COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP69 **Cir. Ct. No. 1993CF362**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. CHRIST,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. John Christ appeals an order denying WIS. STAT. § 974.06 (2003-04)[1] relief from a criminal conviction on six counts, including one kidnapping and two second-degree sexual assault charges. The conviction dates back to 1994 and has been the subject of a previous direct appeal. The trial court denied Christ's present motion because he failed to show that he could not have raised his issues when he appealed. We affirm for that reason and on the merits as well.

¶2 Issues that could have been raised in an earlier appeal or postconviction motion, but were not, cannot be raised in a later WIS. STAT. § 974.06 motion unless the defendant establishes sufficient reason for failing to raise the issue earlier. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Here, Christ did not provide any reason for his failure to bring the issues earlier. Consequently, two of the three issues he raises here are barred, the exception being his challenge to the trial court's subject matter jurisdiction. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶24-25, 273 Wis. 2d 76, 681 N.W.2d 190, *reconsideration denied*, 2004 WI 135, 276 Wis. 2d 25, 688 N.W.2d 656 (challenge to subject matter jurisdiction cannot be waived). That fact alone is sufficient to affirm the trial court on those two issues.

¶3 On the merits, Christ first argues the complaint failed to convey subject matter jurisdiction to prosecute him on the two sexual assault charges because it failed to allege that he committed his acts with the intent and purpose of sexual gratification. However, the complaint alleged Christ had "sexual contact"

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

with his victim during both of the assaults. At the time of the offenses, WIS. STAT. § 939.22(34) (1991-92) defined "sexual contact" as contact for the purpose of sexual gratification. The complaint therefore contained the necessary allegation of intent to commit the crime. The circuit court lacks subject matter jurisdiction only where the complaint charges an offense unknown to the law. ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 194). Here, the sexual assault charges were statutory in origin and sufficiently alleged.

¶4 Christ next challenges the constitutionality of WIS. STAT. § 940.225, contending it is void for vagueness because it does not adequately define sexual gratification. In addition to Christ's ***Escalona*** problem, he waived this issue by not raising it during his prosecution. Additionally, "when the alleged conduct of the accused plainly falls in the prohibited zone sought to be proscribed by the statute in question, the accused may not base a constitutional vagueness challenge on hypothetical facts." ***State v. LaPlante***, 186 Wis. 2d 427, 433, 521 N.W.2d 448 (Ct. App. 1994). Here, Christ's conduct as charged and proved plainly fell within the category of acts committed for sexual gratification under any reasonable view.[2]

¶5 Finally, Christ contends the acts constituting the kidnapping were incidental to the sexual assaults and therefore cannot support conviction on a separate kidnapping charge. He cites Minnesota case law to the effect that kidnapping cannot be charged if the confinement that constitutes the kidnapping is incidental to the perpetration of a separate felony. Again, Christ waived this argument by failing to raise it during his prosecution in the trial court. In any

[2] Christ fondled the victim's genital area, and then forced her to disrobe and perform oral sex on him.

event, this court is not bound by Minnesota law. Moreover, even if the Minnesota rule were applied, the acts forming Christ's kidnapping charge were distinct from and not incidental to the sexual assaults. *See* ***State v. Clement***, 153 Wis. 2d 287, 292-95, 450 N.W.2d 789 (Ct. App. 1989) (a charged sexual assault may prove the "service" element of the charged kidnapping). The evidence showed that Christ forced the victim to drive to a secluded spot, caught her and dragged her back to the car when she tried to escape, and then drove her to another spot. Only then did the sexual assaults occur. The kidnapping was a separate and completed offense.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.