COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1290-CR **Cir. Ct. No. 00-CM-48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THEODORE F. MADAY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County: THOMAS J. SAZAMA, Judge. *Remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Theodore Maday, Jr., appeals from a conviction for having sexual intercourse with a seventeen-year old, contrary to WIS. STAT.

§ 948.09,[1] a Class A misdemeanor.[2] Maday pled no contest to the charge, reserving his right to appeal two issues: (1) whether he should be able to present a defense that the seventeen-year old had falsely indicated that he was of legal age and had pursued the sexual intercourse as part of a scheme to extort money; and (2) whether it is unconstitutional for a seventeen-year old to be a child victim pursuant to § 948.09, when WIS. STAT. § 938.02(1) defines one who is seventeen years of age as an adult for violations of any state criminal law. Maday seeks an order vacating his judgment of conviction and either granting a new trial on grounds that he should have been entitled to raise the mistake-of-age defense or dismissing the case on grounds that the statute is unconstitutional as applied.

¶2 When Maday pled no contest, he waived his right to appeal the first issue. However, because it is apparent from the record that all parties recognized that Maday intended to appeal this issue when he entered his plea, we conclude that Maday should be given an opportunity to withdraw his plea. We remand the case to afford Maday this opportunity, and therefore we decline to address Maday's second issue.

STATEMENT OF FACTS

¶3 For purposes of this appeal, we will accept Maday's version of events as the statement of facts. In 1999, Maday met Alex B. through a friend. Alex offered to have sex with Maday. When Maday inquired whether Alex was of

[1] All statutory references are to the 1999-2000 version.

[2] Originally assigned as a one-judge appeal under WIS. STAT. § 752.31, this case was reassigned to a three-judge panel by order of June 13, 2001. *See* WIS. STAT. RULE 809.41(3).

legal age, Alex responded that he was eighteen years old. Alex and Maday then engaged in sexual intercourse.

¶4 Over eight months later, Alex telephoned Maday at Maday's workplace. After identifying himself, Alex asked Maday if he wanted to lose his home, truck and antique shop. When Maday asked what he was talking about, Alex informed him that he was seventeen when the two engaged in sexual intercourse in 1999. Alex demanded that Maday give him $15,000 in exchange for Alex's silence. He said that unless Maday paid, Alex would go to the police and report the incident.

¶5 Maday indicated that he wanted some time to decide what to do. After discussing the matter with his sister, Maday contacted the police and advised them of the sexual encounter and the extortion scheme. He agreed to cooperate with the police.

¶6 When Alex contacted Maday again, they arranged to meet and exchange the money. When this occurred, the police arrested Alex and charged him with extortion. At the time of his arrest, Alex alleged that Maday had sexually assaulted him without his consent. The State then also charged Maday with fourth-degree sexual assault.

¶7 After Alex admitted that he had gone to Maday's residence and had a sexual encounter as Maday described, the State amended the criminal complaint, changing the charge from fourth-degree sexual assault to sexual intercourse with a minor, in violation of WIS. STAT. § 948.09. Maday filed a motion to dismiss alleging that Alex had misrepresented his age as part of his extortion scheme and that the statute making a seventeen-year old an adult for criminal purposes rendered § 948.09 unconstitutional when a seventeen-year-old victim is involved.

The circuit court denied the motion. The court also indicated that Maday would not be allowed to raise a mistake-of-age defense at trial.

¶8 Maday entered a plea agreement with the State. Pursuant to the agreement, Maday pled no contest to the reduced charge, reserving his right to appeal his two issues. The State acknowledged that as part of the plea bargain, Maday retained his right to appeal these two issues. The circuit court acquiesced in the arrangement and accepted Maday's no contest plea. Maday appeals.

DISCUSSION

I. Right to present a mistake-of-age defense

¶9 On appeal, the State takes a different position with respect to reservation of one of the appellate issues. The State now contends that Maday waived his right to appeal the circuit court's denial of his right to present a mistake-of-age defense, citing ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983).

¶10 In ***Riekkoff***, the procedural facts were similar to the facts in this case. Riekkoff entered a guilty plea as part of a plea bargain reserving the right to appeal an evidentiary issue the circuit court decided in the State's favor. ***Id.*** at 120-21. The State agreed as part of the plea bargain that Riekkoff could preserve the evidentiary issue on appeal, and the circuit court accepted the plea with that understanding. ***Id.*** at 128.

¶11 ***Riekkoff*** restated the general rule that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. ***Id.*** at 123. The supreme court concluded that conditional pleas are not to be

accepted and are not to be given effect, except as provided by statute.[3] ***Id.*** at 125-26. Thus, our supreme court has adopted the rule that a defendant cannot avoid the guilty-plea-waiver rule by entering a "conditional plea" and reserving the right to appeal as to evidentiary issues, except in those situations recognized in WIS. STAT. § 971.31(10). *See* ***id.*** at 126.

¶12 Additionally, the court held that Riekkoff could move to withdraw his plea for two reasons. First, as a matter of law, the plea was not made knowingly or voluntarily with the understanding that he could challenge the evidentiary issue on appeal. ***Id.*** at 128. Second, because the State had not attempted to keep its promise to allow the appeal on the evidentiary issue, due process was violated.[4] ***Id.*** at 129.

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[3] As a matter of state public policy, the legislature has abandoned the guilty-plea-waiver rule in one situation. WISCONSIN STAT. § 971.31(10) provides: "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty." *See also* Laws of 1969, ch. 255, § 63.

[4] We quote the following language from ***State v. Riekkoff***, 112 Wis. 2d 119, 128-29, 332 N.W.2d 744 (1983), because the procedural facts are so similar.

> One thing, however, clearly stands out from the record, and that is that Riekkoff pleaded guilty believing that he was entitled to an appellate review of the reserved issue. Both the prosecutor and the trial judge acquiesced in this view and permitted Riekkoff to believe that, despite his plea, appellate review could be had of the evidentiary order. Because Riekkoff thought he could, with the acquiescence of the trial court and the prosecutor, stipulate to the right of appellate review, it is clear that Riekkoff was under a misapprehension with respect to the effect of his plea. He thought he had preserved his right of review, when as a matter of law he could not. Under these circumstances, as a matter of law his plea was neither knowing nor voluntary. While that plea waived his appellate rights in respect to the antecedent evidentiary motion, we conclude that if Riekkoff desires to move to withdraw his plea he may do so. ***Foster v. State***, 70 Wis. 2d 12, 233 N.W.2d 411 (1975).

(continued)

¶13 Pursuant to ***Riekkoff***, Maday cannot enter a no contest plea and then pursue a mistake-of-age defense on appeal. However, like Riekkoff, Maday should have the opportunity to withdraw his plea. Because Maday pled no contest with the erroneous understanding that he could challenge the evidentiary issue on appeal, his plea was not knowing and voluntary as a matter of law. Furthermore, because the State did not keep its promise that was an inducement for the plea, due process was violated.

¶14 Consequently, as the supreme court did in ***Riekkoff***, we remand the matter to the circuit court to give Maday the option to withdraw his plea and to

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> Additionally, we agree with the defendant's position that due process was violated because of the state's failure to comply with its obligation under the plea bargain. The record shows that the prosecutor agreed not to argue that appellate review was barred by the plea of guilty, but on appeal the state argued that, under Wisconsin law, appellate review was barred. Although the promise made by the prosecutor even if performed was one that was void in the sense that it was ineffective to give Riekkoff a review of the denial of his evidentiary motion, it nevertheless was a primary inducement for Riekkoff's guilty plea. The significant factor at this stage in the case is that the prosecution violated its agreement not to object to appellate review. This court would have denied review as a matter of right irrespective of the position taken by the state, but the point is that the state did not keep its part of the bargain. This is an unfairness that amounts to a denial of due process. Accordingly, in addition to the fact that this court refuses to extend exceptions to the guilty-plea-waiver rule beyond the one legislatively provided in respect to motions to suppress, we find in this case a denial of due process because the state made a promise it did not keep. The fact that it could not guarantee the effect of its promise is irrelevant, because the promise was an inducement for the plea. We hold that the attempted conditional plea in the instant case is invalid and is ineffective to preserve the right of appeal in respect to the reserved issue. Because it was entered into on the basis of inaccurate and incomplete knowledge, it was neither knowing nor voluntary. Because the state has not attempted to keep the promise which was an inducement for the plea, due process was violated.

stand trial. Maday's option to withdraw his plea must be exercised within thirty days after remittitur. If he chooses not to exercise that option, the circuit court's decision with respect to this issue is affirmed because we have concluded, consistent with ***Riekkoff***, that Maday lost his right to appeal this issue when he pled no contest.

II. Whether it is constitutional for a seventeen-year old to be a child victim

¶15 The second issue Maday raises is whether it is arbitrary and capricious and therefore unconstitutional for a seventeen-year old to be a "child" victim pursuant to WIS. STAT. § 948.09 when WIS. STAT. § 948.02(1) defines one who is seventeen years of age as an "adult" for violations of any state criminal law. Because we have concluded that Maday should be given the opportunity to withdraw his plea based on his intent to appeal his right to present a mistake-of-age defense, we conclude that it would be premature for this court to address the constitutional issue on its merits, or to consider whether this issue was also waived when Maday pled no contest. This does not prevent Maday from raising this issue in any future appeal.

By the Court.—Judgment remanded with directions.

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