COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1609-CR **Cir. Ct. No. 2003CF136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Thomas Smith appeals a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Smith pled no contest to one count of first-degree sexual assault of a child. He later moved to withdraw the plea on the ground that it was not knowing, voluntary, and intelligent because he did not understand the nature of the charge. Specifically, he argued that he did not understand either of the legal theories of conspiracy that might have supported the charge. The court held an evidentiary hearing and found that Smith did understand at least one of the theories of conspiracy. Accordingly, it denied the motion.

¶3 On appeal, the State concedes that the plea colloquy did not meet the requirements of WIS. STAT. § 971.08(1)(a) (2007-08)[1] and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). If the defendant shows that the plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures, and also alleges that in fact he did not know or understand the information that should have been provided at the plea colloquy, then the burden shifts to the State to prove at an evidentiary hearing that the plea was knowing, intelligent, and voluntary. ***State v. Howell***, 2007 WI 75, ¶¶27-29, 301 Wis. 2d 350, 734 N.W.2d 48.

¶4 Smith's motion arises from ambiguity in the record about whether he was pleading no contest under WIS. STAT. § 939.31 as a conspirator in an inchoate crime he intended to commit in the future, or instead was pleading no contest under WIS. STAT. § 939.05(2)(c) as a conspirator in a crime that was completed by another person, allegedly at Smith's direction. The facts alleged in the complaint arguably support either theory of conspiracy, and the record up through sentencing

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

contains references to both theories, with nothing that appears to unambiguously show which theory the case was charged or pled under.

¶5 Smith argues that in light of this record, the court erred in finding that he understood his plea as being to a completed-crime theory of conspiracy. We are satisfied that the court's finding was not clearly erroneous. The plea questionnaire included what Smith appears to concede is a correct description of the completed-crime theory of conspiracy, as applied to the facts of this case. His trial counsel testified that he went over the version in the questionnaire with Smith, and that he appeared to understand it. During the plea colloquy, the circuit court read a different set of elements, but Smith did not testify that he was aware of this difference at the time or that it confused his understanding of the material in the plea questionnaire. Smith testified that he did not understand the charge, but the court did not find that credible in light of the rest of the record. Accordingly, the court properly denied Smith's motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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