COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0801 **Cir. Ct. No. 98-CF-677**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL F. HICKMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Carl Hickman appeals from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (1999-2000).[1] The

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

issues are whether his plea was validly entered and whether his appellate counsel was ineffective. We affirm.

¶2 Hickman entered an ***Alford*** plea to one count of second-degree sexual assault, as a repeater. Following his conviction in 1999, Hickman filed a postconviction motion, and then an appeal in this court. We affirmed the conviction. The present appeal is from denial of Hickman's motion brought under WIS. STAT. § 974.06.

¶3 Hickman argues that the trial court did not have authority to accept his guilty plea, because the plea he intended to enter was to the charge of sexual contact, rather than sexual intercourse, which was the count charged. Hickman's argument is based on an erroneous belief that sexual contact and sexual intercourse are separate crimes. The statute that Hickman was convicted under, WIS. STAT. § 940.225(2)(a) (1995-96), criminalizes both sexual contact and sexual intercourse and provides the same penalty for either act. As we noted in Hickman's first appeal, under the plea he entered, he was free at sentencing to argue that the conduct forming the basis for the conviction was sexual contact, while the State could argue that it was sexual intercourse.

¶4 In addition, to the extent that Hickman's current claim is based on an allegation that he did not understand the elements of the charge, this is an argument we already decided in his first appeal. We rejected the argument because Hickman did not explain what he thought the elements of the charge were, or how his understanding of the consequences of the plea differed from the actual consequences. We reviewed the plea colloquy and the postconviction testimony from Hickman and his trial counsel and affirmed the trial court's finding that

Hickman did not have a genuine misunderstanding of the nature or consequences of his plea.

¶5 Hickman also argues that his appellate counsel was ineffective in the first appeal for not arguing that the trial court lacked authority to accept a plea on a charge of sexual intercourse. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We reject this argument because, in light of our discussion above, there either would have been no merit to the argument, and therefore it was not deficient performance not to raise it, or the argument was indeed raised by appellate counsel and decided by this court.

By the Court.—Order affirmed.

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