COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1761-CR **Cir. Ct. No. 2007CF446**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. LAGREW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. John A. LaGrew pled no contest to first-degree sexual assault of a child, sexual exploitation of a child and possession of child pornography. He appeals from the resulting judgment of conviction and from an

order denying his postconviction motion to withdraw his pleas. LaGrew argues that his convictions should be vacated because he pled to a crime nonexistent at the time of his plea. We disagree and affirm.

¶2 The State charged LaGrew in a ten-count information: two counts of first-degree sexual assault of a child under the age of thirteen in violation of WIS. STAT. § 948.02(1)(b) (2005-06),[1] six counts of possession of child pornography and two counts of sexual exploitation of a child. As to the sexual assault charges, the information alleged that LaGrew had sexual intercourse with a seven-year-old child in April, June and July 2007 not resulting in great bodily harm.

¶3 LaGrew intended to plead no contest. At the plea hearing, the prosecutor stated that, under WIS. STAT. § 939.616(1), WIS. STAT. § 948.02(1)(b) carried a twenty-five-year mandatory minimum sentence. LaGrew objected because that penalty did not conform to his understanding of the plea bargain. The State then amended the information to charge a violation of § 948.02(1)(e) and the factual allegations were changed from sexual intercourse to sexual contact.

¶4 LaGrew entered no-contest pleas to one count each of child sexual assault, possession of child pornography and child exploitation; the remaining counts were dismissed and read in. The court sentenced LaGrew to three consecutive bifurcated prison terms totaling eighty years' confinement plus thirty years' extended supervision. LaGrew moved for postconviction relief.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 It is necessary at this point to explain legislative revisions to WIS. STAT. § 948.02(1) because they are central to LaGrew's postconviction motion and to this appeal. Two acts passed during the 2005-06 Legislative Session made changes to statutes addressing sex-related crimes against children and the applicable penalties. 2005 Wis. Acts 430 and 437 both were enacted on May 22, 2006 and both took effect on June 6, 2006. We may presume that the governor approved Act 437 last. *See* WIS. STAT. § 35.095(2)(a) (2009-10).

¶6 Before its revision, WIS. STAT. § 948.02(1) (2003-04) read in its entirety: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." As affected by Act 430, § 948.02(1) created separate definitions of sexual contact and sexual intercourse through subsecs. (1)(a) through (1)(e). Relevant here are subsec. (1)(b), which was created to read: "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony," and subsec. (1)(e), which was created to read: "Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony."

¶7 Act 430 also created WIS. STAT. § 939.617, since renumbered to WIS. STAT. § 939.616.[2] Section 939.616 set forth mandatory minimum sentences for persons convicted of child sexual assaults. A violation of WIS. STAT. § 948.02(1)(b), as affected by Act 430—sexual intercourse with a person under twelve—carried a mandatory minimum sentence of twenty-five years.

[2] We will refer to the statute as WIS. STAT. § 939.616, its current denomination.

¶8 Act 437 recombined sexual contact and sexual intercourse in WIS. STAT. § 948.02(1)(a) and (b) and drew distinctions based on the degree of harm caused. As affected by Act 437, § 948.02(1) thus provided:

> **948.02 Sexual assault of a child. (1)** FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of one of the following:
>
> (a) If the sexual contact or sexual intercourse resulted in great bodily harm to the person, a Class A felony.
>
> (b) If the sexual contact or sexual intercourse did not result in great bodily harm to the person, a Class B felony.

Class A felonies carry a life sentence. WIS. STAT. § 939.50(3)(a).

¶9 Believing the Act 430 and Act 437 changes to be in conflict, the revisor of statutes appended this note to the version of WIS. STAT. § 948.02 shown in the prior paragraph:

> **NOTE: Sub. (1) is affected by 2005 Wis. Acts 430 and 437. The 2 treatments are mutually inconsistent. Sub. (1) is shown as affected by the last enacted act, 2005 Wis. Act 437. As affected by 2005 Wis. Act 430, it reads [in relevant part]:**
>
> **(1) FIRST DEGREE SEXUAL ASSAULT....**
>
> **(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.**
>
> **….**
>
> **(e) Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.**

¶10 With this background, we return to LaGrew. LaGrew initially was charged under WIS. STAT. § 948.02(1)(b), as affected by Act 437. The prosecutor

pointed out that WIS. STAT. § 939.616(1) called for a twenty-five year minimum sentence for violations of § 948.02(1)(b), evidently unaware that the subsec. (1)(b) to which § 939.616(1) referred was the one, like § 939.616 itself, that was created by Act 430. When LaGrew declined to plead, the State charged him with the "inconsistent" § 948.02(1)(e). As noted, LaGrew pled no contest to that charge and received his 110-year bifurcated sentence.

¶11 Postconviction, LaGrew sought either to withdraw his plea or to have the complaint declared defective and void. He argued that WIS. STAT. § 948.02(1)(e) was nonexistent when he pled because it had been superseded by Act 437. The court denied his motion because the legislature later repealed and recreated WIS. STAT. § 948.02 (1), as affected by 2005 Wisconsin Acts 430 and 437. *See* 2007 Wis. Act 80, §12. The court reasoned that such a reconciliation bill would have been unnecessary had Act 437 already impliedly repealed Act 430. LaGrew appeals.

¶12 LaGrew again contends that he must be allowed to withdraw his pleas because WIS. STAT. § 948.02(1)(e) no longer was the law at the time of his plea. He asserts that the note to WIS. STAT. § 948.02 indicates the revisor's conclusion that, as the Acts were mutually inconsistent, the law in effect at the time of the offense was "as affected by the last enacted act, 2005 Wis. Act 437"—in other words, that § 948.02(1)(e) was nonexistent. We disagree with LaGrew's interpretation.

¶13 The construction of a statute presents a question of law which we review de novo. ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶9, 252 Wis. 2d 404, 643 N.W.2d 515. The predominant goal of all statutory interpretation is to

ascertain legislative intent. ***Caflisch v. Staum***, 2000 WI App 113, ¶7, 235 Wis. 2d 210, 612 N.W.2d 385.

¶14 Our analysis invokes several established principles. "Repeals by implication are not favored in the law." ***Heaton v. Independent Mortuary Corp.***, 97 Wis. 2d 379, 392, 294 N.W.2d 15 (1980) (citation omitted). "The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together, or when the intent of the legislature to repeal by implication clearly appears." ***Id.*** at 392-93 (citations omitted). Further, when confronted with apparently inconsistent legislation, a court's goal is to ascertain the intent of the legislative body and construe the law accordingly. ***Cross v. Soderbeck***, 94 Wis. 2d 331, 343, 288 N.W.2d 779 (1980). We construe sections on the same subject matter to harmonize the provisions and to give each full force and effect. ***State v. Fischer***, 2010 WI 6, ¶24, 322 Wis. 2d 265, 778 N.W.2d 629. We also presume that when the legislature enacts a new provision it has in mind previous statutes dealing with the same subject matter. *See* ***State v. Hungerford***, 84 Wis. 2d 236, 251-52, 267 N.W.2d 258 (1978). "[I]n the absence of any express repeal or amendment therein, the new provision [is] enacted in accord with the legislative policy embodied in [the] prior statutes, and they should all be construed together." ***Id.*** at 252 (citation omitted).

¶15 Applying these principles, we conclude that the revisions to WIS. STAT. § 948.02(1) by Acts 430 and 437 were not "manifestly inconsistent and repugnant" to each other. Sexual contact with a person under thirteen has been

designated a Class B felony since WIS. STAT. ch. 948's creation in 1987.[3] Only the crime's placement and numbering in WIS. STAT. § 948.02(1) has changed. In addition, the legislature cannot have intended Act 437 to impliedly repeal Act 430 because, if already repealed, there would have been no need for 2007 Wis. Act 80 to reconcile the two acts. And when the legislature did reconcile the Acts' "mutually inconsistent" treatments of § 948.02(1), it recreated a § 948.02(1)(e) using language identical to that in § 948.02(1)(e) of Act 430. *See* 2007 Wis. Act 80, §12. The legislative intent could not be much clearer.

¶16 By merging the language of WIS. STAT. § 948.02(1) as affected by Acts 430 and 437, the State's brief demonstrates that the statutes can be harmonized in substance. While there may be overlap, the only inconsistency between the two versions is in the numbering or lettering of subparts. As the trial court noted, the Acts' different purposes—mandatory minimum sentences for certain child sex offenses (Act 430) and the possibility of life imprisonment for sexual contact or intercourse that results in great bodily harm to the child (Act 437)—are not inconsistent with each other.

¶17 In sum, LaGrew pled no contest to sexual contact with a child under thirteen, a Class B felony. Both the prosecutor and defense counsel endorsed his plea. Whether Act 430, Act 437 or both were in effect when LaGrew committed and pled, this crime unquestionably existed as a substantive matter. At most, it no longer was denominated "WIS. STAT. § 948.02(1)(e)" when Act 437 was enacted. Even so, nothing in Act 437 displaced Act 430's subsec. (1)(e); it simply made it

[3] The sole, and short-lived, exception was that sexual contact resulting in great bodily harm was a Class A felony. *See* Wis. Stat. § 948.02(1)(a) (2005-06). That exception ended when the statute was repealed and recreated by 2007 Wis. Act 80, §12.

redundant. Because subsec. (1)(e) was not substantively or facially inconsistent with anything in Act 437, we reject LaGrew's claim that Act 437 implicitly repealed it. We appreciate the trial court's and the State's thorough analyses and agree that LaGrew did not plead to a nonexistent crime.

¶18 LaGrew next urges that, if we do not find the statutory provisions to be mutually exclusive, we must allow him to withdraw his plea because he pled to an offense with a mandatory minimum sentence—something he did not do voluntarily, knowingly or intelligently.

¶19 That simply is not the case. LaGrew did not enter his plea to any crime listed in WIS. STAT. § 939.616(1) in either form or substance. In form, he pled no contest to WIS. STAT. § 948.02(1)(e), a statute not enumerated in § 939.616(1). In substance, he pled no contest to sexual contact with a child under the age of thirteen without use of force, a crime not contemplated to be subject to § 939.616(1). *See* 2005 Wis. Act 430, §§ 1, 3, 4; *see also* the revisor's note to § 939.616(1) Furthermore, LaGrew's belief that the court imposed a mandatory minimum sentence under § 939.616 is unfounded. The initial and adjourned plea hearing transcripts confirm that neither the State nor the court considered a mandatory minimum sentence applicable and the sentencing transcript makes no reference to one. LaGrew has failed to show by clear and convincing evidence that his plea was not knowingly, voluntarily or intelligently entered, such that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994).

¶20 Lastly, LaGrew contends he should be allowed to withdraw his pleas to all counts because a plea agreement is a unitary agreement. *See* ***State v. Williams***, 2003 WI App 116, ¶21, 265 Wis. 2d 229, 666 N.W.2d 58. We question

whether LaGrew truly desires to repudiate the plea agreement since the remedy is reinstatement of the original charges so as to restore the parties to their pre-agreement positions. *See* ***id.*** We need not dwell on that, however, because we have concluded that his no-contest plea to the sexual assault charge stands. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

By the Court.—Judgment and order affirmed.

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