

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 14, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-2366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLIFFORD W. NEAL,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Clifford W. Neal appeals from a postconviction order. The issue is whether Neal is entitled to withdraw his plea because it was based on a legal impossibility. Because revocation of Neal's probation rendered moot the claimed legal impossibility, we affirm.

Neal pleaded no contest to second-degree sexual assault, as a party to the crime, §§ 940.225(2)(a) and 939.05, STATS. The trial court accepted the plea agreement and joint recommendation to withhold sentence and impose probation. The court noted the State's agreement not to oppose Neal's motion to reopen and amend the judgment from a felony to misdemeanor sexual assault, if he successfully completed probation. The court revoked Neal's probation and the court imposed a three-year sentence.

After the trial court accepted the plea agreement, we held in *State v. Hayes*, 167 Wis.2d 423, 425, 481 N.W.2d 699, 700 (Ct. App. 1992), that a trial court cannot impose a condition to amend the judgment from a felony to a misdemeanor upon successful completion of probation. Neal moved to withdraw his plea because under *Hayes* the plea agreement was legally impossible. The court denied the motion because it concluded that revocation of Neal's probation rendered the *Hayes* issue moot. We agree.

Revocation of Neal's probation foreclosed the trial court from amending the judgment from a felony to a misdemeanor. Neal claims that his failure to complete probation does not diminish his reliance on the condition that *Hayes* rendered legally impossible. We disagree. Neal lost the benefit of the condition because he failed to complete probation. That failure rendered his postconviction challenge moot.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.