STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 03-3454-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT L. PETERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE TAYLOR COUNTY CIRCUIT COURT, THE HONORABLE GARY L. CARLSON, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs fully set forth the facts and the legal authorities governing this court's review. Publication of the court's decision is not warranted because this case involves only the application of established legal principles to a particular factual situation.

STATEMENT OF THE CASE

Defendant-appellant Robert L. Peterson was charged in Taylor County Circuit Court with two felony

plea to the charge the second-degree sexual assault of a child (22:1-3; A-Ap. 31-32).

After probation revocation proceedings were initiated against Peterson, the state moved for entry of judgment and sentencing on the second-degree sexual assault of a child charge (29:1-3). The court granted the motion and directed that judgment be entered on that charge (65:17). The court sentenced Peterson to an indeterminate sentence of eight years' imprisonment (34:1; 66:49; A-Ap. 1).

Peterson subsequently filed a motion for postconviction relief in which he argued that his guilty plea, conviction and sentence "were all premised on an unauthorized and illegal procedure" because "[n]o Wisconsin case law or statute authorizes the procedure created by the parties and the Court for the deferral of judgment" (41:4-5). At the hearing on that motion, the court noted that Peterson was informed at the time he entered his guilty plea to the charge of second-degree sexual assault of a child that the court did not have to agree with the recommendations of the agreement (67:22-23; A-Ap. 25-26). The court stated that it "could have sentenced the defendant directly off the felony, but instead . . . gave the defendant a break" (67:22-24; A-Ap. 25-27). The court held that it had the inherent authority to defer the entry of judgment or to defer sentencing and that there were no statutory provisions prohibiting it from doing so (67:25; A-Ap. 28). Accordingly, the court denied the motion for postconviction relief (67:26; A-Ap. 29).

ARGUMENT

THE TRIAL COURT PROPERLY DEFERRED ENTRY OF JUDGMENT PURSUANT TO THE PLEA AGREEMENT.

Peterson argues that the circuit court lacked the authority to accept a guilty plea but defer entry of

case. *Id.* Under the agreement, Wollenberg's sentence on the theft counts was withheld and he was placed on four years' probation. *Id.* Entry of judgment on the burglary counts was to be deferred for six years, provided Wollenberg committed no additional crimes and abided by the terms of his probation. *Id.*

When Wollenberg's probation was revoked, the state moved for entry of the deferred judgments. *Id.* at ¶3. The court granted the motion, entering judgments of conviction on the four burglary charges and sentencing Wollenberg to concurrent eight-year prison terms on each count. *Id.* Wollenberg filed a postconviction motion to withdraw his plea, claiming that he had pled pursuant to a deferred prosecution agreement that was void because it was not in writing. *Id.*

This court rejected Wollenberg's argument that his agreement was subject to the procedural requirements under Wis. Stat. § 971.39 for deferred prosecution agreements. *Id.* at ¶6. It held that the agreement at issue was not a deferred prosecution agreement but a "plea agreement with the State that contemplated a deferred entry of judgment on the more serious burglary charges." *Id.*

The court further held that even if the agreement was a deferred prosecution agreement subject to Wis. Stat. § 973.19's procedural requirements, it would not review Wollenberg's claim that the judgment was void for failing to comply with those procedures because Wollenberg asked the court to adopt the agreement and agreed to the order deferring judgment. *Id.* at ¶13. Wollenberg "invited the error he alleges," the court said, "and we normally will not review invited error." *Id.* at ¶12.

The court also rejected Wollenberg's argument that the circuit court "has no authority to defer an entry of judgment of conviction because (1) Wis. Stat. § 972.13(1) states that a 'judgment of conviction shall be entered' upon a defendant's no contest plea; (2) Wis. Stat.

acknowledges that in *State v. Terrill*, 2001 WI App 70, 242 Wis. 2d 415, 625 N.W.2d 353, and *State v. Barney*, 213 Wis. 2d 344, 570 N.W.2d 731 (Ct. App. 1997), this court, at least implicitly, approved the procedure. *See* Peterson's brief-n-chief at 10.[3]

Peterson argues, however, that *Wollenberg*, *Terrill* and *Barney* are inconsistent with *State v. Boyer*, 198 Wis. 2d 837, 543 N.W.2d 562 (Ct. App. 1995), where, he says, the court "specifically rejected the parties' attempt to defer entry of judgment for an offense not specifically listed in § 961.47." Peterson's brief-in-chief at 9. That is not an accurate description of *Boyer*, because *Boyer*, unlike *Wollenberg*, *Terrill* or *Barney*, did not involve a deferral pursuant to a plea agreement. To the contrary, the circuit court in *Boyer* ordered that prosecution be deferred pursuant to Wis. Stat. § 961.47 over the state's opposition. *See Boyer*, 198 Wis. 2d at 839-40.

Under § 961.47, when a person has pled guilty or been found guilty of certain controlled substances offenses, the court, "without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him or her on probation. . . ." Wis. Stat. § 961.47(1). If the person successfully completes probation, the court "shall discharge the person and dismiss the proceedings. . . ." *Id.*

In *Boyer*, the circuit court deferred entry of judgment even though the charge was not one of those enumerated in the statute as being eligible for deferral.

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[3]In *Barney*, the parties entered into a plea agreement pursuant to which the court accepted the defendant's guilty pleas on felony and misdemeanor charges, placed the defendant on probation on the misdemeanor charge, and deferred entering a judgment of conviction on the felony charge for the duration of the diversion period. *See Barney*, 213 Wis. 2d at 350-51. In *Terrill*, the defendant and the state entered into a plea agreement pursuant to which the defendant entered guilty pleas to both felony and misdemeanor charges but the court deferred acceptance of the guilty plea on the felony charge while the defendant was placed on "informal supervision." *Terrill*, 242 Wis. 2d 415, ¶3

potential penalties for that charge. *See* Peterson's brief-in-chief at 12.

There are at least two major problems with those arguments. First, Peterson did not raise those claims below. He never argued, either in his written motion or in his argument at the motion hearing, that the plea agreement in this case was defective because it contemplated that he would be convicted of a misdemeanor if he successfully completed probation (41:1-12; 67:3-9, 12-22; A-Ap. 6-12, 15-25). He never argued, either in his motion or at the hearing, that the plea colloquy was inadequate or that there was no factual basis for the misdemeanor charge (*id.*). Rather, his claim was limited to the narrow argument that a circuit court lacks the authority to defer entry of judgment except as specifically permitted by statute (41:5-12). As Peterson's counsel told the court:

> Our argument is pretty straightforward in that the deferred prosecution agreement that was entered in this case and upon -- upon which Mr. Peterson was sentenced is not authorized by any of the statutes that allow for deferred prosecution agreements.
>
> It might have been the case had the statutory procedure been followed, agreement of 971.39; however, that's set forth in the brief, none of the requirements of that statute were met.

(67:3-4; A-Ap. 6-7.) There is not the slightest indication in Peterson's arguments below that, in addition to his claim that the court lacked the authority to defer entry of judgment, he was asserting the legally distinct claims that the plea colloquy was inadequate to insure his understanding of the misdemeanor charge and that there was no factual basis for a plea to that charge.

By failing to raise below his claim that the plea colloquy was inadequate with respect to the misdemeanor sex offense or his claim that there was no factual basis for that charge, Peterson has waived those issues. "It is a fundamental principle of appellate review that issues must

between the more serious charge and the offense to which the defendant has pled guilty. *Id.* This principle "reflects the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes." *Id.*

In this case, there unquestionably was a factual basis for the "more serious charge" of second-degree sexual assault of a child. That charge required the state to prove that Peterson had "sexual contact or sexual intercourse with a person who has not attained the age of 16 years." Wis. Stat. § 948.02(2). The criminal complaint, which provided the factual basis for Peterson's plea (62:21-22), alleges that in January, 1999, when they were in the basement of Peterson's house, Peterson had sexual intercourse with J.K.R., who was then fifteen years old (1:2-3).

The misdemeanor charge on which Peterson would have been convicted had he carried out his end of the plea agreement would have required the state to prove that the defendant had "sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years." Wis. Stat. § 948.09. That charge is "reasonably related to" the more serious felony charge because the only relevant difference between the felony and misdemeanor charges is the age of the victim. *See Harrell*, 182 Wis. 2d at 419-20 (third-degree sexual assault charge to which defendant pled guilty was reasonably related to the original charge of first-degree sexual assault of a child).[4] Accordingly, had Peterson been convicted of the misdemeanor sex offense charge, the factual basis requirement would have been met.

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[4]Although the misdemeanor charge prohibits only sexual intercourse, *see* Wis. Stat. § 948.09, while the felony charge prohibits both sexual intercourse and sexual contact, *see* Wis. Stat. § 948.02(2), Peterson was alleged to have had (and admitted having) sexual intercourse with J.K.R. (1:2-3; 34:1; A-Ap. 1).

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Re: State v. Wollenburg, Appeal No. 03-1706-CR

Dear Attorneys Weber, Kassel and Alesia:

This letter is in response to telephone calls from Attorneys Weber and Kassel regarding the opinion downloaded from the Court System's Web site that differed from the opinion sent to the parties when the opinion was filed on December 9, 2003. Further investigation into this matter revealed that the differences were due to the editorial process employed by the Court after the opinion was ordered published.

While there is text on each opinion stating that further editing may occur and that the final version will appear in the bound volume, the Court does have a process in place to notify the parties when there is an editing change of this size. Unfortunately, that process was not implemented in this situation and I am sorry for any confusion it caused. I have been assured that the changes made to the opinion are editorial in nature and do not change the Court's mandate. We have taken steps to try to ensure that, in the future, editorial changes of this nature are noticed to the parties.

For your reference, enclosed is a copy of the opinion reflecting the editorial changes made after publication was ordered.