COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1481 **Cir. Ct. No. 95-CF-79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. BORK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Bork appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion to withdraw his no contest plea for lack of

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

a factual basis. The postconviction hearing was conducted by telephone. Bork argues that the trial court violated his right to a public trial and denied him access to legal assistance when it ordered a prison inmate to either refrain from assisting Bork or leave the room. The inmate elected to leave the room. Bork also argues that the trial court erroneously exercised its discretion when it denied his motion to withdraw his no contest plea. We reject these arguments and affirm the order.

¶2 As the postconviction hearing commenced, the court inquired whether Bork was represented by counsel. Bork responded that he did not have an attorney but, "I do have legal assistance here with me." He referred to his assistant as "an inmate paralegal person." The court then informed Bork that only a licensed attorney would be allowed to participate in the hearing. Apparently upon hearing whispering, the court again instructed Bork that it would not allow anyone other than a licensed attorney to instruct Bork on what to say. "So the other gentleman, or whoever is with you, will have to leave the room or at least not serve as counsel. That's not proper." Later, the court commented, "Mr. Bork, I am not happy that you keep disregarding what I told you. I am not allowing you to receive advice from anybody who is not a licensed lawyer. And did that person leave the room?" Bork responded that his inmate adviser had left the room.

¶3 Assuming that a collateral attack on a conviction is subject to the constitutional and statutory provisions for a public trial, we conclude that exclusion of Bork's inmate adviser does not implicate public trial protections. First, we note that the trial court did not compel the other inmate to leave the room. He offered the inmate a choice of leaving the room or remaining silent. The inmate elected to leave the room. In addition, the court had the right to remove the other inmate from the room when he persisted in violating the court's instruction to remain silent. The right to a public trial is not absolute. The trial

court can exclude a person if it is necessary to preserve higher values and is narrowly tailored to serve that interest. *See* ***Waller v. Georgia***, 467 U.S. 39, 45 (1984). Prohibiting the unauthorized practice of law and enforcing the court's demand for silence by expelling one person meets that test.

¶4 Compelling the other inmate's silence or requiring him to leave the room did not violate Bork's right to legal assistance. Bork erroneously relies on ***Johnson v. Avery***, 393 U.S. 483 (1969), for the proposition that he is entitled to legal assistance from other inmates. Cases that require prisons to provide the resources to allow meaningful access to the courts should not be construed to allow other inmates to give legal advice during court hearings.

¶5 Finally, the trial court properly exercised its discretion when it refused to allow Bork to vacate his no contest plea. Bork pled no contest to a charge that he touched his three-year-old daughter's vagina through her clothing for the purpose of sexually degrading or humiliating her or arousing or gratifying himself. Bork now contends that there was no factual basis for determining his purpose. He contends that he was motivated by anger or revenge at his wife or the social services agency, and that caused him to fondle his daughter with enough force or repetition that it caused scrapes, bleeding and bruising of her vaginal area.

¶6 Bork relies on ***State v. Smith***, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996), for the proposition that a plea cannot be accepted unless there is a factual basis for every element. ***Smith*** involved an ***Alford***[2] plea which requires "strong proof of guilt as to each element." *See* ***Smith***, 202 Wis. 2d at 23. Bork concedes

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

that his was not an ***Alford*** plea. All that is required is that the court "make such inquiry as satisfies it that the defendant in fact committed the crime charged." *See* WIS. STAT. § 971.08(1)(b).

¶7 Bork allowed the trial court to use the complaint as the factual basis for the plea. The complaint recited that a relative saw Bork fonding his daughter's vaginal area, his daughter suffered injury as a result and Bork admitted to police that he fondled his daughter's private parts. He initially told police that he fondled his daughter because he was "mad at his wife because she was trying to separate from him." When confronted with the fact that his wife's attempt at separation had not occurred at that time, he changed his story stating "it was anger from social services in Buffalo County that caused the incident." He explained that his daughter had been placed in a different home and he felt frustrated.

¶8 Bork's intent can be established by reasonable inferences from other facts, even if alternative inferences are also reasonable. *See* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. The complaint allows a reasonable inference that Bork fondled his daughter for the purpose of degrading or humiliating her or sexually arousing or gratifying himself. His stated motive is not inconsistent with the required intent.

By the Court.—Order affirmed.

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