COURT OF APPEALS
DECISION
DATED AND RELEASED

August 3, 1995

No. 94-1746-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STERLING RACHWAL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. MC ALPINE, Judge. *Reversed and cause remanded with directions*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Sterling Rachwal appeals from a judgment convicting him of mistreatment of and sexual gratification with an animal, and from a postconviction order denying his motion to withdraw his pleas and for resentencing. The issues are whether Rachwal's conduct constitutes sexual gratification with an animal under § 944.17(2)(c), STATS., and if not, whether he is restricted to withdrawing his plea to that crime, or whether he is entitled to

withdraw from the entire plea agreement. We conclude that Rachwal's conduct does not constitute a crime under § 944.17(2)(c), as construed in ***Jones v. State***, 55 Wis.2d 742, 746-47, 200 N.W.2d 587, 590 (1972). Because the plea agreement encompassed seven charges and he entered no contest pleas to three of those charges, we conclude that fairness to the parties requires withdrawal of all the pleas entered incident to this plea agreement. Therefore, we reverse the judgment and order, and remand to allow Rachwal to withdraw his three no contest pleas.

Rachwal was charged as a repeater under § 939.62(1), STATS., with one felony and two misdemeanor counts of mistreatment of animals, three misdemeanor counts of sexual gratification with an animal and one count of burglary. These charges arose from Rachwal's inserting one arm into a horse's anus and simultaneously masturbating himself. He ultimately entered no contest pleas to one felony and one misdemeanor count of mistreatment of an animal, contrary to § 951.02, STATS., and one count of sexual gratification with an animal, contrary to § 944.17(2)(c), STATS.[1] The remaining charges were dismissed, but read in at sentencing. The trial court imposed consecutive sentences of eight, three and three years, totalling a fourteen-year sentence, to be served consecutively to a prior revocation sentence.

The principal issue is whether Rachwal's conduct constitutes sexual gratification with an animal, contrary to § 944.17(2)(c), STATS., which makes it a felony to commit "an act of sexual gratification involving his or her sex organ and the sex organ, mouth or anus of an animal." The precursor statute made unlawful an "abnormal act ... entail[ing] the sex organ of one person in the mouth or anus of another." ***Jones***, 55 Wis.2d at 746, 200 N.W.2d at 590. The ***Jones*** court construed the statute to mean that "*[i]t is clear that oral and anal intercourse is prohibited and nothing more*." ***Id***. at 747, 200 N.W.2d at 590 (emphasis added).

Rachwal moved to withdraw his pleas, or for resentencing. The trial court denied the motion, ruling that "the Defendant did commit an act for

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[1] A no contest plea means that the defendant does not claim innocence, but refuses to admit guilt. Section 971.06(1)(c), STATS.; ***Cross v. State***, 45 Wis.2d 593, 599, 173 N.W.2d 589, 593 (1970).

his sexual gratification, that did involve his sex organ, and did also involve the sex organ of an animal." Rachwal appeals.

Rachwal contends that his act was not unlawful under ***Jones***. The State contends that Rachwal's sex organ was involved, even though it did not touch the horse's anus. Section 944.17(2)(c), STATS. The State claims ***Jones*** is factually distinguishable and involved constitutional challenges rather than statutory construction of a bestiality statute.

Jones "limits and defines" the precursor to § 944.17(2)(c), STATS., to prohibit oral and anal intercourse—and nothing more. ***Jones***, 55 Wis.2d at 746-47, 200 N.W.2d at 590. Rachwal's conduct does not constitute sexual gratification under § 944.17(2)(c), as defined by ***Jones***. ***Id***. The distinctions between ***Jones*** and the instant case are immaterial. ***Jones*** binds us. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979) (court of appeals bound by prior decisions of supreme court). Consequently, we reverse and remand to allow Rachwal to withdraw his no contest plea to sexual gratification with an animal.

The secondary issue is whether we should direct the trial court also to allow Rachwal to withdraw his pleas to mistreatment of an animal. Rachwal contends that because the same plea agreement covered the gratification conviction and the two mistreatment convictions, he is entitled to withdraw all of his pleas. The State disagrees, contending that Rachwal's pleas are separable.

We conclude that since the plea agreement was a package-deal, fairness to both parties requires us to allow Rachwal to withdraw his three no contest pleas. We will not speculate as to what the State would have offered, or what Rachwal would have accepted, had there initially been only four charges against him, rather than seven. Therefore, we reverse the judgment and postconviction order and remand to allow Rachwal to withdraw his three no contest pleas.

By the Court.—Judgment and order reversed and cause remanded with directions.

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