COURT OF APPEALS
DECISION
DATED AND RELEASED

April 4, 1996

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, STATS.

NOTICE

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

Nos. 95-2717-CR
95-2718-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODNEY CALHOUN,

Defendant-Appellant.

APPEALS from judgments of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

VERGERONT, J.[1] Rodney Calhoun appeals from a judgment of conviction for misdemeanor battery contrary to § 940.19(1), STATS., and from a judgment of conviction for misdemeanor bailjumping contrary to § 946.49(1)(a), STATS.[2] Calhoun pled guilty to each charge pursuant to a plea agreement. He

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] This court granted Calhoun's motion to consolidate the two appeals by order dated November 13, 1995.

argues on appeal that the State breached the plea agreement and asks that we remand for resentencing before a different judge and order compliance with the plea agreement. We affirm the convictions and the sentences because we conclude the State did not breach the plea agreement.

BACKGROUND

Calhoun was initially charged with third-degree sexual assault, disorderly conduct with a penalty enhancement for threat of use of a dangerous weapon, misdemeanor battery, and disorderly conduct. The charges arose out of a series of incidents with his wife. An amended complaint dropped the sexual assault charge after Calhoun's wife partially recanted her allegations of sexual assault. As a condition of his release on bond, Calhoun was ordered not to have any contact with his wife. Calhoun was subsequently charged with committing felony bailjumping by violating the bond condition. This second complaint alleged that Calhoun had called his wife and asked her to contact his counsel to help "get him out of this mess."

On May 31, 1995, the parties appeared in court seeking approval of a deferred prosecution agreement whereby Calhoun would enter ***Alford*** pleas to misdemeanor battery and disorderly conduct in the first case and misdemeanor bailjumping in the second case. The court declined to approve that agreement because Calhoun denied that he had battered his wife and stated that he was only entering into the agreement to try to save his marriage. Calhoun's counsel also stated that Calhoun had a solid alibi defense to the bailjumping charge. The court explained that under these circumstances it would not accept the agreement because the diversion program did not work when people went into counseling denying that they have done anything wrong. The trial court set a trial date for the first case.

On August 2, 1995, before the scheduled trial date, the parties appeared in court with another plea agreement. The agreement called for Calhoun to plead to misdemeanor battery in the first case and to misdemeanor bailjumping in the second case. The State was to recommend withholding sentence and placing Calhoun on probation for two years with AODA and domestic abuse assessments and treatment, and fines and costs left to the court's

discretion. As part of the agreement, the State agreed that it would not produce any testimony at the plea hearing. Calhoun's counsel later explained that the purpose of this portion of the agreement was that Calhoun's wife could be a very convincing witness, and it was difficult to tell when she was telling the truth and when she was not because she made contradictory statements; he had concerns that she would draw sympathy from the court.

At the August 2, 1995 hearing, Calhoun denied that a battery took place. The court directed the prosecutor to present Calhoun's wife's testimony concerning the battery alleged in the first case. When Calhoun's attorney informed the court that part of the agreement was that the State would not produce testimony, the court repeated that it was directing the State to present testimony, and that Calhoun could withdraw from the plea agreement if he wished. After conferring with Calhoun, his counsel advised the court that they "[had] no problem with allowing the alleged victim---or the victim to testify."

The prosecutor questioned Calhoun's wife on the circumstances of the battery, and on the telephone and personal contacts that had violated the bond condition of no contact. Calhoun's attorney attempted to limit Calhoun's wife's testimony on the bailjumping charge to the one telephone contact alleged in the second complaint, with no details of that conversation, but the court overruled those objections. Calhoun's counsel cross-examined Calhoun's wife, attempting to impeach her credibility. The court overruled the prosecutor's objection that some of this questioning was irrelevant. On redirect, the State asked a few questions on the matters raised in cross-examination, with the court overruling Calhoun's counsel's objection that the State had agreed not to present testimony.

At the close of the testimony, the court declined to accept ***Alford*** pleas, giving Calhoun the choice of pleading guilty or not guilty. Calhoun entered a guilty plea to each of the two charges.

Calhoun's counsel explained that Calhoun wanted to enter ***Alford*** pleas[3] because he did not admit that a battery took place. The court declined to

[3] An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while either

accept ***Alford*** pleas and stated that Calhoun's choice was to plead guilty or not guilty and go to trial. The court then engaged in a thorough colloquy as required by ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The court emphasized that it did not need to accept the recommendation of no jail time and advised Calhoun that it was considering jail time at that point despite that recommendation. Calhoun said he understood that and still wanted to proceed with the plea agreement. After hearing Calhoun's counsel's explanation concerning the State's agreement that the State would not put on testimony and his view that the State's questioning went beyond what was necessary to establish a factual basis for the pleas, the court asked Calhoun if he wanted to withdraw his pleas and go to trial. Calhoun said he did not want to.

The court accepted Calhoun's pleas. On the battery charge, it imposed and stayed a nine-month jail sentence, placed Calhoun on probation for two years, and, as conditions of probation, ordered sixty days in jail, AODA and domestic abuse assessments, certain fines and assessments, and no contact with his wife. On the bailjumping charge, the court ordered a consecutive six-month jail sentence, with certain fines and assessments.

DISCUSSION

If a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. ***Santobello v. New York***, 404 U.S. 257, 262 (1971). Where, as here, the facts are undisputed, whether the State violated the plea agreement is a question of law which we review de novo. *See* ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995).

Calhoun contends that the State breached the plea agreement because the direct and redirect examination of Calhoun's wife went beyond that necessary to establish a factual basis for the plea. We conclude that the State did not breach the plea agreement because it was ordered by the court to present

(..continued)
maintaining his innocence or not admitting having committed the crime. ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

testimony to provide a factual basis for the charges, and its questioning of Calhoun's wife was appropriate given that order.

A plea agreement that does not allow the sentencing court to be apprised of relevant information is void as against public policy. ***State v. McQuay***, 154 Wis.2d 116, 125, 452 N.W.2d 377, 381 (1990). Whether to accept an ***Alford*** plea is within the trial court's discretion. ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995). Before accepting either a guilty plea or a plea of no contest, the court must make such inquiry as satisfies it that the defendant, in fact, committed the crime charged. Section 971.08(1)(b), STATS.

When Calhoun denied that a battery took place and contested the allegations in the complaints, the court properly ordered the State to present testimony to establish a factual basis for the pleas. The State had to comply with that order or the court would not accept the pleas. It was not possible for the State to comply with that order and comply with its agreement not to present testimony. At that point, Calhoun had the option, which the court made clear to him and which he discussed with his attorney, of going forward with the plea hearing or proceeding to trial. He chose the former and agreed to permit his wife to testify.

Calhoun recognizes that the State had no choice but to present Calhoun's wife's testimony when the court directed it to do so. However, he argues that the State should have limited questions to the bare minimum necessary to establish a factual basis for the pleas. We reject this argument. The State had no obligation to attempt to guess how little testimony it could present while still satisfying the court that there was a factual basis for the pleas. That was not what the State had agreed to. The court's ruling on the objections by both parties was a clear indication that it wanted a full development of the facts relating to the charges. The State's questions, on direct, were appropriately focused on laying a factual basis for the pleas. The questions on redirect were appropriate given defense counsel's cross-examination.

Calhoun made the decision not to admit that the complaints provided a factual basis for the pleas. This entailed the obvious risk that the court would want testimony to establish that basis, with the equally obvious

result that the State could not comply with its agreement not to present testimony. Calhoun had the right to have the State honor its agreement if the court did not direct otherwise. But he did not have the right to limit the court's ability to have the information it felt necessary in order to have valid pleas. Calhoun had two opportunities--once before his wife testified and once after--to withdraw his pleas in view of the court's determination that it wanted Calhoun's wife's testimony. He is not entitled to enforcement of the plea agreement before a different sentencing judge.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.