COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2031-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

ROBIN R. FECCI,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Dismissed.*

SCHUDSON, J.[1] The State of Wisconsin appeals from the circuit court order granting Robin R. Fecci conditional discharge pursuant to § 961.47, STATS. The State argues that the court had no "authority to *sua sponte* amend a criminal complaint to a different charge to facilitate expungement and dismissal." This court need not resolve whether the circuit court had such authority, however, because the State did not object to the vacating of the judgment on the original

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

charge, and because Fecci satisfied the conditions of her probation. Accordingly, the State's arguments are moot and its appeal is dismissed.

The procedural history, while convoluted, is undisputed. Fecci was charged with two counts of attempt to obtain a prescription drug (phentermine) by fraud, in violation of §§ 961.16(2), 961.20(2m)(d), and 450.11(7), STATS. On November 4, 1997, she pled guilty to both counts. The court found her guilty, entered judgment, and proceeded immediately to sentencing where, essentially, the only issue was whether Fecci needed probation. Following a discussion of that issue, defense counsel broached the subject leading to this appeal, stating, "The last issue, and it is something I have not yet discussed with the State, is the issue of expungement."

The court then heard argument and discussed the potential for expungement or discharge, correctly observing 1) that "expungement," under § 973.015, STATS., was not available to Fecci because she was over the age of twenty-one; and 2) that conditional discharge and dismissal, under § 961.67, STATS., was not available to Fecci because her offenses were not among those encompassed by that statute. The court commented, "I don't see any way of getting around that with any fair reading of the statute." Nevertheless, after additional discussion, the court began its search for a way to do just that:

> I would acquiesce in Ms. Fecci's argument that she be allowed to take advantage of the conditional discharge as set out in Section 961.47. I will order that she be placed on probation for the minimum mandatory period of six months for each of these offenses, and probation is a single six-month term. The single condition of probation shall be that she comply with the counseling recommended by the doctors at Cedar Creek [treatment facility] for either a six-month period or some shorter period if they deem that counseling is no longer required.

> I would further order that the judgment of conviction I directed entered on each of the two counts be vacated so that there is no judgment of conviction. And then we will set the case for a review date in about six and a half months for Ms. Fecci to show proof that she has complied with the conditions of probation.

On June 1, 1998, the case returned and the court was advised of "Ms. Fecci's successful completion of the terms of probation." Defense counsel then requested that, "[b]ased upon her successful completion, the terms of probation set by the Court on November 4th, and pursuant to the terms of this negotiation," Fecci be granted "conditional discharge." Then, for the first time, the State objected, offering a confusing argument:

> The State's position in 961.47 is, while it does cover discovery, the drug chapter offenses under 450.11 are not contemplated – concluded under 961.47. So if the Court would enter that, the State would be in a position to appeal that order.
>
> I have to admit I don't have any case law that may address that issue. This was just an order from the head of our drug unit to make objection at this point.

The court then attempted to "work through the problem then" – i.e., the problem presented by its improper application of § 961.67, STATS., to offenses beyond the purview of the statute. Following an extended discussion, the court attempted to solve the problem: "I will order the complaint amended to delete any reference to Section 450.11(7) …. I will order that the complaint be amended to reflect that this was a charge under Section 961.41(3g) (b)."

The State again objected. Implicitly overruling the objection, the court observed: (1) that at the November 4, 1997 proceeding, the prosecutor "acquiesced in the taking of the plea under Chapter 961 with the expectation that a conditional discharge would be ordered under Section 961.47 if Ms. Fecci was successful in meeting the conditions imposed by Section 961.47 for a conditional

discharge," and 2) "Ms. Fecci successfully completed her period of probation supervision and was discharged [from probation] on May 4, 1988."

The State now argues that the circuit court had no authority, *sua sponte*, to order the amendment of the complaint, and that it "did not 'acquiesce' to the trial court's amendment of the criminal complaint." Assuming the State is correct on the first point (and this court will make that assumption for purposes of this appeal), this court then must examine whether, as Fecci argues, the State "acquiesced to the trial court's amendment of the criminal complaint" or "is equitably estopped from challenging the amendment of the criminal complaint."

Neither the circuit court nor the parties provide an exact account of the circuit court proceedings. Reviewing the record, this court notes that the circuit court was incorrect in concluding that the prosecutor "acquiesced in the taking of the plea under Chapter 961." The plea proceeding never included any reference to the potential for chapter 961 conditional discharge; the subject never came up until sentencing. Similarly, Fecci is incorrect in arguing that the State "acquiesced to the trial court's amendment of the criminal complaint." The amendment was not ordered until the June 1, 1998 proceeding when, quite promptly, the State objected to the amendment. But the State also misses the mark.

On November 4, 1997, although the State never acquiesced to the amending of the complaint, the State did acquiesce to two things: the vacating of the judgment of conviction, and the ordering of probation. When the circuit court stated, "I would further order that the judgment of conviction that I directed entered on each of the two counts be vacated so that there is no judgment of conviction," the State did not object. When the court then set a six-month review

date to review probation compliance, as if it were proceeding under § 961.67, STATS., the State again did not object.

Thus, the record establishes four things: (1) The State did not object to the vacating of the judgment of conviction. (2) The State did not object to the order and conditions of probation. (3) Assuming (as this court does) that the circuit court had no authority to apply a § 961.67 disposition to Fecci's offenses, the circuit court ordered an unlawful disposition. (4) Fecci complied with the conditions of probation.

The State now requests that this court reverse the circuit court's orders "amending the charges and ordering expungement." But if this court does so, the case still remains with a vacated judgment of conviction. The State requests "that judgments of conviction for two counts of attempt to obtain a prescription drug by misrepresentation be entered against the defendant." But that request is inconsistent with the State's failure to object to the vacating of the judgments and order for probation. *See* ***State v. Michels***, 141 Wis.2d 81, 98, 414 N.W.2d 311, 317 (Ct. App. 1987) (a party is judicially estopped from maintaining a position on appeal which is inconsistent with a position taken in the trial court).

Fecci complied with the probation order. Thus, even assuming the circuit court's probation order was unlawful, Fecci is protected against further judgment or sentencing for these offenses. *See* ***State v. Dean***, 111 Wis.2d 361,

330 N.W.2d 630 (Ct. App. 1983).[2] Therefore, the State's challenge to the circuit court's order granting conditional discharge could have no effect on this case. Vacating the order could not alter the fact that the State did indeed acquiesce to the vacating of the judgment of conviction and to the order for probation, and the fact that Fecci complied with probation. Accordingly, the State's arguments are moot, *see* ***Milwaukee Police Ass'n v. City of Milwaukee***, 92 Wis.2d 175, 183, 285 N.W.2d 133, 137 (1979) ("case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy"), and its appeal is dismissed.

By the Court.—Appeal dismissed.

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

[2] *See* ***DeWitt v. Ventetoulo***, 803 F.Supp 580, 584 (D.R.I. 1992) (due process was violated where defendant had already been released from prison when life sentence was reimposed), *aff'd*, 6 F.3d 32, *cert. denied*, 114 S. Ct. 1542 (1994); *see also* ***Breest v. Helgemoe***, 579 F.2d 95, 101 (1st Cir.) (power of a sentencing court to correct a statutorily invalid sentence must be subject to some temporal limit), *cert. denied*, 439 U.S. 933 (1978); *cf.* ***Littlefield v. Caton***, 856 F.2d 344 (1st Cir. 1988), and ***Lerner v. Gill***, 751 F.2d 450 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985) (no due process violation where prisoners had either not completed their prison terms or had not been granted parole prior to the time the government moved to correct their sentences).