COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2625-CR
2008AP2626-CR

Cir. Ct. Nos. 2006CF295
2007CF507

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEIRDRE M. RICHARDSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Appeal No. 2008AP2625-CR reversed; appeal No. 2008AP2626-CR affirmed.*

Before Dykman, P.J, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Deirdre Richardson appeals from judgments of conviction and orders denying her postconviction motion. The issues relate to plea withdrawal. We reverse as to one conviction and affirm as to the other.

¶2 Richardson pled guilty to one count of conspiracy to deliver cocaine and one count of felony bail jumping. She moved to withdraw the pleas on two grounds. The circuit court denied the motion.

¶3 Richardson first argues that she should be allowed to withdraw her plea to both counts because she did not understand that the plea agreement allowed the State to recommend jail time as a condition of probation.

¶4 Richardson's argument is not clear on the legal framework in which this request is made. In taking guilty pleas, the circuit court is required to ensure that the defendant is informed of and understands certain information regarding the elements of the offense and the potential penalty. *See* WIS. STAT. § 971.08(1)(a) (2007-08)[1] and ***State v. Bangert***, 131 Wis. 2d 246, 262-72, 389 N.W.2d 12 (1986). If the defendant shows that the plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 or other mandatory procedures, and also alleges that in fact she did not know or understand the information that should have been provided at the plea colloquy, then the burden shifts to the State to prove at an evidentiary hearing that the plea was knowing, intelligent, and voluntary. ***State v. Howell***, 2007 WI 75, ¶¶27-29, 301 Wis. 2d 350, 734 N.W.2d 48. However, if the defendant does not allege that the plea colloquy was deficient in some manner, the burden remains on the defendant to

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

prove the ground alleged for plea withdrawal. ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794.

¶5 In this case, regardless of which party had the burden, we are satisfied that the circuit court's findings are not clearly erroneous. At the plea hearing, the circuit court was presented with a "statement of negotiated plea." That document clearly states that the State may recommend jail time as a condition of probation. During the colloquy, the court asked Richardson if she had signed, read, and understood that document, and she answered affirmatively as to all. At the postconviction hearing, Richardson testified that she did not read the document and did not understand that the State was permitted to recommend jail time. The circuit court appeared to find this testimony not credible because of her statements during the colloquy. In light of those statements, we are not able to say the finding is clearly erroneous.

¶6 Richardson also argues that she should be allowed to withdraw her plea to the cocaine conspiracy charge because she did not fully understand one of the elements of the charge. Richardson was charged under WIS. STAT. § 961.41(1x), which cross-references to WIS. STAT. § 939.31, the statute for the inchoate version of conspiracy, meaning that no completed crime need be proved. In addition to the inchoate version, there is a separate statute that provides for convictions on a legal theory of conspiracy when a completed crime has occurred. *See* WIS. STAT. § 939.05(2)(c). The elements for these statutes are similar, but not identical.

¶7 Richardson argues that she was not aware that the crime she pled to required that she had "agreed or combined with another" for the purpose of committing a crime, as WIS. STAT. § 939.31 does. As far as we can see, the circuit

court's plea colloquy did not provide this information, and the State concedes as much on appeal. Nor is it contained in the plea questionnaire. The questionnaire contains the pattern instruction for WIS. STAT. § 939.05(2)(c), which does not include the "agreed or combined with" element. Accordingly, we conclude that the plea colloquy was deficient with respect to an explanation of this charge, and the burden was on the State to prove by clear and convincing evidence that Richardson understood this element. ***Hoppe***, 317 Wis. 2d 161, ¶44.

¶8 Richardson argues that the State failed to meet its burden because her trial counsel's testimony at the postconviction hearing did not establish that he explained to her the "agreed or combined with" element. She argues that his testimony was, at best, ambiguous. He testified that he went over with her the elements in the plea questionnaire. However, as we noted above, the questionnaire elements were for the wrong conspiracy statute.

¶9 Trial counsel also testified that he printed the correct instruction, WIS JI—CRIMINAL 570, and put it in his file. However, as to whether he actually printed the full version of that instruction and discussed it with Richardson, his testimony appears to indicate only a limited discussion. Counsel testified: "I went through what constitutes a conspiracy on here [apparently referring to the plea questionnaire with the wrong statute], and then I also had this in the file, so … I would have reviewed both of those and went through it with her." The court then asked: "All right, and when you're referring to this, you're referring to the first page of instruction 570?" Counsel replied: "Yes, because on there it talks about one and two, and it's the elements that the State must prove for conspiracy as a crime."

¶10 The contents of trial counsel's file were not admitted as an exhibit. However, it is clear from the testimony that counsel was reviewing the file as he testified. As we read the above passage, the court was apparently also looking at the file during the testimony, or was at least able to see in a general way what counsel was holding or looking at. This is the only way we can interpret the court's question about counsel referring to "the first page" of instruction 570. There is no other indication in the record before that question that counsel's file contained only the first page of the instruction. Yet, in response to the court's question, counsel appears to have agreed that it was only the first page, and he noted that it shows elements one and two.

¶11 The version of WIS JI—CRIMINAL 570 that was in effect at the time of Richardson's plea stated elements one and two on the first page. There is also a third element on the second page. The second element is that the defendant was a member of a conspiracy, and this is stated on the first page. However, the first page does *not* include the explanatory material for the second element, which is where the instruction explains that a conspirator is one who "agrees or joins with another," and further explains that a conspiracy is a mutual understanding to accomplish some common criminal objective.

¶12 The circuit court appears to have found that the State met its burden, but the court's discussion as to the instruction was short. The court stated: "I note the testimony of [trial counsel] as well that he went over with Ms. Richardson what the elements were." The court's finding did not address the different versions of conspiracy that counsel had used, nor counsel's testimony that his discussion of WIS JI—CRIMINAL 570 was limited to the first page. Beyond that, the court's only other conclusion as to the conspiracy conviction appears to have

been that its plea colloquy was adequate. However, we have already concluded, and the State has conceded, that the colloquy was not adequate.

¶13 Based on this record, we are not able to affirm a finding that the State proved by clear and convincing evidence that Richardson understood that the conspiracy conviction required that she agreed or combined with another. The evidence is at best ambiguous, and at worst clearly demonstrates that trial counsel concedes he did not discuss that portion of the elements with Richardson. Therefore, as to the cocaine conspiracy conviction only, we reverse.

By the Court.—Judgment and order in appeal No. 2008AP2625-CR reversed; judgment and order in appeal No. 2008AP2626-CR affirmed.

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