COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2093-CR **Cir. Ct. No. 2008CF3264**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Charles D. Brown appeals from a judgment of conviction entered after a jury trial for possession with intent to deliver cocaine (more than one gram but less than five grams), two counts of resisting or obstructing an officer and battery to a law enforcement officer, contrary to WIS.

STAT. §§ 961.41(1m)(cm)1r., 946.41(1) and 940.20(2) (2007-08).[1] He also appeals from an order denying his motion for postconviction relief. Although Brown had initially pled guilty to reduced charges, the guilty pleas were withdrawn after Brown made comments during sentencing that caused the trial court to question whether there was a factual basis for one of the charges, and the case proceeded to trial. At issue in this case is Brown's contention that the trial court should have granted his postconviction motion to vacate the judgment of conviction, reinstate the guilty pleas he entered prior to trial and proceed to resentencing. Brown argues that this remedy is necessary because: (1) the trial court erroneously "*sua sponte*" vacated his guilty pleas and ordered that the case proceed to a jury trial, contrary to the dictates of ***State v. Comstock***, 168 Wis. 2d 915, 485 N.W.2d 354 (1992); and (2) he was subjected to double jeopardy. We conclude that the trial court did not *sua sponte* vacate Brown's pleas; instead, Brown withdrew them. Therefore, Brown's trial on the original charges did not violate double jeopardy. Accordingly, we affirm.

BACKGROUND

¶2 According to the criminal complaint, which the parties stipulated provided the factual basis for the guilty pleas, Brown was the passenger in a vehicle driven by another man. The vehicle was stopped in the road, obstructing the flow of traffic, and Brown was outside the vehicle. Upon seeing a police car pull up behind the vehicle, Brown jumped back into the vehicle and the driver

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

drove away. Eventually the vehicle was stopped. As City of Milwaukee Police Officer Eric Rom exited his squad car, he

> observed [Brown] leaning forward towards his right with his left arm between himself and the passenger seat. The reaching movement the defendant was making was consistent with that of a subject attempting to hide or retrieve an object in the seat or his buttocks area. Officer Rom ordered both the driver and [Brown] to put their hands up, which the driver complied with immediately. As Officer Rom ordered [Brown] to put his hands up a second time, the defendant stopped reaching and discarded an unidentifiable item to the back seat.

Officer Rom conducted a pat-down search of Brown, during which Brown "appeared nervous and attempted to pull away ... on two separate occasions."

¶3 Meanwhile, another officer looked in the vehicle and saw "a blue rubber glove that had a clear plastic bag hanging out of it lying on the rear seat behind the driver." The location of the glove was "in the area" where Officer Rom had seen Brown "discard the unknown item." Inside the plastic bag "were several knotted corner-cuts, each suspected," and later found, to contain crack cocaine.

¶4 From the time of the traffic stop and throughout the booking process, Brown exhibited uncooperative behaviors, including: kicking and spitting at officers, kicking the car door, trying to make himself vomit by placing his hand inside his mouth and trying to bite an officer. This led to the obstruction/resisting and battery charges.

¶5 The case was set for a jury trial. On the day of trial, after *voir dire* had begun but before the jury was selected, Brown's attorney told the trial court that during the lunch break a plea agreement had been reached with the State. According to the terms of the plea agreement, Brown would plead guilty to possession of cocaine as a second or subsequent offense (instead of the more

serious crime of intent to deliver cocaine); one count of obstructing or resisting an officer (with the other count being dismissed and read in); and battery to a law enforcement officer (as originally charged). The trial court conducted a standard plea colloquy with Brown.

¶6 The trial court found Brown guilty and convicted him. Trial counsel then told the trial court that Brown "want[ed] to go to sentencing today." The parties immediately proceeded to sentencing. After the State and trial counsel offered argument, Brown exercised his right of allocution, which led to the following exchange:

> [Brown]: I don't sell drugs really. You know. It was just I was with someone who had them, and I was just there.
>
> THE COURT: You're not even saying those were your drugs?
>
> [Brown]: Right. They wasn't mine. I was just there.
>
> THE COURT: Then how do you plead guilty to something where they are not your drugs?
>
> [Brown]: I am just trying to get it over with.
>
> THE COURT: Well, you've got to admit that you did it, sir.
>
> [Brown]: That is what I just did, I pled guilty.
>
> THE COURT: I know, but you can't plead guilty to something that you didn't do. They weren't your drugs, then how do you plead guilty to them?
>
> [Brown]: I mean, they got put on me. I was- - You know.
>
> THE COURT: Where were the drugs when they were found? They weren't directly on you?
>
> [Brown]: No, they wasn't. They were found in the back seat.
>
> THE COURT: Okay. And you're saying they weren't your drugs?

> [Brown]: Right.
>
> THE COURT: Did you touch them? Did you have them at any point?
>
> [Brown]: No.
>
> THE COURT: At all?
>
> [Brown]: No.
>
> THE COURT: Then I can't take your guilty plea for possession of drugs. They weren't your drugs, then let's finish our trial.
>
> [Brown]: All right.
>
> THE COURT: I mean, I know you want to get it over with.... [B]ut I can't take a guilty plea of somebody who is not admitting the stuff is [his]. It's not right.
>
> [Brown]: Okay.

The trial court then asked Brown if he wanted to talk to his attorney, which he apparently proceeded to do.[2]

¶7 Next, trial counsel spoke with the trial court at a sidebar. The trial court then continued on the record:

> THE COURT: Okay. [Trial counsel] tells me that you want to go ahead with your trial, Mr. Brown.
>
> [Brown]: Yes.
>
> THE COURT: Okay. So I am letting you withdraw your guilty pleas to all the counts that we just went through, all right?
>
> [Brown]: Yes.

[2] The record does not affirmatively state that Brown spoke with his attorney, but we infer that he did so, as the next entry in the transcript is trial counsel asking to approach the bench to speak with the trial court off the record.

> THE COURT: We're going to trial on the original case that was charged.
>
> [Brown]: Yes.

¶8 The trial began that same afternoon. The next day, the jury found Brown guilty as originally charged. On the charge of possession with intent to deliver, Brown was sentenced to two years of initial confinement in prison and two years of extended supervision. On the battery count, Brown was sentenced to twelve months in the House of Correction, consecutive to any other sentence. Brown received thirty-day sentences on each of the obstructing/resisting counts, concurrent to the other sentences.

¶9 Brown filed a postconviction motion seeking to vacate his convictions, reinstate the guilty pleas entered before trial and be resentenced. He argued that vacating his guilty pleas and his trial on the original charges violated ***Comstock*** and subjected him to double jeopardy. In a written order, the trial court denied the motion. This appeal follows.

STANDARD OF REVIEW

¶10 This case requires us to analyze whether vacating Brown's guilty pleas and his trial on the original charges violated ***Comstock*** and Brown's right to be free from double jeopardy. We review these issues *de novo*. *See* ***id.***, 168 Wis. 2d at 920-22 (implicitly applying *de novo* review of circuit court's actions); ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1 ("Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews de novo."); ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984) (application of law to undisputed facts presents question of law that is reviewed *de novo*).

DISCUSSION

¶11 Brown argues that the trial court should have granted his postconviction motion to vacate the judgment of conviction, reinstate the guilty pleas he entered prior to trial and proceed to resentencing. Resolution of this case is controlled by ***Comstock***, and we begin our analysis with that case.

¶12 Comstock was charged with four counts of second-degree sexual assault of a child who was more than twelve but less than sixteen years old, which was a felony. ***Id.***, 168 Wis. 2d at 925. Comstock and the State reached a plea agreement pursuant to which he would plead no-contest to reduced charges. ***Id.*** at 926-27. Specifically, the State amended two of the counts to fourth-degree sexual assault, a misdemeanor, and dismissed the other two counts. ***Id.*** at 926. The State agreed to recommend three years' probation with a maximum of seventy-five days in jail as a condition of probation. ***Id.*** at 927.

¶13 Comstock entered no-contest pleas as agreed and was found guilty. ***Id.*** at 929. The circuit court ordered a presentence investigation (PSI). ***Id.*** at 929-30. The PSI writer concluded that the "circuit court could not sentence this defendant with appropriate severity" and recommended that the circuit court reject the agreement if possible. ***Id.*** at 931. "At the sentencing hearing, the circuit court expressed its concern about how the case had been handled and *sua sponte* raised the question whether the plea agreement could be voided." ***Id.*** at 932. Ultimately, after hearing argument from the parties over the course of several days, "the circuit court concluded, as a matter of law, that despite finding a factual basis for the plea and despite accepting the no contest pleas to reduced charges, it could vacate the plea agreement in the public interest." ***Id.*** at 932-33.

¶14 The circuit court vacated the no-contest pleas to the two misdemeanor charges and reinstated the four felony counts from the original information. ***Id.*** at 934. The circuit court then recused itself from further proceedings. ***Id.***

¶15 Comstock moved to dismiss the four charges in the reinstated information on double jeopardy grounds.[3] ***Id.*** The newly assigned circuit court judge granted Comstock's motion and dismissed the four felony counts with prejudice. ***Id.*** The circuit court also ordered, "without explanation, that the no contest pleas to the two misdemeanor counts" remain vacated. ***Id.***

¶16 On appeal, the Wisconsin Supreme Court recognized that jeopardy had attached to both the amended and dismissed sexual assault charges when the circuit court accepted Comstock's no-contest pleas. *See* ***id.*** at 947, 950. It concluded that the circuit court had "violated federal constitutional protections when, under the circumstances of this case, it *sua sponte* vacated the defendant's pleas and reinstated the original charges." ***Id.*** at 921. The court concluded that the four felony charges could not be reinstated due to double jeopardy considerations. *See* ***id.*** at 947, 950. However, the court disagreed "with that part of the [second] circuit court's order vacating the no contest pleas to the two

[3] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution protect individuals "from being put in jeopardy of punishment more than once for the same offense." ***State v. Eaglefeathers***, 2009 WI App 2, ¶5, 316 Wis. 2d 152, 762 N.W.2d 690 (Ct. App. 2008). "This protection prohibits the government from pursuing: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." ***Id.*** "The prohibition against double jeopardy is not triggered until 'jeopardy attaches' in the proceedings." ***State v. Comstock***, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992).

misdemeanor counts and dismissing those counts." ***Id.*** at 947. The court explained:

> The defendant moved for "specific performance" of the plea agreement, and the defendant has never withdrawn his pleas. The defendant has asserted, and correctly so, that [the original circuit court judge] erred by vacating the no contest pleas to the misdemeanor charges. [That] order vacating the misdemeanor pleas was of no effect, and the parties should be returned to the situation existing before the vacation of the pleas. We remand the matter to the circuit court to reinstate the misdemeanor charges and the no contest pleas and for sentencing proceedings.

Id.

¶17 ***Comstock*** provided guidance to circuit courts concerning vacating pleas *sua sponte*. Exercising its "superintending authority," the court directed circuit courts

> to refrain from *sua sponte* vacating a guilty or no contest plea after the circuit court has validly accepted the plea by assuring itself of the voluntariness of the plea and the factual basis for the charges *unless the circuit court finds that there was fraud in procuring the plea or that a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea*.

Id. at 921-22 (emphasis added).

¶18 In the instant case, Brown argues that the trial court violated ***Comstock*** by "*sua sponte* vacating [his] guilty pleas and ordering the case to proceed to trial." (Bolding omitted.) For reasons discussed below, we disagree that the trial court *sua sponte* vacated Brown's guilty pleas.

¶19 As the transcript indicates, when Brown exercised his right of allocution at sentencing, he told the trial court that the drugs were not his. This led

the trial court to question whether the guilty plea to that charge was appropriate, and it began asking a series of questions to further explore the facts underlying Brown's plea. In our view, this was entirely consistent with ***Comstock***, because the questions asked would help the court to determine whether there was fraud in procuring the plea or if Brown intentionally withheld material information that would have induced the trial court not to accept the plea. *See* ***id.*** at 922.

¶20 The trial court never completed a formal ***Comstock*** analysis, however, because in the course of conversing with Brown about whether the plea was appropriate, Brown appeared to agree that the case should proceed to trial. Specifically, when the trial court suggested that if the drugs were not his, they should finish the trial, Brown twice responded affirmatively. In response, the trial court asked Brown if he wanted to consult with his trial counsel, and he said yes. Next, trial counsel told the trial court Brown wanted to proceed with the trial.

¶21 The trial court then addressed Brown directly to confirm his wishes:

> THE COURT: Okay. [Trial counsel] tells me that you want to go ahead with your trial, Mr. Brown.
>
> [Brown]: Yes.
>
> THE COURT: Okay. So I am letting you withdraw your guilty pleas to all the counts that we just went through, all right?
>
> [Brown]: Yes.
>
> THE COURT: We're going to trial on the original case that was charged.
>
> [Brown]: Yes.

Not only did Brown affirmatively indicate he wanted to proceed to trial, he does not claim to have subsequently objected to proceeding to trial on the counts as originally charged.

¶22 For these reasons, we reject Brown's assertion that the trial court *sua sponte* vacated his pleas. We also reject his argument that he was subjected to double jeopardy when the original charges were tried to the jury. When Brown withdrew his guilty pleas, he waived any jeopardy that attached by the entry of that plea. *See* ***State v. Bagnall***, 61 Wis. 2d 297, 302, 212 N.W.2d 122 (1973) ("Jeopardy is waived by the entry of a motion to withdraw a guilty plea."), *superseded by statute on other grounds as stated in* ***State v. Rabe***, 96 Wis. 2d 48, 55-56, 291 N.W.2d 809 (1980).

¶23 Finally, Brown suggests that his guilty pleas should not have been vacated because even if the drugs were not his, he was still guilty of possession because he had "joint dominion and control" over the drugs.[4] If the trial court had proceeded to *sua sponte* vacate the guilty pleas, such an argument might be relevant. But here, Brown ultimately elected to withdraw his pleas, after consulting with his trial counsel. His reasons for withdrawing the pleas or the wisdom of doing so are not issues properly before this court.

¶24 For the foregoing reasons, we reject Brown's argument that the trial court should have vacated the judgment of conviction, reinstated the guilty pleas and resentenced Brown. We affirm the judgment and order.

[4] On appeal, Brown does not argue that his guilty pleas should not have been vacated on grounds that his withdrawal of the pleas was not knowing or voluntary. In contrast, in his postconviction motion, he noted that "there was no probing to determine whether his withdrawal of his guilty plea[s] was done knowingly and voluntarily" and asserted that "this was a *sua sponte* vacation of Mr. Brown's guilty plea[s] by the court, not a willful, knowing and voluntary withdrawal of his guilty plea[s] by Mr. Brown." Brown's appellate brief contains passing references to his mental health problems and sixth-grade education, but he does not renew his argument that his plea withdrawal was not knowing or voluntary. Therefore, that issue is waived. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.