COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1161-CR **Cir. Ct. No. 2014CF3**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOYCE M. ZIEHLI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Joyce Ziehli challenges the circuit court's order denying her postconviction motion to compel discovery. Because Ziehli fails to persuade us that she is now entitled to the discovery she seeks, we affirm.

Background

¶2 Ziehli was charged with six counts of felony theft from her employer, a retirement and nursing home. According to the complaint, over a period of 10 years, beginning in 2003, Ziehli stole approximately $381,000, and possibly more, from her employer.

¶3 In February 2014, the parties entered into a stipulation that the circuit court adopted as an order. Under this February 2014 order, the parties agreed to delay the preliminary hearing, and the prosecution agreed to make financial records available to Ziehli that the State would obtain from Ziehli's employer in advance of that hearing. The records were divided into 15 categories covering the pertinent 10-year period and included general ledgers, resident ledgers, monthly financial statements, "journal entries," and annual audit reports.

¶4 According to Ziehli, these records would show that she had misappropriated significantly less money than alleged. Ziehli claimed that she took only about $125,000 or $150,000.

¶5 In the discussion section below, we will address additional circumstances surrounding the February 2014 order. For now, it is enough to say that it is undisputed that the prosecution violated the court's order by failing to produce a portion of the records. The prosecutor informed Ziehli in May 2014 that there would be no further compliance with the order. Knowing this, Ziehli entered into a plea agreement in October 2014.

¶6 Under the plea agreement, Ziehli agreed to plead no contest to five of the six theft counts, and to a total restitution award of approximately $325,700. The prosecution agreed to the dismissal of the remaining count and to make certain recommendations as to sentencing.

¶7 The circuit court accepted Ziehli's pleas and, in March 2015, imposed sentence. The sentence was similar to the prosecution's recommendation, except that the court added an additional 5 years of extended supervision. The court included restitution in the amount reflected in the plea agreement.

¶8 In February 2016, Ziehli filed a postconviction motion to compel discovery. The motion sought the records listed in the February 2014 order that the prosecution failed to turn over prior to the pleas.[1] Ziehli argued that she needed the records to evaluate possible grounds for postconviction relief. The circuit court denied Ziehli's motion for several reasons, including that Ziehli waived her right to discover the records when she entered her no contest pleas.

¶9 We reference additional facts as needed below.

Discussion

¶10 Ziehli argues that she is entitled to postconviction discovery of the records covered by the February 2014 order. The State responds that, under the

[1] Ziehli's motion appears to seek *all* of the records covered by the February 2014 order, but, as best we can tell, Ziehli means to focus on the records that were never produced. Ziehli does not allege or argue that there is some reason why she no longer has access to records the prosecution previously produced under the order. Regardless whether Ziehli now seeks the production of all of the records or only the subset consisting of unproduced records, our decision would be the same.

guilty plea waiver rule, Ziehli forfeited her right to discover the records. "The general rule is that a guilty, no contest, or ***Alford*** plea 'waives all nonjurisdictional defects, including constitutional claims.'" ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote and quoted source omitted).

¶11 In her reply brief, Ziehli concedes that "a direct request for enforcement of the pretrial discovery order is an issue that would normally be subject to the guilty-plea-waiver rule." Ziehli argues, however, that "for the same reasons discussed [elsewhere in her briefing], the court should reach the merits of this issue."

¶12 More specifically, we understand Ziehli to be making four arguments for why she believes she is entitled to postconviction discovery of the records covered by the February 2014 order:

(1) Ziehli has a right to the records under the test for postconviction discovery in ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999);

(2) Based on the prosecution's violation of the February 2014 order, the circuit court should have disregarded the guilty plea waiver rule and should have imposed postconviction discovery as a sanction for that violation;

(3) The guilty plea waiver rule should not prevent Ziehli from now obtaining the records for purposes of challenging the restitution amount or other aspects of her sentence; and

(4) In applying the guilty plea waiver rule, the circuit court relied on an erroneous factual finding that the prosecution was not in possession of records not produced to Ziehli.

¶13 In the sections that follow, we explain why none of these arguments persuade us that Ziehli is entitled to postconviction discovery of the records covered by the February 2014 order. We need not and do not address whether Ziehli is entitled to production of some or all of the records under a legal theory that she has not advanced here.

*1. Right to Postconviction Discovery Under **O'Brien***

¶14 Ziehli argues that she is entitled to postconviction discovery under ***O'Brien*** because, if she had received all of the discovery, she would not have pled to five of the six counts, she could have successfully challenged the amount of restitution ordered, and she could have received a more favorable sentence in other respects. As best we can tell, Ziehli's ***O'Brien*** argument assumes that the ***O'Brien*** right to postconviction discovery cannot be waived by a plea, and that any decision by a defendant to forgo discovery before entering a plea agreement does not matter. For the reasons we now explain, we decline to make these same assumptions. We therefore reject Ziehli's apparent assertion that ***O'Brien*** applies regardless of a defendant's choice to plead rather than to proceed with discovery.

¶15 ***O'Brien*** contains minimal reasoning as to the basis for the right to postconviction discovery. Parts of ***O'Brien*** appear to support Ziehli's assumptions. The court in ***O'Brien*** concluded that there is "a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence," *see* ***id.*** at 321, and that evidence is consequential "if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *see* ***id.*** at 320-21.

¶16 Picking up on these parts of ***O'Brien***, Ziehli argues that her motion allegations satisfy the ***O'Brien*** test because, had the prosecution disclosed all of the records in the February 2014 order, Ziehli would not have entered her pleas or agreed to the restitution amount, and would have received a lesser sentence. As noted, Ziehli alleged that the unproduced records would likely demonstrate that the amount she misappropriated was far less than the amount alleged.

¶17 Other parts of ***O'Brien***, however, suggest that the discussion in ***O'Brien*** does not address situations in which a defendant chooses to forgo discovery in order to get the benefit of a plea agreement that is offered, in part, in lieu of discovery. Further, parts of ***O'Brien*** indicate that the right to postconviction discovery is tied to the defendant's underlying statutory right to pertinent material within a reasonable time before trial. *See* ***id.*** at 319 & n.10 (citing WIS. STAT. § 971.23).[2]

¶18 The facts in ***O'Brien*** involved access to, and testing of, physical evidence referenced at trial. *See* ***id.*** at 312-13. The ***O'Brien*** court observed that WIS. STAT. § 971.23 allowed for pretrial testing of physical evidence but did *not* provide for postconviction discovery of such evidence. ***O'Brien***, 223 Wis. 2d at 319. In concluding that defendants might still have a means to receive postconviction access to such evidence, the court relied on the due process right to "be given a meaningful opportunity to present a complete defense." *See* ***id.*** at 320.

[2] All references to the Wisconsin Statutes are to the 2015-16 version.

At one point, the ***O'Brien*** court appeared to directly tie the issue-of-consequence test to *trial*, stating that the defendant must show a reasonable probability that the undisclosed evidence would have "changed the outcome of the *trial*." *See* ***id.*** at 321 (emphasis added). Thus, ***O'Brien*** involved no choice to forgo pretrial discovery and no corresponding benefit to the defendant in making that choice.

¶19 Here, in contrast, Ziehli, knowing she was short-circuiting discovery, chose to obtain the benefit of a plea agreement. The situation here is also different from ***O'Brien*** because Ziehli does not rely on WIS. STAT. § 971.23 but rather on the *February 2014 order* as the source of the State's underlying pretrial discovery obligation. But, for reasons we next explain, we conclude that Ziehli is properly held to have waived reliance on that order by entering her pleas. Thus, as best we can tell here, applying ***O'Brien*** as Ziehli asks would simply result in an end run around Ziehli's waiver.

2. The Waiver Rule and the Prosecution's Violation of the February 2014 Order

¶20 We turn to Ziehli's argument that, based on the prosecution's violation of the February 2014 order, the circuit court should have disregarded the guilty plea waiver rule and should have required postconviction discovery as a sanction for that violation.

¶21 It is true that we have the power to disregard the guilty plea waiver rule. *See* ***Kelty***, 294 Wis. 2d 62, ¶18 ("[T]the guilty-plea-waiver rule is a rule of administration and does not involve the court's power to address the issues raised."). Given the circumstances here, however, we conclude that the rule should be enforced.

¶22 We now discuss those circumstances in more detail. We include in the discussion that follows reference to additional undisputed facts as well as to factual allegations in Ziehli's postconviction motion. Because the circuit court did not hold an evidentiary hearing on Ziehli's motion, we will assume that the factual allegations in her motion are true.

¶23 Shortly after the complaint against her was filed, Ziehli moved to delay the preliminary hearing and to compel production of the records at issue here. In her motion papers, Ziehli provided several reasons for needing the records but, read as a whole, it is apparent that the motion is focused on obtaining the records for purposes of the preliminary hearing.

¶24 As indicated above, the prosecution agreed to Ziehli's requests to delay the preliminary hearing and to produce records, and these topics became the subject of the February 2014 order. To repeat, the prosecution agreed under the February 2014 order to cooperate with Ziehli's employer to produce the records in advance of the preliminary hearing, which was postponed to June 2014.

¶25 In May 2014, given the volume of records covered by the February 2014 order, the prosecution apparently had a change of heart. The prosecution informed Ziehli that it had already produced over 6,000 pages of documents and that it was unwilling to continue copying the financial records under the February 2014 order without further indication from Ziehli that the records were necessary for her defense. The prosecution also notified Ziehli at that time that, in reviewing the records, the prosecution saw nothing to support Ziehli's claimed theory of defense.

¶26 Ziehli then moved to enforce the February 2014 order, and the court addressed that motion at the same time it conducted the June 2014 preliminary

hearing. During the June hearing, the prosecution clarified that it had produced 7,800 pages of records, which were all of the records that had come into its possession by that time. The prosecution argued that additional records should not be necessary for purposes of a preliminary hearing. Without condoning the prosecution's violation of the February 2014 order, the circuit court declined to enforce the order or sanction the prosecution's violation by, for example, compelling the prosecution to produce additional records by any particular date. The court noted that any prejudice to Ziehli was limited to the preliminary hearing and would not affect her trial preparation. The court also made clear its expectation that there would be future discovery requests and that the parties should strictly comply with their discovery obligations going forward.

¶27 We pause to observe here that it is not apparent to us that the February 2014 order remained in effect after the preliminary hearing. As we have noted, the order appeared to focus on the production of records for purposes of the preliminary hearing, and the court declined to enforce the order at that hearing. Further, the court did not address whether the order would be in effect going forward after the preliminary hearing. Regardless, what *is* clear is that, by the time of the preliminary hearing, Ziehli knew that the prosecution's position was that, regardless of the order, it had produced all of the financial records that it planned to produce.

¶28 In August 2014, after the preliminary examination and before the plea agreement, Ziehli filed a subsequent statutory discovery demand that included a request for the records covered by the February 2014 order. Beyond that, however, Ziehli does not now argue that she took further action to enforce the February 2014 order and, so far as we can tell, Ziehli does not argue that the

discovery *statute* obligated the prosecution to produce the records prior to the time she entered her pleas.

¶29 In October 2014, having not received further records covered by the February 2014 order, Ziehli entered her pleas. She made no reference at the time of the plea to any need for additional discovery.

¶30 To these facts we add Ziehli's most pertinent postconviction motion allegations, which can be summarized as follows:[3]

- At the time Ziehli entered her pleas, Ziehli believed, based on information from third parties, that her employer had destroyed many of the records covered by the February 2014 order that were never produced.
- After Ziehli's conviction and sentencing, a defense investigator interviewed the "CEO-Executive Director" of Ziehli's employer.
- According to the investigator's notes, the executive director believed, "[t]o the best of his knowledge," that all records covered by the February 2014 order had been turned over to the district attorney's office.
- The executive director lacked a clear recollection on timing, but, when asked about categories of records that were never produced to Ziehli, he indicated that those records were turned over to the district attorney's office approximately two weeks before Ziehli entered her no contest pleas.
- Had Ziehli known at the time of her pleas that the unproduced records still existed, she would not have entered into the plea agreement.

[3] Ziehli's factual allegations are sometimes ambiguous as to which categories of records she means and as to the timing of events. We do our best to construe the allegations in a manner favorable to Ziehli.

¶31 Based on the above facts and motion allegations, we disagree with Ziehli that the prosecution's violation of the February 2014 order provides a good reason to disregard the guilty plea waiver rule.

¶32 There can be no dispute that, when Ziehli entered her pleas, she knew that the prosecution had violated the February 2014 order, knew the prosecution had not complied with her August 2014 discovery demand referencing that order, and knew which records under the order the prosecution had and had not produced. While we do not condone the prosecution's unilateral announcement to Ziehli that it would not fully comply with the February 2014 order, the fact remains that Ziehli chose to enter her pleas knowing of the prosecution's position and knowing which records she still lacked.[4]

¶33 Further, according to Ziehli's own allegations, the prosecution did not contribute to Ziehli mistakenly believing that unproduced records had been destroyed by her employer. Rather, as noted, Ziehli alleges that she formed this belief based on information she received from third parties.

¶34 For that matter, Ziehli has not alleged that the prosecution knew of Ziehli's belief. Thus, even assuming, as Ziehli alleges, that the prosecution came into possession of additional records two weeks before Ziehli's pleas, Ziehli's allegations do not support a conclusion that the prosecution took advantage of those unproduced records at Ziehli's expense. To the contrary, the prosecution's

[4] Ziehli does not argue that she was unaware of the nature or general content of any of the records that the prosecution failed to produce. She was a bookkeeper of her employer, and her arguments suggest that she was generally familiar with the records at issue. Instead, as we understand it, her argument is that she was deprived of the opportunity to use the unproduced records to support her assertion that she misappropriated less than alleged by the State.

May 2014 notice to Ziehli indicated that the prosecution had already reviewed the records as of May 2014. Further, as we have noted, it is not clear to us that, after the June 2014 preliminary hearing, the February 2014 order remained in effect.

¶35 Accordingly, there is no clear causal connection between the prosecution's violation of the February 2014 order and Ziehli's pleas.

¶36 Ziehli directs our attention to ***State v. Harris***, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737, a case that, like Ziehli's case, involved a plea agreement. *See* ***id.***, ¶4. In ***Harris***, our supreme court ordered plea withdrawal based on the State's failure to disclose victim statements in violation of the criminal discovery statute. *See* ***id.***, ¶¶2, 24-40.

¶37 ***Harris*** is distinguishable for several reasons, but we focus on the most notable reason. Nothing in ***Harris*** indicates that, when the defendant in ***Harris*** chose to enter his plea, he had any reason to think that the prosecution had violated the discovery statute and had failed to disclose victim statements. *See generally* ***id.***, ¶¶2-8, 24-40. In contrast here, as we have said, Ziehli knew that the prosecution had violated the February 2014 order and knew which records she was still missing.

3. Postconviction Discovery For Purposes of Challenging the Restitution Amount or Other Aspects of the Sentence

¶38 Ziehli argues that, regardless whether the guilty plea waiver rule applies to prevent her from seeking postconviction discovery to challenge the "plea itself," the waiver rule does not apply to prevent her from seeking that same discovery to challenge the restitution amount or other aspects of her sentence. Ziehli argues that the waiver rule is "inapposite" to the latter two types of challenges.

¶39 Putting aside whether Ziehli is generally correct as to the guilty plea waiver rule's application to restitution and other aspects of sentencing, we conclude that there are specific reasons here why Ziehli's arguments fail.

¶40 As to restitution, the restitution amount here was an integral part of the plea agreement from the point of view of both parties and the victim. Thus, we see no reason why our application of the guilty plea waiver rule to the restitution amount should differ from our application of that rule to Ziehli's decision to enter a plea.

¶41 As to other aspects of Ziehli's sentence, we conclude that, even if we disregarded the waiver rule, Ziehli's argument lacks merit. That is, Ziehli does not persuade us that the unproduced records might have changed the circuit court's other sentencing decisions. Ziehli argues that the unproduced records would support her claim that she misappropriated only $125,000 or $150,000, instead of the much larger amount alleged, and that this difference might have led to a more favorable sentence. Ziehli asserts that, during the sentencing hearing, the prosecution argued that Ziehli's continuing claim as to the amount showed that Ziehli remained dishonest, failed to accept responsibility, and was a flight risk.

¶42 When we look to the circuit court's sentencing comments, however, we disagree that Ziehli's claim as to the amount mattered. Although the court made reference to the large "amount" that Ziehli misappropriated as a sentencing factor, the court did not focus on any particular dollar figure, nor did the court even mention the difference between Ziehli's claimed amount and the alleged amount. Rather, the court's sentencing comments demonstrate that the court focused primarily on other factors, including the ongoing nature of Ziehli's crimes; the fact that Ziehli took advantage of a position of trust; and Ziehli's

efforts to cover her tracks and continue misappropriating funds even after her employer began to suspect a problem and confronted her on it. In sum, we are confident that the circuit court would have imposed the same sentence even if Ziehli had misappropriated $125,000 or $150,000, as she claimed.

4. Circuit Court's Factual Finding that the Prosecution Did Not Possess Records

¶43 Finally, Ziehli argues that the circuit court relied on an erroneous factual finding that the unproduced records were not in the prosecution's possession. Ziehli argues that her postconviction motion contains evidence to the contrary, namely, the notes from her investigator's interview with Ziehli's employer's executive director, who, according to the investigator, said that additional records were provided to the prosecution two weeks before Ziehli's pleas.

¶44 We have not relied on the circuit court's factual finding here. Rather, as we stated, we take Ziehli's factual allegations as true, including the allegations in her investigator's notes. Apart from arguments that we have already rejected, Ziehli makes no other developed argument based on the prosecution's possession of records. Thus, our analysis concludes here.

Conclusion

¶45 For the reasons stated, we affirm the judgment against Ziehli and the order denying her postconviction motion to compel discovery.

By the Court.—Judgment and order affirmed.

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