STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2044-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIE WILLIAMS,

Defendant-Appellant.

APPEAL FROM A SEPTEMBER 29, 2015 ORDER ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE CHAD G. KERKMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the positions of the parties are fully presented in the arguments in their briefs. The opinion should be published because this case involves several presently unsettled issues of law and procedure relating to the new "911 Good Samaritan Law."

ARGUMENT

I. Wisconsin Stat. § 961.443 creates a procedural defense that provides a complete bar to the filing of any charges, as well as any trial, for the crimes specified in that section.

Wisconsin Stat. § 961.443 provides that a person who attempts to aid someone who is believed to be suffering from an overdose or other adverse reaction to a controlled substance is "immune from prosecution" for the crimes specified in that section.

The State agrees with the defendant-appellant, Marie Williams, that this statute creates a procedural defense that provides a complete bar to the filing of any charges, as well as any trial, for the specified crimes if a person qualifies as an "aider."

Immunity is not just an impediment to conviction. Immunity is freedom from suit or liability conferred on a defendant because of the defendant's status or position. *Paige K.B. v. Molepske*, 219 Wis. 2d 418, 424, 580 N.W.2d 289 (1998); *Ford v. Kenosha County*, 160 Wis. 2d 485, 495, 466 N.W.2d 646 (1991). Immunity from suit avoids the burden of litigation. *State ex rel. Hass v. Court of Appeals*, 2001 WI 128, ¶ 14, 248 Wis. 2d 634, 636 N.W.2d 707. *See Webster's Third New Int'l Dictionary* 1130-31 (unabr. 1986) (immunity is the freedom or exemption from the burdens arising out of a legal relationship).

In a criminal case, transactional immunity prohibits and precludes a criminal prosecution. *State v. Worgull*, 128 Wis. 2d 1, 14, 381 N.W.2d 547 (1986); *State v. J.H.S.*, 90 Wis. 2d 613, 617,

280 N.W.2d 356 (Ct. App. 1979).[1] It is an exemption from prosecution. *The American Heritage Dictionary of the English Language* 903 (3d ed. 1996).

A prosecution is the institution and continuance of a criminal suit involving the process of bringing formal charges against a defendant before a legal tribunal and pursuing them to a final judgment. *American Heritage Dictionary* at 1454; *Webster's Dictionary* at 1820.

Therefore, immunity from prosecution is not a substantive affirmative defense that would factually defeat the State's claims during a trial, *see State v. Watkins*, 2002 WI 101, ¶¶ 36-40, 255 Wis. 2d 265, 647 N.W.2d 244, but a procedural defense that provides a complete bar to the filing of any criminal charges and any trial involving those charges, conferred under § 961.443 because of a person's status as someone who aids another person who has an adverse reaction to drugs.

II. A defendant who claims immunity from prosecution has the burden to prove this defense by a preponderance of the evidence at a hearing on a pretrial motion to dismiss the prosecution.

The State agrees with Williams that a defendant who claims immunity from prosecution has the burden to prove this defense by a preponderance of the evidence at a pretrial hearing on a motion to dismiss the prosecution.

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[1] There are two kinds of immunity in criminal cases, transactional immunity and use immunity. Unlike transactional immunity, use immunity does not provide amnesty from prosecution but simply prohibits the state from using compelled testimony in the prosecution. *J.H.S.*, 90 Wis. 2d at 616-17.

Immunity is what is statutorily labeled an "affirmative defense" under rules of civil procedure in the sense that it is a matter in avoidance that does not go to the merits of the controversy, and therefore must be raised by motion before trial or be deemed waived. *Becker v. Crispell-Snyder, Inc.*, 2009 WI App 24, ¶ 31, 316 Wis. 2d 359, 763 N.W.2d 192; *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 34, 559 N.W.2d 563 (1997); *City of Kenosha v. State*, 35 Wis. 2d 317, 328, 151 N.W.2d 36 (1967); Wis. Stat. §§ 802.02(3), 802.06(2).

The appropriate motion is a motion to dismiss the prosecution. David F. Herr et al., *Fundamentals of Litigation Practice* § 9:3 (2014 ed.).

Usually, the moving party has the burden of proof, including both the burden of producing evidence and the burden of persuasion. *State v. McFarren*, 62 Wis. 2d 492, 499-500, 215 N.W.2d 459 (1974).

A related consideration is the natural tendency to place the burden of proof on the party seeking to change the status quo, *State v. Russ*, 2006 WI App 9, ¶ 7, 289 Wis. 2d 65, 709 N.W.2d 483, such as by contending that a court should relinquish its jurisdiction. *See State v. Verhagen*, 198 Wis. 2d 177, 187-98, 542 N.W.2d 189 (Ct. App. 1995).

The burden of proof is also placed on the party who has particular knowledge of the facts regarding an issue, especially when the opposing party would have to prove a negative. *Russ*, 289 Wis. 2d 65, ¶ 7; *McFarren*, 62 Wis. 2d at 500-01.

All these considerations compel the conclusion that a defendant who brings a pretrial motion to dismiss a prosecution, which would change the status quo by depriving the court of its existing jurisdiction, and who has particular knowledge of the facts regarding a claim that the defendant

was attempting to aid another person believed to have an adverse reaction to drugs, should have the burden of proof, especially since placing the burden on the State would require the State to undertake the almost impossible task of proving the negative proposition that the defendant was not attempting to aid another person believed to have had an adverse reaction to drugs.

The standard of proof should be a preponderance of the evidence, which is the default standard in the absence of special situations where public policy requires a standard that is higher. *See State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982); *Madison v. Geier*, 27 Wis. 2d 687, 692, 135 N.W.2d 761 (1965).

III. Wisconsin Stat. § 961.443 does not provide immunity from prosecution for any crimes except those expressly enumerated in the provision.

The State does not agree with Williams that § 961.443 offers her immunity from prosecution, not only on charges of possessing drug paraphernalia and possessing a controlled substance, but also on charges of bail jumping for violating the conditions of her bail by possessing drug paraphernalia and controlled substances.

The plain language of the statute makes clear that it provides immunity from prosecution only for those crimes expressly enumerated in the provision, i.e., possession of drug paraphernalia in violation of Wis. Stat. § 961.573 and possession of a controlled substance in violation of Wis. Stat. § 961.41(3g). The statute does not provide immunity for any crimes except those expressly enumerated. *See State v. Popenhagen*, 2008 WI 55, ¶ 43 n.23, 309 Wis. 2d 601, 749 N.W.2d 611 (when a statute lists things without any general words before or after them,

everything else is excluded from the application of the provision).

When the meaning of a statute is plain, the statute must be given its plain meaning. *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶ 17, 290 Wis. 2d 421, 714 N.W.2d 130; *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶¶ 7-8, 270 Wis. 2d 318, 677 N.W.2d 612; *J.A.L. v. State*, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991). It is impermissible to read in things that are simply not there. *State v. Hall*, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997). *See Popenhagen*, 309 Wis. 2d 601, ¶ 43 n.23.

A prosecution for bail jumping in violation of Wis. Stat. § 946.49(1)(b) for violating the conditions of bail by possessing drug paraphernalia is not a prosecution for possession of drug paraphernalia in violation of Wis. Stat. § 961.573. A prosecution for bail jumping in violation of Wis. Stat. § 946.49(1)(b) for violating the conditions of bail by possessing a controlled substance is not a prosecution for possession of a controlled substance in violation of Wis. Stat. § 961.41(3g).

The crime of bail jumping has three elements: (1) the defendant was charged with a crime, (2) the defendant was released from custody on bond with conditions, and (3) the defendant intentionally failed to comply with the conditions of the bond. *State v. Schaab*, 2000 WI App 204, ¶ 9, 238 Wis. 2d 598, 617 N.W.2d 872; Wis. Stat. § 946.49(1).

The third element of this offense can be committed in many different ways, indeed, as many ways as there are conditions of release. *State v. Nelson*, 146 Wis. 2d 442, 450, 432 N.W.2d 115 (Ct. App. 1988). When one of the conditions of the defendant's bail is that she not commit any new crimes, the number of ways the crime of bail jumping can be committed multiplies exponentially.

To prove that a defendant violated the conditions of her bail by committing a new offense the State obviously must prove that the defendant actually committed the new offense. Wis. JI-Criminal 1795 (2015).

But the defendant's commission of a new offense is merely a fact necessary to prove an element of the crime of bail jumping. The elements of the new crime do not become absorbed into the crime of bail jumping. *See State ex rel. Jacobus v. State*, 208 Wis. 2d 39, 53-54, 559 N.W.2d 900 (1997). Those elements merely determine what facts are necessary to prove the third element of the crime of bail jumping.

The crime of bail jumping and the new crime remain separate and distinct offenses. *Jacobus*, 208 Wis. 2d at 53; *Nelson*, 146 Wis. 2d at 449. The new crime does not become a lesser included offense of the crime of bail jumping. *Nelson*, 146 Wis. 2d at 450.

So when a defendant is prosecuted for the crime of bail jumping for violating the conditions of her bail by committing a new crime, the defendant is not being prosecuted for the new crime. *Jacobus*, 208 Wis. 2d at 54. The defendant is not charged with the new crime. *State v. Hauk*, 2002 WI App 226, ¶ 14, 257 Wis. 2d 579, 652 N.W.2d 393. The defendant is not convicted of the new crime. *Hauk*, 257 Wis. 2d 579, ¶ 14.

So when, as in this case, the defendant is prosecuted for the crime of bail jumping for violating the conditions of her bail by committing the new crimes of possessing a controlled substance and possessing drug paraphernalia, she is not being prosecuted for the crimes of possessing a controlled substance or possessing drug paraphernalia.

And because the defendant is not being prosecuted for the crimes of possessing drugs or drug paraphernalia, the

immunity provision of § 961.443, which prohibits prosecution for possessing drugs or drug paraphernalia, does not come into play. The bar to prosecuting an aider for possessing drugs or drug paraphernalia does not bar prosecution of the aider for the separate and distinct crime of bail jumping.

To support her argument that § 961.443 provides immunity for the crime of bail jumping when that offense is premised on the commission of the new crimes of possessing drugs or drug paraphernalia, Williams urges this court to consider the legislative police underlying the statute.

But a court cannot change unambiguous language in a statute for reasons of public policy. *State v. Lee*, 2008 WI App 185, ¶ 13, 314 Wis. 2d 764, 762 N.W.2d 431; *State v. Inglin*, 224 Wis. 2d 764, 774, 592 N.W.2d 666 (Ct. App. 1999); *State v. Briggs*, 214 Wis. 2d 281, 288, 571 N.W.2d 881 (Ct. App. 1997); *State v. Brunette*, 212 Wis. 2d 139, 142, 567 N.W.2d 647 (Ct. App. 1997); *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 560-61, 419 N.W.2d 236 (1988).

Moreover, Williams' discussion considers only half of the legislative equation.

The immunity provision in § 961.443 attempts to balance two competing considerations. On the one hand, there is a desire to encourage people to get help for those who are suffering an overdose or other reaction to drugs. But on the other hand, the cost of this desirable goal is allowing the aider to get away with committing a crime.

The Legislature struck the balance by providing immunity for only two crimes, possession of drug paraphernalia in violation of Wis. Stat. § 961.573 and possession of a controlled substance in violation of Wis. Stat. § 961.41(3g). The legislative policy was that letting an aider get away with

any other crimes was too great a cost for furthering the goal of getting help for someone who was suffering an adverse reaction to drugs.

Thus, for example, there is no immunity for delivering a controlled substance in violation of Wis. Stat. § 961.41(1), especially when delivering that substance causes the overdose or other reaction suffered by the person who needs help. *See* Wis. Stat. § 940.02(2) (2013-14).

Therefore, assuming that Williams is able to meet her burden of proving that she qualifies as an aider because she was attempting to bring a person who was suffering from a drug overdose to a hospital, Wis. Stat. § 961.443(1)(a), she would be immune from prosecution for the charges of possession of drug paraphernalia in violation of Wis. Stat. § 961.573 and possession of a controlled substance in violation of Wis. Stat. § 961.41(3g), but not for the charges of bail jumping in violation of Wis. Stat. § 946.49(1).

CONCLUSION

It is therefore respectfully submitted that the court should establish the proper procedure to be followed when a defendant claims immunity from prosecution under § 961.443.

The case should be remanded to the circuit court with instructions to hold an evidentiary hearing on Williams' claim that she is entitled to immunity under this section because she qualifies as an aider under the definition in the statute.

If Williams succeeds in proving that she is an aider, the prosecution on the charges of possessing drug paraphernalia and possessing a controlled substance should be dismissed. But in any event, the prosecution on the charge of bail jumping

should be allowed to continue because § 961.443 does not provide immunity for that offense.

Dated: March 30, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,298 words.

Dated this 30th day of March, 2016.

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Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of March, 2016.

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