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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2018AP311-CR and 2018AP312-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ESMERALDA RIVERA-HERNANDEZ,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL OF AN ORDER OF THE CIRCUIT COURT OF SHEBOYGAN COUNTY, HONORABLE DANIEL J. BOROWSKI PRESIDING

TRIAL COURT CASE NOS. 2016CM490 AND 2017CM321

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs adequately develop the law and facts necessary for the disposition of the appeal and the case can be decided based on well-established legal principles.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of the Defendant-Appellant Rivera, the State exercises its option not to present a statement of the case. Wis. Stat. § 809.19(3)(a)(2). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

I. RIVERA'S CHALLENGE TO THE TRIAL COURT'S DECISION IS BARRED BY THE GUILTY-PLEA-WAIVER RULE.

Rivera argues that the trial court erred when it improperly evaluated Rivera's reasoning and recommendations for the amendment motion. (Rivera Br. at 11–20.) Because Rivera entered "no contest" pleas to the battery and bail jumping (R. 84.), she has forfeited that claim.

Generally, a valid "no contest" plea waives all nonjurisdictional defenses to a conviction. (*See State v. Riekkoff*, 112 Wis. 2d 119, 122–23, 332 N.W.2d 744 (1983).) Courts refer to this as the "guilty-plea-waiver rule," but it is more accurately described as a rule of forfeiture. (*See State v. Kelty*, 2006 WI 101, ¶ 18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.)

Rivera fails to assert this is a jurisdictional defense or point to any authority that suggests this is a jurisdictional defense. Moreover, Rivera does not contend that she believed this issue would be preserved notwithstanding the no-contest plea. On April 18, 2017, with regard to the court's denial of the State's amendment motion, the following exchange occurred:

> THE COURT: And the question is is the amendment in the public's interest. And that doesn't – I don't think that takes race, creed, color, or otherwise into consideration. And no case has been cited in front of me that says it is. In fact, it seems it's just the opposite. And it's just concerning. And that was the primary change [(Rivera's immigration status)] from the last time I recall. Am I correct in that, Defense Counsel?
>
> DEFENSE COUNSEL: When I filed my written response I did not mention that.
>
> THE COURT: I understand, but you mentioned it twice in court.
>
> DEFENSE COUNSEL: Right. On the record last time, it's more so to make a record for appeal in case a Court of Appeals does determine that this is something that needs to be considered. I just need to make my record.
>
> THE COURT: Does defense have standing to appeal this if I say no to the plea agreement?
>
> DEFENSE COUNSEL: We can do an interlocutory appeal.

(R. 82: 11–12). Rivera did not file any interlocutory appeal.

Finally, Rivera received a significant benefit from her plea, as one count of disorderly conduct and two counts of bail jumping were dismissed and read into the record.

Consequently, this Court should hold that Rivera forfeited raising this issue when she entered pleas of "no contest." If this Court chooses to address the merits of this issue, however, as discussed below, Rivera's challenge still fails.

II. THE TRIAL COURT DID NOT MISCHARACTERIZE RIVERA'S IMMIGRATION STATUS.

Rivera argues that the trial court referred to her as an "illegal alien" or "illegal immigrant" three times at the hearing

on April 18, 2017. Rivera further argues that the court noted she was "illegally in the United States." (Rivera's Br. at 10.) Finally, she contends that each of these instances was a mischaracterization of her immigration status and, thus, a factual mistake that upset the balancing test that the trial court used to decide the State's amendment motion.[1] (*Id.* at 10–11.) It is Rivera, however, that has mischaracterized her immigration status.

Rivera contends that she was a Deferred Action[2] for Childhood Arrivals ("DACA") applicant and, consequently, "not an 'illegal' alien, 'illegal' immigrant, or 'illegally' in the United States." (*Id.* at 11.) Such an assertion incorrectly states the immigration status of a DACA applicant.

In order to understand the failure of Rivera's argument, it is necessary to understand what a DACA applicant is. A DACA applicant is an individual who has *applied* to receive deferred action, but has not yet been deemed to have met the criteria for deferred action. (United States Citizenship and

[1] Ms. Rivera does not contend that the trial court applied the incorrect test, but only that the court mischaracterized Ms. Rivera's immigration status when applying the test.

[2] Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.

Immigration Services, Frequently Asked Questions, (Nov. 27, 2018), https://uscis.gov/archive/frequently-asked-questions.)

In contrast, a DACA beneficiary receives deferred action. Even DACA beneficiaries, however, are not conferred legal status. Per United States Citizenship and Immigration Services:

> Although action on [an individual's] case has been deferred and [an individual does] not accrue unlawful presence during the period of deferred action, deferred action does not confer any lawful status. The fact that [an individual is] not accruing unlawful presence does not change whether [that individual is] in lawful status while [they] remain in the United States.

(*Id.*) Therefore, neither DACA applicants nor DACA beneficiaries are considered to be in the United States legally.

Rivera asserts that she was "not an 'illegal' alien, 'illegal' immigrant, or 'illegally' in the United States." (Rivera Br. at 11–20.) One such authority Rivera cites for that propsition, facially contradicts the assertion for which she has relied on it. (*Id.* at 15–16 (citing *Plyler v. Doe*, 457 U.S. 202, 218, 102 S. Ct. 2382, 2395, 72 L. Ed. 2d 786 (1982).) In *Plyler*, the Court noted that "[s]heer incapability or lax enforcement of the law barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of *illegal migrants*—numbering in the millions—

within our borders." (*Plyler v. Doe*, 457 U.S. at 218 (emphasis added).) The Court further noted that "[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." (*Id.* at 219.) Finally, the Court noted that "[t]he children who are plaintiffs in these cases are special members of this underclass." (*Id.*) While the Court may consider children to be special members of that underclass, they are still members of an underclass that the Court described as being made up of "illegal migrants." Nothing in *Plyler* stands for the proposition that children whose parents brought them to the United States illegally should not be considered to be in the United States illegally, only that they are differently situated than their parents when penalties are considered. Therefore, the trial court was correct when it did not distinguish between the status of Rivera's parents and Rivera herself because their legal status in the United States was the same.

In light of the above, the trial court did not mischaracterize Rivera's immigration status. While terms such as "illegal alien" and "illegal immigrant" may be seen by some to be politically incorrect, they were not misstatements of Rivera's immigration status and the court made no factual

mistake—as Rivera argues—that upset the balancing test the court used to decide the State's amendment motion.

Thus, this Court should hold that the trial court did not improperly mischaracterize Rivera's immigration status and properly applied the balancing test when it decided the State's amendment motion. If this Court does find that the trial court improperly mischaracterized Rivera's immigration status, however, as discussed below, Rivera's challenge still fails because any such mischaracterization was harmless error.

III. ANY ERROR IN THE CHARACTERIZATION OF RIVERA'S IMMIGRATION STATUS DID NOT CAUSE RIVERA ANY HARM.

The State disagrees with Rivera that the trial court mischaracterized her immigration status, but if the court erred with its remarks, the error did not result in any harm to Rivera.

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record that the error complained of has affected the substantial rights of a party).

(*State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189.) "Wisconsin's harmless error rule is codified in Wisconsin Statute § 805.18 and is made applicable to criminal proceedings by Wisconsin Statute § 972.11(1)." (*State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d

500.) "The Standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." (*Id.*)

"The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." (*Id.*)

The harmless-error test applies to a claim that a court relied on a clearly irrelevant or improper factor. (*State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.) To demonstrate the harmlessness of a court's reliance on an irrelevant or improper factor, the State must prove beyond a reasonable doubt that the court would have reached the same conclusion if the court had not considered the factor. *See In re Commitment of Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.)

First and foremost, the trial court very clearly stated it was denying the State's amendment motion on other grounds:

> THE COURT: So we're left here on the morning on the eve before trial still dealing with this oral motion. Frankly, my inclination is and I will initially deny the motion on the grounds that it was not properly brought forth and consistent with the Court's order.[3]

[3] The trial court had previously ordered the State to file the motion for amendment in writing, but the State did not do so. (R. 82:3–12.)

(R. 82: 5.) The court further stated:

> THE COURT: However, for some reason someone takes issue with that and says the record's unclear, we can go to the merits. And the merits, I think, were now incorporated by reference my ruling on January 11th of 2017 because both parties – and I will address the immigration issue shortly – both parties have incorporated by reference their prior briefs, which were on file before I made the last decision saying this wasn't in the public's interest.

(*Id.* at 5–6.) With regard to the immigration issue and its impact on the denial of the State's amendment motion, the court stated:

> THE COURT: The defendant has due process rights, and it matters not to this Court whether the defendant is white, black, Jewish, Hmong, Mexican, legal, or illegal. They're entitled to due process rights in this court. And they're not – I should not treat them differently because they're illegal or take away their rights or sentence in a way – and sentencing is where this typically comes up. That's the cases I found it in. And it's an inappropriate factor. I said it was inappropriate at the time. And I – as far as the public's interest in prosecution, I found no authority for the Court's consideration of a new factor relating to her status.

(*Id.* at 9.) Based on the trial court's statements, it is clear that the court's decision did not rely on any characterization—correct or incorrect—of Rivera's immigration status. The court made its decision on other grounds that did not include her immigration status. Consequently, even if the trial court mischaracterized Rivera's immigration status, it did not cause her any harm and this Court should deny Rivera's motion.

CONCLUSION

The Defendant-Appellant's argument fails as a matter of law and fact and therefore the State respectfully requests that you deny his requests for relief.

Dated this 27th day of November, 2018.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wisconsin Statute § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is **1,999** words.

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with Wisconsin Statute § 809.19(12)(f).

I further certify that this brief was delivered to the Clerk. Wisconsin Court of Appeals. 110 East Main Street, Suite 215, Madison, Wisconsin, by placing a copy of the same in the U.S. Mail with proper postage affixed on November 27, 2018.

Dated this 27th day of November, 2018

Respectfully Submitted,

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