

STATE OF WISCONSIN  
IN THE COURT OF APPEALS  
DISTRICT II

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

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State of Wisconsin,

Plaintiff-Respondent,

v.

Esmeralda Rivera-Hernandez,

Defendant-Appellant.

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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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REPLY BRIEF OF DEFENDANT-APPELLANT ESMERALDA RIVERA-HERNANDEZ

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Dated: December 26, 2018

## ARGUMENT

### A. RIVERA'S CHALLENGE OF THE TRIAL COURT'S DECISION IS NOT BARRED BY THE GUILTY-PLEA-WAIVER RULE

In support of its argument that Rivera's challenge is barred, the State's brief cites State v. Riekkoff, 112 Wis. 2d 119, 332 N. W. 2d 744 (1983). State's Brief at 2. Yet endnote two of the opinion states the following in relevant part:

"We [Supreme Court of Wisconsin] again emphasize that we are not in this case called upon to state the exact boundaries of the guilty-plea-waiver rule, . . . Here it is pellucid that the application or nonapplication of waiver rests only upon this court's rule of administration and in no way deprives the court of subject matter jurisdiction. Thus, we reiterate that we do not address the intriguing and significant question of what, if any, nonjurisdictional claims may not be barred by a guilty plea. That question is not raised in this case. Accordingly, we do not state as a flat rule that a guilty plea waives all defects except those related to subject matter jurisdiction." Id. (emphasis added).

This court has the discretion to not apply the guilty-plea-waiver rule to this case. Due to the unusual motion to amend proceeding in the trial court, that both the Sheboygan prosecutor and Rivera's trial attorney joined together in, that would have ended the criminal proceeding against Rivera (had the trial court ruled as requested by both the prosecutor and defense attorney), Rivera respectfully requests this court to not bar her appeal.

**B. DESPITE THE STATE'S RELIANCE UPON U.S. CITIZENSHIP AND IMMIGRATION SERVICES ARCHIVED INFORMATION<sup>1</sup>, the TRIAL COURT FAILED TO FOLLOW THE REASONING OF PLYLER AND THUS PREJUDICED RIVERA**

Before setting forth this sub-argument, it is necessary to alert this court to an erroneous fact that was presented to the trial court by the trial court defense attorney. This error has recently come to light as the undersigned reviewed the State's brief with Rivera. On page four of Rivera's initial brief, within the "Statement of Facts" section, a portion of the March 16, 2017 trial court proceeding was quoted:

"She [Rivera] is-she did apply for DACA. . ." Id.  
Yet Rivera has not yet applied for DACA, primarily in that she is not a high school graduate and is presently working on her GED.<sup>2</sup>

The undersigned does not believe that the change of this one fact significantly alters the arguments made by the parties. If the State believe it needs to file a supplemental brief, due to this change of fact, Rivera does not object to same.

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<sup>1</sup>At pages 4-5, the State cites United States Citizenship and Immigration Services, Frequently Asked Questions, (Nov. 27, 2018), <https://uscis.gov/archive/frequently-asked-questions>. The State does not include the publication as part of its brief. Attached to the present brief is a printout of the first three pages with the same web site address as shown in the State's brief, with print out date of December 23, 2018.

<sup>2</sup>See Defendant's Response to State's Motion to Amend an Ordinance, filed April 17, 2017 [R36], in which the defense attorney states, "[s]he is currently working, going to school for her GED, and raising her child." Id. at 2.

The State argues that because the United States Citizenship and Immigration Services (USCIS) information treats DACA persons as "unlawful," that the trial court's view of Rivera as "illegal," etc.<sup>3</sup> was not inappropriate and did not prejudice Rivera.

The State further argues that the United States Supreme Court case of Plyler does not support Rivera's argument. The State argues,

"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." Id.

The State misunderstands to essence of the Plyler decision. The holding of Plyler is the following;

"A Texas statute which withholds from local school districts any state funds for the education of children who were not 'legally admitted' into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment." Id.

The essence of Plyler is that a person, who arrived in the United States as a child with his/her parent(s), not having legal admission, is not automatically lumped in with "illegals" when considering the application of a particular law to that person.

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<sup>3</sup> As stated in Rivera's initial brief, the trial court stated the following during the April 17, 2018 motion hearing: that Rivera is "an illegal immigrant;" that Rivera is "an illegal alien;" and that Rivera is "here illegally in this country." Id. at 8.

Even if Rivera would concede that she is an "illegal" as set forth in the subject USCIS information, there is no indication that the trial court gave any credit to Rivera's personal history of arriving in the United States as a child. The State's argument that the USCIS document allows the same treatment of Rivera as any "illegal" ignores the holding of Plyler, and of Gayton.<sup>4</sup>

As argued in Rivera's initial brief, pursuant to Conger and Kenyon, the trial court in the present case was to apply the concerns of the defendant to the overall public interest calculation employed by the court. Rivera brief at 12-13. Even if Rivera would concede that she is an "illegal," per the USCIS information, the public interest calculation is still relevant as argued in Rivera's initial brief.

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<sup>4</sup> As stated in Rivera's initial brief, the trial court cited State v. Gayton. Rivera quoted the following from Gayton, concurring opinion:

"Of the estimated 11 million undocumented immigrants in the United States, 76,000 live in Wisconsin, a group that encompasses a great diversity of individuals and experiences. Despite a perception held by some that all undocumented immigrants are law breakers or criminals, many immigrants are undocumented due to circumstances beyond their control. For example, so-called DREAMERS are undocumented immigrants who were brought to the United States when they were young. Plyler v. Doe, 457 U.S. at 219-20, 102 S.Ct. 2382 (explaining that children who were brought to the United States unlawfully are not similarly situated to adults who entered the country unlawfully)." Gayton at 303-304 (emphasis added)."

During the April 18, 2017 hearing, the trial court stated that it had the discretion to completely ignore Rivera's status as part of the public interest calculation:

"[I] think the Salas [Gayton] case gives the Court discretion as to how it all plays out because in that same case it says (as read), 'the defendant's nationality is one of several factors a Court may not rely upon when imposing sentence.' It was a sentencing case." [R82:11].

Yet the April 18, 2017 hearing was not a sentencing hearing or a plea hearing.<sup>5</sup> The motion to amend proceeding involved instead a broader public interest calculation. As stated in Conger:

"It is true, as this court noted in *Kenyon*, that the public standard is 'admittedly broad,' and that '*Guinther* sheds little light on the various factors and considerations which may legitimately be included under this rubric.' *Kenyon*, 85 Wis. 2d at 46, 270 N.W. 2d 160. It is also true that *Kenyon* did not ameliorate that problem. Rather, this court simply noted that '[i]t would be impossible to make an exhaustive list of just what to take into account in this regard. *Id.* at 47, 270 N.W. 2d 160.'" Conger at 676. Rivera brief at 14.

It is clear from Conger and Kenyon that a trial court is not restricted from standards in a plea or sentencing hearing to evaluate a defendant's position in a motion to amend proceeding. Rivera brief at 14. Although the trial court

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<sup>5</sup>The trial court during the April 18, 2017 hearing also cited State v. Ortiz-Mondragon, 364 Wis. 2d 1, 866 N.W. 2d 717 (2015). [R81:10]. Rivera brief at 18-19. The trial court relied upon Ortiz-Mondragon to erroneously equate a trial court's non-consideration of a defendant's immigration status in a plea matter with its conclusion that a trial court does not consider a defendant's immigration status in a motion to amend hearing.

repeatedly admonished Rivera's counsel for not providing the court with a supportive, on point case regarding the immigration status issue of Rivera, Conger and Kenyon was sufficient case law to fully consider Rivera's status in the public interest calculation. Rivera brief at 14-15.

The trial court should have considered Rivera's risk of deportation, if the court would not allow the amendment. Rivera brief at 17. By not allowing the amendment, Rivera was at risk of criminal conviction. Id. The trial court should have considered also the type of criminal conviction (battery) that Rivera faced. Id.<sup>6</sup>

Instead of the court fully exploring the effect of a potential criminal conviction upon Rivera, and a potential deportation of Rivera, and even a potential separation of Rivera from her child (which is a public interest matter in that the child would potentially become a ward of the government), the trial court instead found that,

"[t]he public's interest and the personal convenience, the personal interest of the defendant are not the same. Fair prosecution of crimes, yes" [Id.:6]. Rivera brief at 19.<sup>7</sup>

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<sup>6</sup>Rivera's initial brief set forth the relevant case law regarding the interplay between a criminal conviction and deportation/risk of deportation. Rivera brief at 18-19.

<sup>7</sup>As stated in the opening paragraphs of this sub-argument,

Yet as an undocumented alien, it is arguable that the trial court had an even greater duty to consider Rivera's position than the trial court would with a normal defendant with full citizenship. Rivera brief at 20. The full citizenship defendant has no risk of deportation if a motion to amend is denied, and there is a later criminal conviction. Id. Yet a defendant with Rivera's status does have the risk. Id.

**C. THE TRIAL COURT'S ACTIONS WERE NOT HARMLESS ERROR.**

The State's brief correctly states that the burden of proof("beyond a reasonable doubt") to show harmless error is upon the

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the initial brief made arguments with the misunderstanding that Rivera had applied for DACA status. Rivera's initial brief made the following statements: "At the time of the April 18, 2017 hearing, Rivera was not and "illegal." Id. at 19. If she had been, perhaps the trial court's reasoning would have more traction, because as an "illegal" before the Complaint was filed on July 1, 2016, there would be less of an obligation to fully apply a defendant's concerns to the public interest analysis. Id. at 19-20. One could reasonably distinguish a DACA applicant from a person, such as Rivera, who is a child immigrant, yet who has not yet applied for DACA status. Yet there is still an obligation of the trial court to apply the public interest analysis. The undersigned wants to correct the statement made in the initial brief that (as stated above in this footnote) "there would be less of an obligation to fully apply a defendant's concerns to the public interest analysis." The same obligation would exist whether Rivera was a DACA applicant or not, in that the trial court should have examined the circumstances of why Rivera had not yet applied for DACA status. Such an analysis would have also related to the analysis of Rivera's risk of deportation (and the potential separation of Rivera from her minor child).

State. State's brief at 8.

The State's first argument is that the court on April 18, 2017 denied the State's motion to amend due to the State not following up its oral motion of March 16, 2017 with a written motion. Yet this argument should be rejected because the trial court expressly stated in the hearing (April 4, 2017) immediately prior to the April 18, 2017 hearing:

"[i]f there's anything more the parties want to add on the issue of whether I should accept the amendment, put it in writing by the 10<sup>th</sup>. . . ." [R84:35].<sup>8</sup>

Furthermore, defense counsel stated during the April 4, 2017 hearing that, "[W]e're agreeing with the State's motion to amend this to an ordinance violation." [R84:32].

The trial court did not require the State to follow up its oral motion to amend of March 16, 2017 with a written submission. [R84:35]. The court expressly invited each party to submit a written argument, yet the court did not require same. Id. Furthermore, following the trial court's invitation of April 4, 2017, defense counsel did submit a written document in agreement with the State's oral motion [R36].

The State's remaining argument is that the trial court afforded Rivera due process rights regardless of her immigration

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<sup>8</sup>The relevant portion of the April 4, 2017 hearing transcript is submitted as an Appendix to this brief.

status. And that therefore the court's characterization of Rivera's immigration status has no impact on the court's analysis.

Rivera's response to this argument is found within the preceding section of this brief; that section explains the need for a trial court public interest analysis, due to Rivera's personal history of arriving in this country as a child, and the risk of deportation due to her present immigration situation. Due to the arguments made in the preceding section, the State does not meet its beyond a reasonable doubt burden of proof.

#### **CONCLUSION**

This appellate court reviews whether the trial court correctly examined the relevant facts, applied the proper standard of law, and used a demonstrably rational process to reach a conclusion that a reasonable judge could reach.

Rivera argues that the trial court, by its April 18, 2017 decision denying the State's motion to amend the criminal complaint to a non-criminal ordinance violation, failed to apply the correct standard of law. It is clear from Conger and Kenyon that a defendant's position is within the public interest. The trial court erroneously applied a plea hearing or sentencing hearing standard to Rivera's status argument. Yet the motion to amend public interest standard is much broader. The trial court failed to allow adequate consideration of Rivera's undocumented

status, and the effect of a potential criminal conviction upon Rivera and her daughter. The erroneous application of law by the trial court is reversible error.

For all of the reasons set forth herein, it is respectfully requested that the judgment of conviction be vacated, and that the case be remanded to the circuit court.

Dated this 26th day of December, 2018 in Sheboygan,  
Wisconsin.

Respectfully submitted,

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#### **CERTIFICATION**

I certify that this brief conforms to the rules contained in s. 809.19 (8)(b) for a brief and appendix produced with monospaced font. The length of this brief is ten pages.

I finally certify that the brief and appendix that was electronically filed by the undersigned on December 26, 2018 is identical to the brief and appendix that the undersigned mailed to the Wisconsin Court of Appeals on December 26, 2018.

Dated this 26th day of December, 2018.

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