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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP902-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

VICTORIA L. CONLEY,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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The Defendant-Appellant-Petitioner, Victoria L. Conley, by Attorney David R. Karpe, of Madison, Wisconsin, hereby petitions this Court, pursuant to Wis. Stat. §§808.10 and 809.62, to review the September 10, 2020 decision of the court of appeals in this case.

ISSUE PRESENTED

Does it constitute manifest injustice not to permit a defendant to withdraw a no contest plea to disorderly conduct where she lacked understanding of the meaning of "otherwise disorderly conduct?"

The circuit court found that because the charge as written in the complaint was read to the appellant by trial counsel, the plea was knowing and intelligent.

The court of appeals held that the State showed by clear and convincing evidence that Ms. Conley had entered her plea knowingly, voluntarily, and intelligently, and that the circuit court did not clearly err in finding that at the time of her plea Ms. Conley understood the nature of the crime.

The Wisconsin Supreme Court should grant review because the Court's decision will help clarify and develop the law as to how much a judge needs to explain to a pleading defendant regarding the meaning of "otherwise disorderly conduct."

CRITERIA FOR REVIEW

Even though the decision below, *State v. Conley,* 2019AP902-CR (September 10, 2020), is an unpublished one-judge opinion, the Supreme Court ought to grant review because the Court's determination of the issue in this case would have statewide application. Review will help develop the law and provide guidance to judges throughout the state regarding how much a judge needs to explain to a defendant pleading guilty to "otherwise disorderly conduct."

STATEMENT OF THE CASE

This was a direct appeal under Wis. Stat. (Rule) § 809.30 of a conviction in a criminal misdemeanor matter.

Statement of Facts

The facts as stated in the decision of the court of appeals are essentially correct and not in dispute, *see State*

v. Conley, 2019AP902-CR (September 10, 2020).

The court of appeals summed up the case like this:

> The criminal complaint charged Conley with three offenses: two counts of misdemeanor battery and one count of disorderly conduct. All three offenses allegedly occurred over the course of a short period one evening in the same general area of Madison.
>
> The following are pertinent allegations from the complaint. Conley was in a car when she confronted her husband, who was then in a different car. Riding with the husband in his car was a female, "Tina" (not her real name). Conley used the car she was operating to intentionally "rear end" the husband's car multiple times.
>
> The husband drove to a nearby restaurant parking lot, with Tina still in his car, and Conley following. The husband parked in the lot and got out of his car. Conley got out of her car and "attacked [the husband] with closed fists."
>
> Conley then "attack[ed]" Tina inside the husband's car. She punched Tina, pulled her hair and "pulled out" her pony tail, and forced her into the back seat of the car. I will refer to this as "the alleged attack in the car."
>
> After the alleged attack in the car, Tina emerged from the husband's car and entered the restaurant. About five minutes later, Conley entered the restaurant, accompanied by about four other females. Various of these persons pushed Tina down in her booth, held her down, and hit her.

The complaint did not allege a specific role for Conley in this activity in the restaurant, only that she was present before Tina was attacked.

The criminal complaint identified the victim of both batteries as Tina, with one battery occurring in the parking lot of the restaurant and the other occurring inside the restaurant. But the complaint did not specify a location or victim for the disorderly conduct.

The parties entered into a plea agreement. The State agreed to move to dismiss the two battery charges and Conley entered a no contest plea to disorderly conduct. The court accepted the plea as proposed by the parties, including following a joint recommendation that the court order a $100 fine plus costs and assessments as the sentence.

During the plea and sentencing hearing, the circuit court informed Conley: "the charge at Count 3 alleges on or about October 17, 2016, in the City of Madison, ... you engaged in disorderly conduct under circumstances in which such conduct tended to cause a disturbance."

The court confirmed personally with Conley that she had gone over a plea questionnaire and waiver of rights form with her attorney and had then signed the plea form. Conley's attorney told the court that she was satisfied that Conley understood possible defenses that Conley might have to the disorderly conduct charge and that Conley was entering the plea voluntarily, intelligently, and with understanding. Both Conley's attorney and Conley personally confirmed that the court could rely on the

allegations in the complaint to provide an adequate factual basis for the plea.

After the court accepted the plea, counsel for both sides briefly urged the court to adopt the joint sentencing recommendation. In making a brief sentencing argument, Conley's counsel told the court that, "from [Conley's] perspective," the "events that happened in the car"—a reference to the alleged attack in the car—"was absolutely a mutual fight. Both women came away with injur[ies] from that altercation."

Represented by new counsel, Conley filed the motion for postconviction relief at issue in this appeal. She requested an evidentiary hearing. Conley claimed that the plea-taking court failed to "determine that the plea [was] made voluntarily with [Conley's] understanding of the nature of the charge," as required by Wis. Stat. §971.08(1)(a), and also that at the time of the plea Conley "did not know that the State would have to prove that her conduct had a tendency to disrupt good order and to provoke a disturbance." Conley also alleged that her trial counsel provided ineffective assistance because she did not move to dismiss the disorderly conduct charge on the ground that the charge was unconstitutionally vague and duplicitous.

The circuit court granted Conley's request for an evidentiary hearing. At the hearing, Conley waived her right to maintain the attorney-client privilege and her trial counsel testified. Most pertinent to this appeal, trial counsel testified

in part as follows regarding her pre-plea discussions with Conley:

> Q. [Trial counsel], do you recall what you [told] Ms. Conley when describing what conduct constituted the disorderly conduct charge?
>
> A. Ms. Conley and I had had several conversations just about the case in general, but specifically about if the case were to resolve with a plea to disorderly conduct could there be an agreement about what conduct could have formed the basis for a disorderly conduct charge if she was going to plea to it. My memory of the events in my conversations with Ms. Conley is that she agreed that she engaged in a mutual fight and that that was what she was prepared to stipulate to as far as forming the factual basis for disorderly conduct.

Conley did not testify. She submitted an affidavit that made the following broad averment without elaboration: "Neither my attorney or the Court explained to me at the time what disorderly conduct meant or what the State would have been required to prove at trial to conclude that my conduct was disorderly."

The circuit court denied the motion. The court concluded in pertinent part that Conley "understood the nature of the crime" and "the elements the State would have to prove to convict her at trial." The court also stated that "the charge of disorderly conduct at count 3 was not duplicitous of the two battery charges."

State v. Conley, 2019AP902-CR at ¶¶ 4-16.

The court of appeals held that the State showed by clear and convincing evidence that Ms. Conley had entered her plea knowingly, voluntarily, and intelligently, and that the circuit court did not clearly err in finding that at the time of her plea Ms. Conley understood the nature of the crime. *Id.* at ¶3.

Ms. Conley now seeks review of that decision.

ARGUMENT

The Court Should Grant Review Because the Court's Decision Will Help Clarify and Develop the Law as to How Much a Judge Needs to Explain to a Pleading Defendant Regarding the Meaning of "Otherwise Disorderly Conduct"

Disorderly conduct is a very common charge in Wisconsin. It casts a wide net, with limits, in terms of the range of behaviors that are prohibited. The most troubling aspect of the statute is the "otherwise disorderly conduct" catchall definition, and what constitutes disorderly conduct

and what is not, and does it need to be conduct already described in the previous description of the statues that is violent, abusive, etc. If a defendant pleads guilty to it, what exactly is she pleading guilty to?

That nebulous expression, "otherwise disorderly conduct," was not explained to Ms. Conley, and she did not say that it was explained to her. She did not know what it meant, but once she had it explained to her after conviction, she felt she had a defense to it, which, if it had been explained to her prior to or at the plea, she could have raised. Previous case law says that when the statute, after the specific enumerations, in a catchall clause proscribes "otherwise disorderly conduct" which tends to "provoke a disturbance," "this must mean conduct of a type **not** previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance." *State v. Givens*, 28 Wis.2d 109, 120, 135 N.W.2d 780 (1965).

The judge did not read the words, "otherwise

disorderly conduct" to Ms. Conley, and her lawyer said she read the charge but did not go into a further discussion as to what "otherwise disorderly conduct" meant. Do the words "otherwise disorderly conduct" represent a legislative word choice and clear meaning? If so, possibly, such legislative word choice negates the need to apply doctrines such as *ejusdem generis*. *See State v. Engler*, 80 Wis.2d 402, 406, 259 N.W.2d 97. But the Court has not explicitly spoken to this issue.

The Court has often stated that the threshold question to be addressed when construing a statute is whether the statutory term is ambiguous. *Id.* A statutory term is deemed ambiguous if reasonable persons could disagree as to its meaning. *Kollasch v. Adamany*, 104 Wis.2d 552, 561, 313 N.W.2d 670 (1981). If parties disagree as to a term's meaning, the Court will look to the language of the statute itself to determine whether well-informed persons should become confused as to a term's meaning. *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis.2d 235, 238-239, 253

N.W.2d 896 (1977). Here, the question is a little different – that is, is the term easily understood by a criminal defendant? In order to objectively evaluate a defendant's conduct to see if it was "otherwise disorderly" the Court considers the context in which the conduct occurred. *See State v. Schwebke*, 2002 WI 55, ¶¶24, 30, 253 Wis.2d 1, 644 N.W.2d 666, cert. denied, 537 U.S. 1090 (2002). The Court has examined the "otherwise disorderly" provision in the past: *City of Oak Creek v. King*, 148 Wis. 2d 532, 436 N.W.2d 285 (1989); *State v. Werstein*, 60 Wis. 2d 668, 211 N.W.2d 437 (1973); and *State v. A.S.*, 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712. It is "especially true" that the "otherwise disorderly" provision generally "proscribes conduct in terms of results which can reasonably be expected therefrom rather than attempting to enumerate the limitless number of antisocial acts which a person could engage in that would menace, disrupt, or destroy public order." *Werstein*, 60 Wis.2d at 671-72. However, these cases do not point out whether a court must define

"otherwise disorderly conduct" to a defendant who claims not to have understood what that expression meant.

There does not appear to be an "otherwise disorderly conduct" case presently before the Court, but the Court is due to hear oral argument next month in *State v. Savage*, 2014AP90-CR, concerning the denial of a guilty plea to failure to register as a sex offender, and whether a defendant needs to show a reasonable probability that a proffered defense would have succeeded at trial. The case at bar is analogous in one aspect, in that the opinion of the court of appeals was that Ms. Coney's conduct's in the car was what she was admitting was that the "mutual fight" in the car was the "otherwise disorderly conduct" to which she was pleading guilty, *State v. Conley*, 2019AP902-CR, ¶25 n.8, and that she did not have a defense even though it was a "mutual fight" — if the "other woman" in the triangle was engaging in consensual combat, then who was disturbed?

The court of appeals upheld the circuit court's denial of Ms. Conley's motion to withdraw her plea, holding that

it was not necessary to explain the term to her. Granting review will be beneficial in guiding circuit court judges as to whether defining "otherwise disorderly conduct" is necessary for defendants who plead guilty to such an offense.

CONCLUSION

For the reasons set forth above, Ms. Conley respectfully requests that this Court grant review in this matter.

Respectfully submitted this 9th day of October, 2020.

_____

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CERTIFICATE

I certify that this petition meets the criteria under Rules 809.19(8)(b), and 809.62(4), Stats., for a petition produced with a proportional serif font. The petition is 2,604 words long.

Signed,

_____
David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition which complies with the requirements of s. 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Signed,

_____
David R. Karpe