RECEIVED
02-24-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2019AP2024-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS J. RICHER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE SHAUGHNESSY P. MURPHY AND SARAH MAE HARLESS, PRESIDING

PLAINTIFF-RESPONDENT'S RESPONSE BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
barbertm@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUE 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 8

ARGUMENT 9

The circuit court did not violate Richer's right to be free from double jeopardy. 9

A. The Double Jeopardy Clause protects against successive prosecutions for the same offense. 9

B. Richer's case falls squarely within the *Comstock* exception because the court learned of information that called into question the validity of the plea. 11

C. *Comstock* does not apply because Richer was not subject to multiple jeopardies. 17

1. Jeopardy does not attach in any meaningful sense when a court accepts and then vacates a no-contest plea in the same hearing. 18

2. Assuming jeopardy did attach when the court accepted Richer's plea, it continued until the judgment of conviction following his second plea hearing. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 5

Gilmore v. Zimmerman,
793 F.2d 564 (3d Cir. 1986) 11

North Carolina v. Pearce,
395 U.S. 711 (1969) 9

Salters v. State,
52 Wis. 2d 710, 191 N.W.2d 691 (1971) 19, 20, 21

State v. Bangert,
131 Wis. 2d 246, 389 N.W.2d 12 (1986) 12

State v. Clark,
2000 WI App 245, 239 Wis. 2d 417, 620 N.W.2d 435 20

State v. Comstock,
168 Wis. 2d 915, 485 N.W.2d 354 (1992) .....1, *passim*

State v. Hill,
2000 WI App 259, 240 Wis. 2d 1, 622 N.W.2d 34 9

State v. Kelty,
2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886..... 9, 21

State v. Roubik,
137 Wis. 2d 301, 404 N.W.2d 105 (Ct. App. 1987)..... 15

State v. Rushing,
2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894 16

State v. Searcy,
2006 WI App 8, 288 Wis. 2d 804, 709 N.W.2d 497 15

State v. Trawitzki,
2001 WI 77, 244 Wis. 2d 523, 628 N.W.2d 801 8

State v. Waldman,
57 Wis. 2d 234, 203 N.W.2d 691 (1973) 15

State v. Williams,
2000 WI 78, 236 Wis. 2d 293, 613 N.W.2d 132 22

United States v. Dixon,
509 U.S. 688 (1993) 9

United States v. Santiago Soto,
825 F.2d 616 (1st Cir. 1987) 11, 18

Constitutional Provisions

U.S. Const. amend. V 9

Wis. Const. art. I, § 8(1) 9

Statutes

Wis. Stat. § 971.08 12

STATEMENT OF THE ISSUE

The circuit court accepted and then *sua sponte* vacated Douglas J. Richer's no-contest plea to possession/intent to deliver more than 50 grams of heroin at the same hearing. The court did so based on statements Richer made during allocution that called into question the factual basis of his plea and whether it was knowing and voluntary. No charges were dismissed before the court vacated the plea. Richer subsequently entered the same plea to the same offense under a virtually identical plea bargain—the only difference being the agreement converted from a joint recommendation to allow the parties to argue at sentencing. No new or amended charges were filed in the interim. Richer then moved for postconviction relief, seeking reinstatement of his original plea and the original agreement, which was denied.

Did the circuit court violate Richer's constitutional right to be free from double jeopardy?

The postconviction court concluded no constitutional violation occurred because Richer withheld material information during the plea colloquy that would have caused the circuit court to reject the plea at the first plea hearing.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are warranted, as this appeal involves application of well-settled rules of law and the issues can be addressed fully in the parties' briefs.

INTRODUCTION

Richer's constitutional right to be free from double jeopardy was not violated for three independent reasons. First, under the rule of judicial administration announced in *State v. Comstock*, 168 Wis. 2d 915, 485 N.W.2d 354 (1992), a

circuit court is permitted to *sua sponte* vacate an accepted guilty plea if the defendant withholds material information that would have caused it to reject the plea. Both the circuit court and postconviction court correctly found that Richer's comments during his allocution satisfied this standard, as they called into question the factual basis of Richer's plea and whether it was knowing and voluntary.

Second, jeopardy did not attach at the first plea hearing because the court accepted and then vacated the plea within minutes and no new charges were filed. Third, even if jeopardy did attach at the first hearing, the same jeopardy continued until the court accepted Richer's second plea and dismissed the remaining charges. Under either of these theories, *Comstock* simply does not apply because Richer was not subject to multiple prosecutions or different charges for the same offense, and therefore was not subject to multiple jeopardies.

STATEMENT OF THE CASE

Charges against Richer

On July 11, 2016, police officers arrested Richer in Dunn County in connection with an undercover drug purchase. (R. 3:3–4.) Officers then obtained a search warrant for Richer's residence in Eau Claire County. (R. 1.) During a search of his home, police found over 600 grams of methamphetamine, as well as drug trafficking paraphernalia. (R. 3:5.) This was "one of the largest meth discoveries in recent history in Eau Claire County." (R. 61:20.) Richer's wife, Renee Peterson, was taken into custody following the search. (R. 3:5.)

In Eau Claire County Case No. 2016CF0879, the State charged Richer with (1) possession with intent to deliver methamphetamine and (2) maintaining a drug trafficking place—both as a party to a crime, as a repeat offender, and as

a second or subsequent offense. (R. 3:1–2.) Peterson was charged with similar felonies, absent the enhancers. (R. 3:3.) The State later moved to sever the charges and filed an information charging Richer with the same offenses in the complaint. (R. 6; 20.) Richer was also charged with possession with intent to deliver between 3–10 grams of methamphetamine in a separate case, Dunn County Case No. 2016CF0230, which is not the subject of this appeal.[1]

First plea hearing

During a status conference on October 13, 2017, the State indicated that the parties had reached a plea agreement. (R. 61:1.) Richer would plead to count one in the information (possession with intent to deliver), and the remaining count would be dismissed and read in; the charges in Dunn County would be dismissed; the State would dismiss the charges against Peterson; and the parties would submit a joint recommendation for a 16-year bifurcated sentence of 6 years' initial confinement and 10 years' extended supervision. (R. 61:2–3.)

During the subsequent plea colloquy, Richer consulted with his counsel multiple times and gave nuanced and qualified answers to the court's questions. When the court asked Richer if he understood the elements of the offense, Richer equivocated and said, "I mean, there isn't any sale thing here that this involved, this is something that it was found on our property in which we owned." (R. 61:6.) Richer said he was willing to enter a plea because he was told that "if I'm in possession of it, that it automatically is the law assumes it is intent to sell because of -- because of the amount, that I don't have an argument to dispute that." (R. 61:7.) When his attorney asked Richer to verify that he was willing to enter a plea, he stated, "I'm willing to enter the plea, but I'm just saying -- I'm told that this is a matter of -- we've

[1] *See* https://wcca.wicourts.gov.

discussed this." (R. 61:7.) He then spoke with his attorney off-the-record. (R. 61:8.) The court then explained in detail the enumerated elements of the offense to which Richer would be pleading. (R. 61:8–9.)

When the court asked Richer if "anyone made any threats or promises to get you to enter into this plea today," Richer again needed to consult with his counsel. (R. 61:9–10.) He then responded: "Nothing other than the elements and the plea agreement." (R. 61:10.)

After confirming that Richer understood he would be waiving his constitutional rights (R. 61:12–13), the court asked Richer if he agreed that there was a factual basis for the charge to which he was pleading; Richer responded: "The information that the State alleges? . . . As -- as written, yes." (R. 61:15.) The circuit court, concerned with this response, informed Richer that he need not agree with every fact alleged, but needed to agree that the facts would support a guilty or no contest plea. (R. 61:15.) Following this exchange, Richer had two off-the-record conversations with his attorney about the "drugs at [his] residence." (R. 61:15–16.)

Following a clarification from the prosecutor as to the elements of the offense, Richer pleaded no contest to count one in the information. (R. 61:17.) The court accepted the plea and adjudged Richer guilty. (R. 61:17.) After the parties explained the joint sentencing recommendation (R. 61:18–23), the court gave Richer the opportunity to allocute (R. 61:24).

Richer began by stating that "[t]he first thing I'm going to say is I don't want to say anything that's going to -- that's going to jeopardize the court trying to withdraw -- not accept my plea. I want to make that real clear." (R. 61:24.) He then stated that the "key element" to his plea was his belief that his wife's attorney was not effective and that he "felt it was [his] responsibility to protect her." (R. 61:24–25.)

Richer then explained that the drugs that were found in his residence belonged to two other individuals who were living in his residence while he was in jail in a drug treatment program. (R. 61:25.) He stated that his first attorney was ineffective and pressured him to accept a plea agreement or threatened to withdraw. (R. 61:26.) Richer then claimed that his prior counsel had information that the district attorney was withholding exculpatory evidence and that he was pressured to not pursue a *Brady*[2] motion. (R. 61:26, 29.)

Richer again had two off-the-record conversations with his attorney, after which the court attempted to reaffirm that Richer was aware of the elements of the offense. (R. 61:27.) Richer responded: "That I understand that that's what I was charged? I don't understand." (R. 61:28.) The court attempted to clarify that Richer understood that he was agreeing that the State could prove the elements of the offense. (R. 61:28.)

Following another off-the-record conversation with his attorney, Richer explained that he was told that if he pursued the *Brady* motion, the State would withdraw its plea offer. (R. 61:28–29.) He again asserted that his first attorney was ineffective and made no attempt to obtain the exculpatory evidence he claimed the State was withholding. (R. 61:29.) Richer continued: "I didn't want [the prosecutor] to withdraw the plea offer because of the fact is, again, I -- I was -- I was willing to take responsibility of this, I was put in a position where it was either -- I don't know how to say this." (R. 61:29.) He stated that the *Brady* issue "is going to be dealt with later on, of course." (R. 61:29.)

The prosecutor then objected that Richer's statements meant that his plea could not be accepted. (R. 61:29.) Richer's counsel attempted to reaffirm his willingness to accept the plea agreement. (R. 61:30–31.) However, the court said that

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Richer's statements during allocution indicated that he did not really accept the plea:

> While we engaged in the colloquy, I wasn't confident initially that Mr. Richer wanted to take this plea. We went over each element thoroughly, we went over each constitutional right thoroughly, and each response to the question was either cute or tried to be nuanced, and that's why I went over it multiple times and until the point where I was satisfied. Mr. Richer, in his right of allocution, is making it abundantly clear to me that he doesn't think that -- he doesn't think that the facts of this case that have been stipulated to support his plea.

(R. 61:31.)

The court then said it was "very concerned," that it believed Richer's comments had undermined the court's attempt to confirm the validity of his plea and that it was "not convinced" Richer understood the offense he was pleading to. (R. 61:31–32.) The court then decreed: "I will withdraw your plea on your behalf." (R. 61:31–32.)

Importantly, at no point during the initial plea hearing did the State move to withdraw or dismiss the charges in count two of the information or the charges against Richer's wife. No charges were dismissed. The court did not impose sentence, and no judgment of conviction was entered.

Second plea hearing

Richer moved to suppress the evidence obtained during the traffic stop that led to his arrest as well as the evidence seized from his residence. (R. 18.) Richer also moved the court to reconsider its decision withdrawing his plea, arguing that had he been allowed to finish his statements, it would have been clear that he was knowingly, voluntarily, and intelligently entering into the plea; he claimed that it was a manifest injustice to withdraw it. (R. 25.)

At a subsequent hearing, Richer's counsel informed the court that he was willing to enter into another plea agreement but wanted the court to rule on his motion for reconsideration first. (R. 67:3–4.) The court denied the motion and explained that it withdrew the previous plea because "[m]y primary concern was numerous times, maybe even three times, I went to great length to rehabilitate Mr. Richer during that plea because I was getting the feeling that he didn't believe in the words he was saying." (R. 67:7.)

The prosecutor then explained that the terms of the new plea agreement were almost identical to the previous one, absent the joint sentence recommendation. Specifically, Richer would plead to count one; count two would be dismissed and read in; the charges in Dunn County would be dismissed; the charges against Peterson would be dismissed; and the parties would jointly recommend a PSI, but be free to argue at sentencing. (R. 67:8–9.)

The court then conducted another plea colloquy during which Richer pleaded no contest to count one. (R. 67:9–20.) The court accepted the plea and dismissed count two of the information, as well as the charges against Peterson, and ordered a PSI. (R. 67:21.) A judgment of dismissal as to count two was entered the same day. (R. 26.) The court later sentenced Richer to 15 years' initial confinement and 15 years' extended supervision and entered a judgment of conviction to that effect. (R. 35:1–2.)

Postconviction proceedings

Richer moved for postconviction relief, claiming that the court's withdrawal of his initial plea violated his constitutional right to be free from double jeopardy under *Comstock*. (R. 52:1.) He also asserted that his second plea did not waive the alleged double jeopardy violation because his trial counsel was ineffective for not invoking *Comstock* and because his double-jeopardy claim could be adjudicated on the

existing record.[3] Richer requested reinstatement of the original plea bargain and a new sentencing. (R. 52:2.)

Following an evidentiary hearing, the postconviction court denied the motion. Although noting that *Comstock* was somewhat distinguishable, the court said that it did not need to "get into -- to that part [of] whether *Comstock* applies." (R. 72:15.) The postconviction court explained that "it's pretty clear it says that the judge or the court may not vacate the plea unless there's fraud in procuring the agreement or a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea." (R. 72:15.) The postconviction court said that after reviewing the transcript from the initial plea hearing, "its pretty clear" that the circuit court was not "sure that the defendant[ ] [was] entering the plea knowingly, voluntarily, and intelligently," and that "if these statements that Mr. Richer made, if he had made those before the judge accepted the plea, then he wouldn't have accepted it." (R. 72:16.) Accordingly, the postconviction court concluded that "the defendant withheld material information which would have induced the court not to accept the plea, so for that reason, the motion is denied." (R. 72:17.)

Richer appeals. (R. 58.)

STANDARD OF REVIEW

The issue of whether a person's right to be free from double jeopardy has been violated presents a question of law that is reviewed de novo on appeal. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801. However, factual findings made by the circuit court that are pertinent

[3] As the State is not arguing waiver in this case, it does not further address the second portion of Richer's postconviction motion.

to the analysis are upheld unless clearly erroneous. *State v. Hill*, 2000 WI App 259, ¶ 12, 240 Wis. 2d 1, 622 N.W.2d 34.

ARGUMENT

The circuit court did not violate Richer's right to be free from double jeopardy.

A. The Double Jeopardy Clause protects against successive prosecutions for the same offense.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The Wisconsin Constitution contains the same protection in article I, section 8(1): "[N]o person for the same offense may be put twice in jeopardy of punishment." Wisconsin courts have said these provisions are "identical in scope and purpose," such that they are interpreted commensurately. *State v. Kelty*, 2006 WI 101, ¶ 15, 294 Wis. 2d 62, 716 N.W.2d 886.

The protection against double jeopardy is two-fold: It protects a criminal defendant from successive prosecutions and from multiple punishments for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993). Only the former protection is at issue here. "Protection against successive prosecutions precludes both 'a second prosecution for the same offense after acquittal[ ]' and 'a second prosecution for the same offense after conviction.'" *Kelty*, 294 Wis. 2d 62, ¶ 16 (alteration in original) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

In the context of plea withdrawal cases, "[t]he decisions interpreting double jeopardy are complex and difficult to understand and apply, often turning on the factual context" of each case. *Comstock*, 168 Wis. 2d at 936. As a result, in *Comstock*, the Wisconsin Supreme Court, utilizing its

superintending authority, announced a rule of judicial administration that circuit courts should refrain from *sua sponte* vacating guilty or no-contest pleas "unless the circuit court finds that there was a fraud in procuring the plea or that a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea." *Id.* at 953. However, the court did not need to discuss the scope of the exception it announced because neither of the parties in that case argued it applied. *Id.* at 944.

But the Wisconsin Supreme Court's constitutional analysis in *Comstock* was much more nuanced than the bright-line rule of judicial administration it announced and its constitutional holding was limited to the facts before the court. The facts of *Comstock* and its constitutional analysis will be discussed in further detail below. For now, it is enough to note that the Wisconsin Supreme Court held that "jeopardy attached *in this case* upon the circuit court's acceptance of the defendant's plea of no contest to the amended information." *Id.* at 921 (emphasis added). It further held that the circuit court "violated federal constitutional protections when, *under the circumstances of this case*, it *sua sponte* vacated the defendant's pleas and reinstated the original charges." *Id.* (first emphasis added).

Given that the court's constitutional holdings were qualified and limited to the facts and circumstances "of this case," it is not clear that the rule of judicial administration announced in *Comstock* amounts to a substantive rule of constitutional law. But assuming, *arguendo*, that it does, this case falls squarely within the exception articulated *Comstock*.

B. Richer's case falls squarely within the *Comstock* exception because the court learned of information that called into question the validity of the plea.

In reaching its holding in *Comstock*, the Wisconsin Supreme Court discussed and distinguished several federal and state cases that informed its analysis, including *United States v. Santiago Soto*, 825 F.2d 616 (1st Cir. 1987) and *Gilmore v. Zimmerman*, 793 F.2d 564 (3d Cir. 1986). *Comstock*, 168 Wis. 2d at 940–42. According to the Wisconsin Supreme Court, these two cases were not persuasive because "[i]n both cases, the district court accepted the guilty plea but then vacated [them] on grounds relating to the factual basis for the plea." *Id.* at 943. The court noted that a plea that lacks a factual basis is defective and void. *Id.* at 943.

This distinction was the basis for the exception to the rule of judicial administration the court thereafter announced. *Comstock*, 168 Wis. 2d at 953. As the court explained, circuit courts should not *sua sponte* vacate pleas once accepted "unless the circuit court finds that there was fraud in procuring the plea or that a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea." *Id.* at 953.

The exception to this rule is based on "the circuit court's right and duty to be apprised of all relevant information before accepting a guilty or no contest plea *and before sentencing*." *Id.* (emphasis added). And it "allows the circuit court to make informed decisions protecting the public interest." *Id.*

While Richer acknowledges the exception to *Comstock*'s general rule, his argument against applying the exception here would require its repudiation. For instance, he asserts: "Richer's constitutional rights belong to *Richer*—they don't belong to, and can't be asserted by, the state or the court."

(Richer's Br. 18.) But this argument ignores the circuit court's heavy obligation under Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 261–62, 389 N.W.2d 12 (1986), to ensure that a defendant's plea is constitutionally valid in that it is knowing, intelligent, and voluntary and has a factual basis. If Richer were correct, then a circuit court could never *sua sponte* vacate a plea, even if it learned minutes after the colloquy that the defendant had lied, omitted key facts, or was coerced into accepting the plea. And, this would also encourage defendants to game the system by making statements during allocution that could be later used to undermine the plea.

Here, the circuit court's factual finding was not clearly erroneous when it found that Richer's initial plea was not knowing, voluntary, and intelligent. The statements made by Richer while allocuting—understood in the context of his reluctant and qualified responses during the plea colloquy—led the circuit court to state that it was "very concerned." It explained that his comments made it "abundantly clear" to the court that Richer did not agree that there was a factual basis for the plea. (R. 61:31.) The court explained that it "wasn't confident" Richer wanted to take the plea. (R. 61:31.) Then, when denying Richer's motion to reconsider, the circuit court further explained that it "was getting the feeling that [Richer] didn't believe in the words he was saying." (R. 67:7.)

The circuit court's findings are supported by the record. When asked if he understood the elements of the offense, Richer appeared to dispute the intent to deliver element, stating: "I mean, there isn't any sale thing here that this involved, this is something that it was found on our property in which we owned." (R. 61:6.) He then indicated that he was willing to enter a plea because he was told that "if I'm in possession of it, that it automatically is the law assumes it is intent to sell because of -- because of the amount, that I don't have an argument to dispute that." (R. 61:7.) He said: "I'm

willing to enter a plea, but I'm just saying -- I'm told that this is a matter of -- we've discussed this." (R. 61:7.) When asked if he agreed with the factual basis of the charge to which he was pleading, he responded: "The information that the State alleges? . . . As -- as written, yes." (R.61:15.)

Then during allocution, Richer said that the drugs were brought into his residence by two other individuals living there while he was in jail in a drug treatment program. (R. 61:25.) He then alleged that the State withheld exculpatory evidence, that his previous counsel was ineffective, that he was put in an impossible situation, and that he would be dealing with the *Brady* violation "later on." (R. 61:29.)

As to the voluntariness of his plea, when the court asked him during the plea colloquy if "anyone made any threats or promises to get you to enter into this plea today," Richer needed to consult with his counsel before responding. (R. 61:9–10.) He then said: "Nothing other than the elements and the plea agreement." (R. 61:10.)

During allocution, Richer stated that the "key element" as to why he was accepting the plea was that "my wife's lawyer has basically done nothing for her . . . . I felt it was my responsibility to protect her." (R. 61:24–25.) As noted above, a component of the plea agreement was that the State would dismiss the charges pending against Richer's wife. (R. 61:21.) Richer's trial attorney even indicated that "probably the clinching part of the deal [is] that the State would move to dismiss with prejudice any claims against Ms. Peterson, his wife. . . . [H]e wanted to make sure that the court knew that that was a big reason why he's choosing to take this today." (R. 61:21–22.)

After reviewing the transcripts, the postconviction court stated that following Richer's statements at allocution, the circuit court did not believe that Richer's plea was made

knowing, intelligently, and voluntarily. (R. 72:16.) It further concluded that "if these statements that Mr. Richer made, if he had those before the judge accepted the plea, then he wouldn't have accepted it." (R. 72:16.) In other words, the postconviction court concluded that "the defendant withheld material information which would have induced the court not to accept the plea." (R. 72:17.)

The postconviction court's ruling was a correct application of the *Comstock* exception. Richer's arguments to the contrary are not persuasive.

First, Richer boldly asserts that he "neither denied possessing the drugs nor an intent to distribute them." (Richer's Br. 15.) This argument is completely at odds with Richer's statements during the plea colloquy and during allocution, which when read together, along with the numerous off-the-record discussions with counsel, leave the unmistakable impression that Richer was only admitting that the drugs were found in his residence. Richer was not admitting that he possessed the drugs (as he claimed he was in jail at the time) and he disputed that he intended to deliver them, but believed that due to the amount, the law would not allow him to contest it. Thus, regardless of the precise legal definition of "possession" (Richer's Br. 15), the fact remains that the circuit court believed that Richer was not admitting that there was a factual basis for the charge of possession with intent to deliver.

Second, Richer claims that "the postconviction court was wrong as a factual matter about the effect of Richer's statements." (Richer's Br. 16.) He asserts that he made it abundantly clear to the circuit court that he was admitting that the State could prove the elements of the offense. (Richer's Br. 16.) But this argument ignores the circuit court's observations that Richer "didn't believe in the words he was saying." (R. 67:7.)

Because the circuit court acts as the finder of fact at a plea hearing, this Court must give deference to its credibility determinations, especially when based on the witnesses' demeanor. *See State v. Searcy*, 2006 WI App 8, ¶ 35, 288 Wis. 2d 804, 709 N.W.2d 497 (concluding that the circuit court's finding that juror's testimony was not persuasive and indicative of a "disgruntled" juror was not clearly erroneous). Here, the record supports the circuit court's finding that, given the totality of Richer's statements during the plea colloquy and then during allocution, Richer was not entering into the plea in a knowing, voluntary, and intelligent manner. *See id.* (appellate court must accept circuit court's findings if supported by reasonable inferences from the record).

Richer's final argument is that even if he had denied an element of offense, it would have been error for the circuit court to vacate his plea. (Richer's Br. 16–18.) But this ignores that Wisconsin law does "not require a court to accept a plea of guilty but merely prescribe[s] the procedure to be followed by the court in exercising its legal discretion on whether to accept the plea." *State v. Waldman*, 57 Wis. 2d 234, 237, 203 N.W.2d 691 (1973). In *Waldman*, the Wisconsin Supreme Court held that the circuit court did not err in refusing to accept the defendant's guilty plea after he initially pleaded not guilty. *Id.* Similarly, Wisconsin law is well-established that a circuit court is not bound to accept a plea entered as part of the plea agreement. *State v. Roubik*, 137 Wis. 2d 301, 305, 404 N.W.2d 105 (Ct. App. 1987).

Thus, contrary to what Richer argues, the appropriate question here is whether the circuit court would have been acting *within its discretion* to reject Richer's no-contest plea had it known of the information he provided during allocution. For the reasons discussed above, the circuit court would have been well within its discretion to conclude that Richer's plea was not truly knowing, intelligent, and voluntary.

Richer relies on *State v. Rushing*, 2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894, for the proposition that a defendant's subsequent assertion of innocence is not sufficient to call into question the validity of a previous plea. (Richer's Br. 16–17.) *Rushing* stated that "[a] claim of innocence, of course, is not sufficient as a stand-alone reason to permit a plea withdrawal." *Id.* ¶ 11. But this statement must be understood in the context that *Rushing* was addressing a claim of deficient plea colloquy and a motion for plea withdrawal. The court ultimately determined that the defendant had not met his burden to rebut the State's claim of prejudice such that he was entitled to withdraw his plea. *Id.* ¶ 16.

Unlike *Rushing*, the issue here is not whether the defendant has met his burden to withdraw his plea, but whether the circuit court had sufficient reason for concluding that Richer's plea was not knowing and voluntary. (R. 72:17.) When viewing the totality of Richer's statements during allocution in the context of his plea colloquy, the postconviction court properly concluded that Richer "intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea." *Comstock*, 168 Wis. 2d at 953.

Therefore, assuming that the rule of judicial administration announced in *Comstock* establishes the scope of Richer's constitutional right to be free from double jeopardy, no constitutional violation occurred because the express exception in *Comstock* applies. However, even if this Court concludes that the *Comstock* exception does not apply, Richer's right to be free from double jeopardy nonetheless was not violated.

C. *Comstock* does not apply because Richer was not subject to multiple jeopardies.

Before addressing the exception set forth in *Comstock*, the postconviction court questioned whether *Comstock* even applied given the factual differences between that case and the present one. (R. 72:14–15.) The postconviction court was correct to do so. As noted above, although *Comstock* announced a bright-line rule of judicial administration, its constitutional analysis was more nuanced and its constitutional holdings were expressly limited to the facts before it. *Comstock*, 168 Wis. 2d at 921. Those facts are important.

In *Comstock*, the defendant was charged with four felony counts of second-degree sexual assault of a 15-year-old. *Id.* at 926. The parties reached a plea agreement under which the State would amend the first two charged felonies to misdemeanors and dismiss the remaining felonies; the defendant agreed to plead no contest to the misdemeanors. *Id.* at 926–27. The prosecution also agreed to recommend probation and not to bring any further charges against the defendant with respect to the victim or allegations concerning the victim's sister. *Id.* at 927.

At the plea hearing, the circuit court first allowed the proposed amendments to the criminal complaint, accepted the defendant's no-contest plea, and then ordered a presentence investigation (PSI). *Id.* at 929–30. Based on comments in the PSI, as well as statements from the victim, her psychologist, and the district attorney, the court later vacated the plea "in the public interest" at sentencing and reinstated the original felony charges. *Id.* at 931–34. The defendant then filed a motion to dismiss the reinstated charges on double jeopardy grounds, which was granted. *Id.* at 934.

Under these facts, the Wisconsin Supreme Court concluded that jeopardy attached at the time the court

accepted the defendant's plea of no contest to the lesser offenses and that the court violated the defendant's right to be free from double jeopardy by "reinstat[ing] the original charges." *Id.* at 921. Accordingly, the court held that the circuit court's order vacating the defendant's no-contest pleas and reinstating the original felony charges was void and remanded the matter for sentencing under the original plea agreement. *Id.* at 947.

The facts here are materially distinguishable from *Comstock*, such that jeopardy did not attach at Richer's plea hearing, and, even if it did, Richer was subject to a single jeopardy that continued to his conviction. Richer was not subject to multiple prosecutions for the same offense.

1. Jeopardy does not attach in any meaningful sense when a court accepts and then vacates a no-contest plea in the same hearing.

"The prohibition against double jeopardy is not triggered until 'jeopardy attaches' in the proceedings." *Comstock*, 168 Wis. 2d at 937. In this context "jeopardy" means "exposure to the risk of a determination of guilt or innocence." *Id.* at 937. *Comstock* concluded that under the facts before it, jeopardy attached when the circuit court accepted the defendant's plea of no-contest. *Id.* at 938. Richer argues that this holding established a bright-line, constitutional rule. (Richer's Br. 12–14.) A closer analysis of *Comstock* shows otherwise.

In reaching its holding in *Comstock*, the Wisconsin Supreme Court distinguished federal cases that had held that jeopardy does not attach in the plea context until the court sentences a defendant and enters judgment. *Comstock*, 168 Wis. 2d at 940–42. In distinguishing one of these cases—*Santiago Soto*, 825 F.2d 616—the court noted that there "the circuit court accepted the guilty plea and rejected it in the

same proceeding on grounds that the accused may not be guilty." *Comstock*, 168 Wis. 2d at 943. The Wisconsin Supreme Court stated that "it is hard to conclude that the accused was placed in jeopardy in any meaningful sense" under these circumstances. *Id.*

That is precisely what occurred in the present case. After an initial reluctance to do so, the circuit court accepted Richer's plea of no-contest, but then mere minutes later vacated it due to statements Richer made calling into question the factual basis of the plea and whether it was knowing and voluntary. Under these circumstances, "it is hard to conclude" that Richer "was placed in jeopardy in any meaningful sense." *Comstock*, 168 Wis. 2d at 943.

Due to the unique circumstances under which Richer's plea was accepted and then minutes later vacated, and under the logic of *Comstock*, jeopardy did not attach when the circuit court initially accepted his no-contest plea. Because jeopardy never attached, no Fifth Amendment violation occurred.

2. Assuming jeopardy did attach when the court accepted Richer's plea, it continued until the judgment of conviction following his second plea hearing.

In the event this Court does not agree with the State that jeopardy did not attach upon the circuit court's initial acceptance of Richer's no-contest plea, it should nonetheless find no double-jeopardy violation for a second, independent reason: Assuming jeopardy attached, it continued until his second no-contest plea under the continuing jeopardy doctrine.

The continuing jeopardy doctrine was articulated in *Salters v. State*, 52 Wis. 2d 710, 191 N.W.2d 691 (1971). In *Salters*, the defendant initially pleaded not guilty to first-degree murder. *Id.* at 710. After the preliminary hearing, he

pleaded guilty to an amended charge of homicide by reckless conduct, and the court accepted the plea. *Id.* Thereafter, a police officer testified to the facts of the underlying crime, and, at the request of the court, the State reinstated the original charges. *Id.* The defendant then moved to dismiss the amended complaint, but the motion was denied. *Id.* On appeal, the Wisconsin Supreme Court held that no double-jeopardy violation occurred because the circuit court did not end one jeopardy and begin another when it ordered the original charges reinstated. *Id.* at 715. "In the present case jeopardy attached when the first plea was entered, and that same jeopardy continued to exist until [the court] entered a judgment of conviction." *Id.* at 714–15 (footnote omitted).

In *Comstock*, the Wisconsin Supreme Court reviewed its prior decision in *Salters*, but concluded that the case was distinguishable because it "involved a court's accepting a guilty plea without fully hearing the evidence and making a determination of the voluntariness and factual accuracy." *Comstock*, 168 Wis. 2d at 946. In contrast, in *Comstock*, there was no question as to whether the initial plea was voluntary or factually accurate. *Id.* That is, in *Comstock*, "the circuit court never concluded that the acceptance of the no contest plea was defective" either because it lacked a factual basis or "that the defendant had not entered the plea voluntarily or intelligently." *Id.* at 943.

Importantly, the *Comstock* court did not overrule *Salters* or explicitly reject its theory of continuing jeopardy. *Salters* remains good law. Indeed, *Salters*' continuing jeopardy theory was cited by this Court with approval in *State v. Clark*, which relied on *Salters*' holding that "[i]n order for there to be validity to the assertion of double jeopardy . . . 'there would have to be a judgment of acquittal or conviction or a dismissal of the charges *and then a second prosecution begun*.'" *State v. Clark*, 2000 WI App 245, ¶ 5, 239 Wis. 2d 417, 620 N.W.2d 435 (quoting *Salters*, 52 Wis. 2d at 715).

Accordingly, even assuming that jeopardy attached when the circuit court first accepted Richer's plea, under the holding in *Salters*, the same jeopardy continued until the court entered a judgment of conviction following his second plea.

Indeed, *Salters*' rationale applies with stronger force to the facts here because unlike the defendant in *Comstock* or *Salters*, Richer did not plead to an amended charge and then have the original (more serious) charge reinstated. In *Comstock*, before accepting the defendant's plea, the court allowed the State to file an amended information, which reduced the charges from four felonies to two misdemeanors. *Comstock*, 168 Wis. 2d at 926–27. The circuit court subsequently vacated the plea and reinstated the original four felony charges. *Id.* at 933–34. Under these circumstances, the defendant in *Comstock* legitimately faced a "second prosecution for the same offense after conviction." *Kelty*, 294 Wis. 2d 62, ¶ 16 (citation omitted). The same was arguably true in *Salters*.

Not so here. Richer faced the same charges after the court vacated his plea as he did minutes before when it accepted the plea. Although the court initially accepted Richer's no-contest plea to count one, (R. 61:17), the remaining charges were never dismissed before the court vacated the plea (R. 61:17–31). No amended charges were filed. The charges in count two were not dismissed until after the court accepted Richer's plea after the second plea hearing. (R. 35; 26; 67:21.) Richer entered the same plea to the same charge in the second hearing that he did in the first.

Stated differently, unlike the defendant in *Comstock*, the penalties to which Richer was exposed never changed as a result of the court vacating his plea. Although the agreement with the State changed from a joint recommendation to a free-to-argue situation, this fact is of no constitutional importance because a circuit court "is not bound by the State's sentence recommendation under a plea

agreement." *State v. Williams*, 2000 WI 78, ¶ 2, 236 Wis. 2d 293, 613 N.W.2d 132. As the circuit court retained the same sentencing authority under either agreement, Richer was not "exposed" to any additional penalty as a result of the new plea agreement.

The bottom line is that in *Comstock*, the circuit court suffered buyer's remorse after it accepted a very lenient plea agreement and reinstated more serious charges than what the defendant originally pleaded to. The defendant legitimately faced two jeopardies for the same offense. In contrast, Richer was not subject to a second prosecution for the same offense. The same jeopardy that existed when he entered his initial plea continued until the ultimate judgment of conviction. Therefore, Richer was not subject to double jeopardy for the same offense, and his constitutional rights were not violated.

The fact that Richer's right to be free from double jeopardy was not violated is evident from the relief he seeks. Richer says that the appropriate remedy "is the reinstatement of the original plea[ ] and dismissal[ ], and a sentencing on the original bargain." (Richer's Br. 13, 21.) As explained above, there were no dismissals of any charges at the original hearing. And, the "original bargain" was functionally the same as the second plea agreement because the circuit court would not have been bound by the parties' joint sentencing recommendation at the first sentencing. Further, the State has already honored its promise to dismiss the remaining charges against Richer here and in Dunn County and the charges against his wife. Richer cannot show what elements of the "original bargain" were unsatisfied.

CONCLUSION

This Court should affirm the judgment of conviction and order denying Richer's motion for postconviction relief.

Dated this 24th day of February, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
barbertm@doj.state.wi.us

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 6,447 words.

Dated this 24th day of February, 2020.

_____
TIMOTHY M. BARBER
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 24th day of February, 2020.

_____
TIMOTHY M. BARBER
Assistant Attorney General