STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2020AP742-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LISA RENA LANTZ,
Defendant-Appellant.

ON APPEAL FROM THE FEBRUARY 22, 2017, JUDGMENT OF CONVICTION AND THE MARCH 23, 2020, ORDER DENYING LANTZ'S WIS. STAT. § (RULE) 809.30 POSTCONVICTION MOTION, THE HONORABLE JOHN P. ZAKOWSKI PRESIDING
BROWN COUNTY CASE NUMBER 2016CF482

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted by:

Matthew S. Pinix, 1064368

PINIX LAW, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
matthew@pinixlaw.com
www.pinixlaw.com

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

I. Lantz's sentences on the conspiracy and solicitation charges unconstitutionally punish her twice for the same acts, necessitating redress.

Lisa Lantz, by her own admission, was a member of a conspiracy that delivered a large amount of methamphetamine to Brown County. Lantz's admitted involvement in that conspiracy lasted from September 1, 2015, to March 22, 2016. Throughout that time, Lantz had a buyer/seller relationship with Bill Yang, a more senior member of the conspiracy. Lantz would purchase meth from Yang with the purpose of reselling it. Absent that buyer/seller relationship and the affiliated procurement of meth from Yang, Lantz would not have been part of the meth distribution conspiracy for which she was convicted and sentenced.

Lantz challenges on appeal the State's ability to punish her both for conspiring with Yang to deliver meth and—as part of that very conspiracy—for soliciting Yang to deliver meth for her resale. Her appeal is thus about whether the Legislature allows multiple punishments for acts that variously constitute separate drug crimes. The key question is whether Lantz can be punished multiple times for the overarching conspiracy to deliver drugs *and* individual acts of solicited delivery that occurred as part of the conspiracy.

A. Soliciting Yang to bring drugs for resale is necessarily part of Lantz's conspiracy *with* Yang to deliver *those* drugs; the charges are identical in fact and her challenge to them is not forfeit.

The State makes two arguments related to the factual underpinnings of Lantz's conspiracy and solicitation convictions. First, the State contends that the charges are different in fact. (St.'s Br. 7-8.) Second, the State contends that Lantz's guilty plea forfeited her right to challenge

the convictions as multiplicitous because the record does not clearly show that her solicitations were part of her conspiracy. (St.'s Br. at 9.)

The record refutes those arguments.

At sentencing, the prosecution presented the sworn testimony of a Brown County Drug Task Force investigator, Brian Messerschmidt. (R.123:5; A-Ap 21.) Messerschmidt testified at length about the drug trafficking conspiracy with which Lantz was affiliated and her role in it. (*See, e.g., id.*:9-10; A-Ap 25-26.) Messerschmidt explained that Lantz served "as a middler and supplier to lower level customers." (*Id.*:10; A-Ap 26.) He explained that evidence existed showing "the ongoing buyer/seller relationship between Lantz and Yang and their coordination to further the [drug trafficking organization] and the distribution of methamphetamine." (*Id.*)

As proof that Lantz was conspiring with Yang to deliver meth, the prosecutor questioned Messerschmidt about specific communications between the two that police had intercepted. (*Id.*:23, 25-27; A-Ap 39, 41-43.) Messerschmidt testified that the back-and-forth exchanges between Lantz and Yang were "significant . . . in establishing what type of role [Lantz] had *in this conspiracy*." (*Id.*:23; A-Ap 39 (emphasis added).)

In one such exchange, Lantz told Yang that she needed him to bring her meth because she had customers waiting. (*Id.*) "[T]hat call, specifically," occurred on "February 27th, 2016" and is one of the solicitations that Lantz challenges on appeal as multiplicitous with her conspiracy conviction. (*Id.*:27; A-Ap 43; *see also* R.6:2, 9-10 (same communication quoted in complaint).) The criminal complaint summarizes another exchange between Lantz and Yang occurring on March 13, 2016. (R.6:10-11.) In that one, Lantz again asked Yang to bring her meth because she had sold half of what she

previously obtained from him. (*Id.*) That March 13th exchange is the basis of the other solicitation that Lantz now challenges as multiplicitous. (*Id.*:2, 10-11.)

The record is thus quite clear that the solicitations about which Lantz complains were part of the conspiracy to which she pleaded guilty. After all, as Messerschmidt explained, Lantz's soliciting Yang to bring her drugs for resale is an integral part of their conspiracy. The overarching conspiracy thus includes the facts underlying the solicitations, and the crimes are identical in fact. What is more, the crimes' factual sameness proves that Lantz did not forfeit her multiplicity challenge; her solicitations were clearly part of her conspiratorial act.

The State's forfeiture argument is based the proposition that Lantz conspired to deliver more than 50 grams of meth even when the weight of her individual solicitations is set aside. But merely because Lantz's overall conspiracy delivered more than fifty grams of meth does not mean that one can, by intellectual sleight of hand, set aside her solicitations as though they were not part of the conspiracy. Instead, as Messerschmidt's testimony clearly demonstrates, Lantz's solicitations were an integral part of her conspiracy with Yang to deliver meth.

The solicitations are not outside the conspiracy's charging period; they happened during it. The solicitations involved the very same drugs that the conspiracy delivered; it is not as though Lantz delivered meth and solicited heroin. And, importantly, when given the opportunity, Messerschmidt pointed to evidence of Lantz's solicitation as demonstrative of her "role . . . in th[e] conspiracy." The facts in the record thus unequivocally establish that Lantz's solicitation of Yang was part of her conspiracy to distribute drugs with him. Her multiplicity challenge is thus not forfeit.

B. Punishing Lantz twice for the same act of conspiring to deliver meth and soliciting its conspiratorial delivery is contrary to the Legislature's intent; her multiple punishments are unconstitutional.

Much of the State's argument on this score is premised on the proposition that Lantz's solicitations are not part of her conspiratorial acts. (*See* St.'s Br. at 13-15.) Namely, the State uses its proposed factual distinguishability to rebut Lantz's argument on three of the four prongs of the multiplicity analysis: (1) legislative intent, (2) the nature of the proscribed conduct, and (3) the appropriateness of multiple punishments. (*Id.*); *see also State v. Ziegler*, 2012 WI 73, ¶63, 342 Wis.2d 256, 816 N.W.2d 238 (setting forth multiplicity test). But, as detailed above, the record shows that Lantz's conspiracy included her solicitations; the acts are not factually distinguishable. Thus, the State's counterargument on those three points of the multiplicity analysis is infirm and unpersuasive for the fallacy of its premise.

In addition to its factual dissimilarity contention, the State makes other counterarguments concerning the legislative intent analysis. (St.'s Br. at 11-13.) First, the State faults Lantz for not discussing the conspiracy or solicitation statutes when explaining how the applicable statutes prove the Legislature's disinterest in multiple punishments. (*Id.* at 11.) It is true that Lantz focused her argument on statutory provisions in the controlled substances act. (Lantz's Br. at 22-23.) However, her argument was rightly aimed at those provisions.

Pertinently, the State's charging document makes no mention of the statute establishing conspiracy as a standalone offense. (*See* R.6:1 (no reference to Wis. Stat. § 939.31).) Instead, when charging Lantz, the State articulated its theory of conspiracy by reference to the controlled substances act's penalty provision statute. (*Id.* (citing Wis. Stat. § 961.41(1x)).) Lantz's multiplicity

challenge is that she cannot be penalized twice for the same acts occurring as a conspiracy and solicitation. The State's use of the penalty provision rather than the conspiracy statute in the charging document demonstrates the primary importance of the controlled substance act's provisions to the multiplicity analysis that Lantz presents.

As Lantz detailed in her opening brief, those provisions evince the Legislature's intent that persons not be punished separately for individual acts occurring as part of an aggregated conspiracy. (Lantz's Br. at 22-24.) For example, the Legislature choose to enact a provision prohibiting re-prosecution of individual solicitations that occurred as part of a conspiracy following a conviction of the overarching conspiracy. *See* Wis. Stat. § 971.365(2). That law is demonstrative of the Legislature's want to avoid twice punishing a person for individual acts that have already been punished as part of an aggregated conspiracy conviction. *See id.* Given Section 971.365(2), it makes no sense to say—as does the State—that the Legislature intended to allow multiple punishments for solicitations occurring within a conspiracy *and* the overarching conspiracy, but only so long as they are part of the same case. It is inexplicable that the Legislature would protect the same acts against multiple punishments if charged in separate cases whilst permitting multiple punishments so long as the charges are brought in the same case.

The State points this Court to *State v. Eisch*, 96 Wis.2d 25, 291 N.W.2d 800 (1980), to rebut Lantz's argument that the statutes evince the Legislature's want to avoid multiple punishments. But *Eisch* is distinguishable; two differences between Lantz's case and *Eisch* are notable.

First, *Eisch* involved a single sexual assault with multiple acts constituting separate manners of commission. 96 Wis.2d at 29. Lantz's case involves drug crimes, not sex crimes. As explained above, key language

in the controlled substances act—which was not at issue in *Eisch*—is determinative of the Legislature's want not to punish drug conspiracy's and the underlying crimes. The question before the court was whether the defendant could be convicted of sex crimes that were the same in law but different in fact. *Id.* at 31. the question in Lantz's case is the reverse: whether punishing drug crimes that are different in law but the same in fact is permissible. As noted above, the fact *Eisch* is thus of little relevance to the issue before this Court.

The State also disputes the relevance of Wis. Stat. § 961.45. (St.'s Br. at 13.) But Section 961.45 is important because it provides further evidence of the Legislature's want not to punish people twice for acts constituting controlled substance offenses. Namely, if Lantz had been convicted in federal court of conspiring with Yang to deliver meth, she could not then have been convicted in Wisconsin for soliciting Yang to deliver meth to her. *See* Wis. Stat. § 961.45; *see also State v. Hansen*, 2001 WI 53, ¶44, 243 Wis.2d 328, 627 N.W.2d 195 (Sec. 961.45's protection not limited to offenses with same elements). Punishing those solicitations would have been barred by Section 961.45 and the Legislature's obvious want to avoid twice punishing a person for the same act.

As Lantz explained in her opening brief, our supreme court has read Section 961.45's "act" liberally to encompass more than a mere elements test. (Lantz's Br. at 23 (citing *Hansen*, 2001 WI 53, ¶¶16-42).) Because Lantz's solicitations were part of her conspiracy, Section 961.45 would protect her from being twice punished in both state and federal court. It makes no sense to think that the Legislature would have disallowed twice punishing Lantz following her federal court conviction, but nonetheless have allowed twice punishing her if the multiple charges had arisen in a single Wisconsin case. Section 961.45 is thus further demonstrative of the Legislature's intent to avoid punishing a person twice for

an aggregated drug conspiracy and the individual acts comprising the conspiracy.

The State's final argument notes that the Legislature prohibits convictions for both being a party to a crime and conspiring to or soliciting its occurrence. (St.'s Br. at 13 (citing Wis. Stat. §§ 939.72(1) & (2)).) That is true, but it is not too significant.

As Lantz explained above, the provisions of the controlled substances act are, in this drug conspiracy case, key to evaluating whether the Legislature wanted to twice punish the same act. The catch-all provisions of Section 939.72 are not narrowly tailored to drug cases, but instead apply to all sorts of criminal acts. For other crimes, it might be fair to reason based on Section 939.72 that the Legislature intended to allow punishing both conspiracy and solicitation. But the sections of the controlled substances act to which Lantz has drawn this Court's attention evince the Legislature's intent not to twice punish people for the same drug crime. Thus, Section 939.72's provisions contribute little to understanding the Legislature's intent regarding multiple punishments in drug cases, and the State's argument is not persuasive.

As for the nature of the proscribed conduct prong of the multiplicity analysis, *Ziegler*, 2012 WI 73, ¶63, the State makes one argument in addition to its contention that Lantz's solicitations were not part of her conspiracy (St.'s Br. at 14-15). The State seems to contend that Lantz's conspiracy and solicitations are not similar in nature because the law allows a prosecutor to aggregate multiple drug crimes into a single charge. (*Id.*) But that argument is largely nonresponsive the pertinent inquiry: "whether the conduct is separated in time or different in nature." *State v. Steinhardt*, 2017 WI 62, ¶33, 375 Wis.2d 712, 896 N.W.2d 700. Lantz's solicitations occurred during her conspiracy and were an integral part of it. Each time Lantz solicited Yang to deliver her meth for

resale, she was furthering the conspiracy to deliver that meth. Thus, Lantz's solicitations are not separated in time from her conspiracy, nor are they different in nature from it.

Punishing Lantz for both conspiring with Yang to deliver meth and soliciting Yang's delivery of meth for resale in that conspiracy violates her right to due process. *Ziegler*, 2012 WI 73, ¶62. When analyzed under the applicable multiplicity analysis, it becomes clear that the Legislature did not intend for Lantz to be punished both for her conspiracy and the individual acts that constitute parts of that conspiracy. *See id.* ¶63. Her sentences on the solicitation counts should be vacated.

II. Not litigating Lantz's meritorious multiplicity challenge was ineffective if it forfeited the issue; her ineffective assistance claim was sufficiently pled.

The State's first response to Lantz's ineffective assistance argument is that her multiplicity claim fails on the merits, and thus her counsel cannot be ineffective for not raising it. (St.'s Br. at 15-16.) Lantz will surely concede that, if her multiplicity claim lacks merit, her counsel was not ineffective. *See State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis.2d 270, 647 N.W.2d 441. But, as set forth above, Lantz does not accept that premise: her multiple punishments *were* unconstitutional.

The State next argues that Lantz's counsel had no obligation to litigate "an issue of unsettled law." (St.'s Br. at 16.) It is true that Wisconsin has a *per se* rule establishing that defense counsel is never deficient for failing to argue an unsettled question of law. *State v. McMahon*, 186 Wis.2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). However, that *per se* rule is contrary to the well-established test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 685, 688 (1984).

Strickland did not phrase its deficiency test categorically. *Id.* Instead, *Strickland* posited that deficiency can lie whenever counsel's performance falls below an objective standard of reasonableness. *Id.* The Court expressly stated that "[m]ore specific guidelines are *not* appropriate." *Id.* (emphasis added). Instead of adopting "detailed rules for counsel's conduct," *Strickland* explained that "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* Whereas *Strickland* expressly rejected categorial rules for discerning deficiency, Wisconsin's *per se* rule that counsel is *never* deficient for not arguing an unsettled point of law is contrary to *Strickland*'s clearly established rule.

If Lantz's sentences do violate the multiplicity doctrine, then it was objectively unreasonable for her counsel not to challenge them. Objectively reasonable defense counsel is expected to be sufficiently versed in criminal law to protect the defendant's interests. *See ABA Stds. Crim. Justice: Prosecution & Defense Function*, Std. 4-1.2(e) at 120 (3d ed. 1993), Wis. SCR 20:1.1. Not even the State argues that it would have been reasonable for Lantz's trial counsel to allow her to be sentenced in violation of the constitution. (*See* St.'s Br. at 16.) Any argument to the contrary would be unavailing, especially when Lantz's trial counsel proffered no strategic basis for not objecting. (R.125:10-11; A-Ap 131-32.) Instead, trial counsel explained that he made no objection simply because he saw no constitutional problem. (*Id.*) If indeed there is a constitutional problem, defense counsel was surely deficient for not recognizing and challenging it.

The State's final complaint about Lantz's ineffective assistance claim is that it is insufficiently pled. (St.'s Br. at 16.) However, Lantz articulated sufficient facts to trigger a hearing on her counsel's effectiveness. *See State v. Allen*, 2004 WI 106, ¶23, 274 Wis.2d 568, 682 N.W.2d

433. And the postconviction court held a hearing at which Lantz was able to produce additional evidence of deficiency in the form of her counsel's testimony. (R.125:5-11; A-Ap 126-32.)

Lantz's sought-after relief is to vacate her multiplicitous solicitation sentences. If she is now unable to gain that relief solely because of her counsel's ineffectiveness, then the remedy is simply to grant her the relief she would have had but for it. The State's complaints about Lantz's claim being insufficient are thus unpersuasive.

III. The sentencing court erred; Lantz's twenty-seven-year term of imprisonment exceeds the minimum term necessary to satisfy the court's goals.

Lantz argues on appeal that the sentencing court erred by not ensuring that her term of imprisonment was the minimum necessary to satisfy its sentencing objectives. In support, she avers that the sentencing court: (1) jumped the recommendations it was given, (2) focused on meth's pernicious impact in the community to the exclusion of its impact on her, (3) diminished or distorted mitigating information in her background, and (4) ordered consecutive sentences without adequate explanation. (Lantz's Br. at 33-36.) In response, the State takes a divide-and-conquer approach. (St.'s Br. at 18-21.) Rather than assessing the cumulative effect of those errors, the State explains why each individually is not proof of an erroneous exercise of discretion. (*Id.*)

But a reviewing court must "view the sentencing remarks in their totality" when deciding whether the lower court erred. *State v. J.E.B.*, 165 Wis.2d 655, 674, 469 N.W.2d 192 (1991). When Lantz's sentencing is viewed through that lens, her argument comes into focus. As Lantz explained in her opening brief, the totality of the

court's comments show that a twenty-seven-year term of imprisonment is more than was necessary to satisfy the court's objectives. (Lantz's Br. at 33-35.) This Court should reverse.

CONCLUSION

For those reasons and the ones set forth in her opening brief, Lantz asks this Court to grant the relief articulated in her opening brief. (Lantz's Br. at 37.)

Dated this 13th day of January, 2021.

PINIX LAW, LLC
Attorneys for Defendant-Appellant

Electronically signed by Matthew S. Pinix
By: Matthew S. Pinix

CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,999 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 13th day of January, 2021.

PINIX LAW, LLC
Attorneys for Defendant-Appellant

Electronically signed by Matthew S. Pinix
By: Matthew S. Pinix