STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2022 AP 002196-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORDIARAL WEST,

Defendant- Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DENYING A MOTION TO WITHDRAW PLEA ENTERED ON OCTOBER 26, 2022, IN THE CIRCUIT COURT OF FOND DU LAC COUNTY
The Honorable Dale English, Presiding
Trial Court Case No. 2014 CF 522

Respectfully submitted:

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Argument

I. WEST SHOULD BE GRANTED AN EVIDENTIARY HEARING ON HIS MOTION BECAUSE THE RECORD REVEALS THAT NEITHER HIS ATTORNEY NOR THE COURT AFFORDED HIM AN OPPORTUNITY TO FAIRLY APPRAISE WHETHER HIS ALLEGED CONDUCT FACTUALLY SATISFIED THE CHARGE TO WHICH HE PLED, PARTICULARLY SINCE IT RELIED ON AN OBSCURE STATUTE THAT WAS NEVER REFERENCED BY THE STATE, THE COURT, OR HIS ATTORNEY, UNTIL THE POST-CONVICTION COURT UNEARTHED IT WHEN DENYING THE MOTION SUB JUDICE.

The outcome of this appeal largely turns on the application of section 971.365, Stats., and how it interfaced with the facts of this case, and the plea colloquy. As the State notes, the factual basis determination requires this Court to interpret section 971.365 which, in turn, presents a question of law this Court reviews de novo. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995). Even assuming, *arguendo*, that this section allowed the State to aggregate small, individual amounts of cocaine into a larger offense, it is clear from the plea colloquy that West was never adequately advised, either by the circuit court or his attorney, what the State would have to prove to establish a factual basis for the crime to which he pled guilty. The single intent and design language was missing in action.

An issue the State largely ignores is that because the circuit court denied West's motion without an evidentiary hearing, it must be assumed that it accepted West's assertions as true. *State v. Allen*, 2004 WI 106, ¶ 15, 274 Wis. 2d 568, 682 N.W.2d 433. This includes the fact that West steadfastly denied having anything to do with the 14.53 grams of cocaine that was found in the residence of Dazwan Jones and Miguel West, notwithstanding a single piece of mail with West's name that was mistakenly delivered to the lower rather than the upper unit.

Indeed, West denied any connection to the 14.53 grams earlier during the very hearing at which he ultimately entered the plea in question. He also produced affidavits from the two individuals who would testify that West had nothing to do with the 14.53 grams of cocaine, both of whom were also convicted for possession of that cocaine. West continued and continues to deny possession of that larger amount of cocaine in the wake of his plea. It is for this reason that West noted that when the 14.53 grams are redacted from the equation, only 4 grams of cocaine is implicated, which is an insufficient factual basis for a quantity greater than 5 grams alleged in the primary 2014 complaint.

The State, however, argues that if one includes the single transaction in May of 2015, the 5-gram threshold can be crossed. (State's Response, p. 25). The State then goes on to argue:

> The postconviction court correctly determined that based on all of that, the court could easily conclude that the various violations were pursuant to a single intent and design.

(*Id.*). (citations omitted). The question, however, is not whether *the court* could have concluded that. The question, instead, is whether *West* understood how that single, additional delivery *might* be used as a factual basis for an aggregate offense, and what circumstances would be necessary to make such permissible. This, in turn, required that West be given the opportunity to assess whether his conduct in the late summer of 2014, following which he was arrested and charged, and then his conduct in the late spring of 2015, was "pursuant to a single intent and design." And here it is notable that the 2014 charges were conspiracy charges, while the 2015 charge was possession with intent to deliver.

The State relies on the May 2015 charge to rebut the idea that all of the charges were conspiracy charges, and when viewed from that perspective, such is true. However, what the State fails to recognize is that the 2014 charges were styled as conspiracy charges because the allegations did not include that West ever "possessed" the cocaine at the center of those transactions. Instead, as the record reveals, it was Dazwan

Jones who possessed and delivered the smaller amounts of cocaine.

The State, however, citing *State v. Elverman*, 2015 WI App 91, ¶ 21, 366 Wis. 2d 169, 873 N.W.2d 528, argues that a single intent or design to may be inferred from the complaint. (State's Response, p. 24). *Elverman*, however, is a very different case, and what it did not say is that a single intent and design can be inferred from *two* different complaints filed in two different years. And *Elverman* was not a drug case. Nor was it a plea case. Elverman went to trial, and so the question in *Elverman* was whether the complaint gave him sufficient notice of the theft charge he was facing.

There could be little confusion in *Elverman* because the complaint expressly charged him with the very offense of which he was convicted: aggregate offenses of theft exceeding $10,000. Indeed, unlike this case, Elverman's counsel had even referred, during a pretrial probable cause motion, to the statutory provision – section 971.36, Stats. - under which smaller thefts can be aggregated into a single and larger offense. Thus, although the complaint set forth a series of smaller thefts from an Alzheimer's afflicted victim, Elverman had more than sufficient notice of the charge he was facing. That kind of clarity is lacking in this case.

Moreover, unlike section 971.365(1)(b), Stats., section 971.36 has a clearly defined framework:

> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if one of the following applies:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it.

> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> (d) If the property is mail, as defined in s. 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in s. 947.013(1)(a).
>
> (4) In any case of theft involving more than one theft but prosecuted as a single crime, **it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars.** On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. But an acquittal or conviction in any such case does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge. **In case of a conviction on the original charge on a plea of guilty or no contest, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge and in that event conviction does not bar a subsequent prosecution for any other acts of theft.**

(Emphasis added).

Section 971.365(1)(b), Stats., by contrast is bare bones and merely states:

> In any case under s. 961.41(1m) (em), 1999 stats., or s. 961.41 (1m)(cm), (d), (dm), (e), (f), (g) or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

Conspicuous by its absence in the case of *drug* offenses is the legislative grant of permission to *not* specify the particulars of the underlying aggregated offenses, and yet, that is precisely what happened in this case. The absence of such language in the case of *drug* offense should be read to mean that the particulars *are* needed when individual *drug* offense are aggregated. *Cf. State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416 ("Under the well-established canon of *expressio unius est exclusio alterius* (the expression of one thing excludes another), where the legislature specifically enumerates certain exceptions to a statute, we conclude, based on that rule, that the legislature intended to exclude any other exception").

Moreover, section 971.36 notes the importance of specifying what individual offenses are being aggregated in the context of a *plea*. Such is important because it establishes what offenses cannot be pursued, and which can, in the wake of the resolution by plea bargain. Here, that question is left obscured. Can the State still pursue charges against West for the individual offenses because the 14.53 grams alone was sufficient for the offense to which he pled? Or can the State pursue a charge against West for the 14.53 grams because the individual offenses combined exceed the requisite threshold? The relative ambiguity of the statute, coupled with the ambiguity surrounding the putative factual basis for West's plea, leaves these questions unanswered.

The same principles apply to the fact that the State presumed to aggregate drug conspiracy charges under section 971.365 even though that section does not authorize the aggregation of conspiracy charges. Drug conspiracy charges were specifically omitted from that section. When the legislature specifically enumerates certain offenses, and leaves one out, it is presumed that what is not mentioned was left out intentionally. *Cf. Delaney, supra.* As previously noted, there is no clear authority that allows the State to aggregate multiple conspiracy charges into a single charge of possession with intent.

The State is correct that the failure to include this obscure statutory provision in the criminal complaint or

Amended Information did not *per se* make West's plea involuntary, or devoid of a factual basis. The State is also correct that neither does the statute's obscurity compel a particular outcome. Nor, perhaps, does the absence of any reference to it during the plea colloquy, and which putatively formed the basis for West's plea, definitively resolve the issue. Nevertheless, the focus should not be diverted from whether West truly understood the mechanism by which this plea deal was constructed. If section 971.365(1)(b), Stats., really was the indispensable linchpin of the plea agreement, even though it was never referenced once prior to the post-conviction court digging it out of the statutes, such should have been out in the open so that West could appraise his conduct against the statutory language before deciding whether to enter a plea.

Finally, West believes his development of the vagueness of section 971.365, Stats., adequately makes the point. Quite conspicuous by its absence from that section is any explanation that a series of minor drug transactions can be aggregated into a single more *serious* crime. The language is insufficient to put small scale drug dealers on notice that they can be prosecuted as large scale drug dealers based on nothing more than the repetitive nature of their offenses. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). And for the reasons already stated, and particularly when juxtaposed to the well-developed statutory language for aggregating theft offenses, section 971.365 lacks adequate standards for those who enforce the laws and adjudicate guilt so the statute can be applied consistently. *Id.*

Conclusion and Relief Requested

For all the foregoing reasons, West respectfully requests that this Court reverse the circuit's order and remand with instructions that the circuit court grant him an evidentiary hearing on his motion to withdraw his guilty plea.

Dated this 4th day of May, 2023.

Electronically signed by: Rex Anderegg
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1,924 words, as counted by Microsoft Office 365.

I further hereby certify that if an appendix is filed with this brief, it complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, any appendix filed with this brief contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

Finally I further certify that if the record is required by law to be confidential, the portions of the record included in any appendix filed with this brief are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of May, 2023.

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