STATE OF WISCONSIN

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

DISTRICT I

Case No. 2023AP1883-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

REBECCA L. PINEDA,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO VACATE A JUDGMENT OF CONVICTION AND WITHDRAW A PLEA ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MILTON L. CHILDS, SR., PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

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INTRODUCTION

In 2019, Defendant-Respondent Rebecca L. Pineda pled no contest to charges of theft and identity theft related to her embezzlement of over $10,000 from her employer, The Packing House restaurant. At sentencing, through counsel, she apologized to the owners of The Packing House, saying that she was sorry, wanted to make things right, and wanted to move on with her life. Approximately 18 months later, however, Pineda moved to vacate her convictions and withdraw her pleas. First, she argued that her plea counsel was ineffective for failing to retain a forensic accountant to review and possibly challenge the evidence against her. Second, she argued that the State violated her constitutional and statutory rights by failing to turn over supposedly exculpatory evidence of a connection between one of the owners of The Packing House, C.W., and Detective Dale Bormann, a trustee serving on the board of the Milwaukee Police Association ("MPA") who investigated Pineda's crimes. Pineda claimed that links between C.W. and the MPA, including a donation made to C.W.'s political campaign by the MPA and an award granted to The Packing House by the MPA, could have been used to impeach Detective Bormann at trial. The circuit court rejected Pineda's ineffective assistance of counsel claim, but it granted her motion with respect to the undisclosed connection between C.W. and the MPA, concluding that the State should have turned over evidence of the connection.

The circuit court's decision was wrong. As an initial matter, Pineda's claim that the State's failure to turn over certain evidence violated her due process rights is a nonstarter because those rights are trial rights that do not apply when a defendant pleads to committing crimes. Moreover, Pineda failed to establish that the evidence in question was material such that the State's failure to turn it

over constituted either a due process violation or a statutory discovery violation. This Court should reverse.

ISSUE PRESENTED

Did the circuit court err when it granted Pineda's motion to vacate her convictions and withdraw her pleas based on an alleged discovery/due process violation?

The circuit court granted the motion, concluding that evidence of the connection between C.W. and Detective Bormann should have been turned over before Pineda's plea.

This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts, which can be fully set out in the parties' briefs.

STATEMENT OF THE CASE

This appeal originates out of the criminal conviction of Pineda on charges related to her embezzlement from her place of employment, The Packing House restaurant. Pineda began working at The Packing House as an office manager in May of 2016. (R. 2:2.) In that role, Pineda handled "daily business matters, accounts receivable, accounts payable, payroll, human resource matters and related paperwork, and depositing money." (R. 2:2.) By December of 2016, C.W., owner of The Packing House, noticed that a deposit was short and began looking into it. (R. 2:2.) After uncovering multiple "fraud schemes" perpetrated by Pineda, C.W. reported the matter to police. (R. 2:2.)

In a criminal complaint dated March 9, 2018, the State charged Pineda with three counts: theft by an employee

exceeding $10,000, fraudulent use of a credit card in an amount between $5000 and $10,000, and identity theft, each with a habitual criminality repeater enhancer. (R. 2:1–2.) According to the criminal complaint, Pineda embezzled over $20,000 from The Packing House in five ways. (R. 2:2.) First, Pineda stole cash that should have been deposited in the restaurant's bank account. (R. 2:2.) Second, Pineda made unauthorized purchases on credit cards stolen from the restaurant's safe. (R. 2:2.) Third, Pineda wrote unauthorized checks to pay for her own personal liabilities, including tax payments and unemployment compensation liabilities. (R. 2:2.) Fourth, Pineda inflated her paychecks by increasing her wages without authorization. (R. 2:2.) Finally, Pineda eliminated payroll taxes from her paycheck, increasing her take home pay. (R. 2:2.)

After the embezzlement was discovered and Pineda's employment at The Packing House was terminated, "her employer received an email that appeared from an attorney threatening to take [C.W.] to court." (R. 2:2.) However, the attorney denied writing the email and stated that Pineda was not a client, and evidence showed that Pineda "misappropriated the attorney's identity to threaten [C.W.] and demand more money from her former employer." (R. 2:2.)

The charges each included a habitual criminality enhancer owing to Pineda's previous conviction of a felony for forging a check in Virginia. (R. 2:8.)

When interviewed by police about the embezzlement, Pineda claimed that she had not stolen any cash or pretended to be an attorney. (R. 2:8.) She further claimed that C.W. "gave her permission to use financial transaction cards (including a 'gas' card) and write company checks to pay her personal debts with the Wisconsin Departments of Revenue and Workforce Development, and otherwise use money for her own benefit." (R. 2:8.)

On September 23, 2019, however, Pineda pled no contest to the theft and identity theft counts. (R. 34:7–8.) The count related to fraudulent use of a credit card was dismissed and read in pursuant to a plea agreement with the State. (R. 34:2.) The plea agreement also provided that Pineda would pay at least $14,000 in restitution and that the State would recommend concurrent sentences of 12 to 15 months of initial confinement followed by a total of 60 months of extended supervision. (R. 34:2.) Pineda stipulated to the use of the criminal complaint as the basis for her pleas. (R. 34:12.)

The case went to sentencing in February of 2020. (R. 50:1.) Pineda declined her right to allocution, but her attorney stated that Pineda wanted to apologize: "[Pineda] wants me to tell the court and [C.W.] this. That she is sorry. That she wants to make this right. And she wants to continue to move forward with life." (R. 50:52.) The Milwaukee County Circuit Court[1] sentenced Pineda to a combined total of two years of initial confinement and five years of extended supervision. (R. 50:61.) The court also ordered roughly $14,000 in restitution to The Packing House. (R. 50:62.)

Pineda filed a motion for postconviction relief in August of 2021. (R. 89.) The motion raised two arguments for why she should be allowed to withdraw her no contest pleas. (R. 89:1.) First, Pineda alleged that her plea counsel was ineffective for failing to hire a financial expert to review the information in the criminal complaint and for stipulating to the complaint as the factual basis for the charges. (R. 89:1.) Second, Pineda alleged that she became aware after sentencing that Detective Bormann was a trustee of the MPA, which had endorsed C.W.—owner of The Packing House—for alder and made a contribution to his campaign in the spring of 2016. (R. 89:6.) Additionally, a social media page for C.W.'s

[1] The Honorable David A. Hansher presided over Pineda's plea and sentencing.

campaign contained a picture of C.W. and Detective Bormann together, ostensibly as part of an endorsement of C.W. for alder, and the MPA issued The Packing House a "Business Appreciation Award" during the pendency of the investigation. (R. 89:6.) She contended that the State's failure to disclose this information constituted both a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), and a discovery violation under Wis. Stat. § 971.23(1)(h). (R. 89:14–15.)

The circuit court[2] held a series of hearings and took testimony from multiple witnesses, including C.W., Detective Bormann, Pineda, Pineda's plea counsel, and Pineda's proffered financial expert. (R. 133; 135; 136; 137; 138; 139; 140; 162.) Relevant to this appeal, Pineda agreed that the case was a matter of her word against C.W.'s, not Detective Bormann's. (R. 139:26–27.) Detective Bormann, for his part, testified that he did not recall having met C.W. previously, nor were his actions during the investigation altered in any way by the relationship. (R. 138:87–88.) As the circuit court later noted, Detective Bormann was a trustee of the MPA for 11 years, which also made him a member of the MPA board during that time. (R. 163:7.) He did not remember, however, the board's decision to financially contribute to C.W.'s political campaign. (R. 163:7–8.)

The circuit court found all testimony to be credible with the exception of certain aspects of Pineda's testimony. (R. 163:6–11.) It denied Pineda's motion with respect to the ineffective assistance of counsel claim, concluding that Pineda's plea counsel did not perform deficiently because he had reviewed and believed he understood the financial aspects of the case and because he had ample discussions with Pineda about the case and about hiring an expert. (R. 163:13.)

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[2] The Honorable Milton L. Childs presided over Pineda's postconviction proceedings.

However, the court granted Pineda's motion with respect to the State's failure to disclose information about C.W., Detective Bormann, and the MPA. (R. 163:16.) The court concluded that the information should have been provided to Pineda earlier, given that the plea occurred so closely in time to when trial was scheduled, and that the State's failure to do so violated Pineda's due process rights. (R. 163:16.) The court mentioned the discovery statute as well, but it did not specifically rule whether the State's nondisclosure was a violation of the rules of pretrial discovery. (R. 163:16.) It vacated Pineda's convictions, allowed her to withdraw her pleas, and scheduled the case for further proceedings. (R. 163:16.)

The State now appeals.

STANDARD OF REVIEW

In an appeal from a circuit court's order on a motion for plea withdrawal based on the claim that the State failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), the reviewing court accepts the trial court's findings of fact unless clearly erroneous, but the ultimate determination of whether a *Brady* violation occurred presents a question of law subject to de novo review. *State v. Lock*, 2012 WI App 99, ¶ 94, 344 Wis. 2d 166, 823 N.W.2d 378. This Court's analysis of an alleged discovery violation is also a question of law to be reviewed independently on appeal. *State v. (Ronell) Harris*, 2008 WI 15, ¶ 15, 307 Wis. 2d 555, 745 N.W.2d 397. In determining whether a manifest injustice has occurred, the appellate court reviews the circuit court's findings of fact under the clearly erroneous standard of review, but independently determines whether those facts amount to a manifest injustice. *See State v. Taylor*, 2013 WI 34, ¶ 25, 347 Wis. 2d 30, 829 N.W.2d 482.

ARGUMENT

The circuit court erred when it granted Pineda's motion to vacate her convictions and allowed her to withdraw her pleas.

A. A defendant seeking to withdraw her pleas after sentencing must establish the existence of a manifest injustice.

When a defendant seeks to withdraw her plea after sentencing, she must prove by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. "The clear and convincing standard for plea withdrawal after sentencing, which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists.'" *Taylor*, 347 Wis. 2d 30, ¶ 48 (citation omitted). One way for a defendant to demonstrate a manifest injustice is by demonstrating the denial of a constitutional right. *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

A defendant who takes her case to trial "has a constitutional right to material exculpatory evidence in the hands of the prosecutor." *State v. DelReal*, 225 Wis. 2d 565, 570, 593 N.W.2d 461 (Ct. App. 1999); *Brady*, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). The burden to show a *Brady* violation rests with the defendant. *State v. (Kevin) Harris*, 2004 WI 64, ¶ 13, 272 Wis. 2d 80, 680 N.W.2d 737. A *Brady* violation has three elements: (1) the evidence must be favorable to the accused as either exculpatory or impeaching; (2) "the evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) the evidence must be material in that prejudice ensued from its

suppression. *Id.* ¶ 15 (citation omitted). But the prosecutor is not required to share all possibly useful information with the defendant. *Id.* ¶ 16 (citing *United States v. Ruiz*, 536 U.S. 622, 629 (2002)). The evidence, either exculpatory or impeaching, must be material because it could reasonably put the whole case in such a different light that it would undermine confidence in the outcome. *Id.* ¶¶ 13–15 & n.12. The mere possibility that information might help the defense does not make it material. *Id.* ¶ 16. Moreover, the due process right created by *Brady* does not extend to plea negotiations; it is solely a trial right. *See Id.* ¶ 17 (citing *Ruiz*, 536 U.S. at 633).

To withdraw a guilty plea after sentencing on non-constitutional grounds, a defendant still must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice; that is, that there are "serious questions affecting the fundamental integrity of the plea." *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44. This, too, is a heavy burden that can only be met by clear and convincing evidence. *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993).

Wisconsin Stat. § 971.23 sets out the pre-trial discovery obligations of parties to a criminal prosecution. Under Wis. Stat. § 971.23(1)(h), the State must disclose exculpatory evidence that is favorable to the accused because it tends to establish his innocence or impeaches the credibility of a State's witness. *Harris*, 272 Wis. 2d 80, ¶¶ 12, 27 & n.9–10 (noting that the evidence subject to disclosure under Wis. Stat. § 971.23(1)(h) includes the evidence subject to disclosure under *Brady*) (citations omitted). However, in order to be subject to disclosure, the evidence in question must be material because it undermines confidence in the outcome; in other words, the failure to disclose must be so serious that there is a reasonable probability that the undisclosed evidence would have resulted in a different verdict. *Id.* ¶¶ 13–15, 27. Unlike a *Brady* violation, the State's violation of its

discovery obligations under Wis. Stat. § 971.23(1)(h) can apply in a plea context to justify a defendant's withdrawal of her plea. *See Harris*, 272 Wis. 2d 80, ¶ 37.

B. Pineda's due process claim under *Brady* fails because it involves a trial right under which she cannot obtain relief because she pled to the charges against her.

There can be no disagreement that Pineda pled no contest to the charges in this case before going to trial. Indeed, the record demonstrates that Pineda accepted the offered plea agreement in advance of the scheduled trial date. (R. 99:1.) Thus, Pineda cannot obtain postconviction relief by asserting what is solely a trial right. As *Harris* makes clear, "due process does not require the disclosure of material exculpatory impeachment information before a defendant enters into a plea bargain." *Harris*, 272 Wis. 2d 80, ¶ 17. Therefore, Pineda's claim that there was a violation of her due process rights in this way is a legal impossibility. The circuit court's holding to the contrary was wrong.

The circuit court seemed to base its conclusion that there was a due process violation on the timing of Pineda's pleas, which were entered shortly before trial was set to begin. Apparently, the circuit court believed that because trial was impending, the State committed a due process violation by failing to turn over the evidence in question. But there are at least two problems with the circuit court's ruling in this regard. First, it ignores the fact that Pineda agreed to plead guilty[3] to the charges before the hearing, making it was reasonable for the State to consider its constitutional obligations under *Brady* fulfilled at that point in light of the

[3] Pineda wavered at the plea hearing, but she eventually agreed to enter no contest pleas to the charges instead of the guilty pleas to which she initially agreed.

supreme court's clear holding in *Harris*. Second, it misses the entire point of *Harris*, which explains that the due process right under *Brady* does not apply to plea negotiations because of the nature of pleas, not because of their timing with respect to trials. *Harris*, 272 Wis. 2d 80, ¶¶ 21–23. The nature of Pineda's pleas here is unchanged: although they may have been entered with Pineda laboring under a "form[ ] of misapprehension," *Ruiz*, 536 U.S. at 630, they were nevertheless "factually justified, desired by [Pineda], and help[ed] to secure the efficient administration of justice." *Id.* at 631. The proximity to trial with which the pleas were entered is irrelevant.

At bottom, *Harris* is clear that a defendant cannot obtain relief under *Brady* following the entry of a plea. Neither this Court nor the circuit court can overrule or disregard that clear holding. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). To the extent that the circuit court granted Pineda's requested relief on the basis of there being a due process violation, this Court should reverse.[4]

C. Pineda's claim of a discovery violation fails because she failed to establish that the evidence was material.

In addition to finding a due process violation, the circuit court also briefly commented that "non-disclosure violated section 971.23" when granting Pineda's postconviction motion. (R. 163:16.) This aspect of the circuit court's decision was wrong, as well. As discussed, in order to establish her entitlement to relief, Pineda needed to show that the undisclosed evidence was material. *Harris*, 272 Wis. 2d 80,

[4] The State further maintains that there was no due process violation because the evidence in question was not material. Because materiality is also a component of the alleged statutory discovery violation, for the sake of brevity, the State does not repeat its argument on the lack of materiality in this section.

¶¶ 13–15. However, the undisclosed evidence here—that Detective Bormann was a trustee of the MPA, which donated money to C.W.'s political campaign some time before the investigation into Pineda's crimes; that the MPA awarded The Packing House with a "Business Appreciation Award"; and that a photograph of Detective Bormann with C.W. was used on the social media page of C.W.'s campaign[5]—was not material. Indeed, the circuit court's decision was completely silent on materiality.

At best, the undisclosed evidence establishes a tangential relationship between Detective Bormann and C.W. via the MPA. And at best, that relationship potentially could have been used to impeach Detective Bormann at trial—if he testified—by suggesting that he may have had a motive to support C.W.'s claims against Pineda.[6] But as Pineda acknowledged during the postconviction proceedings, a jury's determination of guilt in this case would have come down to weighing Pineda's credibility against C.W.'s, not against Detective Bormann's. (R. 139:26–27.) Regardless of whether Detective Bormann may have simply accepted certain things C.W. said as fact for purposes of his investigation, the ultimate question of Pineda's guilt would not have been established at trial by Detective Bormann simply repeating the things C.W. told him, as that would have violated the rule against hearsay. In short, this additional material's limited

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[5] With regard to the photograph specifically, it also bears mention that there is no indication that the State was in possession of the photograph at any point during the pre-plea proceedings. Rather, it seems that Pineda located the photograph on a third party's social media page and provided it to the court with her postconviction motion.

[6] It also bears mention, however, that Detective Bormann credibly testified that he had no recollection of meeting C.W. before the investigation began "until well after" (R. 163:8), so it is highly unlikely that cross-examination on this topic would have swayed a jury at all.

ability to impeach Detective Bormann would have been virtually meaningless in the broader context of the case against Pineda when the State's entire case would have rested on C.W.'s testimony, not Detective Bormann's. It was therefore immaterial.

Pineda nevertheless argued that she would not have pled to the charges and instead would have insisted on going to trial had she known about the connection between Detective Bormann and C.W. While the circuit court did find Pineda's testimony to be credible "for the most part" (R. 163:11), it is frankly beyond belief that any defendant would hinge their nonacceptance of a plea deal on such a tenuous, tangential piece of impeachment evidence. The State submits that it is far more likely that Pineda simply regrets her pleas. But a defendant's regret over their choice to plead to charges is not a "manifest injustice" and does not create serious questions about the integrity of the pleas; it therefore cannot form the basis for plea withdrawal. *See Dillard*, 358 Wis. 2d 543, ¶ 36. And in any event, it is not clear that a defendant's testimony that she would not have pled to charges had she known about possible impeachment evidence is sufficient to establish materiality warranting plea withdrawal. In the newly discovered evidence context, for example, "[e]vidence which merely impeaches the credibility of a witness does not warrant a new trial." *Greer v. State*, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968). There is no reason why recently uncovered impeachment evidence should warrant a new trial when the defendant has already admitted guilt.

* * *

The circuit court's decision in this case is troubling. Detective Bormann credibly testified that he did not recall at the time of the investigation into Pineda's thefts from The Packing House that there was any connection whatsoever between himself and C.W. or the restaurant. (R. 138:87–88.) Yet the court vacated Pineda's convictions and allowed her to

withdraw her pleas based solely on the notion that the State should have turned information about the connection over to the defense before Pineda entered her pleas. On one hand, the information was perhaps technically in the State's possession in that it involved Detective Bormann's personal dealings. *See State v. DeLao*, 2002 WI 49, ¶ 24, 252 Wis. 2d 289, 643 N.W.2d 480 ("The State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecutor's office."). On the other hand, however, it is not clear how Detective Bormann can be expected to have disclosed information about his personal dealings that he did not remember. This is perhaps the biggest indication that the evidence in question was immaterial: if Detective Bormann did not draw any connection between himself, the MPA, and C.W., there is no way that connection could have had any feasible impact on the investigation, and thus, no way that it could have had any feasible impact on the outcome of a trial.

At the end of the day, it is unreasonable to conclude that the State was required to turn over information that Detective Bormann could not recall prior to Pineda entering a plea agreement. The information was not material to Pineda's guilt or punishment. This Court should reverse.

CONCLUSION

For the reasons discussed, this Court should reverse the circuit court's order granting Pineda's motion to vacate her judgment of conviction and allowing her to withdraw her pleas.

Dated this 15th day of April 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,858 words.

Dated this 15th day of April 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of April 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING