COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1464 **Cir. Ct. No. 1991CF911360**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGELIO MEDRANO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Rogelio Medrano appeals an order of the circuit court denying his third motion to vacate his conviction and withdraw his plea to one count of possession with the intent to deliver twenty-five to one hundred grams of cocaine. Medrano asserts he is entitled to withdraw his plea because the

court failed to properly advise him of the possible immigration consequences of his plea, as required by WIS. STAT. § 971.08(1)(c).[1] The court denied the motion, stating that the law on which Medrano relied was not retroactively applicable to his case and, in any event, his motion was precluded. We agree with the circuit court and affirm.

¶2 Medrano, a Mexican national, entered his guilty plea on June 24, 1991. He signed a plea questionnaire and waiver of rights form. Paragraph 12 of the form states:

> **Deportation:** If I am not a citizen of the United States of America, I know that upon a plea of guilty or no contest and a finding of guilty by the Court for the offense(s) for which I am charged in the criminal complaint or information, I may be deported, excluded from admission to this country, or denied naturalization under federal law.

During the plea colloquy, Medrano acknowledged that his attorney had gone over the form with him in English and Spanish. Medrano also acknowledged that he understood the form. The court did not personally advise Medrano of the possible deportation consequences, but it did accept his plea and adjudicated him guilty. Medrano received an eighteen-month prison sentence and did not appeal.

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[1] WISCONSIN STAT. § 971.08 states, in relevant part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> ….
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

¶3 On June 10, 1992, Medrano moved to vacate the judgment of conviction and withdraw his plea. He alleged that because the court had failed to follow WIS. STAT. § 971.08(1)(c) and immigration officials had begun deportation proceedings against him, § 971.08(2) entitled him to plea withdrawal.[2] The State argued that the plea questionnaire, which advised Medrano of the deportation consequences and which Medrano had signed and acknowledged, adequately provided the statutory warnings. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 826–828, 416 N.W.2d 627, 629 (Ct. App. 1987). The court denied the motion.[3] Medrano did not appeal and was deported.

¶4 Medrano re-entered the United States. On March 24, 1993, Medrano filed a new motion to vacate his conviction and withdraw the plea, citing the same grounds as in his first motion. The court denied the motion because "this motion, having previously been heard and denied, is totally without merit and will not be entertained by the court again." Medrano did not appeal and was deported.

¶5 On February 11, 2008, Medrano filed his third and present motion. This time, he submitted an affidavit swearing he was unaware of his plea's consequences. He asserted that harmless error analysis applied to his situation and

[2] WISCONSIN STAT. § 971.08(2) states:

> If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

[3] The judgment roll indicates the motion was denied. However, there is no hearing transcript or written order in the Record.

because the affidavit sufficiently demonstrated prejudice, withdrawal was necessary. He also argued that under newer case law, the plea questionnaire alone was insufficient to meet the WIS. STAT. § 971.08(1)(c) personal admonition requirement. The court denied the motion because it concluded the cited case law was not retroactive and, further, the issue had been decided twice before.[4] Medrano now appeals.

¶6 Resolution of this case requires a brief overview of the case law relating to plea withdrawal when there is a WIS. STAT. § 971.08(1)(c) violation by the circuit court. Prior to 1993, we essentially permitted circuit courts to rely on plea questionnaire forms to advise defendants of the rights they were surrendering by entering a plea. *See* ***Moederndorfer***, 141 Wis. 2d at 827–828, 416 N.W.2d at 629. We stated that a "defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting." ***Id***, 141 Wis. 2d at 828, 416 N.W.2d at 630.

¶7 In 1993, we addressed the import of the WIS. STAT. § 971.08(2) language directing that a court "shall" vacate a conviction and permit plea withdrawal if the court has failed to personally give the deportation warning. ***State v. Chavez***, 175 Wis. 2d 366, 370, 498 N.W.2d 887, 888 (Ct. App. 1993). We noted that § 971.08(2), read against WIS. STAT. § 971.26, resulted in an

[4] The court initially denied the motion because it appeared the Department of Homeland Security was seeking to deport Medrano based on illegal re-entry into the United States. Medrano moved for reconsideration and demonstrated that his deportation was because of his conviction and prior deportation order. The court set a briefing schedule, asking the parties to address both the motion for reconsideration and the original motion to vacate. After briefing, the court implicitly granted the motion for reconsideration, then denied the original motion.

ambiguity, because the latter section states that no "indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." *See* WIS. STAT. § 971.26; ***Chavez***, 175 Wis. 2d at 370-371, 498 N.W.2d at 888. Based on the § 971.26 language, we concluded that harmless error applied to § 971.08(1)(c) violations. ***Chavez***, 175 Wis. 2d at 370-371, 498 N.W.2d at 888–889. A plea questionnaire could, at that time, show a plea was knowing, intelligent, and voluntary, despite the lack of a personal admonition. ***Id.***

¶8 A defendant who seeks to withdraw a guilty plea because a circuit court failed to follow mandated plea procedures must make a *prima facie* showing of that failure. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986). In 1994, we concluded that WIS. STAT. § 971.08(1)(c) is unambiguous in its personal admonition requirement, so where the Record reveals the circuit court failed to personally provide the deportation warning, the defendant will be able to make the required *prima facie* showing. ***State v. Issa***, 186 Wis. 2d 199, 209, 519 N.W.2d 741, 745 (Ct. App. 1994). However, we again observed the WIS. STAT. § 971.26 ambiguity and again concluded harmless error can apply. ***Issa***, 186 Wis. 2d at 210–211, 519 N.W.2d at 745–746. Significantly, though, we noted that reliance on the plea questionnaire alone would be insufficient to satisfy § 971.08(1)(c). ***Issa***, 186 Wis. 2d at 201, 519 N.W.2d at 742.

¶9 In 2002, the harmless error standard was ruled inapplicable; if the circuit court failed to personally give the WIS. STAT. § 971.08(1)(c) admonition, and if the defendant could show the plea was likely to result in deportation, the circuit court was required to vacate the conviction and permit plea withdrawal. ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 192–193, 646 N.W.2d

1, 10. In 2004, ***Douangmala*** was deemed a rule of criminal procedure, not substantive law, and therefore would not apply retroactively. ***State v. Lagundoye***, 2004 WI 4, ¶2, 268 Wis. 2d 77, 82–83, 674 N.W.2d 526, 528.

¶10 Medrano attempted to invoke ***Issa***, arguing the plea questionnaire alone was insufficient to show he had been properly advised of the possible deportation consequences of his plea. The circuit court concluded that ***Issa*** could not provide Medrano with relief. It determined that the ***Lagundoye*** analysis, which determined ***Douangmala*** was a non-retroactive rule of procedure, would likewise apply to ***Issa***'s holding about plea questionnaires, rendering that case's application prospective only. Further, the court concluded, because ***Issa*** did not provide relief, the motion for withdrawal was barred by the law of the case, or issue preclusion.[5]

¶11 We agree with the circuit court here that Medrano's current motion is barred by issue preclusion, although we conclude preclusion applies regardless of whether ***Issa*** should apply retroactively. "The doctrine of issue preclusion forecloses relitigation of an issue that was [actually] litigated in a previous proceeding involving the same parties or their privies." ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 447, 665 N.W.2d 391, 394. Issue prelusion may foreclose an issue of evidentiary fact, ultimate fact, or of law. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 485–486, 683 N.W.2d 485, 493. Application of issue preclusion requires us to evaluate whether there is

[5] The circuit court discussed whether Medrano's claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Escalona*** applies only to constitutional and jurisdictional issues or errors. *See* WIS. STAT. § 974.06. This case involves a statutory error.

an identity of parties, which is a question of law, and whether application of issue preclusion is consistent with fundamental fairness, which is a mixed question of fact and law. ***Masko***, 264 Wis. 2d 442, ¶¶5–6, 665 N.W.2d at 394–395.

¶12 Here, the parties to the three motions are the same and the issue of law is unchanged. Further, the *second* motion was already denied as precluded. However, at no point did Medrano challenge that determination. We will not permit him to relitigate the issue now.[6]

¶13 Additionally, Medrano does not appear to directly challenge the circuit court's application of ***Lagundoye*** to ***Issa***. Instead, he argues that ***Lagundoye*** was wrong to deem ***Douangmala*** to be procedural instead of substantive. He places particular emphasis on the fact that ***Douangmala*** was unanimously decided and ***Lagundoye*** was not. This court cannot revise supreme court holdings. ***Cook v. Cook***, 208 Wis. 2d 166, 189–190, 560 N.W.2d 246, 256 (1997). To the extent that there is any conflict between ***Douangmala*** and ***Lagundoye***, the latter in time prevails. *See* ***Kramer v. Board of Edu. of Menomonie Area***, 2001 WI App 244, ¶20, 248 Wis. 2d 333, 344, 635 N.W.2d 857, 862. The division of the court's vote is irrelevant.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Interestingly, ***Issa*** was decided over fourteen years before Medrano sought relief based on the case. *See* ***State v. Issa***, 186 Wis. 2d 199, 209, 519 N.W.2d 741, 745 (Ct. App. 1994).