COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1352-CR **Cir. Ct. No. 00-CF-218**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT K. SEAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed in part; vacated in part and cause remanded.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 NETTESHEIM, P.J. WISCONSIN STAT. § 302.095(2) (1999-2000)[1] prohibits "[a]ny officer or other person" from delivering, or procuring to be delivered, to "any inmate" articles that are contrary to the rules and regulations of the prison. Scott K. Seal appeals from a judgment of conviction for two counts of party to the crime of delivering illegal articles to an inmate, as a repeat offender, contrary to WIS. STAT. §§ 302.095, 939.05 and 939.62(1)(b). The first count was based on Seal's procurement of a cell phone, a pair of pants, a shirt, a magazine and three cassette tapes; the second count was based on his procurement of cigarettes, alcohol and money. At the time of these events, Seal himself was an inmate. Seal argues that the trial court erred by denying his motion to dismiss the charges following a bindover at the preliminary hearing. Specifically, Seal contends that an inmate cannot be charged pursuant to § 302.095(2) with delivering contraband to himself.

¶2 We conclude that WIS. STAT. § 302.095(2) does not apply to an inmate who, as a party to the crime, delivers illegal contraband to himself or herself. We therefore vacate Seal's conviction on the first count. However, we affirm Seal's conviction on the second count because the evidence demonstrates that he shared the contraband alcohol with another inmate. Because our vacation of Seal's conviction on count one undermines the premise upon which the trial court sentenced Seal and upon which the State entered into a plea agreement with Seal, we authorize the following proceedings on remand: the trial court may resentence Seal on count two; or the State may seek reinstatement of a charge

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

dismissed under the plea agreement. If the dismissed count is reinstated, Seal shall be allowed to withdraw his no contest plea to count two.

FACTS

¶3 On May 1, 2000, the State charged Seal with three counts of party to the crime of solicitation to smuggle contraband to a prisoner as a repeat offender. The complaint alleged that Seal had admitted to receiving contraband, including alcohol, cassette tapes, clothes and protein supplements from a prison guard, Derek M. Fuller, at the Oshkosh Correctional Institution. Fuller also admitted to bringing the items into the prison for Seal, including cigarettes, vodka and rum, a cell phone and charger, a pair of pants, a shirt, a magazine, and three cassette tapes. According to Fuller, Seal would arrange for items to be sent to Fuller's residence and then Fuller would deliver the items to Seal.

¶4 At the preliminary hearing, the State presented testimony from Brian Miller, the correctional officer who discovered the contraband in Seal's cell. James Busha of the Oshkosh police department additionally testified regarding his interview of Seal. According to Busha, Seal admitted to receiving alcohol and had told Busha that he drank it and shared it with his cellmate. Based on this evidence, Seal was bound over for trial.

¶5 The State filed an information alleging the same three counts charged in the complaint. The first count alleged that Seal, while a party to the crime, "procured to be delivered or had in his possession with intent to deliver to an inmate … or concealed in a prison articles with intent that he shall obtain the same," a cell phone and charger, a pair of pants, a shirt, a magazine and three cassette tapes; the second count alleged the same with respect to "vodka, cigarettes and $50" and the third count alleged the same with respect to "vodka and rum."

¶6 Seal moved to dismiss the information, arguing that he could not be charged, as party to the crime, with delivering property to himself as an inmate in a state prison. Following a hearing, the trial court denied Seal's motion, ruling that the charges were not precluded as a matter of law and that whether the charges were appropriate under the circumstances presented a factual question to be determined once the evidence was presented.

¶7 Thereafter, Seal and the State entered into a plea agreement whereby Seal pled no contest to the first two counts of delivering illegal articles and the State dismissed the third count. The trial court approved the agreement and, following two sentencing hearings, sentenced Seal to eight years on the first count and placed Seal on probation under an eight-year imposed and stayed sentence on the second count.[2] Seal appeals.

DISCUSSION

¶8 WISCONSIN STAT. § 302.095(2) governs the delivery of articles to inmates. It provides in relevant part:

> **(2)** Any officer *or other person* who delivers or procures to be delivered or has in his or her possession with intent to deliver *to any inmate* confined in a jail or state prison, or who deposits or conceals in or about a jail or prison, or the precincts of a jail or prison … any article or thing whatever, with intent that any inmate confined in the jail or prison shall obtain or receive the same, or who receives from any inmate any article or thing whatever with intent to convey the same out of a jail or prison, contrary to the rules or regulations and without the knowledge or permission … of the warden or superintendent of the prison, in the case of a prison, shall be imprisoned for not more than 3 years or fined not more than $500.

[2] The sentence on the first count was consecutive to the sentence Seal was then serving.

Id. (emphasis added). Seal contends that this statute does not apply to an inmate who delivers contraband to himself or herself and, therefore he was improperly bound over on a crime not known to the law.

¶9 On a threshold basis, the State contends that Seal has waived his right to challenge the trial court's ruling by thereafter entering no contest pleas pursuant to the plea agreement. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983) (a plea of guilty or no contest, when knowingly and voluntarily made, waives all nonjurisdictional defects and defenses); *see also* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (defendant challenging bindover at preliminary hearing may obtain relief only before trial). However, Seal's argument contends that the State charged him with offenses not known to the law—the delivery of contraband by an inmate to himself. This argument implicates the trial court's subject matter jurisdiction, and it cannot be waived. ***Mack v. State***, 93 Wis. 2d 287, 295, 286 N.W.2d 563 (1980). We therefore turn to the merits of Seal's argument.

¶10 The construction of WIS. STAT. § 302.095(2) presents a question of law that we review de novo. *See* ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997) (questions of statutory construction are questions of law which we review de novo). Our purpose in construing § 302.095 is to discern the intent of the legislature, and to this end we first consider the language of the statute. *See* ***Setagord***, 211 Wis. 2d at 406. If the language clearly and unambiguously sets forth the intent of the legislature, we apply that language to the facts at hand. ***Id***. Statutory language is clear and unambiguous when it has only one reasonable meaning, and, conversely, it is ambiguous when it is capable of being reasonably understood in two or more different ways. ***Id***. We avoid constructions of statutory language that are unreasonable.

¶11 Seal argues that an inmate cannot deliver contraband to himself or herself and therefore WIS. STAT. § 302.095(2) does not apply in this setting. However, Seal's argument does not discriminate between the differing factual bases for the two counts to which he pled no contest. Count one of the information concerned the contraband that Seal did not share with a third person, whereas count two of the information concerned, in part, the alcohol contraband that Seal shared with his cellmate. Therefore, we must consider both whether § 302.095(2) applies to an inmate who delivers alcohol to another inmate *and* whether the statute applies to an inmate who is charged as a party to the crime of delivering contraband to himself or herself.

¶12 We begin with count two of the information which relied on the preliminary hearing evidence that Seal was complicit in the procurement of vodka and other items and that he shared the vodka with his cellmate. WISCONSIN STAT. § 302.095(2) prohibits "[a]ny officer *or other person*" from delivering contraband to "any inmate." (Emphasis added.) The phrase "other person" is certainly broad enough to take in Seal, even though he also is an inmate. And Seal's cellmate certainly qualifies as "any inmate." While it may be uncertain whether the statute proscribes the delivery of contraband by an inmate to himself or herself, we hold that the statutory language clearly and unambiguously applies to an inmate who is complicit in the delivery of contraband to another inmate. Absent any indication that the legislature intended to exclude inmates as "other persons" in such a setting, we hold that Seal falls into that category. Therefore, as to count two, the evidence at the preliminary hearing established a reasonable probability that Seal violated § 302.095(2).

¶13 Next we consider whether WIS. STAT. § 302.095(2) applies to an inmate who procures contraband for delivery to himself or herself. The State

argues that the statute allows for such a crime; Seal argues that it does not. We conclude that the statute is capable of being reasonably understood to support the competing interpretations of both parties. Although we do not have any informative legislative history, we can confidently state from the facial language of the statute that the legislature intended to punish "[a]ny officer or other person" who delivered contraband to inmates. However, we cannot state with equal confidence that the legislature sought to extend that punishment to inmates who were complicit in the delivery of such contraband to themselves.[3] The most we can say is that the legislature did not *expressly and unambiguously* extend the statute to such a situation. Clearly the legislature knew how to distinguish between "inmates" and "other persons" in this setting since the statute uses both terms in the same sentence. Moreover, the legislature uses the term "inmate" when designating the recipient of the contraband, but does not use that term when designating the provider of the contraband. If the legislature had intended to include "inmates" in the category of "other persons" in a setting where the inmate delivers, or procures to deliver, contraband to himself or herself, it had the opportunity to clearly say so. It did not.

¶14 Our holding that the statute is ambiguous in this setting in no way conflicts with our concurrent holding that the statute is clear and unambiguous with respect to count two which alleged that Seal delivered contraband to another inmate. It is a fundamental principle of statutory construction that "a statute may be ambiguous in one factual setting and unambiguous in another." ***Reyes v.***

[3] We note, however, that the possession of the contraband found in Seal's cell is subject to discipline by the department of corrections. *See* WIS. ADMIN. CODE §§ DOC 303.43 and 303.47 (possession of intoxicants and miscellaneous contraband).

Greatway Ins. Co., 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999). "Permitting the facts of a case to gauge ambiguity simply acknowledges that reasonable minds can differ about a statute's application when the test is a constant but the circumstances to which the text may apply are kaleidoscopic." ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659.

¶15 The rule of lenity, developed in the federal courts, holds that where a criminal statute is ambiguous, it should be interpreted in a defendant's favor. ***State v. Kittilstad***, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999). The rule of lenity is "echoed in the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" ***Id***. (citation omitted). As noted, the legislature could have resolved this ambiguity by expressly making it a crime for an inmate to deliver or procure to be delivered items to himself or herself. The legislature did not do so. We therefore hold that WIS. STAT. § 302.095(2) does not criminalize an inmate's delivery of contraband to himself or herself.

¶16 Our holding, however, does not fully dispose of this issue since Seal was charged as a party to the crime pursuant to WIS. STAT. § 939.05. A person is a party to the commission of a crime if the person: (1) directly commits the crime, (2) intentionally aids and abets the crime, or (3) conspires to commit the crime. ***Id***.[4] The information in this case only alleges that Seal was a party to the crime; it

[4] WISCONSIN STAT. § 939.05 provides in relevant part:

> **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it ….

(continued)

does not further specify in what capacity Seal acted as a party to the crime. We have already held that Seal could not directly commit the crime. Therefore, we turn to a discussion of whether Seal could have aided and abetted a crime not known to the law. The mere statement of the issue reveals the answer. If the underlying conduct does not constitute a crime, then conspiring or aiding and abetting such conduct also does not constitute a crime.

¶17 While not dispositive, we find ***State v. Smith***, 189 Wis. 2d 496, 525 N.W.2d 264 (1995), helpful in resolving this issue. Smith was charged with conspiracy to deliver a controlled substance based upon his attempt to sell cocaine to a woman. ***Id***. at 498-99. Smith and the woman agreed that the exchange would occur in Smith's automobile. ***Id***. at 500. Instead of showing up at the appointed time and place, the woman tipped off the police to the impending transaction. ***Id***. However, the police search of Smith's vehicle failed to turn up any controlled substance. ***Id***. The State charged Smith with conspiracy alleging that he conspired with the woman to deliver cocaine, and Smith pled guilty to the charge. ***Id***. He later sought to withdraw his plea on the ground that there was no factual basis for the conspiracy conviction. ***Id***. The trial court denied the motion. ***Id***.

> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it….

While the information alleged that Seal acted as a party to the crime, it did not specifically allege the capacity in which Seal acted.

¶18 On appeal, the supreme court analyzed the issue from the perspective of the woman, who was the prospective buyer of the cocaine. The court observed, "[T]here was no claim or proof that the buyer intended to further deliver the cocaine which would [have been] a felony." ***Id***. at 501. Noting that the evidence "only show[ed] that Smith offered to deliver cocaine to [the woman] for her personal use," the court concluded that "the legislature did not intend that the State could, by adding a conspiracy charge to the possession charge, create a felony charge against the buyer who buys an amount of cocaine consistent with personal use where there is not even a claim by the State that the buyer intended to further deliver the cocaine to a third party." ***Id***. at 502, 504. Since the evidence did not establish such a conspiracy, the court reversed Smith's conviction. ***Id***. at 504.

¶19 This case is factually different from ***Smith*** in that here Seal is *both* the provider *and* recipient of the contraband whereas Smith was only the provider of the controlled substance. Nonetheless, we find the core rationale of the supreme court instructive. The supreme court ruled that Smith, as the provider, could not be charged with conspiring to deliver controlled substances because the evidence did not establish the underlying predicate crime—that the woman intended to deliver the controlled substance to a third party. ***Id***. at 501-02.

¶20 An analogous situation exists here with respect to count one. In this case, the underlying predicate "crime" is the delivery of contraband by an inmate to himself. As we have already held, this crime is not known to the law. Therefore, Seal, in his role as the provider, could not be charged as a party to that

crime. Thus, the evidence at the preliminary hearing did not establish a reasonable probability that Seal had violated WIS. STAT. § 302.095(2) as a party to the crime.[5]

¶21 Next we turn to the remedy. Where a defendant enters a guilty or no contest plea to a crime that does not exist, the remedy is vacation of the conviction. *See* ***State v. Briggs***, 218 Wis. 2d 61, 73, 579 N.W.2d 783 (Ct. App. 1998). We therefore vacate Seal's conviction on count one of the information. However, our vacation of Seal's conviction on count one does not conclude this matter since our action carries potential consequences for the trial court, the State and Seal to consider.

¶22 The trial court sentenced Seal on two counts of delivering contraband to an inmate as a party to the crime pursuant to a plea bargain by which the State dismissed the third count. On the first count, which we vacate, the court sentenced Seal to eight years in prison. On count two, which we affirm, the court granted Seal probation under an imposed and stayed sentence of eight years.

¶23 At the sentencing hearing, the trial court stated:

> So recognizing the seriousness in the context of the entire situation, the nature of these offenses, the victims

[5] We stress that we are not holding that the defendant must be capable of committing the underlying crime before a charge of party to the crime may lie. In fact, the law generally is otherwise. In ***State v. Tronca***, 84 Wis. 2d 68, 267 N.W.2d 216 (1978), the State charged Tronca as a party to the crime of misconduct in public office based upon his conduct as the "go between" for the public officer and a third party. ***Id***. at 85. Because he was not himself a public officer, Tronca contended that he could not be charged as a party to the crime. ***Id***. at 83. The supreme court disagreed, saying that "the party-to-a-crime statute is applicable unless legislative intention to the contrary is either explicit or implicit in the statute." ***Id***. at 84.

This case does not run afoul of ***Tronca*** because there the predicate crime—misconduct by the public officer—was known to the law and the evidence demonstrated such crime. Here, the alleged predicate crime—delivery of contraband by an inmate to himself—is not known to the law.

> beyond, the ripple effect throughout the whole system, in the context of all these prior opportunities to change, I find that to not incarcerate would unduly depreciate the seriousness of the offenses and that, in light of all of these factors I have mentioned, that the minimum would be the maximum. Consequently, the total length of your sentence as to Count No. 1 is 8 years.... As to Count No. 2 … you're sentenced to 8 years, consecutive to Count No. 1 and any prior …. [H]owever, execution of the sentence will be stayed and defendant placed on probation for a period of 8 years.

¶24 When a sentencing court would have structured sentences differently had it known of the defect in the original sentences, we allow the trial court, in its discretion, to resentence the defendant if the premise and goals of its original sentence have been frustrated. ***State v. Holloway***, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996). Here, there obviously is a defect in the original sentence on count one since the trial court was without authority to sentence on a crime not known to the law. Nonetheless, the court's sentencing remarks indicated the need for incarceration. Our vacation of Seal's conviction on count one may frustrate the sentencing court's premise and goals since Seal was incarcerated on that count. We therefore remand this case to give the court the opportunity, *if it so chooses*, to resentence Seal on count two. We stress that we are not in any sense suggesting that the trial court must resentence Seal on count two or that the court's grant of probation on that count was inappropriate. We leave that determination to the proper exercise of discretion by the trial court.

¶25 As to the State, we observe that this case was resolved by a plea agreement whereby the State agreed to dismiss the third count of the information. Recently, this court remanded a plea bargained case where one of the convictions was reversed because of a faulty plea hearing. On remand, we authorized the trial

court to vacate all convictions and to reinstate the original charges.[6] *See* ***State v. Lange***, 2003 WI App 2, ¶37 ___ Wis. 2d ___, 656 N.W.2d 480. Relying on ***State v. Briggs***, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), we stated that when a reversed judgment is the product of a plea bargain and where the remaining conviction "was not sufficient to satisfy the interests of the State," a remand was appropriate for the State to consider whether it would seek reinstatement of the charges dismissed under the plea agreement. *See* ***Lange***, 2003 WI App 2 at ¶¶31-37.

¶26 It may be that our vacation of Seal's conviction on count one does not "satisfy the interests of the State" per ***Lange***, and therefore the State may desire to reinstate the dismissed count. We do not mandate that action by the State. We simply observe that our action may prompt the State to seek trial court approval for such action. This is a matter addressed to the State's prosecutorial discretion and our remand allows for the exercise of that prosecutorial discretion *if the State should so choose*.[7]

¶27 Finally, as to Seal, if the State seeks to reinstitute the dismissed count, and if the trial court grants that request, such would undo the parties' plea agreement. Under those circumstances, Seal would then be entitled to withdraw the no contest plea he entered to count two under the plea agreement.

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[6] The primary purpose of the remand in ***State v. Lange***, 2003 WI App 2, ___ Wis. 2d ___, 656 N.W.2d 480, was to allow the State an opportunity to demonstrate that the defendant's plea was knowingly, voluntarily and intelligently entered where the defendant had satisfied his threshold burden to show that the plea was entered contrary to the requirement of WIS. STAT. § 971.08. ***Lange***, 2003 WI App 2 at ¶¶28-30. Only if the State could not meet that shifted burden did we authorize the reinstatement of the original charges. ***Id***. at ¶¶31-37.

[7] Obviously, if the State takes such action, the trial court's authority to resentence Seal on count two becomes a moot point.

CONCLUSION

¶28 We conclude that WIS. STAT. § 302.095(2) does not apply to an inmate who delivers contraband to himself or herself as a party to the crime. We therefore vacate Seal's conviction and sentence on the first count. However, we further conclude that § 302.095(2) can be applied to an inmate who delivers contraband to another inmate. We therefore affirm Seal's conviction on the second count. We remand to allow the trial court, the State, and Seal to consider the various options we have described.

By the Court.—Judgment affirmed in part; vacated in part and cause remanded.

Recommended for publication in the official reports.