COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1850-CR **Cir. Ct. No. 98-CF-68**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL L. DAWBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 VERGERONT, P.J. Russell Dawber appeals a judgment of conviction and sentence for the manufacture of tetrahydrocannabinols (THC) and possession of THC with intent to deliver, which followed revocation of a diversion agreement. He challenges the revocation of the agreement on a number of grounds, seeking vacation of the convictions and reinstatement of the agreement.

We conclude: (1) the plain terms of the diversion agreement provided for revocation if any condition was violated; (2) the definition of "violation of … criminal law" provided in the agreement is ambiguous, but the trial court did not err in not holding an evidentiary hearing because Dawber did not request an evidentiary hearing or make an argument that would necessitate the resolution of factual issues; (3) revocation of the agreement did not violate Dawber's right to due process; and (4) revocation did not violate public policy.

¶2 We also conclude Dawber's right to be protected from double jeopardy was not violated by an error in an order suspending his operator's license. Accordingly, we affirm the judgment of conviction and the sentence.

BACKGROUND

¶3 Dawber was charged in a criminal complaint with the felonies of manufacturing THC in an amount greater than fifty plants under WIS. STAT. § 961.41(1)(h)3 (2001-02)[1] and WIS. STAT. § 961.50, and possession of THC with intent to deliver an amount greater than fifty plants under § 961.41(1m)(h)3 and § 961.50. Represented by counsel, he subsequently entered into a plea agreement under which he agreed to plead guilty to the two charges in the complaint and to three misdemeanor charges for possession of THC; in return the State agreed to make a specific sentencing recommendation on the three misdemeanors and to ask the court to withhold conviction on the two felony counts and dismiss those upon successful completion of five years of a diversion agreement.

[1] All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

¶4 The diversion agreement, which Dawber and his attorney both signed, stated: "If any of the conditions are violated as set forth below, it is understood that this agreement will be revoked and this matter will be brought back to court for entry of judgment of conviction and sentencing." One of the terms that Dawber agreed to was:

> To commit no further violations of state or federal criminal law. For purposes of this agreement a 'violation' will be found if a court of law finds probable cause to believe that the defendant has committed an offense. Violations of the law do not include traffic forfeitures of Chapter 300's of the Wisconsin Statutes.

On December 9, 1998, the court approved the diversion agreement, accepted pleas to the three misdemeanor charges, entered a judgment of conviction on each of those, and sentenced Dawber consistent with the parties' joint recommendation.

¶5 On June 26, 2001, the State filed a motion to revoke the diversion agreement on the ground that it was filing a criminal complaint charging Dawber with physical abuse to a child and substantial battery contrary to WIS. STAT. § 948.03 and WIS. STAT. § 940.19, respectively. That complaint was filed, and at the initial appearance on July 9, 2001, the court stated that it was "satisfied the complaint states probable cause for the offenses charged, that of physical abuse of a child and substantial battery…." According to Dawber's account in the presentence report, the charges arose out of an altercation with his sixteen-year-old stepson in which he "head butted" his sixteen-year-old stepson and broke his stepson's nose after his stepson had hit him. At the conclusion of the initial appearance, the court took up the State's motion:

> THE COURT: Okay. Is there an argument as to why I should not revoke that agreement upon the finding of probable cause for a new offense?

> DEFENSE ATTORNEY: Yes, Your Honor. We would ask that that matter be held in abeyance pending the outcome of this case. As I think I've indicated, there's more to this case than meets the eye.
>
> Secondly, we just received the complaint today and the motion just a few days ago and would ask for a reasonable opportunity to respond. We feel the most appropriate way would be to defer this until the conclusion of these proceedings.
>
> THE COURT: All right, I'll go along with that; we'll defer this – we'll tag it with the other case. We'll just tag it along with the other case.

¶6 On August 8, 2001, just before the preliminary hearing on the new charges, the court again took up the motion to revoke the diversion agreement. The prosecutor asked the court to revoke the agreement because the court had found probable cause at the initial appearance and that constituted a breach of the agreement. The court asked Dawber's counsel for his comments and counsel stated that he had not had notice the motion on the diversion agreement was going to be taken up; he had understood the court was holding it in abeyance pending resolution of the new charges. This discussion then took place:

> THE COURT: Well, I suppose you'd have to get a transcript to persuade me that that was the case because I don't recall that one way or the other. What would be the reason to do that in light of the provision of the agreement that says that if the court finds probable cause that he committed a new offense during the agreement, it's revoked.
>
> DEFENSE ATTORNEY: We anticipate –
>
> THE COURT: You don't – frankly the only reason I can think of is if you think you're going to negotiate something here.
>
> DEFENSE ATTORNEY: That's a possibility and we didn't receive notice that this was going to be heard today.
>
> THE COURT: Well, it's not very complicated, but do you have any objection to the court holding that in abeyance

> frankly for the sole reason of leaving something on the table that the two of you can talk about by way of an agreement?
>
> PROSECUTOR: I do at this point, Your Honor, because the last time we did appear, the court indicated that we would take up both matters on this appearance on today's date.
>
> THE COURT: …. Let me see if a minute sheet tells me anything. Okay, this is what – all the minute sheet says, it says defer motion to tag along with 2001 CF 61. So I'll defer to the minute sheet and what that indicates to me is that the court is saying we will resolve it at some point, but not necessarily today.
>
> So while I'll state for the record the court is satisfied that there's grounds to revoke the agreement because there's been a finding of probable cause, I'm not going to enter the conviction at this time because I think we ought to leave that open pending the resolution of this other case. And you know, I don't see how the State's disadvantaged by doing that.

¶7 A jury trial on the two new charges took place in November 2001. The jury was instructed that self-defense was an issue in the case and was given the instruction on self-defense. While the jury was deliberating, the prosecutor raised the motion to revoke the diversion agreement and the following dialogue took place:

> THE COURT: We might as well [take up the motion].
>
> DEFENSE ATTORNEY: Your Honor, I'd ask for an opportunity to file a brief in response to that.
>
> THE COURT: What would the brief be about? The diversion agreement provides in relevant part as follows at paragraph one: he agrees not to commit further violations of state or federal criminal law. For purposes of this agreement, a violation will be found if a court of law finds probable cause to believe that the defendant has committed an offense. Which the court found in the charging document that was filed.
>
> DEFENSE ATTORNEY: Yes, Your Honor. However, the transcript of the plea required that he not commit any

> further offenses and also it's an equitable matter. This is a court of equity –
>
> THE COURT: Oh, no it's not, not when it comes to a question of contract law. This is an issue of contract law, as I understand it.
>
> The court's granting the motion to revoke the diversion agreement to this extent; there's any equitable issues, those had to be addressed with the State in some sort of potential plea negotiation. Apparently that didn't come to any fruition, so the motion is granted.

¶8 The jury returned verdicts of not guilty on the two new charges.

¶9 On the day of the sentencing for the two THC felonies, Dawber filed an "Objection to Entry of Conviction and Imposition of Sentence" in which he stated that he "renews his objection" to the revocation of the plea agreement and entry of conviction on these two charges and lists the following grounds for his objection: due process; equal protection; the acquittal; the State's failure to establish at a hearing proof of a material and substantial breach of the agreement; violation of the privilege of self-defense, which is against public policy; and ambiguity of the plea agreement. The prosecutor referred to this objection during sentencing and the court asked Dawber's counsel if he wanted to say anything further about that. Dawber's counsel answered: "Nothing further, Your Honor. It's a renewal of prior objections we made." Later, during Dawber's counsel's comments on sentencing, he referred to the fact Dawber had been acquitted of the two charges that led to the revocation of the diversion agreement, and he described the wording of the agreement as "ambiguous." The court disagreed, stating that the agreement was clear on what "violation" meant and, when the court found that the complaint stated probable cause at the initial appearance, that satisfied the definition of "violation."

¶10 The court sentenced Dawber to a fine and costs and to a concurrent six-month suspension of his license on each count concurrent.

DISCUSSION

¶11 We address first Dawber's contention that the diversion agreement was wrongfully revoked. Several of his arguments concern the construction of the diversion agreement: that his conduct was insufficient to justify revocation of the agreement because it was not a material and substantial breach; that the standard of probable cause is ambiguous; and that he never intended that his agreement to "commit no further violations of the law" included legally privileged conduct.

¶12 In construing the agreement, we draw on contract principles. ***State v. Windom***, 169 Wis. 2d 341, 348, 485 N.W.2d 832 (Ct. App. 1992). We enforce unambiguous contracts as written. ***Id.*** Contractual language is ambiguous only when it is reasonably susceptible to more than one construction. ***Id.*** at 348-49. Whether a contract is ambiguous presents a question of law, which we decide de novo. ***Id.*** at 349. If a contract is ambiguous, then the intent of the parties is an issue for a fact-finder. ***Columbus Propane v. Wisconsin Gas***, 2002 Wis App 9, ¶15, 250 Wis. 2d 582, 596, 640 N.W.2d 819.

¶13 This agreement states that if "any of the conditions are violated as set forth below, it is understood that this agreement will be revoked and this matter will be brought back to court for entry of judgment of conviction and sentencing." This unambiguous language does not require a material or substantial breach before revocation, but plainly provides for revocation if "any of the conditions are violated." The cases on which Dawber relies for his argument that a material and substantial breach of the diversion agreement is required do not concern a written agreement containing this language. *See* ***State v. Rivest***, 106 Wis. 2d 406, 411,

316 N.W.2d 395, 398 (1982); ***State v. Jorgensen***, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (1987); ***State v. William***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 517, 637 N.W.2d 733. These cases do not support his argument that we should not enforce the plain language of this diversion agreement. Therefore, the question is whether Dawber violated the condition in this agreement relating to violations of criminal law.

¶14 We agree with Dawber that the definition of "violation" is ambiguous: "if a court of law finds probable cause to believe that the defendant has committed an offense." First, there are numerous standards for "probable cause" in criminal law. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999) ("'probable cause' does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings"). In addition, the language "*if a court finds* probable cause" could be reasonably construed to mean that there must be an evidentiary hearing in this case in which the court finds probable cause based on evidence presented; but it could also be reasonably construed to refer to court proceedings on the new offense at which the court finds probable cause—either at the initial appearance, considering only the complaint, or at the preliminary hearing, based on the evidence presented then. There is additional ambiguity, we conclude, when there is a self-defense defense to the new offense: "probable cause" based on a complaint or after a preliminary hearing would not likely take into account an affirmative defense, but it is reasonable to construe "probable cause" in the context of this agreement as encompassing consideration of that defense.

¶15 Because of these ambiguities, we conclude that, had Dawber requested an evidentiary hearing before the trial court to establish the parties' intent with respect to the definition of "violation," he would have been entitled to

one. However, Dawber did not request an evidentiary hearing in the trial court or present an argument that would necessitate resolving factual issues. As we understand his argument, he is contending, first, that he was not provided an opportunity to do so, and, second, that the court was obligated to hold an evidentiary hearing whether he requested one or not.

¶16 We reject Dawber's argument that he did not have an opportunity to request an evidentiary hearing or present an argument that would necessitate resolving factual issues. At the initial appearance, when the court specifically asked for an argument why the diversion agreement should not be revoked upon the court's finding of probable cause based on the complaint, Dawber's counsel did not make an argument based on the construction of the agreement, but asked only that the issue of revocation be deferred until conclusion of the proceedings on the new offense. Based on the next discussion of this matter, just before the preliminary hearing,[2] Dawber was on notice that, in the court's view, its finding of probable cause at the initial appearance had satisfied the terms of the agreement, and the only reason it was not entering a judgment of conviction was to allow the opportunity for an agreement between the parties. Nevertheless, Dawber did not then, or during the next several months leading up to the trial on the new charges, request an evidentiary hearing or make an argument against revocation that would necessitate an evidentiary hearing.

¶17 When the next discussion took place, on November 30, 2001, Dawber's counsel asked for an opportunity to brief and, when asked what the

[2] It appears from the record that a preliminary hearing did take place on the new charges, and we infer the court found probable cause to bind over because a trial took place.

issues would be, identified two: (1) that at the plea hearing the oral description of the agreement did not include the definition of violation; and (2) that equity played a role. The Objection to Entry of Conviction and Imposition of Sentence that Dawber filed on the day of sentencing was the first mention that there were ambiguities in the agreement and that an evidentiary hearing should have been held, but this objection did not ask the court to reconsider its entry of the conviction and allow an evidentiary hearing, and it did not develop the arguments in the objection. At sentencing, Dawber's counsel made clear he was not asking the court to treat the objection as a motion, and he referred to the ambiguity of the agreement only in the context of arguing for a sentence of supervised probation. We conclude Dawber had adequate opportunity to request an evidentiary hearing or to present an argument that necessitated resolving factual issues.

¶18 In his argument that the trial court was obligated to hold an evidentiary hearing even if he did not request one, Dawber relies on ***State v. Rivest***, 106 Wis. 2d at 411. In ***Rivest***, there was an evidentiary hearing on factual disputes concerning exactly what the plea agreement was and whether the defendant's conduct had breached the agreement to testify truthfully. In this situation, in contrast, the issue concerned the construction of a written diversion agreement. ***Rivest*** does not provide a holding or a rationale that would require an evidentiary hearing when this is the issue and when the defendant does not request an evidentiary hearing or identify any factual issues that need resolution. In other contexts in criminal proceedings a defendant is generally not entitled to an evidentiary hearing, even if he or she requests one, unless there is a factual issue to resolve. *See* ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999) ("We agree with the Seventh Circuit that 'a court does not have to hold an evidentiary hearing on a motion just because a party asks for one. An evidentiary hearing is necessary

only if the party requesting the hearing raises a significant, disputed factual issue.' (Citation omitted.)") We see no reason why that is not true in this context.

¶19 Because Dawber never asked the court for an evidentiary hearing or presented an argument that would necessitate an evidentiary hearing to resolve factual issues, we conclude the trial court did not err in failing to hold an evidentiary hearing. Without an evidentiary hearing, we are unable to resolve the arguments concerning the construction of ambiguous terms in the agreement that Dawber asks us to resolve. Generally, we do not address issues on appeal unless they were first raised in the trial court. ***Maclin v. State***, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979). Although we have the authority to do so, we exercise that authority only where there are no factual issues that need resolution. ***Id.*** at 29. We have chosen on this appeal to address arguments that were not made in the trial court to the extent the record permits. However, we cannot decide the proper construction of the ambiguous definition in the contract without the factual record and findings by the trial court that would have resulted from an evidentiary hearing. It is not clear that Dawber is requesting a remand for an evidentiary hearing, but in any event we see no justification here for such a remand. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1997) (the rule requiring parties to present their arguments to the trial courts prevents the unnecessary use of judicial resources that results if parties may raise a general issue at the trial level with the knowledge that the details can later be relitigated on appeal or remand should they not be successful in the trial court). Accordingly, we conclude Dawber is not entitled to relief on the ground that the court did not properly construe the terms of the diversion agreement.

¶20 Alternatively, Dawber argues that, regardless of the definition of "violation" in the diversion agreement, it offends due process to apply a probable

cause standard, however defined, because that standard is too low. Dawber asserts that it is not fair to revoke the diversion agreement because he was acquitted of the two new charges. However, the diversion agreement plainly does not require conviction of a crime for revocation but provides a lesser standard. Dawber does not provide any authority or argument grounded in due process jurisprudence that would support the invalidation of the condition to which he agreed solely because it did not require conviction of a crime.

¶21 Dawber makes a similar argument based on public policy. He contends that, because self-defense is privileged conduct and a defense to criminal prosecution for that conduct under WIS. STAT. § 939.45(2), it is against public policy to apply the definition of "violation" in the diversion agreement in this situation. We are not persuaded by this argument. We have difficulty in drawing from the legislature's policy that self-defense is privileged conduct a policy regarding the appropriate standard for "violation of … criminal law" in a diversion agreement. Typically diversion agreements contain a condition that the defendant not violate any criminal law. The standard that should apply for determining whether this has occurred implicates the various purposes of plea agreements and diversion agreements from the perspective of both the prosecutor and the defendant. We see no basis in § 939.45(2) for concluding that the legislature has expressed any policy regarding such matters.

¶22 We conclude that the trial court did not err in revoking the diversion agreement and Dawber is not entitled to a vacation of his sentence and reinstatement of the diversion agreement.

¶23 We next address Dawber's contention that he was subject to multiple punishments for the THC felonies contrary to the double jeopardy clause.[3] He bases this brief argument on the fact that the order of license suspension entered on December 9, 1998, showed a conviction for the two THC felonies, as well as the three misdemeanors, and ordered a six-month suspension, concurrent, for each of those five convictions. Then, when he was sentenced for the THC felonies after the revocation of the diversion agreement, that sentence included a six-month suspension for each conviction, concurrent.

¶24 It is evident that the reference to the two THC felonies on the December 9, 1998 order of license suspension was in error: no judgment of conviction was entered at that time for the two THC felony charges—that was the whole point of the plea hearing that took place on that date. The judgment of conviction entered on that date refers only to the three misdemeanors and shows concurrent six-month-license suspensions for each. Dawber does not explain why he did not have the error corrected long ago. In any event, the error did not result in any additional punishment, because the six-month suspensions were all concurrent. In the absence of any authority or developed argument, we decline to consider a mistake on a court order that did not in any practical way affect Dawber to be a punishment for purposes of the double jeopardy clause.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] Both the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution protect against double jeopardy.