

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2003

Cornelia G. Clark
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. 02-3350-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CM-2032

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUILLERMO GUTIERREZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Guillermo Gutierrez appeals from a postconviction order denying his motion to withdraw his guilty plea to a charge of retail theft as a repeat offender. Gutierrez claims that the prosecution in this case

¹ This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

violated his double jeopardy protection. Like the trial court, we reject Gutierrez's argument. We affirm the postconviction order.

Procedural History

¶2 Although this appeal concerns the postconviction order issued by Judge David M. Bastianelli, the case really turns on the State's prior prosecution of Gutierrez in a proceeding before Judge Bruce E. Schroeder. We therefore focus on that proceeding.

¶3 The State originally charged Gutierrez with one count of retail theft as a repeat offender. The case was assigned to Judge Schroeder. Represented by counsel, Gutierrez pled not guilty and the matter was scheduled for a jury trial. On the day of the scheduled jury trial, Gutierrez advised Judge Schroeder that he no longer contested the retail theft charge, but he did contest the repeater allegations. Accordingly, Judge Schroeder conducted a plea colloquy and Gutierrez pled guilty. Judge Schroeder then scheduled the matter for a sentencing and fact-finding hearing to allow the State to submit evidence of Gutierrez's prior convictions. Noting that a presentence report would likely present information concerning Gutierrez's prior convictions, Judge Schroeder requested one be prepared. Importantly, Judge Schroeder made no statement accepting Gutierrez's guilty plea.

¶4 Before the sentencing and fact-finding hearing, Gutierrez's attorney was permitted to withdraw. Thereafter, Gutierrez filed a series of pro se motions seeking to withdraw his guilty plea. The cumulative thrust of these motions was that Gutierrez did not understand the plea proceedings.

¶5 At the sentencing and fact-finding hearing, Gutierrez appeared with new counsel, who indicated to Judge Schroeder that she joined in Gutierrez's pending motion to withdraw the plea. Counsel also stated her understanding that if Judge Schroeder granted the motion, the State would move to dismiss the complaint without prejudice and then file a new complaint. The State did not oppose Gutierrez's motion.

¶6 Judge Schroeder then personally inquired of Gutierrez whether he understood the consequences of allowing the plea withdrawal. In particular, Judge Schroeder advised Gutierrez that the case would be returned to its original posture. The judge also stated his recollection that he had never accepted Gutierrez's guilty plea during the plea hearing. Gutierrez confirmed that he understood the consequences of his plea withdrawal request, but he contended that Judge Schroeder had accepted his guilty plea. Gutierrez based this statement on the fact that Judge Schroeder had requested a presentence report. During the ensuing exchange, Judge Schroeder warned Gutierrez that if the court granted the plea withdrawal request, "any jeopardy that you might have had as a result of the plea is going to be given up."

¶7 Judge Schroeder then had the court reporter read back the proceedings at the plea hearing. That information confirmed Judge Schroeder's recollection that he had not accepted Gutierrez's guilty plea at the plea hearing. Based on that fact, Judge Schroeder stated, "So I don't think there is a question of jeopardy in this case of any kind."

¶8 Gutierrez's counsel then spoke off the record with Gutierrez, following which she reported that Gutierrez wished to proceed with the motion to withdraw his plea. Counsel confirmed her previous understanding that if the

motion were granted, the State would dismiss the complaint without prejudice and would file a new complaint. In response, the State again confirmed that it did not oppose Gutierrez's motion, and further confirmed defense counsel's statement that the instant complaint would be dismissed and a new complaint would be filed.

¶9 Judge Schroeder then granted Gutierrez's motion to withdraw his guilty plea. Next, the judge asked if there was any objection to the State's motion to dismiss without prejudice. Gutierrez's counsel objected, contending that the State should file an amended complaint as opposed to dismissing without prejudice and filing a new complaint. In response, Judge Schroeder invited the State to file an amended complaint. However, the State responded that a fresh complaint would clarify the charges by breaking out Gutierrez's conduct into two charges—one charge of retail theft and a second charge of concealing property. In addition, the State advised that the new complaint would correct information and eliminate confusion in the original complaint regarding Gutierrez's prior convictions. Finally, the State indicated that the new complaint recited a further prior conviction. Although he had invited the State to file an amended complaint, Judge Schroeder nonetheless granted the State's motion to dismiss without prejudice.

¶10 Later the State filed the instant complaint, which alleged two counts of retail theft based on allegations that Gutierrez both concealed and took and carried away the merchandise. This case was assigned to Judge Bastianelli. Pursuant to a plea agreement, Gutierrez pled guilty to the charge of taking and carrying away the merchandise and the State dismissed the concealment charge.

¶11 Postconviction, Gutierrez brought a motion contending that the prosecution in the instant case violated his federal and state double jeopardy

protections. Judge Bastianelli disagreed, ruling that jeopardy had not attached because Judge Schroeder had never accepted Gutierrez's guilty plea. In addition, Judge Bastianelli ruled that even if jeopardy had attached, any double jeopardy concerns were eliminated when Judge Schroeder granted Gutierrez's motion to withdraw his guilty plea. Consequently, Judge Bastianelli denied Gutierrez's postconviction motion. Gutierrez appeals.²

Discussion

¶12 Gutierrez claims that jeopardy attached because Judge Schroeder accepted his guilty plea. Gutierrez concedes, as he must, that Judge Schroeder never expressly accepted his guilty plea at the plea hearing. However, he contends that Judge Schroeder's request for a presentence report constituted an implicit acceptance of the guilty plea. Gutierrez points to WIS. STAT. § 972.15(1) which states, "*After a conviction* a court may order a presentence investigation, except that the court may order ... a presentence investigation *only after a conviction for a felony.*" (Emphasis added.) Since Judge Schroeder requested a presentence report, Gutierrez reasons that Judge Schroeder had accepted his guilty plea and deemed him convicted of the charge.

¶13 We reject Gutierrez's argument for two reasons. First, as Judge Schroeder correctly recognized, WIS. STAT. § 972.15(1) authorizes the court to order a presentence investigation only after a felony conviction. Since the charge against Gutierrez was a misdemeanor, Judge Schroeder prudently did not *order* a

² Gutierrez's guilty plea did not waive his postconviction right to claim a double jeopardy violation. See *State v. Hubbard*, 206 Wis. 2d 651, 655-57, 558 N.W.2d 126 (Ct. App. 1996).

presentence investigation; instead the judge *requested* an investigation. Judge Bastianelli held to the same effect in his postconviction ruling: “However, the fact that a presentence was requested is not the same thing as making the inference the guilty plea was accepted because you can order only a presentence on that vein. That may be true on a felony but not on a misdemeanor in this particular stage.”

¶14 Second, the transcript from the plea hearing unequivocally demonstrates that Judge Schroeder never accepted Gutierrez’s guilty plea following the plea colloquy. Instead, given Gutierrez’s challenge to the alleged prior convictions, Judge Schroeder deferred any further action on Gutierrez’s guilty plea until the contested matter of the prior convictions had been resolved. A guilty plea does not trigger double jeopardy. *State v. Waldman*, 57 Wis. 2d 234, 237-38, 203 N.W.2d 691 (1973). Instead, jeopardy attaches when a circuit court accepts a defendant’s plea of guilty. *State v. Comstock*, 168 Wis. 2d 915, 937-38, 485 N.W.2d 354 (1992). Therefore, jeopardy did not attach under the unique circumstances of the case before Judge Schroeder.

¶15 Moreover, even if jeopardy had attached, it was rescinded when Judge Schroeder granted Gutierrez’s motion to withdraw his guilty plea. “[A] defendant who succeeds in getting his first conviction set aside cannot argue successfully that the double jeopardy provisions bar a second prosecution.” *Day v. State*, 76 Wis. 2d 588, 591, 251 N.W.2d 811 (1977).

¶16 Here, Gutierrez wanted it both ways: he wanted to withdraw his plea and, at the same time, he wanted to dictate the terms of the future proceedings. In essence, Gutierrez contends that the State is irrevocably committed to the charge stated in the complaint when a defendant succeeds in withdrawing a guilty plea. However, the law does not vest a defendant with such

absolute control over the future proceedings. Instead, the law has its own rules governing the amendment of charges and the dismissal of a complaint without prejudice. The State may amend a complaint after arraignment with leave of the court. *See* WIS. STAT. § 971.29(1); *Whitaker v. State*, 83 Wis. 2d 368, 373-74, 265 N.W.2d 575 (1978). Also with leave of the court, the State may dismiss a criminal prosecution and file a new complaint.³ *State v. Larsen*, 177 Wis. 2d 835, 836, 503 N.W.2d 359 (Ct. App. 1993).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ As we have noted, Judge Schroeder signaled that he would allow the State to file an amended complaint. Thus, Gutierrez would have had to answer to the additional charge of concealing merchandise whether it was alleged in an amended complaint or a new complaint.