COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2004

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. 04-0755-CR **Cir. Ct. No. 03CF000063**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN THOMAS LAPEAN,

DEFENDANT-APPELLANT.

APPEAL from an order and a judgment of the circuit court for St. Croix County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded.*

¶1 CANE, C.J.[1] Alan LaPean appeals from an order denying specific performance of a deferred prosecution agreement (DPA) and from a judgment of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

conviction for disorderly conduct. He argues the trial court erred by concluding his DPA was unenforceable. We agree and reverse the order and judgment.

BACKGROUND

¶2 On March 7, 2003, the State charged LaPean with one count of causing substantial bodily harm with intent to cause bodily harm, contrary to WIS. STAT. 940.19(2). The charge stemmed from a February 25 high school hockey game in which LaPean was a player. At the end of the game and after LaPean's team lost, LaPean hit a hockey puck that cleared the rink's seven-foot tall Plexiglas wall and traveled into the grandstands, which then hit an opposing team's fan, David Jensen. Jensen was taken to the hospital and incurred $517.61 in medical bills to treat his injuries. At the time of the incident, LaPean was an eighteen-year-old high school senior with no prior criminal record.

¶3 On May 7, prior to the preliminary hearing, the State drafted and entered into a DPA with LaPean. It provided in full:

> **WHEREAS**, the State of Wisconsin through the St. Croix County District Attorney's Office has charged the above defendant, ALAN LAPEAN, with ONE COUNT OF SUBSTANTIAL BATTERY, in violation of § 940.19(2) of the Wisconsin Statutes, in case number 03CF64; and
>
> **WHEREAS**, the above action is now pending between the State of Wisconsin and the defendant ALAN LAPEAN, and;
>
> **WHEREAS**, the State of Wisconsin and the defendant wish to resolve the matter without a criminal trial;
>
> **IT IS HEREBY AGREED AS FOLLOWS:**
>
> 1) The case will be placed in "deferred prosecution" status with the Court for a period of 12 months.
>
> 2) The defendant agrees to the following:

a. The defendant will not engage in any criminal behavior;

b. The defendant will send a written letter of apology to the victim.

c. The defendant will do 50 hours of community service. The defendant will make his own arrangements and submit written documentation to the District Attorney's Office upon completion.

d. The defendant will make restitution to the victim, David Jensen, for all of his medical expenses.

3) The bail/bond agreement in this case remains in effect during the pendency of this agreement.

4) The alleged victim in this case has been consulted.

5) Upon successful completion of the terms cited above, the above-referenced matter will be dismissed.

The DPA was signed and dated by LaPean, LaPean's attorney, and the district attorney. Although the victim, Jensen, approved the agreement, he was not a party to it.

¶4 On May 16, the parties filed the DPA with the circuit court clerk but did not request the court to take any action on it. However, on May 20, Judge Eric Lundell, sua sponte, refused to approve the agreement, indicating he felt it was too lenient.

¶5 Judge Lundell was eventually substituted with Judge Eugene Harrington. In the meantime, LaPean made restitution, sent Jensen a letter of apology, and finished his fifty hours of community service. The only remaining term of the DPA that LaPean had to comply with was to remain crime free until May 7, 2004.

¶6 However, on July 10, 2003, just over two months after the DPA was entered into, the State informed LaPean that Jensen "changed his mind" and no longer agreed to the DPA's terms.[2] The State wrote to LaPean by letter:

> [Jensen] has indicated to me that he feels a misdemeanor along with probation is appropriate. This is contrary to what he initially indicated to me when I made the original offer. The original offer of a Deferred Prosecution Agreement with an eventual dismissal was always conditioned on the victim agreeing to this. Since he no longer agrees, I believe the original agreement is questionable, if not void.

In the letter's closing, the State suggested they should begin negotiating other dispositions.

¶7 LaPean moved for specific performance of the DPA. The trial court, Judge Harrington presiding, acknowledged DPA's are a valuable tool in resolving criminal cases, but also noted there is little guidance from Wisconsin courts regarding their enforcement. After recognizing there are statutes pertaining to DPA's that involve juveniles, WIS. STAT. § 938.245; domestic abuse, WIS. STAT. § 971.37; and the Department of Corrections, WIS. STAT. § 971.39; and that LaPean's DPA did not directly fall within any of these statutes, the court nevertheless concluded § 971.39 was indirectly applicable even though the Department of Corrections was not a party to the DPA. The court observed that § 971.39(1)(b) requires that "[t]he defendant admits, in writing, [to] all of the

[2] At the motion hearing, LaPean questioned Jensen regarding his turnabout. Jensen testified that Judge Lundell's removal from the case changed his mind and caused him "to rethink this whole thing." Jensen said he learned of Judge Lundell's removal and disagreement with the DPA only after he read about it in the local newspaper and after the prosecutor's office and the local media news contacted him. Jensen testified he now felt a misdemeanor conviction followed by a probation sentence was appropriate.

elements of the crime charged." Because LaPean's DPA did not contain this admission, the court concluded it was unenforceable.

¶8 Pursuant to a plea agreement, LaPean later pled guilty to disorderly conduct and was sentenced to one year of probation, with the possibility of expunction. *See* WIS. STAT. § 973.015. This appeal follows.

DISCUSSION

¶9 LaPean argues the trial court erred by concluding the DPA was void because it did not include WIS. STAT. § 971.39(1)(b)'s requirement that he admit to all elements of the charged crime. We agree. Whether a statute applies to a set of facts is a question of law we review independently. *See* ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 79-80, 591 N.W.2d 583 (1999).

¶10 The legislature has created several statutes governing DPA's that arise from or pertain to specific circumstances. WISCONSIN STAT. § 938.245 concerns DPA's for juveniles, while WIS. STAT. § 971.37 regulates DPA's stemming from domestic abuse scenarios and § 971.39 controls DPA's involving the Department of Corrections. Under these circumstances and in their corresponding statutes, the legislature has expressly provided the requirements a DPA must meet.

¶11 The absent provision the trial court concluded rendered LaPean's DPA unenforceable is found in WIS. STAT. § 971.39(1)(b), which requires the defendant to "admit[], in writing, [to] all of the elements of the crime charged." ***Id.*** However, as noted above, § 971.39 concerns DPA's involving the Department of Corrections, an involvement LaPean's DPA did not include. Because LaPean's DPA did not fall within the parameters of § 971.39, that section's requirements of

a DPA are not controlling here. Therefore, the DPA's failure to include LaPean's admission to the charged crimes does not render the DPA void.

¶12 Consequently, we are left with a non-statutory DPA between the State and LaPean. It is analogous to a contract, and we will apply contract law to interpret it. *See* ***State v. Windom***, 169 Wis. 2d 341, 348, 485 N.W.2d 832 (Ct. App. 1992). This presents a question of law we also review de novo. *See* ***State v. Toliver***, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994). When the terms of the contract are plain and unambiguous, we will construe the contract as it stands. ***Id.***

¶13 By the DPA's own terms, it did not require court approval nor was it contingent on continuing victim approval. It unambiguously promised to dismiss the charges against LaPean when four terms were satisfied:[3] (1) that LaPean refrain from criminal behavior for twelve months, (2) that he perform fifty-hours of community service, (3) that he write a letter of apology to Jensen, and (4) that he make restitution to Jensen. The trial court found that LaPean substantially complied with the DPA's terms and the State does not dispute that finding.

¶14 It is also undisputed that the State repudiated its obligations to perform under the DPA because Jensen no longer felt its outcome was appropriate.

[3] The DPA should have only promised the State would move to dismiss the charges, as the trial court can refuse to dismiss a case if dismissal is contrary to the public interest. *See* ***State v. Kenyon***, 85 Wis. 2d 36, 47, 270 N.W.2d 160 (1978).

Nothing in the contract allowed the State to take such action.[4] "[I]f a party renounces or repudiates the party's contractual obligations in advance of the time for performance, the other party, if not itself in default, is discharged from further performance and may either (1) stand on the contract and seek specific performance or damages or (2) rescind the contract." MICHAEL B. APFELD ET AL., CONTRACT LAW IN WISCONSIN § 12.17 (2d ed. supp. 2004). LaPean was not in default and substantially complied with his end of the bargain; thus, he seeks specific performance of his DPA. We conclude he is owed that.

¶15 The State, however, analogizes DPA's to plea agreements, and argues that just as with plea agreements, it should be able to withdraw from a DPA at any time, absent an abuse of discretion,[5] before a guilty plea is entered or until the defendant detrimentally relies on it. *See* ***State v. Beckes***, 100 Wis. 2d 1, 7-8, 300 N.W.2d 871 (Ct. App. 1980); *see also* ***State v. Scott***, 230 Wis. 2d 643, 653, 602 N.W.2d 296 (Ct. App. 1999). Here, the State observes LaPean has not pled guilty to the charged crimes and he has not detrimentally relied on the DPA insofar as he has yet to forfeit any constitutional rights. Thus, the State contends, its repudiation of the DPA is permissible. We are not persuaded.

[4] It is interesting to note that for domestic abuse DPA's, the legislature has provided that "[t]he written agreement shall be terminated and the prosecution may resume upon written notice by either the person or the district attorney to the other prior to the completion of the period of the agreement." WIS. STAT. § 971.37(2). However, given that LaPean's DPA was non-statutory, the power given by this section is not incorporated into his DPA.

[5] In ***State v. Beckes***, 100 Wis. 2d 1, 7-8, 300 N.W.2d 871 (Ct. App. 1980), we held an abuse of discretion occurs where the prosecutor "deliberate[ly] abuse[s] the assumed opportunity freely to make and withdraw plea proposals as a means of testing the wills and confidence of defendants and their counsel or of deliberate harassment."

¶16 Although plea agreements and DPA's certainly are similar in that they both dispose of a case without trial, their different resolutions require us to reject the State's argument. In a plea agreement, the State will secure a conviction for something; that is, the defendant will accept responsibility for a crime. However, as we observed in ***State v. Wollenberg***, 2004 WI App 20, ¶9, 268 Wis. 2d 810, 674 N.W.2d 916, compliance with a DPA results in dismissal of the underlying charges. Given this distinction, we conclude it is unfitting to provide the State with an unfettered ability to withdraw from an agreement it struck with a defendant that promises to move to dismiss the pending charges. To allow the State to simply change its mind after the defendant substantially complied with the DPA "comports neither with ordinary contract principles nor with the more expansive notions of fundamental fairness that control the relations between a state and its citizens." ***Arizona v. Platt***, 783 P.2d 1206 (Ariz. App. 1989).[6]

¶17 In sum, we conclude LaPean is entitled to specific performance of his DPA. Because LaPean has substantially complied with his end of the bargain, so must the State. Pursuant to the DPA's terms, the State must move to dismiss the pending charges. We note that this does not mean the trial court is bound by

[6] We note that ***Arizona v. Platt***, 783 P.2d 1206 (Ariz. App. 1989), is factually inapposite. There, the defendant entered into a DPA that was required to have the defendant waive his right against self-incrimination rights by signing a statement concerning the offense and his right to a speedy trial. The defendant also paid the cost of participating in a diversion program and other sums instead of performing community service. The State rescinded the DPA after concluding the defendant's statement concerning the offense was not sufficiently inculpatory. The court held the State could not rescind the contract simply because it wished it had not entered into the agreement at all.

Factual differences aside, the court's holding is grounded in the sound public policy of preserving fair relations between the State and the citizens; a policy we conclude is also applicable here.

the agreement. As was held in ***State v. Kenyon***, 85 Wis. 2d 36, 47, 270 N.W.2d 160 (1978), a trial court can refuse to grant a motion to dismiss a case if it finds that dismissal is contrary to the public interest. Nevertheless, the State must make a good-faith effort to comply with its agreement. *See* ***Scott***, 230 Wis. 2d at 655.

By the Court.—Order and judgment reversed and cause remanded.

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