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DISTRICT II

June 16, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP412-CR State of Wisconsin v. Christian J. Leiske (L.C. #2019CF591)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The State of Wisconsin appeals from a judgment of the circuit court dismissing multiple drug-related charges against Christian J. Leiske. The State contends that a deferred prosecution agreement (DPA) offered to Leiske complied with the terms of the statute under which it was

rendered—WIS. STAT. § 961.443(2)(b)2. (2017-18).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20). We agree with the circuit court that the State failed to comply with the terms of the statute, and thus, affirm.[2]

On September 8, 2019, Fond du Lac police were dispatched to a Fleet Farm in response to an ambulance call. There, police found Leiske on the floor. Leiske told police that he had taken heroin. Police also found heroin and a syringe in Leiske's pocket. A later search of Leiske's car produced additional heroin and paraphernalia. The State charged Leiske with one count of possession of narcotic drugs and one count of possession of drug paraphernalia.

Leiske, through counsel, filed a motion to establish immunity from prosecution pursuant to WIS. STAT. § 961.443(2)(b)2. (2017-18), contending that he was an "aided person" entitled to a DPA. Section 961.443 (2)(b)2. (2017-18) provided in pertinent part:[3]

> **(2)** IMMUNITY FROM CRIMINAL PROSECUTION AND REVOCATION OF PAROLE, PROBATION, OR EXTENDED SUPERVISION.
>
> ….
>
> (b)

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] We address similar issues to those raised here in ***State v. Davis***, No. 2019AP2164-CR, unpublished op. and order (WI App June 16, 2021). Although the procedural posture of that case is different than that here, our analysis is the same. Thus, we release both summary orders at the same time.

[3] The statute includes a sunset clause that eliminated the immunity provisions in WIS. STAT. § 961.443(2)(b) (2017-18) effective August 1, 2020. *See* sec. 961.443(2); 2017 Wis. Act 33, § 1y. Because all of the events at issue here took place before this date, the sunset provision does not impact our analysis.

> ….
>
> 2. If an aided person is subject to prosecution under [WIS. STAT. §] 946.49 for bail jumping, under [WIS. STAT. §] 961.573 for the possession of drug paraphernalia, under [WIS. STAT. §] 961.41 (3g) for the possession of a controlled substance or a controlled substance analog, or under [WIS. STAT. §] 961.69 (2) for possession of a masking agent under the circumstances surrounding or leading to an aider's commission of an act described in sub. (1) that occurs on or after July 19, 2017, the district attorney shall offer the aided person a deferred prosecution agreement that includes the completion of a treatment program.

The State stipulated to the facts in Leiske's motion, including that Leiske was an aided person, and the circuit court found that Leiske was entitled to a DPA pursuant to the statute. The court then set a deadline for the State to offer the DPA.

The State offered Leiske an agreement requiring, as relevant to this appeal, that Leiske enter pleas of guilty or no contest to the charges. The agreement provided that the "[j]udgment and sentencing for [the charges] will be suspended" for eighteen months "from the date the agreement is signed by the court, or sooner if the State moves to dismiss early." The agreement required the successful completion of certain terms and conditions. Leiske's violation of the terms or conditions would "result in entry of Judgment of Conviction and sentencing on any and all deferred counts, with both sides free to argue all issues of sentencing up to the maximum possible penalty."

Leiske moved to dismiss the charges, arguing that the State failed to offer a DPA in conformity with WIS. STAT. § 961.443(2)(b)2. (2017-18); rather, the State offered Leiske a "post-plea" agreement which required Leiske to plead guilty or no contest to the charges in order to obtain the benefit of the agreement. Leiske argued that the DPA was an "attempt[] to compel the defendant to give up his constitutional right to have the State prove him guilty beyond a reasonable doubt in order to obtain an agreement that it is statutorily obligated to offer him."

The circuit court agreed with Leiske and found that the State's DPA failed to "reflect[] a common sense reading of the statute." Specifically, the court noted that the purpose of WIS. STAT. § 961.443(2)(b)2. (2017-18) was to "defer[] the prosecution, from this point forward, with a treatment program," but that the State's DPA "calls for an additional step by the District Attorney and that additional step is a further step in the prosecution, which is a plea to the charge. I think that is anathema to the idea that there is a deferral of the prosecution. Because it isn't being deferred." When the State refused to offer an agreement without a plea, the court subsequently ordered the charges against Leiske dismissed. This appeal follows.[4]

This case presents a question of statutory interpretation that we review de novo. *See* ***State v. Clayton W. Williams***, 2014 WI 64, ¶16, 355 Wis. 2d 581, 852 N.W.2d 467. "Statutory interpretation begins with the plain language of the statute." ***State v. Dinkins***, 2012 WI 24, ¶29, 339 Wis. 2d 78, 810 N.W.2d 787. "We generally give words and phrases their common, ordinary, and accepted meaning," but a statute's plain meaning "is seldom determined in a vacuum." ***Id.*** (citation omitted). We thus interpret statutory language "in the context in which it is used; not in isolation but as part of a whole … and reasonably, to avoid absurd or unreasonable results." *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. "An interpretation that contravenes the manifest purpose of the statute is unreasonable." ***Dinkins***, 339 Wis. 2d 78, ¶29.

The Wisconsin legislature passed WIS. STAT. § 961.443 in response to the opioid and heroin crisis. The law is designed to remove disincentives drug users and others ("aiders") might

[4] Other than its argument on the merits that the prosecutor's offer complied with the statute, the State does not argue that the circuit court's dismissal was improper.

have in seeking emergency medical help for fellow users ("aided persons") who are overdosing or experiencing other life-threatening reactions to drugs. *See* ***State v. Marie Williams***, 2016 WI App 82, ¶15, 372 Wis. 2d 365, 888 N.W.2d 1.

The parties do not dispute that Leiske was an "aided person" who qualified for a DPA. The dispute centers around whether the DPA offered to Leiske, which required him to plead guilty or no contest to the charges against him, violated WIS. STAT. § 961.443(2)(b)2. (2017-18). The State contends that its DPA did not violate the statute, as a post-plea agreement can be considered a DPA, and nothing in the plain language of the statute prohibits the State's broad prosecutorial discretion to require a post-plea DPA.

As stated, WIS. STAT. § 961.443(2)(b)2. (2017-18) provided: "[i]f an aided person is subject to prosecution … [for certain drug-related crimes] … the district attorney *shall* offer the aided person a *deferred prosecution agreement* that includes the completion of a treatment program." ***Id.*** (emphasis added). The State argues that the post-plea agreement was compliant with § 961.443(2)(b)2. (2017-18) because it was an actual DPA as contemplated by the statute. Relying on ***State v. Wollenberg***, 2004 WI App 20, 268 Wis. 2d 810, 674 N.W.2d 916, (2003) Leiske counters that the State offered him a deferred *judgment* agreement, not a deferred *prosecution* agreement. We agree with Leiske.

Wollenberg guides our analysis. In ***Wollenberg***, a case examining WIS. STAT. § 971.39 (governing DPAs in counties with less than 100,000 people), we differentiated between a DPA and a DJA by explaining that a plea agreement requires the involvement and acceptance of a circuit court, whereas a DPA only involves the parties contemplated by the statute. ***Wollenberg***,

268 Wis. 2d 810, ¶¶10-11.[5] Here, the only statutorily mandated parties to the DPA were the State and Leiske; however, the State offered to ask the court not to enter judgment after Leiske pleaded guilty or no contest. Assuming the court accepted the plea and deferred judgment, the case would eventually be dismissed if Leiske met certain conditions. Such a resolution obviously *does* require the participation of the court and is not mentioned by the statute.

[5] WISCONSIN STAT. § 971.39, entitled "Deferred prosecution program; agreements with department," only requires an agreement between the State, the defendant, and the Department of Corrections. Under § 971.39(1)(c), "[t]he defendant agrees to participate in therapy or in community programs and to abide by any conditions imposed under the therapy or programs" while the prosecution is deferred. Notably, the statute itself effectively defines what a deferred prosecution agreement is, and it does not involve a plea. As the court noted in ***State v. Wollenberg***, 2004 WI App 20, ¶11 & n.5, 268 Wis. 2d 810, 674 N.W.2d 916 (2003), unlike a plea agreement that requires the circuit court's acceptance, the statute does not require court approval of the DPA. Nor does the statute require that the DPA be filed with the circuit court or placed on the record. In fact, the circuit court need not be notified that there is a DPA. ***Id.***

Accordingly, we agree that the State offered Leiske a DJA as it required Leiske to commit himself to a certain adjudication, rather than simply deferred prosecution.[6]

The State argues that, despite ***Wollenberg***, a post-plea agreement can be considered a deferred prosecution agreement. The State points to ***State v. Daley***, 2006 WI App 81, 292 Wis. 2d 517, 716 N.W.2d 146, in which our court held that the deferred prosecution program offered in domestic abuse and sexual assault cases under WIS. STAT. § 971.37 did not preclude the district attorney from entering into an agreement whereby the defendant agreed to a plea.[7] *See* ***Daley***, 292 Wis. 2d 517, ¶9. In that case, the plea was submitted to the court to determine that it was voluntary, but acceptance of the plea and entry of judgment were delayed pursuant to

[6] Leiske points to numerous state and federal cases setting forth our court's adoption of this commonly understood distinction between a DPA and DJA. While they undoubtedly involve different statutes, decisions, and issues, the common thread is undeniable—a deferred prosecution agreement is not understood to involve a plea as a necessary condition. *See, e.g.*, ***United States v. Jones***, 448 F.3d 958, 960-61 (7th Cir. 2006) (in a deferred prosecution, a defendant avoids an adjudication of guilt because he never reaches that point in the criminal process); ***Travers v. Shalala***, 20 F.3d 993, 997 (9th Cir. 1994) ("In a deferred prosecution, it is not simply the judgment, but the initiation [or prosecution] of charges altogether, which is withheld…. In a deferred adjudication … the entry of a judgment is a mere formality because the defendant has irrevocably committed himself to a plea … which cannot be unilaterally withdrawn."); ***State v. Johnson***, No. 15-1853, 2016 Iowa App. LEXIS 971, at *4-5 (Iowa Ct. App. Sept. 14, 2016) ("A deferred judgment is not a deferred prosecution, which is primarily a nonjudicial procedure sometimes employed by prosecutors. A deferred judgment is available after the verdict is rendered and not until then."); ***State v. Drum***, 181 P.3d 18, 24 (Wash. Ct. App. 2008) ("[A]greeing to deferred prosecution is not the same as pleading guilty: to accept deferred prosecution is to leave adjudication by plea or trial to a later time, whereas to plead guilty is to submit to adjudication by plea, provided that the court accepts the plea."); *see also* ***United States v. Cox***, 934 F.2d 1114, 1124 (10th Cir. 1991) (distinguishing deferred judgment from deferred prosecution and saying only the former involves a plea); U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(f) ((U.S. SENT'G COMM'N 2007) (defining "deferred prosecution" as diversion "without a finding of guilt" and distinguishing it from diversions involving pleas); 9 CHRISTINE M. WISEMAN & MICHAEL TOBIN, WISCONSIN PRACTICE SERIES, CRIMINAL PRACTICE & PROCEDURE § 12:15 (2d ed., Aug. 2020 update) (distinguishing between deferred prosecution programs, where charges may or may not be filed, and deferred judgment agreements involving pleas, which must be approved by the court).

[7] WISCONSIN STAT. § 971.37 is also entitled "Deferred prosecution programs" and simply requires and recommends certain core provisions when a prosecutor chooses to offer a DPA in abuse cases.

certain terms and conditions the defendant was to satisfy. ***Daley***, 292 Wis. 2d 517, ¶3. Despite our earlier decision in ***Wollenberg***, the court referred to the agreement as a deferred prosecution agreement, even though it involved a plea. *See, e.g.*, ***Daley***, 292 Wis. 2d 517, ¶¶1, 3.

We acknowledge the inconsistency in terms of the label the parties and court placed on the agreement. However, ***Daley*** is not controlling for several reasons.

First, even under the State's analysis of ***Daley***, the agreement offered to Leiske was not a DPA. Namely, the State repeatedly acknowledges that the agreement in ***Wollenberg*** was not a DPA because the plea had been accepted by the circuit court. However, the State argues, in ***Daley***, the agreement was a "post-plea DPA" because the court merely determined that the plea was voluntary but deferred acceptance. The State contends the "line" between a "post-plea DPA" and DJA is drawn after the plea but before acceptance by the court, explaining:

> A post-plea DPA suspends the prosecution just before the court accepts the defendant's guilty plea, whereas with a DJA, the proceedings are suspended just before the entry of the judgment of conviction. Moreover, the nature of the agreements differs. DJAs are considered part of the plea agreement and negotiations; because of that, they must be approved by the court. ***State v. Wollenberg***, 2004 WI App 20, ¶¶10-11, 268 Wis. 2d 810, 674 N.W.2d 916. In contrast, DPAs are not considered part of the plea negotiations and do not require court approval. ***Id.***

Here, the agreement *did* require the circuit court's approval, and stated that violation would result in a judgment of conviction and sentencing, not submission of the plea to the court for acceptance. Under the State's analysis, this agreement was a DJA.[8]

In any event, we see no legal support for drawing the State's proposed "line" between a DPA and DJA after a plea but before acceptance by the circuit court. That kind of "post-plea" distinction was never drawn by us in either ***Daley*** or ***Wollenberg***.

Beyond that, in ***Daley***, it does not appear that anyone challenged whether the DPA label was appropriate. Thus, the commonly accepted understanding of what a DPA is and the distinction between a DPA and a DJA, as established in ***Wollenberg***, was not at issue. Rather, the issue was whether the prosecutor could demand a plea in an agreement with the defendant. *See* ***Daley***, 292 Wis. 2d 517, ¶7. There is no question that prosecutors have broad discretion to negotiate different variations of pleas for many crimes, including pleas involving deferred judgments, as was the case in ***Daley*** and ***Wollenberg***, regardless of the statutory deferred prosecution programs. But, here, the statute *mandates* that the prosecutor offer a *deferred prosecution agreement*. If the legislature had intended for the State to have discretion to include other requirements in the mandatory DPA it could have easily written that into this section. It did not. Thus, without any mention of a plea, a recommendation to the circuit court that it accept the plea, or deferred entry of judgment, we are bound by the distinction established in ***Wollenberg***, and further accept the plain meaning of WIS. STAT. § 961.443(2)(b)2. (2017-18)

[8] While the State points out that deferred judgment agreements can be used in conjunction with multiple charges (for example, defendant pleads guilty to a felony charge and a misdemeanor charge; the felony adjudication is deferred, and the misdemeanor charge proceeds to sentencing), we see nothing about that option as relevant to determining what constitutes a DPA.

aptly articulated by the circuit court—that it contemplates a deferral of any further prosecution, including a required plea.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals