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**DISTRICT II**

December 15, 2021

*To:*

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

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2019AP945-CR

State of Wisconsin v. Akot J. Deng (L.C. #2013CF677)

Before Gundrum, P.J., Neubauer and Grogan, 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).**

Akot J. Deng appeals his judgment of conviction entered on his no contest pleas to battery to a law enforcement officer, substantial battery, second-degree recklessly endangering safety, resisting an officer causing substantial bodily harm, and fleeing an officer, each as a repeat offender, contrary to WIS. STAT. §§ 940.20(2), 940.19(2), 941.30(2), 946.41(2r),

346.04(3), and 939.62 (2017-18).<sup>1</sup> Deng<sup>2</sup> seeks plea withdrawal on the basis that the circuit court erroneously exercised its discretion when it denied Deng's recusal motion. 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. Because Deng resolved his case with a plea, he waived his right to challenge the recusal decision on appeal. We affirm.

In October 2013, police attempted to stop a vehicle Deng was driving, but Deng fled from police, struck another vehicle, and took out a fire hydrant before coming to a stop. Deng then fled on foot. Police identified the owner of the vehicle as Deng J. Deng, who told police he had not given Deng permission to use it.

Four days after the incident, two police officers went to Deng's home to question him. Deng admitted he was driving the vehicle without the owner's permission and that he fled the traffic stop because he did not have a driver's license, had been drinking, and was on probation. When police told Deng he was being arrested, he resisted by striking one of the officers in the face with a drinking glass so hard that the glass broke. The skirmish continued and Deng and the two police officers ended up on the ground. One officer felt Deng was attempting to grab the officer's gun and called for his partner to tase Deng. The tase had no effect, but eventually the officers were able to get Deng under control. The officer that Deng hit with the drinking glass had a deep puncture wound to his face and was transported to the hospital. The officer received thirteen stitches to close the cuts on his face and neck.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

<sup>2</sup> We refer to Akot Deng as "Deng" throughout this opinion. References to any other individual with the same last name will include the individual's first name to avoid confusion.

The State charged Deng with seven counts: (1) attempting to flee or elude an officer; (2) operating a motor vehicle without owner's consent; (3) battery of an officer; (4) substantial battery; (5) resisting an officer causing substantial bodily harm; (6) attempting to disarm an officer; and (7) second-degree recklessly endangering safety. All seven counts carried the repeater enhancer due to Deng's felony drug conviction from a month before this incident.

Deng negotiated a plea bargain with the State where he would plead no contest to four charges, and the other three would be dismissed and read in. The State agreed to recommend no more than 10.5 years' initial confinement and 9.5 years' extended supervision. The presentence investigation report described Deng's familial background, including that he was born in Sudan, spent time in Egypt, and moved to the United States where he "got a green card in 2008." At this sentencing hearing, Deng's lawyer described Deng's background, including his Sudanese origin. The circuit court did not mention Deng's immigration status at the sentencing. Instead, the circuit court addressed the seriousness of the offenses, his character and background, and noted that Deng, at age twenty, had already had probation revoked twice. The circuit court imposed a sentence of 10.5 years' initial confinement and 9.5 years' extended supervision.

Post-sentence, Deng filed a motion seeking plea withdrawal based on ineffective assistance of counsel. He argued he had not entered his pleas *knowingly* because his lawyer failed to advise him of the deportation consequences. His lawyer testified at the *Machner*<sup>3</sup> hearing and explained his reasons for not properly advising Deng about deportation. The lawyer said that under then-President Barack Obama's administration, convicted criminals were not

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<sup>3</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

being deported. He testified that he would have negotiated a different plea if he knew Deng would be deported. Deng also testified at the *Machner* hearing. He told the circuit court he was born in Sudan, moved to Egypt as a young child, and then came to the United States as a refugee before obtaining a green card or lawful resident permit. He testified that his trial lawyer never told him that his convictions would result in deportation, and if he had known this fact, he would have gone to trial. The circuit court granted Deng's plea withdrawal motion.

Thereafter, Deng filed a written motion for recusal because Deng felt the circuit court could not be impartial as a result of learning the details of Deng's immigration status, having presided during the plea and sentencing hearings, and because of comments the court made when it imposed sentence.<sup>4</sup> The circuit court denied the motion seeking its recusal after it held a hearing because it found it could be impartial and explained in its written order that the court treated noncitizens the same as "any other defendant." Deng filed a petition for supervisory writ and a petition for leave for an interlocutory appeal in this court asking us to order judicial substitution under WIS. STAT. § 971.20.<sup>5</sup> This court denied Deng's petitions. In the order denying the supervisory writ petition, we specifically noted: "Deng acknowledges that he still

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<sup>4</sup> Deng also filed a motion for substitution after the postconviction court granted his plea withdrawal request. Because Deng addresses only the denial of his motion for recusal on appeal, we generally limit our discussion to the recusal motion.

<sup>5</sup> WISCONSIN STAT. § 971.20(7) provides:

SUBSTITUTION OF JUDGE FOLLOWING APPEAL. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

has an opportunity to appeal the circuit court's [recusal] decision *should he take his case to trial.*" (Emphasis added.)

Deng did not take his case to trial. Instead, he entered into a new plea bargain with the State. This time, Deng pled no contest to five charges in exchange for dismissal of the other two.<sup>6</sup> At the sentencing hearing, Deng's lawyer argued for a sentence structure that would not trigger automatic deportation, and the State agreed with the recommended sentence structure. The circuit court imposed a sentence consistent with the structure recommended by the parties. Deng was sentenced to ten years' initial confinement and seven years' extended supervision on two of the convictions, and the circuit court withheld sentence on the other convictions and ordered probation instead.

On appeal, Deng argues the circuit court erroneously exercised its discretion by refusing to recuse itself. Deng contends the circuit court failed to even exercise its discretion, gave inadequate analysis, and instead simply made a "blanket statement of impartiality." Deng asserts that if the circuit court had adequately exercised its discretion, it would have recused itself because the circuit court's prior involvement not only gave it knowledge of Deng's immigration status and information from Deng's first plea hearing, but also created bias from commentary it made during Deng's first sentencing.

We decline to address the merits of Deng's recusal claim because by pleading no contest instead of going to trial, Deng waived his right to raise this issue on appeal. *See State v. Kelty*,

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<sup>6</sup> Deng pled no contest to counts one, three, four, five, and seven. The State dismissed counts two and six.

2006 WI 101 ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. A defendant who resolves a criminal charge by entering a plea “waives all nonjurisdictional defects, including constitutional claims.” *Id.* (citation omitted). We refer to this as the “guilty-plea-waiver rule.” *Id.*

In other words, when a defendant negotiates a plea bargain with the State and enters a knowing, voluntary, and intelligent plea, he or she is admitting guilt and breaking “the chain of events which has preceded [the plea] in the criminal process.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). A negotiated plea “is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case” and “is a sufficient basis for the State’s imposition of punishment.” *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). Moreover, when a defendant agrees to resolve his case with a plea, “the State acquires a legitimate expectation of finality in the conviction thereby obtained.” *Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975). “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims” of constitutional error that took place *before* he chose to resolve his case with a plea. *See Tollett*, 411 U.S. at 267.

Deng’s only issue in this appeal *preceded* his choice to resolve his case with a negotiated plea. He believed the circuit court should have recused itself because it had been involved in his first plea and sentencing. He tried to appeal the circuit court’s recusal denial to this court *before* he decided to plead no contest. This court declined Deng’s petition for supervisory writ and denied his request for interlocutory appeal, but in the supervisory writ order, we specifically noted that Deng admitted he could raise the recusal-error issue if he “take[s] his case to trial.” Despite having this information, Deng elected to resolve his case by pleading no contest instead of going to trial. Deng’s choice is not surprising, as the plea bargain offered by the State

provided Deng with the opportunity to avoid automatic deportation. Nevertheless, Deng's choice means he waived his right to have this court consider the circuit court's recusal decision. Deng appeared in open court and pled no contest to the charges. The circuit court conducted a thorough plea colloquy to ensure Deng entered his pleas knowingly, intelligently, and voluntarily, and he makes no challenge to the adequacy of that plea colloquy.

Deng knew that if he wanted to appeal the circuit court's recusal decision, he could do so by proceeding to trial. Instead, Deng decided to resolve the matter by accepting a negotiated plea—which provided substantial benefits to him—most significantly the opportunity to avoid mandatory deportation. Having made that choice, Deng waived his right to have this court review all claims of nonjurisdictional defects, including his claim the circuit court erroneously exercised its discretion in refusing to recuse itself. *See Kelty*, 294 Wis. 2d 62, ¶18. By pleading no contest, Deng waived his right to challenge the circuit court's recusal decision.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*