

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-0979-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JILL J. KUNISH-WOLFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: ALLAN J. DEEHR, Judge. *Judgment affirmed in part and reversed in part; order affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Jill Kunish-Wolff appeals from a judgment of conviction of party to the crime of first-degree reckless homicide by delivery of heroin and conspiracy to deliver heroin as a repeater. She also appeals from an order denying her postconviction motion. She raises several issues, many of

which are disposed of by our decision in the companion case, *State v. Tkacz*, No. 97-0974-CR (Wis. Ct. App. June 3, 1998). As in *Tkacz*, we reverse the conviction for conspiracy to deliver heroin because it is a lesser-included offense of party to the crime of first-degree reckless homicide by delivery of heroin. We affirm Kunish-Wolff's homicide conviction and the order denying her motion for a new trial based on newly discovered evidence.

Kunish-Wolff was convicted for her role in the death of Laurie Karlin by a heroin overdose. On the night of December 27, 1993, Karlin was transported to the hospital from the apartment shared by Kunish-Wolff and codefendant Peter Tkacz. Kunish-Wolff and Tkacz were tried together and both convicted.

We first address the claim that the conviction of both conspiracy to deliver heroin and first-degree reckless homicide by delivery of heroin violates the prohibition against double jeopardy.¹ In *Tkacz*, slip op. at 4-8, we concluded that because of the manner in which the State chose to charge the conspiracy to deliver

¹ The State argues that Kunish-Wolff waived her right to claim a double jeopardy violation by not raising it prior to the conclusion of trial. We recognize that it is incumbent on a defendant to raise a multiplicity claim before the end of trial so that the prosecution has an opportunity to develop those facts supporting multiple charges. See *United States v. Griffin*, 765 F.2d 677, 681-82 (7th Cir. 1985). See also *State v. Wolverson*, 193 Wis.2d 234, 253, 533 N.W.2d 167, 173 (1995) (“No procedural principle is more familiar ... than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.”(quoted source omitted)), *cert. denied*, 516 U.S. 1099 (1986). However, we reject the application of waiver in this instance because the State raises waiver for the first time on appeal and we may address an issue subject to waiver in the interest of judicial economy, such as to avoid a later claim of ineffective assistance of counsel. See *State v. Harrell*, 182 Wis.2d 408, 417, 513 N.W.2d 676, 679 (Ct. App. 1994)

heroin count, double jeopardy is violated by the conviction for both charges. Therefore, we reverse Kunish-Wolff's conviction for conspiracy to deliver heroin.²

We next address Kunish-Wolff's argument relating to Rose Krist. At trial Krist testified that she bought heroin from Tkacz and Kunish-Wolff on December 25, 1993. She described how the three of them went into the bathroom of her home where Tkacz prepared the heroin and injected it into her. Krist confirmed that the substance was heroin by the reaction she felt after the injection. Krist admitted that she did not reveal the sale when initially interviewed by police officers but that she implicated Tkacz and Kunish-Wolff in a police interview conducted in December 1994.

Kunish-Wolff argues that the trial court erroneously exercised its discretion in precluding defense counsel from exploring Krist's probationary status at the time of the December 1994 police interview. This issue is also governed by our conclusion in *Tkacz*, slip op. at 13-15, that the limitation on cross-examination was within the trial court's latitude to impose reasonable limits on cross-examination based on concerns about prejudice, confusion or relevancy. See *State v. McCall*, 202 Wis.2d 29, 43-44, 549 N.W.2d 418, 424 (1996).

The next issue concerns the testimony given by James Brown, a drug dealer from whom Tkacz and Kunish-Wolff purchased heroin. Brown explained how Tkacz and Kunish-Wolff would come to Milwaukee together to purchase drugs and that Karlin had come with them a couple of times. He confirmed that

² As in *Tkacz*, because we reverse the delivery conviction, we need not address Kunish-Wolff's claims that her right to a unanimous jury verdict was violated or that the evidence warranted a special instruction consistent with *State v. Smith*, 189 Wis.2d 496, 525 N.W.2d 264 (1995), that drug purchases for personal use could not support a conspiracy to deliver conviction.

on December 27, 1993, Tkacz bought twenty-two bags of heroin. When asked if he had been promised anything in exchange for his testimony, Brown indicated that he was not getting anything in return for his testimony. Brown admitted that the prosecutor had agreed not to charge him in connection with Karlin's death. The trial court limited defense counsel's attempt to explore possible inducements for Brown's testimony.

A later review of Brown's plea agreement reflected that Brown's answer and the prosecutor's representation of the plea agreement were less than complete. Brown's plea agreement included a plea to three charges and an agreement not to prosecute drug conspiracy charges with forty-five other individuals, a promise not to charge Brown for any role in Karlin's death, a joint sentencing recommendation for ten years on each charge pled to, and Brown's agreement to give truthful and accurate testimony related to all drug conspiracies and to testify in the John Doe proceeding regarding Karlin's death.

Kunish-Wolff argues that her right to due process was violated by the prosecution's failure to fully disclose the terms of Brown's plea agreement and to correct Brown's false trial testimony that no considerations were given in exchange for his testimony. She also claims that the trial court improperly shifted the burden of discovery of the terms of the plea agreement to defense counsel and improperly restricted cross-examination regarding the agreement. Finally, she contends that trial counsel was ineffective for not earlier checking Brown's court file to ascertain the terms of the plea agreement. These issues were also raised in *Tkacz*. Although we adopt our analysis and conclusion in *Tkacz*, slip op. at 17-18, that the prosecutor's failure to fully disclose the terms of the plea agreement and the trial court's failure to order the prosecutor to respond to a discovery request for

exculpatory evidence were errors, we conclude that with respect to Kunish-Wolff the errors were harmless.

Error is harmless when there is no “reasonable possibility that the error contributed to the conviction” and the court “is certain the error did not influence the jury.” *State v. Sullivan*, 217 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998). In *Tkacz* the error was not harmless because Brown’s testimony linked Tkacz to Karlin’s death. See *Tkacz*, slip op. at 19-20. The same is not true with respect to Kunish-Wolff where the evidence of her role in Karlin’s death is much stronger.

Krist’s testimony established that Kunish-Wolff was involved in drug distribution, even to the point of assisting in the injection of heroin in another person. Lonnie Klein, a drug user, testified that Karlin was unable to inject herself and that he had seen Kunish-Wolff inject Karlin on a previous occasion. In her John Doe³ testimony, Kunish-Wolff admitted that on a previous occasion Karlin had gotten high at Kunish-Wolff’s house, that Karlin was shooting heroin in December 1993, and that most of the time Karlin needed someone to assist her in shooting up. On December 27, 1993, Kunish-Wolff had used heroin. She admitted that an intoxicated Karlin came to the apartment around 10:00 p.m. on December 27 and asked for heroin. No one had seen Karlin ingest anything but alcohol earlier in the evening. The medical evidence was that Karlin’s physical symptoms were consistent with a heroin overdose.

³ Kunish-Wolff gave sworn testimony on December 1, 1994. Tkacz gave sworn testimony on April 20, 1994.

There was sufficient evidence linking Kunish-Wolff to Karlin's overdose without even considering Brown's testimony. Therefore, we are certain that the errors with respect to the failure to disclose Brown's plea agreement did not affect the jury's verdict. The errors were harmless.⁴

In her postconviction motion, Kunish-Wolff sought a new trial on the basis of newly discovered evidence. The newly discovered evidence was testimony from Randy Jarman that during a time when he was incarcerated with Tkacz, Tkacz admitted that he alone injected the lethal injection of a narcotic into Karlin. Kunish-Wolff claims that this evidence gives her a basis to argue at a new trial that she did not assist in the administration of the drug to Karlin.

There are five criteria which a defendant must satisfy when seeking a new trial due to newly discovered evidence. *See State v. Brunton*, 203 Wis.2d 195, 200, 552 N.W.2d 452, 455 (Ct. App. 1996) ((1) The evidence must have come to the moving party's knowledge after trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial). The decision of whether to grant a new trial on the basis of newly discovered evidence is addressed to the trial court's discretion.

⁴ Because we conclude that the errors were harmless, we need not address Kunish-Wolff's contention that trial counsel was deficient for not earlier examining Brown's court record to ascertain the exact terms of the plea agreement. Kunish-Wolff cannot establish prejudice; this is particularly true if we consider what trial counsel did to attack Brown's credibility and counsel's testimony that he did not believe the additional information would make Brown less believable to the jury. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the grounds of lack of prejudice. *See State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

See State v. Johnson, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993).

The trial court determined that it was not reasonably probable that a different result would be reached if there were a new trial adding Jarman's testimony. We agree with the trial court, and consequently, we need not discuss whether any of the other criteria were satisfied. *See id.*

Jarman testified that both Kunish-Wolff and Tkacz were at the apartment when Karlin was injected. Therefore, the new evidence does not absolve Kunish-Wolff of party to the crime liability. Kunish-Wolff's presence, coupled with the evidence that Kunish-Wolff purchased heroin, that she was willing to supply drugs to others, that she used heroin the day of Karlin's death, and that Karlin needed assistance to inject drugs, nullifies any exculpatory effect that Jarman's testimony would have.

By the Court.—Judgment affirmed in part and reversed in part; order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

