

**COURT OF APPEALS
DECISION
DATED AND FILED**

OCTOBER 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. **98-3172-CR
98-3173-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**98-3172-CR
STATE OF WISCONSIN,**

PLAINTIFF-APPELLANT,

V.

JOSE LUIS MARTINEZ,

DEFENDANT-RESPONDENT.

**98-3173-CR
STATE OF WISCONSIN,**

PLAINTIFF-APPELLANT,

V.

SAN JUANITA LOPEZ CANIDA,

DEFENDANT-RESPONDENT.

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 § 808.10 and RULE 809.62, STATS.

APPEAL from an order of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order dismissing criminal charges against Jose Luis Martinez and San Juanita Lopez Canida. The issue is whether the facts were sufficient to support bindover on a theory that the defendants conspired in Texas to deliver controlled substances in Wisconsin. We reverse the order, except as to the dismissal of the cocaine charge against Canida, which we affirm.

¶2 Appeal no. 98-3172-CR is from the charges against Martinez, while appeal no. 98-3173-CR is from the charges against Canida. The appeals were consolidated, on the State's motion, for briefing and disposition. Martinez did not file a brief on the merits of the appeal, and therefore we take this as a concession and reverse the order as to Martinez on this ground. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

¶3 As to Canida, the complaint alleged three counts of conspiracy to deliver marijuana in excess of 2500 grams, and one count of conspiracy to deliver cocaine. After the preliminary hearing, the circuit court dismissed the charges on the ground that the court lacked subject matter jurisdiction because the State had not established that the defendant committed a crime in Wisconsin.

¶4 On appeal, the parties agree it is not a question of subject matter jurisdiction, but is instead a question of personal jurisdiction on conspiracy

grounds under § 939.03(1)(b), STATS. That statute provides in relevant part: “A person is subject to prosecution and punishment under the law of this state if: ... (b) While out of this state, the person ... conspires with ... another to commit a crime in this state.”

¶5 The State’s theory is that Canida engaged in a conspiracy by “fronting” large quantities of marijuana and cocaine to Roger Harris, a Wisconsin resident, who then sold the drugs in large quantities to several other persons in Wisconsin. In this theory, the crime being committed in this state is the sale from Harris to his customers, and the argument is that Canida conspired with Harris to make those sales.

¶6 The purpose of a preliminary hearing is to determine whether there is sufficient evidence to bind the defendant over for trial. The evidence need not be enough to establish guilt beyond a reasonable doubt, but need only show a believable or plausible account of the defendant’s commission of a felony. *See State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984).

¶7 Before discussing the evidence, we note that Canida’s testimony at the preliminary hearing was compelled pursuant to a grant of immunity. On appeal, she argues that her own testimony cannot be used against her to establish grounds for bindover. The State does not dispute this argument, and therefore we do not consider Canida’s testimony in this opinion.

¶8 We first address the marijuana charges. Harris testified that on three occasions in mid-1998 he traveled to Texas and bought large quantities of marijuana from Canida. There is testimony by Harris from which it is reasonable to infer that each of these sales was at least partially fronted to him, meaning that the marijuana was given to him without full payment, but that full payment would

be expected from him later. He further testified that he then sold the marijuana to persons in Wisconsin.

¶9 In *State v. Cavallari*, 214 Wis.2d 42, 48-50, 571 N.W.2d 176, 179-80 (Ct. App. 1997), we reviewed existing law and concluded that, to show conspiracy, the State must present evidence that an agreement existed between the seller and the buyer that the buyer will deliver at least some of the controlled substances to a third party. It is not enough to show merely that the seller has *knowledge* that there will be a further delivery to a third party. *Id.* at 52-53, 571 N.W.2d at 180. However, it is enough if the agreement is tacit, rather than express. *Id.* at 51-52, 571 N.W.2d at 180. Applying that law to review of the conviction in *Cavallari*, we concluded that the evidence was sufficient to show an agreement because there were multiple transactions of amounts greater than was consistent with personal use, and, “most importantly,” the drugs were being fronted to the buyer. *Id.* at 53-54, 571 N.W.2d at 181.

¶10 Canida argues that although the evidence may be sufficient to show that she delivered to Harris in Texas, there is insufficient evidence to show that she engaged in a conspiracy by agreeing with Harris to make further deliveries in Wisconsin. In response, the State relies on the evidence that, as in *Cavallari*, on several occasions she fronted Harris an amount of marijuana far in excess of what he might personally use, and was then expecting to be paid for it later. Based on the holding of *Cavallari*, we conclude that the evidence here was sufficient, for purposes of bindover, to show a tacit agreement for Harris to make further sales. Therefore, we reverse the order dismissing the marijuana charges against Canida.

¶11 The evidence as to the cocaine charge presents a different picture, however. Harris testified that on one of his trips to Texas, Canida introduced him

to Martinez, identified him as her new husband, and said that he would be Harris's cocaine connection. On Harris's next trip to Texas, before conducting his marijuana transaction with Canida, Martinez and Harris drove together to a different city, where Martinez apparently arranged for him to be partially fronted an amount of cocaine. Harris then brought the cocaine back to Wisconsin and made further sales. However, when Harris was asked whether Canida was involved in the cocaine transaction, other than introducing him to Martinez, he testified that she was not.

¶12 Canida argues that there is no evidence that she was involved in Martinez's cocaine transactions. The State's initial brief is vague about what evidence it relies on for the cocaine charge against Canida. The brief frequently refers to actions by "the Texas defendants," but it does not make any effort to analyze the evidence for each defendant individually. In its reply brief, the State reviews the evidence regarding Canida and the marijuana transactions, but does not specifically discuss her involvement in the cocaine transaction.

¶13 On this record, we conclude that the evidence is insufficient to show an agreement between Canida and Harris for Harris to deliver cocaine to third parties in Wisconsin. There is simply no evidence that Canida fronted Harris cocaine or otherwise had any involvement in the cocaine transaction. Therefore, we affirm the dismissal of the cocaine charge.

¶14 In summary, we reverse the entire dismissal order as to the charges against Martinez, based on his failure to file a brief in this court. As to Canida, we reverse the dismissal of the marijuana charges, but affirm the dismissal of the cocaine charge.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

