**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 11, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2319** **Cir. Ct. No. 2004CM1093**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MELODY L. DALLMAN,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Reversed and cause remanded with directions*.

¶1 BROWN, J.[1] The trial court dismissed this case in the interests of justice following its refusal to accept a change of plea from not guilty to no contest. The issue here is whether the court had authority to do so. We hold that it did not. We reverse and remand with directions.

---

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶2 On June 16, 2004, Melody L. Dallman was charged with the misdemeanor crime of disorderly conduct. The complaint also stated that because the charge arose out of a domestic abuse situation, the State was invoking WIS. STAT. § 973.055(1) (relating to a domestic abuse assessment). The complaint alleged that Dallman slapped and scratched her husband during a domestic dispute. Dallman petitioned the court for appointment of counsel, claiming indigency, and on June 22, 2004, the court granted the petition, ordered appointment of counsel at county expense, and further ordered repayment by Dallman to the county at the rate of $50 per month.

¶3 On July 28, 2004, Dallman appeared in court to enter a plea of no contest pursuant to a plea agreement with the State. It was first explained to the court that, in return for the plea, the State had agreed to recommend a fine of $100. The court then inquired as to whether Dallman was entering the plea freely and voluntarily. After a brief inquiry, the court asked her counsel: "All right … you're satisfied she's entering the plea freely, voluntarily, understandably and there are sufficient facts to find and adjudicate her guilty?" Counsel replied: "Yes, your Honor." The court then responded: "All right, we'll accept that, enter an adjudication. District Attorney have a thought or recommendation?"

¶4 The State confirmed that the recommendation was a $100 fine plus court costs. The court then asked Dallman's counsel to respond. Dallman's counsel informed the court that Dallman's husband, the victim alleged in the complaint, was in the courtroom. Counsel further informed the court that the husband had sent the court letters, with copies to the State and to counsel. The third of these had recanted the accusation alleged in the complaint. Counsel then requested that the court "come down even a little bit on the fine" due to Dallman's financial condition.

¶5 The court acknowledged receipt of the letters by Dallman's husband and asked Dallman if there was anything she would like to say. Dallman replied that she "would like to take it to the jury, but I don't have the money to keep proceeding. My thought is not guilty but …." The court then responded by addressing the substance of the letters from the husband asking that the charges be dropped and inquired as to how the police became involved in this. Dallman stated that her husband called the police. The court, referring to the complaint, then stated: "Says you grabbed some clothes and threw them at him and told him to get out." Dallman denied that this happened. The court asked: "And because of that you got arrested?" Dallman replied that she was informed she was being arrested for scratching her husband, which was not true in that the scratches came a few days before. Counsel for Dallman then intervened in the colloquy and informed the court that while he thought this case should be tried, Dallman had decided to plead for financial reasons.

¶6 The court then asked Dallman's husband if he wanted to speak. The husband referred to the letters he had written to the court and added that he wished the charges could be dropped. The court inquired as to whether the couple was still together or were separated, and the husband replied that they were going through marriage counseling.

¶7 The court then stated: "Well, let's do this: The Court, upon review of the circumstances here, will dismiss it as a warning and take it from there."

¶8 The State thereafter moved the court to reconsider on the basis that the court had no authority to dismiss the case. The reconsideration motion was denied, and the State brought this appeal.

¶9 The State renewed its argument that the trial court had no authority to dismiss the case. It relied exclusively on ***State v. Braunsdorf***, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980), for the proposition that "the trial courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial." The State also pointed out that the ***Braunsdorf*** court explicitly rejected the idea that a trial court has any "inherent authority" to dismiss a criminal case on nonconstitutional grounds prior to jeopardy attaching. *See* ***id.*** at 585. The State thus asserted that the trial court had neither statutory nor inherent power to dismiss this case.

¶10 Upon review of the record, this court was of the opinion that reliance by the State upon ***Braunsdorf*** was misplaced. As was specifically stated by our supreme court in ***State v. Comstock***, 168 Wis. 2d 915, 947, 485 N.W.2d 354 (1992), jeopardy attaches when a circuit court accepts an accused's plea of guilty. Here, it was readily apparent that the trial court had unambiguously accepted the accused's plea of guilty before dismissing the case with prejudice. Therefore, we were of the opinion that this case was not governed by ***Braunsdorf***.

¶11 In our view the precise question before the court was: what power does a trial court have to dismiss a case with prejudice *after* jeopardy has attached? We considered two possibilities. One possibility is found in our plea process. Even after the court has accepted a plea as being knowing and voluntary, it still must be satisfied that the defendant *in fact* committed the crime charged. WIS. STAT. § 971.08(1)(b). We theorized that if such was the case, dismissal by the court was a possible remedy. Alternatively, we speculated that there may be an inherent power to dismiss a case in the interests of justice after jeopardy has

attached. However, our research to date had not uncovered any known case law concerning whether this power exists.

¶12 After reviewing the record, we did not know upon which ground the trial court dismissed the case with prejudice. In other words, we did not know whether the trial court dismissed the case because it was not convinced that the factual basis for the plea had been established or whether it dismissed in the interests of justice under the belief that it had the inherent authority to do so. We ordered the court to provide a supplemental decision answering the question. We have now received the supplemental decision.

¶13 In its supplemental decision, the court recounted Dallman's reluctance to change her plea. She had stated that she felt she was not guilty but was changing her plea for financial reasons. The court found important Dallman's denial of the basic facts alleged in the complaint. The court also found important the husband's recantation. The court then stated: "The Court recognizes that uncorroborated statements made to the police by the alleged victim would not be admissible at trial as they would be considered hearsay." The court then made the following finding:

> Accordingly, the Court, as a matter of law, could not accept a plea of no contest and adjudicate the Defendant guilty. It is apparent that the Defendant did not freely, voluntarily, and understandably enter a plea that could be accepted by the Court.
>
> The immediate remedy would be for the Court to refuse the plea and schedule the matter for trial. However, the State did not offer any additional evidence that would lead the Court to believe that the State could obtain a disorderly conduct conviction. As the State was requesting a minimal fine of $100 and the Defendant would necessarily be subject to excessive and substantial financial hardship, this Court dismissed the charges "in the interest of justice."

¶14 The court's supplemental decision changes the original decision in one important aspect. While the plea hearing transcript shows the court to have found that the plea was made freely, voluntarily and understandably and that sufficient facts existed to find and adjudicate her guilty, the supplemental decision says that she did *not* freely, voluntarily and understandably enter a plea that could be accepted by the court. This is presumably because of her reluctance to change her plea but for financial reasons and because the court was convinced that there were not sufficient facts to support a conviction.

¶15 When an appellate court is faced with two conflicting appellate decisions, we will deem the later version to be the decision of the court. *See* ***Purtell v. Tehan***, 29 Wis. 2d 631, 636, 139 N.W.2d 655 (1966); ***Bruns Volkswagen, Inc. v. DILHR***, 110 Wis. 2d 319, 324, 328 N.W.2d 886 (Ct. App. 1982). Likewise, when we have two conflicting decisions from the same trial court about the same case, we will follow the most recent pronouncement. Therefore, this court will operate under the premise that the trial court did not accept the plea for the reasons already stated.

¶16 With the state of the record being as it now is, jeopardy has not attached. Therefore, ***Braunsdorf*** does control after all. The trial court has no power to dismiss a case prior to jeopardy attaching. Rather, the remedy is to set the case for trial.

¶17 It may be that the State no longer has a case in light of the husband's recantation and lack of independent evidence to otherwise support the allegations. But, under our present case law, the State alone has the discretion to decide whether to proceed with its prosecution. Under ***Braunsdorf***, the court may not take that power unto itself. Also, it may be that it is an injustice for Dallman to

have to ultimately be responsible for paying lawyer fees when the trial court is of the opinion that the State has no case. But again, ***Braunsdorf*** does not give the courts the power to save her the expense of an allegedly ill-advised prosecution.

¶18 We therefore reverse and remand with directions that the court set the case for trial.

*By the Court.*—Order reversed and cause remanded with directions.

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