COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2475-CR **Cir. Ct. No. 2014CF184**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUGUST D. GENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JOHN B. RHODE, Judge. *Reversed in part and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. August Genz was convicted of possession with intent to deliver amphetamine and conspiracy to deliver tetrahydrocannabinols (THC). Genz appeals only his conviction for conspiracy to deliver THC, arguing there was insufficient evidence to convict him of that count. The State contends this appeal

is moot because Genz has served his sentence. According to the State, vacating the conviction will have no effect and, furthermore, the exceptions to the rule of mootness do not apply.[1] Alternatively, the State argues the evidence was sufficient to support Genz's conviction on the conspiracy count.

¶2 We conclude this appeal is not mooted by the fact that Genz already served his sentence, because the possibility of vacating a felony conviction is not an abstract question but rather a question that implicates Genz's rights going forward. We further conclude that, pursuant to our supreme court's decision in ***State v. Smith***, 189 Wis. 2d 496, 525 N.W.2d 264 (1995), there was insufficient evidence for the jury to convict Genz of conspiracy to deliver THC. We therefore reverse the judgment as to Genz's conviction for conspiracy to deliver THC and remand with directions to issue an amended judgment of conviction.

BACKGROUND

¶3 The State charged Genz with one count of possession with intent to deliver amphetamine on or near school premises, and one count of conspiracy to manufacture/deliver THC, less than 200 grams. The following facts are taken from the testimony presented at trial and are not disputed for the purposes of this appeal. Mark Beer met with City of Antigo police officer Christopher May to report having received text messages asking to trade amphetamines for marijuana. Beer reported that he did not know who sent him the text messages, as they came from an unfamiliar phone number. The unknown person had texted that he was

[1] Because we conclude Genz's appeal is not moot, we do not consider whether any exceptions to the rule of mootness apply.

looking for "green," a street term for marijuana, in exchange for twenty dollars and two "Addies," a street term for D-amphetamine.

¶4 Beer was able to obtain a home address in a text message from the unknown person. May drove past the address obtained by Beer and observed a grey Isuzu Rodeo, which May testified he knew belonged to Genz. At the instruction of law enforcement, Beer texted the unknown person asking to meet in the parking lot of St. John's Church to complete the exchange. The unknown person texted Beer agreeing to meet at the church, and he described his vehicle as a grey Isuzu truck. May and Greg Carter, a Langlade County sheriff's deputy, waited near the church. May observed the grey Isuzu approach and park on Hudson Street, near the church parking lot. May and Carter then approached the grey Isuzu, in which Genz was sitting in the driver's seat. Carter searched Genz and found a prescription bottle with eight D-amphetamine pills on Genz's person. Carter also searched Genz's vehicle and found a cellphone on the passenger seat. Carter obtained a search warrant for the cellphone and found text messages that matched the exchanges with Beer.

¶5 Following a trial, the jury convicted Genz of both counts. Genz now appeals.

DISCUSSION

A. Mootness

¶6 The State contends that Genz's appeal is moot because he has fully served his sentence on the conspiracy conviction, and therefore vacating that conviction will have no effect. There do not appear to be any published decisions in Wisconsin on the issue of mootness under circumstances similar to this case.

¶7 A case is moot when it "seeks to determine an abstract question which does not rest upon existing facts or rights ...." ***State ex rel. Ellenburg v. Gagnon***, 76 Wis. 2d 532, 535, 251 N.W.2d 773 (1977). Mootness is a question of law. ***PRN Assocs. LLC v. State, Dep't of Admin.***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. "[A] case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy." ***Milwaukee Police Ass'n v. City of Milwaukee***, 92 Wis. 2d 175, 183, 285 N.W.2d 133 (1979).

¶8 Relying on ***State v. Walker***, 2008 WI 34, 308 Wis. 2d 666, 747 N.W.2d 673, the State argues that when the defendant has completed his sentence, an appeal may be moot. ***Walker*** is inapplicable, however, because it held that a challenge to a reconfinement order is moot when the defendant has already completed the term of reconfinement. ***Id.***, ¶14. Here, there is no issue of reconfinement but rather the validity of an underlying conviction itself. In addition, the United States Supreme Court has consistently held that an appeal of a criminal conviction is not moot simply because the defendant has completed service of the sentence imposed. ***Sibron v. New York***, 392 U.S. 40, 56 (1968). Our supreme court has also recognized that, in the context of a WIS. STAT. § 974.06 motion, a defendant's discharge from prison does not moot the challenge to his or her conviction. ***Thiesen v. State***, 86 Wis. 2d 562, 570, 273 N.W.2d 314 (1979) (discussing ***State v. Theoharopoulos***, 72 Wis. 2d 327, 240 N.W.2d 635 (1976)).

¶9 The State asserts that Genz's appeal is moot because the conspiracy conviction has no effect upon Genz's existing rights. Without citation to any authority, the State contends that, regardless of our decision in this appeal, Genz would still be a convicted felon because he does not appeal the conviction for

possession with intent to deliver amphetamine. The State adds that Genz has several other prior felony convictions and he has been incarcerated in the past, and vacating the conspiracy conviction would be "entirely symbolic."

¶10 We disagree. "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." ***Sibron v. New York***, 392 U.S. 40, 57 (1968). A challenge to a conviction is not moot because the relief sought would free a defendant from all consequences flowing from his or her conviction. ***Lane v. Williams***, 455 U.S. 624, 630 (1982).

¶11 In ***Pollard***, the Supreme Court "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." ***Sibron***, 392 U.S. at 55 (citing ***Pollard***, 352 U.S. at 358). The ***Pollard*** Court concluded that the mere possibility of collateral consequences to a conviction is sufficient to overcome the question of mootness and justifies dealing with the merits of the appeal. ***Pollard***, 352 U.S. at 358.

¶12 While under ***Pollard*** we need not identify exact collateral consequences that might affect Genz as a result of the conspiracy conviction, the presumption that Genz will suffer collateral consequences under Wisconsin law from an additional felony conviction is warranted. *See* WISCONSIN STATE PUBLIC DEFENDER, CIVIL CONSEQUENCES OF CONVICTION: THE IMPACT OF CRIMINAL RECORDS UNDER WISCONSIN LAW 25 (2017), http://wispd.org/images/AppellateFolder/templatesforms/CivConseqConvfinalversion.pdf (hereinafter CIVIL CONSEQUENCES). Such potential consequences in this case could include: loss of voting rights until the felony sentence has been served, *see* WIS. STAT. §§ 6.03(1)(b) and 304.078(3); disqualification from certain types of employment and

licensure; exposure to habitual criminal laws if subsequently convicted of the same or a similar crime, *see* WIS. STAT. § 939.62; and having one's credibility brought into question based on the number of convictions if called to testify as a witness in a court proceeding, *see* WIS. STAT. § 906.06. *See also* CIVIL CONSEQUENCES 7, 18, 25, 26, 28.

¶13 Highlighting the last collateral consequence mentioned above the court in ***Sibron*** indicated that, contrary to the State's suggestion, a defendant's status as a "multiple offender" has "no relevance" to whether his or her challenge to a conviction is moot. *See* ***Sibron***, 392 U.S. at 56. The Court in ***Sibron*** reasoned:

> A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past. It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record.

Id. (footnotes omitted). We therefore cannot simply assume no further collateral legal consequences will be imposed upon Genz as a result of the challenged conviction. We conclude that Genz's appeal is not moot, and we proceed to a review of the merits of his appeal.

B. Sufficiency of the evidence

¶14 Genz argues there was insufficient evidence presented at trial to convict him of the conspiracy charge. He contends our supreme court's decision

in ***State v. Smith***, 189 Wis. 2d 496, 525 N.W.2d 264 (1995), requires evidence of an agreement for further delivery of a controlled substance to a third party in order for the buyer-seller relationship to be a conspiracy.

¶15 In determining whether evidence was sufficient to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court's review is "very narrow" and gives great deference to the determination of the trier of fact. ***Id.***, ¶57. We examine the record to find facts that support upholding the jury's decision to convict. ***Id.***

¶16 Delivery of THC is proscribed by WIS. STAT. § 961.41(1)(h) (2015-16).[2] Section 961.41(1x) provides that any person who conspires to commit a crime under § 961.41(1)(h) is subject to the same penalties as a person who directly commits that crime, and it refers to the definition of conspiracy set forth in WIS. STAT. § 939.31. A conspiracy occurs when a person "with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime ..." and "one or more of the parties to the conspiracy does an act to effect its object ...." Sec. 939.31.

¶17 There need not be any underlying crime actually committed for there to be a basis for a conspiracy charge. *See* ***State v. Sample***, 215 Wis. 2d 487, 505,

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

573 N.W.2d 187 (1998). Rather, WIS. STAT. § 939.31 "focuses on the subjective behavior of the individual defendant." ***Sample***, 215 Wis. 2d at 505. Thus, the relevant inquiry is whether there was any evidence that Genz committed "an act to effect" the delivery of THC. *See* ***id.***; sec. 939.31.

¶18 The State contends it was not required to prove that Genz himself committed the crime (delivery of THC), but only that he was a member of a conspiracy that agreed to commit—and took actions towards committing—the crime. However, our supreme court has held that a buyer-seller relationship for an amount of a controlled substance consistent with personal use does not support a conspiracy to deliver conviction. *See* ***Smith***, 189 Wis. 2d at 498.

¶19 In ***Smith***, our supreme court considered the singular issue of whether an agreement between a buyer and a seller—the defendant—for the delivery of a small amount of a controlled substance for personal use by the buyer constituted a conspiracy to deliver a controlled substance. ***Id.*** Smith entered into an agreement to sell a small amount of cocaine, after which the buyer informed police of this arrangement. ***Id.*** at 499-50. Smith pleaded guilty to conspiracy to deliver a controlled substance. ***Id.*** at 499. He later filed a postconviction motion to withdraw his guilty plea on the ground that there was no factual basis for the conspiracy charge. ***Id.*** at 500.

¶20 ***Smith*** examined the issue of a conspiracy from the point of view of the buyer, despite Smith's role as the seller in the agreement, because "[a] conspiracy must involve at least two people, with each member subject to the same penalty for the conspiracy." ***Id.*** at 501. The court concluded that the legislature did not intend a buyer-seller relationship involving a small amount of cocaine for the buyer's personal use only to be a conspiracy. ***Id.*** The court

reasoned that because "there was no claim or proof that the buyer intended to further deliver the cocaine …. the most the buyer could have been guilty of was the misdemeanor of possession." ***Id.*** at 501-02 (citation omitted).

¶21 Here, Genz entered into an agreement to buy marijuana in exchange for twenty dollars and two thirty-milligram D-amphetamine pills. Genz argues, and the State does not contest, that this would have been a small amount of marijuana consistent with personal use. As in ***Smith***, there was no claim or evidence that Genz intended to sell, deliver or give the marijuana to a third party.

¶22 The State attempts to distinguish this case from ***Smith*** on the basis that Genz agreed to trade D-amphetamine pills, in addition to twenty dollars, for the marijuana. While these facts differ slightly from those in ***Smith***, in which there was no agreement to trade different controlled substances, the issue before this court is still whether there were sufficient facts to convict Genz of conspiracy to manufacture/deliver THC, not any conspiracy or delivery related to D-amphetamine pills. We therefore do not find the State's attempt to distinguish ***Smith*** compelling.

¶23 The State argues "the evidence presented at trial established that Genz and Beer were in agreement to commit the same crime: delivery of THC to Genz in exchange for delivery of D-amphetamine to Beer." However, Genz and Beer did not agree to commit the same crime. Genz agreed to provide Beer with cash and the D-amphetamine he possessed in exchange for Genz receiving THC. Beer agreed to provide Genz with THC in exchange for Beer receiving the D-amphetamine and cash. Regardless of the in-kind trade, these are two different crimes. Specific to the THC, Beer was to sell to Genz and Genz was to buy from Beer. As ***Smith*** noted, in Wisconsin, "A delivery is a 'transfer *from one person to*

another." ***Id.*** at 503 (quoting WIS. STAT. § 161.01(6) (1991-92)).[3] Thus, the delivery and the purchase (subsequent possession) are two separate crimes, just as in ***Smith***. *See* ***id.*** at 502 (distinguishing between misdemeanor possession and felony distribution).

¶24 Genz was in fact charged with two different crimes: possession with intent to deliver D-amphetamine, which conviction he does not challenge; and conspiracy to deliver THC. Genz was not charged with conspiracy to trade these two substances. Further, as noted above, there is no claim or proof that Genz intended to deliver the THC to a subsequent buyer. Pursuant to ***Smith***, there was insufficient evidence to convict Genz of conspiracy to deliver THC. Accordingly, we reverse in part and remand with directions to issue an amended judgment of conviction.

By the Court.—Judgment reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[3] WISCONSIN STAT. § 161.01(6) (1991-92), was renumbered WIS. STAT. § 961.01(6) in 1995. The quoted statutory language remains substantially similar in the current version. *See* ***State v. Pinkard***, 2005 WI App 226, ¶10 n.3, 287 Wis. 2d 592, 706 N.W.2d 157.