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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2009AP003149CR

Circuit Court Case No. 2008CF000565

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY EDWARD REED, JR.,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and from an Order Denying Postconviction Motion entered by Branch 19 of the Milwaukee County Circuit Court, the Honorable Dennis Cimpl, Presiding

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Brief & Appendix of the Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

United States Court of Appeals Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Were the Defendant-Appellant's guilty pleas knowing, intelligent and voluntary?

The circuit court answered this question by ruling that the Defendant-Appellant waived his right to seek withdrawal of his guilty pleas.

2. Did the State breach the plea agreement?

The circuit court answered this question by ruling that the Defendant-Appellant waived his right to argue that the State breached the plea agreement.

3. Should the circuit court have recused itself from reviewing and ruling the Defendant-Appellant's postconviction motion when the court previously recused itself in the same case?

The circuit court answered: No.

STATEMENT OF THE FACTS

The State charged Reed with three counts of Burglary for incidents occurring on January 5, 2008; January 12, 2008; and January 24, 2008. (2). Reed waived his preliminary hearing and the State filed an Information alleging the same three charges. (38 & 5).

The parties reached an agreement and a plea hearing took place on November 17, 2008 before the Honorable M. Joseph Donald. (41). The plea agreement was as follows:

(1) Reed would plead guilty to count one of the Information.

(2) The State would amend count two of the Information to Attempted Burglary and Reed would plead guilty to the amended charge.
(3) The State would dismiss and read-in count three of the Information.
(4) At sentencing, the State would not make any specific recommendation but leave the sentence up to the court's discretion. (41:2).

The court entered a plea colloquy with Reed (41:3-10) and accepted Reed's guilty pleas. (41:10). After the court accepted the pleas, the State introduced three additional incidents that the State wanted Reed to pay restitution on, in addition to the three charged incidents in the Information. (41:11). The court then stated that these three un-charged offenses were to be read-in for restitution purposes. (41:12). The matter was then adjourned for sentencing.

The sentencing hearing took place before the Honorable Dennis R. Cimpl. (42). At the beginning of the hearing, the State recited the plea bargain and Reed's criminal record and then stated the following:

> "I think the only appropriate response is prison, and it's really just a question of how long should Mr. Reed go to prison." (42:6).

Defense counsel reminded the State of the plea agreement and the State asked the Court to withdraw the above comments. (42:6). Defense counsel stated that they would be acknowledging that the case was a prison case and that did not believe the prosecutor's comments would effect the Court's sentence. (42:7). In addition, Judge Cimpl indicated that he would be recusing himself from the restitution hearing, which was required in the case, because of a personal matter he had going on with American Family Insurance Company who was requesting restitution from Reed. (42:7).

The Court acknowledged on the record that the State violated the plea agreement. (42:8). The Court advised Reed that the court would adjourn the matter for sentencing before

a different judge and different prosecutor but Reed, who had been in custody for almost a year while the case was pending, stated that he wanted to go forward with the hearing.

Near the end of the sentencing hearing the Court discussed the impact of the read-in offenses with Reed:

> THE COURT: "You understand that the read ins that aren't charged, you can never be charged with them; and I can consider them in purposes of sentencing? Do you understand that?
>
> THE DEFENDANT: "Now I do." (42:20).

The Court then again advised Reed it would grant an adjournment:

> THE COURT: "If you feel this record is so messed up at this point that you don't want me to handle the sentencing, I'll pass the case 'cause I got to recuse myself on the restitution anyway or if you want me to go ahead, I'll go ahead." (42:21).

The Defendant again agreed to continue with the sentencing.

The Court ultimately imposed ten years in prison for the Burglary conviction in count one, consisting of five years of initial confinement followed by five years of extended supervision. (42:26 & 22). This sentence was ordered to run consecutive to Reed's reconfinement sentences in other matters. (42:26 & 22). The Court imposed six years in prison, comprised of three years of initial confinement and three years of extended supervision for the Attempted Burglary conviction in count two, and ran that sentence concurrent to the sentence for count one. (42:26 & 22). The case was then adjourned for a restitution hearing before the Honorable William Brash III since Judge Cimpl had recused himself.

Mr. Reed timely filed a Notice of Intent to Pursue Postconviction Relief (21) and filed a Postconviction Motion requesting the Court to vacate the judgment of conviction and grant Reed a new plea hearing and sentencing hearing. (25).

For unknown reasons and despite the fact that Judge Cimpl had already recused himself, the case was re-assigned to Judge Cimpl. The Court established a briefing schedule and then scheduled the postconviction motion for a status conference. (27 & 43). At the status conference, the Court summarily denied Reed's motion and denied Reed's request for the Court to recuse itself. (43:3-5). The Court's reasoning was as follows:

> Judge Donald took the plea. Judge Donald did not explain a dismissal and read-in to Mr. Reed. Mr. Reed was out here. I started to explain it. I offered to recuse myself because I was going to recuse myself on the issue of restitution anyway because the restitution is with American Family. Judge Brash ultimately handled that.
>
> I don't think I have to recuse myself from this motion. Because I just recused myself for that limited purpose of the restitution, which Judge Brash handled.
>
> I think I crossed every "t" and dotted every "i" with Mr. Reed. I gave him every opportunity once he learned about what a dismissal and read-in meant.
>
> There was also some talk about whether or not the State breached the plea bargain in this matter because of their initial recommendation. That was fully told to Mr. Reed. Ms. Cleghorn talked to him off the record at the time to fully explain what a dismissal and read-in was. Mr. Reed's response after all of that was, I want to go ahead with sentencing. I offered to put it off to another date, offered to give him a new judge. He declined all of that.

> I feel he waived his right on this motion, and because I feel that he did, I'm going to deny this.
>
> (43:3-4).

Judge Cimpl entered a written order denying the postconviction motion. (33). Mr. Reed timely filed a Notice of Appeal. (34). This appeal is from the Judgment of Conviction and from the Order Denying Defendant's Postconviction Motion.

ARGUMENT

I. THE DEFENDANT'S PLEAS WERE NOT INTELLIGENTLY MADE AS HE WAS NOT MADE AWARE OF THE CONSEQUENCES OF THE CHARGED READ-IN OFFENSE AND THREE UNCHARGED READ-IN OFFENSES.

Plea withdrawal is a matter of right for a defendant who shows that the plea was not knowingly or voluntarily entered. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Plea withdrawal motions based on a defective colloquy claim follow ***State v. Bangert,*** 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and its progeny. Plea withdrawal motions based on extrinsic factors follow cases under ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

For a plea to satisfy the constitutional standard, a defendant must enter it knowingly, voluntarily and intelligently. ***Bangert***, 131 Wis. 2d at 257. This means a defendant who pleads guilty must understand both the constitutional rights being relinquished as well as the nature of the crimes to which he or she is pleading. ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999). Additionally, the Court must make an inquiry to satisfy itself that the defendant committed the crime that was charged. WIS. STAT. §971.08(b). A defendant alleging that the trial court failed to fulfill its plea colloquy duties is entitled to an evidentiary hearing if he or she makes a prima facie showing that the court accepted the plea in violation of WIS. STAT. § 971.08

or other mandatory procedures, and alleges that he or she did not know or understand the information that should have been produced at the plea colloquy. ***Bangert***, 131 Wis. 2d at 274.

Reed's pleas in this case were not intelligently made. For a plea to be valid, it must be made knowingly, intelligently and voluntarily in order for it to comport with fundamental due process. ***State v. Brown***, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906. With regard to read-in offenses at a plea hearing, the Wisconsin Supreme Court instructed that a circuit court should advise a defendant that it may consider read-in charges when imposing a sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge. ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. When a guilty plea is not knowing, intelligent and voluntary, the Defendant is entitled to withdraw the guilty plea as a matter of right. ***Brown***, 2006 WI at ¶ 19.

In this case, where the plea bargain included the read-in of one dismissed charge and three uncharged offenses, Judge Donald failed to comply with these requirements. Rather, Judge Donald merely asked Reed if he had any objection to the court using three offenses for purposes of sentencing in terms of establishing restitution. Judge Donald neglected to inform Reed that the uncharged read-in offenses could have an impact on Reed's sentence. Reed's pleas were not intelligently made, and therefore, Reed is entitled to withdraw his pleas as a matter of right.

Moreover, Reed did allege that he was unaware of the information that Judge Donald should have provided. The first page of Reed's moving papers include an allegation that "his pleas were not intelligently made because he did not understand the consequences of three un-charged read-in offenses." Therefore, the motion sufficiently alleges that Mr. Reed did not understand the information (about the consequences of the read-in offenses) that should have been provided at the plea hearing to support the plea.

Furthermore, "the requirements for a ***Bangert*** motion are relatively relaxed because the source of the defendant's misunderstanding, the plea colloquy defect, should be clear from the transcript of the hearing at which the plea was taken." ***State v. Howell***, 2007 WI 75 ¶28, 301 Wis. 2d 350, 734 N.W.2d 48.

Reed has, therefore, made a prima facie showing (1) that the circuit court's plea colloquy did not conform with judicially mandated procedures and (2) included an allegation that Reed was unaware of the consequences of the three uncharged read-in offenses which should have been described to him during the plea colloquy. The circuit court committed reversible error by not conducting an evidentiary hearing to determine whether Reed's guilty pleas were knowing, intelligent and voluntary.

II. THE STATE MATERIALLY AND SUBSTANTIALLY BREACHED THE PLEA AGREEMENT.

In addition, the State in this case materially and substantially breached the plea agreement. A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). When examining a defendant's allegation that the State breached a plea agreement, it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation. ***See United States v. Clark***, 55 F.3d 9, 13 (1st Cir. 1995). Therefore, the issue in a post-conviction setting is whether the State breached the agreement and, if so, whether the breach was material and substantial, rather than whether the trial court was influenced by the breach. ***State v. Howard***, 2001 WI App 137 ¶14, 246 Wis. 2d 475, 630 N.W.2d 244, *review denied*, 2003 WI 126, 265 Wis. 2d 418, 668 N.W.2d 558. A material and substantial breach of a plea agreement is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained. ***State v. Deilke***, 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945. Even an oblique variance will entitle the defendant to a remedy if it "taints" the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for. ***State v. Knox***, 213

Wis. 2d 318, 321, 570 N.W.2d 599 (Ct. App. 1997) (citing ***State v. Poole***, 131 Wis. 2d 359, 394 N.W.2d 909 (Ct. App. 1986)).

The plea agreement in this case required the State to not recommend a specific sentence but to leave the sentence up to the court. At sentencing, the State materially and substantially breached the plea agreement by informing the court that Reed deserved to go to prison. This blatantly deprived Reed of a benefit for which he bargained and tainted the sentencing hearing, impairing the integrity of the entire sentencing process. The Court even acknowledged the State's violation during the hearing. A defendant is automatically prejudiced when the prosecutor materially and substantially breaches a plea agreement, and new sentencing is required. ***State v. Smith***, 207 Wis. 2d 258, 558 N.W.2d 379 (1997). Thus, if the court fails to vacate Reed's pleas and schedule a new plea hearing for the reasons stated above, Reed respectfully requests that he be granted at least a new sentencing hearing due to the State's breach.

The State will presumably concede that the prosecutor breached the plea agreement by stating that Reed should go to prison but will likely argue that ADA Griffin's statement was not a material and substantial breach. This position, however, clashes with ***Bangert*** and ***Smith*** for two critical reasons. First, the State fails to acknowledge that by telling Judge Cimpl that Reed should go to prison, the State deprived Reed of a substantial and material benefit that he had bargained for – the bargain that the State would not make any sentencing recommendation to the Court. The fact that the State had agreed to leave the sentence to the Court's discretion was a crucial component of the plea agreement and was a primary factor behind Reed's decision to plead guilty. Second, and more importantly, the Court in ***Smith*** held that when a prosecutor agrees to make no sentencing recommendation but instead recommends a prison term the State has committed a material and substantial breach of the plea agreement. This exact fact scenario occurred at Reed's sentencing hearing. As with the defendant in ***Smith***, Reed and the State agreed that if Reed pled guilty, the State would not make any sentence recommendation to the Court. And as in ***Smith***, the prosecutor, at sentencing, recommended to the Court that

Reed deserved to go to prison and that the only question was for how long. Reed was clearly substantially deprived of the benefit of his bargain.

Reed did not waive his right to challenge the State's breach of the plea agreement. First, the State will be unable to offer statutory or case law in support of their waiver argument and Reed argues that breach of a plea agreement is non-waivable. Second, Reed had waited patiently for his case to evolve through the court system for almost a calendar year. Then, when the day of his sentencing hearing finally arrived, he has to wait in the bullpen for hours until his case was called. He was then expected to be able to decide whether he wanted yet another adjournment without even receiving the benefit of the case being passed and an opportunity to discuss things with his attorney in private. Under the totality of the circumstances it is not permissible to conclude that his decision to proceed with the sentencing hearing was made knowingly, voluntarily or intelligently.

Finally, fundamental fairness dictates that Reed should, at the very least, be entitled to an error-free sentencing hearing. He did not understand the impact of the read-in offenses. Then Reed was seriously jeopardized by the State's breach of the plea agreement. The entire concept of plea bargaining revolves around fundamental fairness. Reed deserves to understand the nature of the read-in offenses, deserves to receive the full benefit of his plea bargain and deserves a brand new hearing.

III. JUDGE CIMPL SHOULD HAVE RECUSED HIMSELF FROM RULING ON THE POSTCONVICTION MOTION.

Whether a judge was a "neutral and detached magistrate" is a question of constitutional fact which we review de novo and without deference to the trial court's ruling. ***State v. Santana***, 220 Wis. 2d 674, 684, 584 N.W.2d 151 (Ct. App. 1998). We begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced. ***Id***. In determining the question, we apply both a subjective and an objective test. ***Id***. We first look to the challenged judge's own

determination of whether the judge will be able to act impartially. ***Id***. Next, we look to whether there are objective facts demonstrating that the judge was actually biased. ***Id***. at 685, 584 N.W.2d 151. This requires that the judge actually treated the defendant unfairly. ***Id***.

The reasons for Judge Cimpl's recusal from determining the restitution issues are unknown. However, Judge Cimpl did recuse himself and Reed's case was assigned to a new judge. After Reed filed his postconviction motion, Judge Cimpl was inexplicably re-assigned to the case despite having already recused itself. Once the Court recused itself, it should have not had any further connection with the case.

CONCLUSION

Based upon the above argument and authorities, Mr. Reed respectfully requests the court to vacate the judgment of conviction and schedule the matter for a new plea and sentencing hearing.

Dated this __ day of April, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,890 words.

I hereby further certify that filed with this brief, separate from this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

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