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STATE OF WISCONSIN

S U P R E M E C O U R T

Case No. 2012AP2513-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RAPHFEAL LYFOLD MYRICK,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I,
REVERSING A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
REBECCA F. DALLET, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE ON REVIEW

Did the court of appeals act in excess of its jurisdiction and usurp the exclusive authority of the supreme court by effectively amending a statutory rule of evidence to make it applicable in a situation expressly excluded by the supreme court when it promulgated the rule?

The court of appeals, by employing a legal fiction, effectively broadened Wis. Stat. § 904.10 to make it applicable any time there are ongoing plea negotiations, including where the prosecutor makes some kind of plea offer to the defendant, which is not contemplated by the plain language of the rule that was purposely narrowed so it would not apply to that situation.

ORAL ARGUMENT AND PUBLICATION

The supreme court ordinarily hears oral arguments and publishes its opinions.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Circuit Court for Milwaukee County, Rebecca F. Dallet, Judge, convicting the defendant-appellant, Raphfeal Lyfold Myrick, of first-degree intentional homicide as a party to the crime.

The issue on review relates to whether the prosecutor properly used at Myrick's trial the testimony that Myrick gave at the preliminary hearing of his codefendant pursuant to plea negotiations which were ongoing at the time Myrick testified but were later broken off without a plea.

The circuit court ruled that the testimony was admissible against Myrick under Wis. Stat. § 904.10 because it was not given in connection with an offer by Myrick to the prosecuting attorney to plead guilty or no contest.

The court of appeals, Fine, J., reversed Myrick's conviction, ruling in a published opinion, *State v. Myrick*, 2013 WI App 123, 351 Wis. 2d 32, 839 N.W.2d 129, that his preliminary hearing testimony was improperly

admitted under § 904.10 because it was given in connection with the plea bargaining process.

In reaching this decision the court of appeals applied the relevant rule of evidence in a novel way that is not contemplated by its plain language or any construction of that language, in substance rewriting the statute significantly differently from the way it was written by its drafters. The decision of the court of appeals conflicts with the plain language of the rule, which was expressly narrowed by the drafters of the rule to make it inapplicable to the situation to which it has been made applicable by the court of appeals.

The court of appeals acted in excess of its jurisdiction and usurped the exclusive authority of the supreme court to amend the statutory rules of evidence.

FACTS

Myrick was charged together with Justin Winston in the shooting death of Marquise Harris (2; 12:1, P-Ap. 132). Since Myrick was the less culpable of the two defendants, the prosecutor, Mark Williams, sought his cooperation in convicting Winston, who actually killed Harris by riddling his body with bullets from an assault rifle (12:1, P-Ap.132; 68:33-35, 41-42, 66; 69:36).

Williams sent a letter to Myrick's attorney advising defense counsel that the state was making an "offer of resolution" conditioned on Myrick's willingness to cooperate in the case against Winston (12:1, P-Ap. 132).

The letter stated that "as part of this negotiation" Myrick would have to agree to testify against Winston whenever the state wanted him to be a witness (12:1, P-Ap.132). Myrick would also be required to give a truthful debriefing to the police (12:1, P-Ap.132).

The letter further stated that "[i]n exchange the State will amend the charge" against Myrick to felony murder, and "would recommend a period of 12 to 13 years of initial confinement" (12:1, P-Ap.132). However, the prosecutor did not promise to actually make these concessions if Myrick cooperated, but hedged his offer by saying that it would be "at the discretion of said district attorney's office . . . as to whether the above negotiation will be conveyed to you to settle [this] case short of trial" (12:2, P-Ap.133). In essence, the prosecutor offered to consider making an offer of a reduced charge to which Myrick could plead if he cooperated in the case against Winston.

Finally, the letter warned that "[s]hould we ultimately reach a negotiation in this case wherein Mr. Myrick agrees to cooperate with and/or testify truthfully on behalf of the State," and subsequently refuses to cooperate or testify, "the State reserves the right to declare any such negotiation null and void" (12:2, P-Ap. 133).

Myrick agreed to cooperate, and pursuant to what the prosecutor paradoxically characterized as a "plea agreement to testify," debriefed the police and testified at Winston's preliminary hearing (62:6, P-Ap.117; 69:31-32, 48-49).

But that is where Myrick's cooperation ended. He refused to testify at any additional proceedings involving Winston (62:4, P-Ap.115).

So there were never any additional negotiations leading to any fixed plea offer by the state or any actual agreement between the state and Myrick that he would plead guilty to a reduced charge with a sentence recommendation by the state. Instead, Myrick went to trial on the original charge of first-degree intentional homicide which was never amended (64-69).

At Myrick's trial the state was permitted to present Myrick's testimony at Winston's preliminary hearing, which also implicated Myrick in the murder as a party to the crime (69:31-64).

DECISION OF THE COURT OF APPEALS

The court of appeals noted that the relevant parts of the applicable statute state that evidence of statements made in court in connection with an offer to the prosecuting attorney to plead guilty is not admissible in any criminal proceeding against the person who made the offer. *Myrick*, 351 Wis. 2d 32, ¶ 5 (P-Ap.105-06).

The court identified the question in this case as whether Myrick's testimony at Winston's preliminary hearing was a statement made "'in connection' with *his* offer to the prosecutor, rather than, as the State argues, merely 'an offer by the prosecutor to Myrick.'" *Myrick*, 351 Wis. 2d 32, ¶ 6. (P-Ap.106) (emphasis in opinion).

The court ruled that the prosecutor's letter to Myrick showed that Myrick made an offer to the prosecuting attorney. *Myrick*, 351 Wis. 2d 32, ¶ 7 (P-Ap. 106). The court said the "State was prepared to offer Myrick" a reduced charge and sentence recommendation "*if* Myrick complied with what the letter required." *Myrick*, 351 Wis. 2d 32, ¶ 7 (P-Ap.106-07) (emphasis in opinion). The reduction and recommendation in the prosecutor's letter was "part and parcel of Myrick's reciprocal offer to the State." *Myrick*, 351 Wis. 2d 32, ¶ 7 (P-Ap.107). Because "the only way Myrick could get the offered sentencing recommendation was to plead guilty . . . Myrick's 'offer to the . . . prosecuting attorney' was similarly 'implicit' in the prosecutor's letter." *Myrick*, 351 Wis. 2d 32, ¶ 7 (P-Ap.107).

The court held that Myrick's testimony at the preliminary hearing was protected by § 904.10 because

this testimony was "'in connection with' the plea-bargaining process" which was still ongoing when he testified. *Myrick*, 351 Wis. 2d 32, ¶¶ 9, 10 (P-Ap.112-13).

So although Myrick's discontinuation of cooperation relieved the state of any need to reduce the charge or recommend a sentence, it did not make the preliminary hearing testimony admissible. *Myrick*, 351 Wis. 2d 32, ¶ 10 (P-Ap.113).

Having found that Myrick's testimony at Winston's preliminary hearing was erroneously admitted at Myrick's trial, the court reversed Myrick's conviction.

ARGUMENT

Wisconsin Statute § 904.10 (2011-12) provides in relevant part that "[e]vidence of statements made in court . . . in connection with" "an offer to the . . . prosecuting attorney to plead guilty or no contest to . . . any . . . crime . . . is not admissible . . . against the person who made the . . . offer."

This statute is entirely unambiguous, and therefore must be understood to mean precisely what its commonly understood words plainly say it means. *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶¶ 16-17, 290 Wis. 2d 421, 714 N.W.2d 130; *J.A.L. v. State*, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991).

Section 904.10 plainly applies by its express terms only when an offer is made *to* the prosecutor. It does not apply when an offer is made *by* the prosecutor. It certainly does not apply when plea negotiations are merely ongoing with no offer actually made by anyone.

Moreover, § 904.10 plainly applies only to an offer to plead guilty or no contest. It does not apply to offers to do anything else. *See State v. Nicholson*, 187

Wis. 2d 688, 697-98, 523 N.W.2d 573 (Ct. App. 1994) (statute does not apply to offer to confess). It would not apply to any offer, if there was one, to testify or debrief the police.

The fact that the statute applies to actual pleas of guilty or no contest, later withdrawn, Wis. Stat. § 904.10, as well as to offers to prosecutors to plead guilty or no contest, also shows that the statute applies to steps performed by defendants in connection with their pleas. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory language interpreted in context in connection with related provisions).

These plain applicability limits are underscored by the operative phrase of the statute that makes a statement inadmissible against the person who made the offer. Since the prosecuting attorney is not a party against whom a statement could be admitted, *see State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 528, 579 N.W.2d 678 (1998), the statute can only be referring to offers made by the defendant, a party against whom a statement and other evidence may be admitted. *See Cardenas-Hernandez*, 219 Wis. 2d at 528; Wis. Stat. § 901.06 (2011-12).

The defendant's offer may be implied as well as express, but it still must be an offer made by the defendant. *See State v. Norwood*, 2005 WI App 218, ¶ 4, 287 Wis. 2d 679, 706 N.W.2d 683.

Therefore, a party objecting to evidence must show that it relates to a criminal charge, and is evidence of a statement made in court in connection with an offer to plead made to the prosecuting attorney, and is being offered against the person who made the offer to plead. Ralph Adam Fine, Fine's Wisconsin Evidence 114 (2d ed. 2008).

This rule, which remains unchanged from its enactment forty years ago, was specifically intended to be narrowly applied, as expressed in the plain language chosen by its drafters, only to offers to the court or to the prosecutor to plead guilty. *See* Judicial Council Committee's Note to § 904.10, 59 Wis. 2d R95 (1973).

In this regard the drafters deliberately changed the federal rule, Note, 59 Wis. 2d at R95, which is not limited to situations where there is an offer by the defendant to the prosecutor to plead, but applies whenever there are plea discussions between the defendant and the prosecutor. Fed. R. Evid. 410 (West 2012).

Faced with the plain meaning of § 904.10 and the plain drafting comment that accompanies it, the court of appeals did not purport to engage in any sort of statutory construction to interpret this provision in a different way. *See generally Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447 (1967) (if the meaning of a statute is plain, it is impermissible to resort to extrinsic sources to devise an esoteric alternative interpretation).

Nor did the court of appeals purport to apply the statute in accord with its plain meaning to the particular facts of this case.

There is absolutely no shred of evidence anywhere in the record that Myrick ever made any offer of any kind to the prosecutor or anyone else.

It was the prosecutor who made the only offer reflected by the record (12, P-Ap.132-33). It was the prosecutor who made an offer to Myrick (12, P-Ap.132-33).

What Myrick did was accept the offer made to him by the prosecutor (69:43), at least for a time until he eventually changed his mind and decided to reject it.

Since an agreement requires an offer by one party and acceptance of this offer by the other party, reflecting a meeting of the minds, if Myrick had responded to the prosecutor's offer by making an offer of his own instead of accepting the prosecutor's offer there would not have been an agreement. *See American Nat'l Prop. and Cas. Co. v. Nersesian*, 2004 WI App 215, ¶ 16, 277 Wis. 2d 430, 689 N.W.2d 922.

Furthermore, the offer the prosecutor made to Myrick was not an offer to allow him to plead guilty to a reduced charge. The prosecutor offered only to exercise his discretion to decide whether to offer Myrick an opportunity to plead guilty to a reduced charge depending on whether Myrick complied with the conditions attached to the prosecutor's offer (12:2, P-Ap.133).

So even Myrick's acceptance was not an acceptance of an offer to plead guilty. Myrick accepted an offer to make an offer to allow him to plead guilty if he fully cooperated in the case against Winston.

There was never any offer by Myrick to the prosecutor to plead guilty to any crime which would have allowed the court of appeals to properly apply § 904.10 to prohibit the use of any statements made by Myrick.

Instead, the court of appeals used an evidentiary device to change the operation of § 904.10 to make Myrick's statements inadmissible under that provision.

When the court of appeals said that Myrick made an "'offer to the . . . prosecuting attorney' for Myrick 'to plead guilty,'" which was "'implicit' in the prosecutor's letter," *Myrick*, 351 Wis. 2d 32, ¶ 7 (P-Ap.106-07), it was not referring to any facts in or inferable from the record. It was indulging in a legal fiction, i.e. an assumption, illusion or pretense that something is true even though it may actually be untrue. Black's Law Dictionary 976 (9th

ed. 2009); Webster's Third New International Dictionary 1290 (unabridged ed. 1986).[1]

A legal fiction is a device that may be used in legal reasoning for the purpose of altering how a legal rule operates without changing the letter of the rule. Black's Law Dictionary at 976-77. A legal fiction may be used to divert a legal rule from its original purpose to indirectly accomplish some other object. Black's Law Dictionary at 976-77. And that is exactly what the court of appeals did in this case.

The court of appeals indulged in the contradictory fiction that acceptance of an offer made by the prosecutor to the defendant is an offer made by the defendant to the prosecutor.

By using this fiction, the court of appeals effectively altered the operation of Wis. Stat. § 904.10, without changing or construing a single word of its language, to make this statute applicable not only to offers by the defendant to the prosecutor to plead guilty, as provided by the express terms of the statute, but also to offers by the prosecutor to the defendant to allow the defendant to plead guilty, which is not contemplated by the statute.

If the defendant accepts an offer made by the prosecutor, the court will pretend that the defendant made an offer to the prosecutor, and if the defendant is

[1] Some legal fictions include the pretense that the legislature has a collective intent that is the sum of its members' intents, *State v. Byers*, 2003 WI 86, ¶ 48, 263 Wis. 2d 113, 665 N.W.2d 729 (Abrahamson, C.J., concurring), that a corporation is an entity separate from its shareholders, *Consumer's Co-op of Walworth County v. Olsen*, 142 Wis. 2d 465, 474, 419 N.W.2d 211 (1988); that a municipality is a person, *Village of Tigerton v. Minniecheske*, 211 Wis. 2d 777, 783, 565 N.W.2d 586 (Ct. App. 1997), and that a person who kills in the heat of passion lacks an intent to kill. *State v. Lee*, 108 Wis. 2d 1, 9-10, 321 N.W.2d 108 (1982).

portrayed as making an offer to the prosecutor his statements made in connection with that imagined offer are inadmissible in evidence.

Indeed, the court of appeals effectuated an even more drastic change than that. Since there never was any actual plea offer by anyone in this case, the court of appeals used a legal fiction to make § 904.10 applicable any time there is an "ongoing" "plea-bargaining process," regardless of whether anyone makes or accepts any offer to plead guilty. *Myrick*, 351 Wis. 2d 32, ¶¶ 7, 10 (P-Ap.106-07, 113).

So what the court of appeals did was to make the initial applicability of the Wisconsin rule the same as the initial applicability of the federal rule by changing it to apply whenever there are plea discussions between the defendant and the prosecutor. *Cf.* Fed. R. Evid. 410.[2]

However, the court of appeals had no jurisdiction or authority to change the operation of the statute from the way the statute is written.

The supreme court has authority to develop and declare the law. *State v. Schumacher*, 144 Wis. 2d 388, 405-06, 424 N.W.2d 672 (1988). The court of appeals does not. *Schumacher*, 144 Wis. 2d at 407.

Section 904.10 is one of the rules of evidence which were promulgated by the supreme court under its inherent and implied power, and under the rule making

[2] This change actually made the Wisconsin rule more broad than the federal rule. While the federal rule is more generous on the front end, it is stingier in back. It does not prohibit the admission of any statement made in court, but only statements made during a plea proceeding. Fed. R. Evid. 410(a)(3). Thus, under the federal rule Myrick's statements made at a preliminary hearing would be admissible in evidence regardless of any plea discussions that preceded them.

authority granted to the supreme court by what is now Wis. Stat. § 751.12 (2011-12). *In the Matter of the Promulgation of Rules of Evidence for the State of Wisconsin*, 59 Wis. 2d R1-R2 (1973).

The supreme court also has power to amend the statutes it has created under its rule making authority. *Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶ 35, 310 Wis. 2d 623, 752 N.W.2d 220; Wis. Stat. § 751.12(2). Indeed, when it promulgated the rules of evidence, the supreme court expressly reserved the power to "repeal, amend, modify or otherwise amplify specific rules of evidence by individual decisions of [the supreme] court without following general rule-making procedures of [the supreme] court." *In the Matter of the Promulgation of Rules of Evidence for the State of Wisconsin*, 59 Wis. 2d R2.

The court of appeals has no similar rule making authority. *State v. Jaramillo*, 2009 WI App 39, ¶ 16, 316 Wis. 2d 538, 765 N.W.2d 855; *State v. Perez*, 170 Wis. 2d 130, 137, 487 N.W.2d 630 (Ct. App. 1992). It has no power to create statutory rules or to amend statutory rules. *Jaramillo*, 316 Wis. 2d 538, ¶ 16; *Perez*, 170 Wis. 2d at 137. *See Mosing v. Hagen*, 33 Wis. 2d 636, 647, 148 N.W.2d 93 (1967) (rules promulgated by supreme court binding on all courts until changed by supreme court). *See also Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals has no power to overrule or modify opinions).

So the court of appeals had no power to effectively amend § 904.10 by expanding it to include statements made by a defendant in connection with the plea bargaining process, regardless of whether any actual offer to plead guilty was made by the defendant to the prosecutor.

When the court of appeals amended § 904.10 by the expedient of using a legal fiction that a defendant who accepts an offer made by the prosecutor may be deemed to be making an offer to the prosecutor, as well as a legal fiction that an offer by the prosecutor to allow the defendant to plead guilty is an offer to plead guilty, the court of appeals purported to exercise a power it does not have, and usurped the power of the supreme court.

Indeed, the court of appeals not only usurped the exclusive power of the supreme court to amend the rules of evidence, it effectively overruled the supreme court's exercise of its power to promulgate those rules.

"In formulating the Wisconsin rules, uniformity with the Proposed Federal Rules was the overriding principle. . . . Changes from the federal rules were proposed only in instances where legal tradition or legislative enactment seemed substantially compelling or where Wisconsin law was more advanced." John A. Decker, *Preface to Proposed Wisconsin Rules of Evidence*, 56 Marq. L. Rev. (no page number preceding page 156) (1973).

Section 904.10 is one of those rare and carefully considered departures from the federal rules. Wisconsin changed the comparable federal rule in four ways, one of which was by narrowing its reach so that it applies only where a defendant makes an offer to the court or the prosecutor to plead guilty. Judicial Council Committee's note to Wis. Stat. § 904.10, 59 Wis. 2d R95.

By expanding this initially narrow rule to make it apply not just to offers by the defendant to the prosecutor, but also to offers by the prosecutor to the defendant, and even to discussions between them that do not include any offer by or to anyone, the court of appeals substituted its own view of the proper applicability of § 904.10 for the view adopted by the supreme court. The court of appeals

effectively amended the statutory rule to make its view of what the rule should be the law, thereby repealing the meaning of the provision as it was promulgated by the supreme court.

When a court acts in excess of its jurisdiction, its judgments and orders are not merely erroneous but void. *State v. Smith*, 2005 WI 104, ¶ 22, 283 Wis. 2d 57, 699 N.W.2d 508; *Kohler Co. v. DILHR*, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1977). *See, e.g.*, *State v. Campbell*, 2006 WI 99, ¶ 43, 294 Wis. 2d 100, 718 N.W.2d 649 (judgment or order valid, not void, when court has jurisdiction). Because the court of appeals acted in excess of its jurisdiction when it amended § 904.10, its decision is void.

A void decision is a nullity, cannot create any right or obligation, and is not binding on anyone. *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 19, 318 Wis. 2d 216, 768 N.W.2d 53; *Campbell*, 294 Wis. 2d 100, ¶ 42; *Kett v. Cmty. Credit Plan, Inc.*, 222 Wis. 2d 117, 127-28, 586 N.W.2d 68 (Ct. App. 1998), *aff'd*, 228 Wis. 2d 1, 596 N.W.2d 786 (1999).

The decision of the court of appeals was plainly beyond the authority of the court of appeals to make, improperly amended a statute in a precedential published decision, and improperly reversed the conviction of a first-degree murderer who voluntarily admitted in court under oath that he was a participant in the crime.

CONCLUSION

It is therefore respectfully submitted that because the court of appeals acted in excess of its jurisdiction to effectively amend a statutory rule promulgated by the supreme court, the supreme court should declare the decision of the court of appeals a nullity, should restore § 904.10 to the plain meaning it has had since it was promulgated, should hold that under the plain meaning of § 904.10 Myrick's preliminary hearing testimony was properly admitted against him at his trial, and should affirm the judgment convicting Myrick of first-degree intentional homicide.

Dated: February 12, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,906 words.

Dated this 12th day of February, 2014.

_____
Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of February, 2014.

_____
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