STATE OF WISCONSIN

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

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

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

I. THE STATE IS NOT PRECLUDED FROM MAKING THE ARGUMENTS IT PRESENTS ON THIS APPEAL.

The state has not changed on appeal the position it took in the circuit court regarding the agreement between the prosecutor and Myrick.

The state does not contend on appeal that there was never any agreement, or that the agreement which there was did not involve some contemplation of a plea.

Rather, the state insists that the only agreement between the parties reflected by the record is the one proposed in the prosecutor's letter to Myrick (12:1-2, P-Ap.132-33). Indeed, the letter itself states that it "embodies the entirety of the agreement," and that "no other promise or agreement exists" between the prosecutor and Myrick (12:2, P-Ap.133).

The agreement proposed in this letter was not that Myrick would enter a plea of guilty to any charges, but that if Myrick complied with the conditions imposed by the prosecutor the prosecutor would exercise his discretion to determine whether to actually offer to Myrick the plea concessions suggested in the letter (12:2, P-Ap.133).

More importantly, this letter embodied an offer made by the prosecutor to Myrick, not an offer by Myrick to the prosecutor (12:1, P-Ap.132). The letter was written by the prosecutor, not by Myrick, and plainly stated that the state, not Myrick, was "making the following offer of resolution" (12:1, P-Ap.132).

So when the prosecutor mentioned a "plea agreement" in court proceedings, he was necessarily referring to the agreement outlined in the letter, as Myrick admits, Brief for Defendant-Appellant at 15, because there was no other agreement. The prosecutor was not referring to any agreement that Myrick would enter a guilty plea to reduced charges because there was no offer to allow Myrick to enter any such plea, much less any agreement that he would do so.

When the prosecutor stated that Myrick was "willing" to plead guilty, he simply meant that Myrick would be amenable to accepting the plea offer contemplated by the prosecutor if the prosecutor actually made that offer after Myrick complied with the required conditions. The word "willing" means inclined or disposed to do something, The American Heritage Dictionary of the English Language 2043 (3d ed. 1996); Webster's Third New International Dictionary 2617

(unabridged ed. 1986), indicating that no commitment to actually do it has been made.

Myrick's cropped quote from the state's opening brief that "'there were never any . . . negotiations'" etc., Brief for Defendant-Appellant at 9,[1] makes it seem, by impermissibly ellipsizing an important word, that the state was contending there were never any negotiations between the prosecutor and Myrick. In fact, the quoted part of the state's brief says that "there were never any additional negotiations." Brief for Plaintiff-Respondent-Petitioner at 4, clearly recognizing that there were some negotiations between the parties, i.e. those reflected in the prosecutor's letter.

Myrick also asserts the state argued "that there was 'no offer actually made by anyone,'" Brief for Defendant-Appellant at 9, making it seem like the state was asserting as fact that no one ever made any offer of any kind. In fact, this snippet was not an assertion of fact, but part of a legal argument. The state argued that Wis. Stat. § 904.10 (2011-12) is unambiguous, does not apply when an offer is made by the prosecutor, and "certainly does not apply when plea negotiations are merely ongoing with no offer actually made by anyone." Brief for Plaintiff-Respondent-Petitioner at 6.

The state did say that there was no evidence "that Myrick ever made any offer of any kind to the prosecutor or anyone else." Brief for Plaintiff-Respondent-Petitioner at 8. But the prosecutor never said or implied that Myrick ever made an offer to him. Myrick cites nothing suggesting that the prosecutor ever made such a concession.

So the state has not taken any position on appeal which was inconsistent with any position it took in the circuit court.

[1] The rest of the quote is wrong as well but not in a way that is excessively misleading.

The state has made arguments which are different from, but not inconsistent with, its arguments in the circuit court.

However, while the state is the petitioner in this court, it was the respondent in the court of appeals. And the respondent on appeal may make arguments it did not make in the circuit court to support the ruling of that court. *See State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860; *State v. Horn*, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987); *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985); *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

Myrick's contention that he did not have an opportunity to develop the facts in the circuit court is clearly incorrect.

As stated by Judge Fine in his text on Wisconsin evidence, a party objecting to the admission of evidence under § 904.10 must show that the statement sought to be excluded was made in connection with an offer to plead made to the prosecuting attorney, and is being used against the person who made the offer to plead. Ralph Adam Fine, Fine's Wisconsin Evidence 114 (2d ed. 2008). Thus, Myrick had legal notice that if he wanted to prevent the admission of his testimony at his codefendant's preliminary hearing he had to show that this testimony was given in connection with an offer to plead guilty he made to the prosecutor.

Instead, Myrick's attorney stated that Myrick made an agreement pursuant to the offer made by the prosecutor (62:7-8, P-Ap.118-19). Counsel argued that federal law prohibited the state from using the testimony given under the agreement (62:9, P-Ap.120). As pointed out in the state's opening brief, the analogous federal law is not limited to situations where there is an offer by the defendant to the prosecutor to plead guilty, but applies

whenever there are plea discussions between them. Brief for Plaintiff-Respondent-Petitioner at 8, 11.

So if anyone is changing positions on appeal it is Myrick, who is now asserting that he made an offer to the prosecutor instead of accepting the offer made to him by the prosecutor.

Besides, Myrick argues in the next section of his brief that the record is sufficiently developed to support his present position that he made an offer to the prosecutor to plead guilty. Brief for Defendant-Appellant at 18.

II. MYRICK DID NOT MAKE ANY OFFER TO THE PROSECUTOR TO PLEAD GUILTY.

Myrick argues that it would make no sense for him to make incriminating statements if he did not have a plea agreement.

But that argument begs the relevant questions in this case, i.e. what did the agreement actually provide regarding a plea, and who made the offer that resulted in the agreement. The answers to those questions are that it was the prosecutor who made the offer, and that the prosecutor offered to consider making an offer to allow Myrick to plead to a reduced charge if Myrick complied with the conditions of the prosecutor's initial offer.

Because Myrick did not fully comply with the conditions of the prosecutor's initial offer, the prosecutor never actually made an offer to allow Myrick to plead guilty to a reduced charge, and Myrick never actually agreed to plead guilty pursuant to any such offer. Myrick may have been willing to plead to a reduced charge if the prosecutor offered to allow him to plead to a reduced charge, but because there was never any such offer there was never any such agreement.

The parties' request to set a date for the entry of a plea after the date of the codefendant's trial is completely consistent with the terms of the offer made by the prosecutor. The parties anticipated that Myrick would comply with the conditions of the offer by testifying at the codefendant's trial, that the prosecutor would then make the offer to actually allow Myrick to plead to a reduced charge conditioned on that testimony, and that Myrick would accept the contemplated offer and plead guilty.

Myrick's argument regarding contract law defeats itself.

Under Myrick's definition of an offer, Brief for Defendant-Appellant at 24, it was the prosecutor who made the offer in this case by manifesting his willingness to enter into a bargain so as to justify Myrick in understanding that his assent to that bargain was invited and would conclude it.

As Myrick admits, Brief for Defendant-Appellant at 26-27, 31, the prosecutor made an offer, and "Myrick agreed to the terms" of the offer made by the prosecutor. Therefore, with an offer by one party and an acceptance by the other party there was an agreement between them.

State v. Nicholson, 187 Wis. 2d 688, 523 N.W.2d 573 (Ct. App. 1994), does not hold, as Myrick suggests, that § 904.10 applies as long as the defendant reasonably expected to negotiate a plea.

Nicholson actually holds that there are plea negotiations if the defendant reasonably expects to negotiate a plea. 187 Wis. 2d at 697. But negotiations for a plea rather than for something else like a confession are simply a condition precedent. *Id.* at 697-98. By quoting the statute, the case reaffirms that for the statute to apply there must still be an offer to plead guilty made by the defendant to the prosecutor during the course of the plea negotiations. *See id.* at 697-98.

An offer may be implied, but it must be an offer made by the defendant to the prosecutor, not acceptance of an offer made by the prosecutor to the defendant, that is implicit.

Myrick argues that the prosecutor forfeited any right to exercise his discretion to make an actual plea offer by failing to exercise this discretion immediately after Myrick debriefed the police. Brief for Defendant-Appellant at 28-29.

But that was the only thing the prosecutor offered to do. So if Myrick is right, and the prosecutor chose to be committed to what was left of the initial agreement, the prosecutor would not have been required to do anything.

As Myrick observes, the drafters of § 904.10 engaged in a legal fiction with a little help from the legislature.

The Judicial Council Committee noted that at least one statute, Wis. Stat. § 345.26(1)(b)1., engages in the fiction that a person who forfeits a deposit in a traffic violation case is deemed to have tendered a plea of no contest regardless of whether that was his actual intent. Judicial Council Committee's note to § 904.10, 59 Wis. 2d R95 (1973). The committee then construed this fictitious tender of a plea of no contest to be a plea offer addressed to the court. Note, 59 Wis. 2d R95.

But this legal fiction does not support what the court of appeals did in this case for two reasons.

First the statutory fictions are reasonable. It is reasonable to attribute to a defendant who fails to contest the charges by failing to appear in court an intent to plead no contest. And it is reasonable to consider the tender of such a plea of no contest to be an offer to the court to plead no contest.

By contrast, it is not reasonable to consider accepting an offer made by another person to be making an offer to that person.

Second, while the legislature or this court can enact a statutory rule embracing a legal fiction, the court of appeals has no authority to change that statute by engaging in a legal fiction of its own.

The committee's note also states that someone who is liable for the conduct of the person who made a plea offer gets the benefit of the exclusionary rule. Note, 59 Wis. 2d R95-96.

This simply means that if someone like an insurance company is sued because of something a criminal defendant did, like cause an accident while driving drunk, and the defendant made a statement in connection with his offer to plead guilty to the criminal charge of drunk driving, the defendant's statement cannot be admitted against his insurance company. It is still the defendant who must make an offer to plead guilty for the exclusionary rule to apply. The insurance company is not deemed to have made the offer. It just gets the benefit of the defendant's offer because it is liable for the defendant's conduct in connection with that offer, and should have the same protection against admissions regarding that conduct as the person who engaged in the conduct and made the admission.

The state has never maintained that the defendant must personally make the offer to plead guilty. Since the defendant's attorney is his agent, the offer may be made by counsel on the defendant's behalf. But it must still be an offer made on behalf of the defendant to the prosecutor, not an offer made by the prosecutor to the defendant's attorney on the defendant's behalf, as in this case.

Myrick seems to suggest that the prosecutor's initial offer amounted to "bad faith" or "shenanigans" because the prosecutor offered only to consider making an

actual plea offer if Myrick met the conditions the prosecutor imposed. Brief for Defendant-Appellant at 38-39.

But the offer was unequivocal and up front. If Myrick did not think that what the prosecutor offered was good enough he was free to reject the offer as stated and demand that the prosecutor agree to actually make, not just consider making, an actual plea offer if he cooperated.

Moreover, if a defendant's attorney unreasonably advises the defendant to accept what turns out to be a bad offer made by the prosecutor, the claim on appeal should be that defense counsel provided ineffective assistance to the defendant, not that the defendant made an offer to the prosecutor.

Finally, Myrick accuses the state of urging a decision which would undermine the policy interests involved in § 904.10.

However, the Judicial Council Committee considered the policy interests when it drafted the statute the way it is. It balanced the right of every litigant to every person's evidence against the right of a defendant to engage in plea negotiations and came up with a compromise that serves each of these interests without unduly infringing on the other. The rule enacted into law inhibits the truth determining process somewhat by excluding some relevant evidence of guilt, while allowing the admission of other evidence to prove what really happened in the case.

The court of appeals had no right to reconsider and rebalance those interests, and no right to change the application of the statute by means of a legal fiction.

CONCLUSION

The decision of the court of appeals should be reversed.

Dated this 10th day of March, 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 2,444 words.

_____
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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 10th day of March, 2014.

_____
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