STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2513-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

vs.

RAPHFEAL LYFOLD MYRICK,

Defendant-Appellant.

On Petition for Review of a Decision of the Court of Appeals, District I, Reversing a Judgment of the Milwaukee County Circuit Court, the Honorable Rebecca F. Dallet Presiding

---

AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

KELLI S. THOMPSON
State Public Defender
State Bar No. 1025437

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
Email: toddl@opd.wi.gov
Attorneys for the State Public Defender

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

INTRODUCTION

On July 2, 2010, Raphfeal Myrick offered to plead guilty to the prosecutor in the pending first-degree murder case against him. His offer was implied by a proffer he gave that day at the prosecutor's request implicating his co-defendant, Justin Winston, in the murder of Marquise Harris. (11:1-44.) By giving this proffer, Myrick clearly exhibited his readiness and desire to plead guilty to a reduced charge of felony murder, which the prosecutor had promised to consider if Myrick turned state's evidence against Winston. (12:1-2.) Under Wis. Stat. § 904.10, Myrick's subsequent testimony against Winston should have been inadmissible in the State's separate case against Myrick.

The State, however, claims that Myrick never actually offered to plead guilty to anything. Through a series of semantic twists and turns, the State argues that since a plea bargain (like any other contract) requires an offer by one party and acceptance by the other, the prosecutor's letter in which he requested Myrick's proffer was the only offer in the case. Myrick merely accepted the offer.

The error in the State's reasoning is that § 904.10 does not require a contractual offer *to enter into a plea agreement*. It only requires an offer *to plead guilty*. In other words, all a defendant must do to come within the protection of § 904.10 is exhibit his readiness or desire to plead guilty to the court or prosecutor. This interpretation is consistent with the plain language and purpose of § 904.10. It is also the interpretation best suited for how plea bargaining actually works in practice. This Court should therefore find that Myrick's testimony was inadmissible under § 904.10 and affirm the decision of the court of appeals.

ARGUMENT

I. Section 904.10 Does Not Require That a Defendant Make an Offer to Enter into a Plea Bargain; It Requires That He Offer to Plead Guilty.

A. The State's interpretation is inconsistent with the plain language of § 904.10.

As material to this case, Wis. Stat. § 904.10 provides that "[e]vidence of statements made in court . . . in connection with" "an offer to the court or prosecuting attorney to plead guilty . . . to the crime charged or any other crime . . . is not admissible in any . . . criminal proceedings against the person who made the . . . offer." The rule is clear and unambiguous on its face and should therefore be construed on the basis of the plain meaning of its terms. ***State v. Mason***, 132 Wis. 2d 427, 432, 393 N.W.2d 102, 104 (Ct. App. 1986). According to those terms, evidence with the following three elements is rendered inadmissible for any purpose: (1) Evidence of statements made in court; (2) made in connection with; (3) an offer to the court or prosecuting attorney to plead guilty.

The State's interpretation rests on the faulty assumption that the "offer" required by the third element should be defined in the contractual sense, so as to require a defendant to initiate the plea-bargaining process by making an offer to enter into a plea agreement – a legally binding contract.[1] Since a contract requires an offer by one party and acceptance by the other, the State argues that the prosecutor's "offer of resolution" letter must necessarily have been the only

[1] A contractual offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (Second) of Contracts § 24 (1979).

offer in this case. Myrick merely accepted this offer. (Pl's Br. at 8-9.)

The State's contractual definition of offer, however, is inconsistent with the plain language of § 904.10. The common dictionary definition for this context – "to exhibit readiness or desire (to do something); volunteer" – is the appropriate fit for two reasons. The American Heritage Dictionary of English Language (5th ed. 2013), *available at* http://ahdictionary.com/word/search.html?q=offer.[2] First, the plain language of the statute simply does not require that a defendant make an offer to the prosecutor *to enter into a plea bargain*. It only requires that he make "an offer . . . *to plead guilty*." Wis. Stat. § 904.10 (emphasis added). For example, a defendant can inform the prosecutor and court at a hearing that he wants to plead guilty simply to be done with a case and move on with his life. Even if no plea bargain has been negotiated, any statements he makes during his colloquy will be inadmissible if the Court rejects his plea. ***United States v. Davis***, 617 F.2d 677, 684 (D.C. Cir. 1979) (construing the then-existing and near identical Rule 11(e)(6) of the Federal Rules of Criminal Procedure).

Second, since the statute provides that a defendant's offer can be made to the prosecuting attorney *or* to the court, defining offer in the contractual sense is illogical. A defendant cannot negotiate a plea bargain or any other contract with a court. He can only offer to plead guilty by expressing his desire or readiness to do so. Defining offer in the contractual sense is thus incompatible with a plain language, common sense interpretation of the statute. *See*

[2] A possible alternative definition for this context is "to present for acceptance or rejection; proffer." This definition is less apt, however, because a prosecutor does not accept or reject a defendant's plea; only a court does.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute."); ***McDonough v. DWD***, 227 Wis. 2d 271, 281, 595 N.W.2d 686, 690 (1999) (a statute should be construed in a way that is supported by common sense).

B. The State's interpretation is inconsistent with the purpose of § 904.10.

"A cardinal rule in interpreting statutes is to favor a construction that will fulfill the purpose of the statute over a construction that defeats the manifest object of the act." ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶ 27, 303 Wis. 2d 258, 735 N.W.2d 93. The purpose of § 904.10 is, of course, to promote the resolution of criminal cases by compromise. The rule furthers this goal by allowing for free and open discussions between the prosecution and defense during plea negotiations. ***State v. Nash***, 123 Wis. 2d 154, 159, 367 N.W.2d 146, 151 (Ct. App. 1985).

For plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him should negotiations break down. Absent this shield, the possibility of self-incrimination would discourage defendants from being completely candid and open during plea negotiations. ***Davis***, 617 F.2d at 683.

Viewed against this backdrop – that the whole purpose of § 904.10 is encourage plea bargaining through frank and open negotiations – the inappropriateness of the State's narrow interpretation becomes clear. No defendant or defense attorney will engage in negotiations after the State has made a plea offer if their remarks can be admitted into

evidence as proof of guilt. ***United States v. Millard***, 139 F.3d 1200, 1206 (8th Cir. 1998) (citing ***United States v. Ross***, 493 F.2d 771, 775 (5th Cir. 1974)). Moreover, it would be fundamentally unfair for the State to draw a defendant into plea negotiations, only to use it as a weapon against the defendant if negotiations fail. ***Id.***

C. Myrick made an offer to the prosecutor to plead guilty, according to the plain wording of § 904.10.

If "offer" is defined according to the common sense, plain language interpretation discussed above, it makes no difference whether Myrick began the negotiations by making a quid pro quo offer to the prosecutor, or whether he accepted the prosecutor's offer. Either way, he offered to plead guilty by "exhibit[ing] [his] readiness [and] desire to" plead guilty to the reduced charge of felony murder during plea negotiations.

Myrick's offer may have been implied by his actions, but it was still an offer to plead guilty. *See* ***State v. Norwood***, 2005 WI App 218, ¶ 20, 287 Wis. 2d 679, 693 N.W.2d 683 (Under § 904.10, an offer to plead guilty may be implicit). He clearly expected to negotiate a plea deal, which was a reasonable expectation under the circumstances. *See* ***State v. Nicholson***, 187 Wis. 2d 688, 698, 523 N.W.2d 573, 577 (Ct. App. 1994) (Statements by a defendant are within § 904.10's prohibition if at the time the defendant subjectively expects to negotiate a plea, and if those expectations are reasonable given the totality of the objective circumstances.). Why else would he have cooperated with the State? Why else would he have incriminated himself? Indeed, all plea negotiations necessarily imply an offer to plead guilty, because plea negotiations do not take place if a defendant has no desire to

plead guilty to anything. *See* ***United States v. Levy***, 578 F.2d 896, 901 (2d Cir. 1978) ("Plea bargaining implies an offer to plead guilty."); *see also* ***Nicholson***, 187 Wis. 2d at 698, 523 N.W.2d at 577 ("[S]tatements made *within the context of plea negotiations* are inadmissible under § 904.10.") (emphasis added).

In addition, it makes no difference whether the State's letter here is characterized as an offer to enter into a plea bargain, or merely as an offer to consider entering into a plea bargain. Either way, the letter reflects an ongoing plea-bargaining process, and it clearly envisioned that Myrick would plead guilty at the end of the road it plotted. ***State v. Myrick***, 2013 WI App 123, ¶¶ 2, 7, 351 Wis. 2d 32, 839 N.W.2d 129. To get there, the letter required Myrick to make a proffer to the police and then testify against Winston. Myrick did exactly that (at least until he withdrew from the agreement), which implied his willingness to plead guilty. His subsequent testimony made in connection with his offer was thus inadmissible under Wis. Stat. § 904.10.

II. The State's Interpretation is Incompatible with Plea Negotiation Practice and Would Lead to Absurd Results.

Plea bargaining and negotiated pleas are important components of this county's and this state's criminal justice system. Properly administered, they can benefit all concerned. ***Blackledge v. Allison***, 431 U.S. 63, 71 (1977). Indeed, "[e]ffective criminal law administration would be difficult if a large proportion of the charges were not disposed of by guilty pleas." McCormick on Evidence, § 266, p. 339 (7th ed. 2013).

Yet plea bargaining does not begin in any uniform or standard way. Some prosecutors make plea offers at the

outset of cases, others do not. Some prosecutors put their offers in writing, others do not. Sometimes defense attorneys begin the negotiations by proposing a plea agreement to the prosecutor. These proposals may be in writing, or they may not. Sometimes defense attorneys initiate plea negotiations informally by email or by asking the prosecutor something like, "is there room for a deal here?" or "can we work something out?" It all depends on the individual facts of a case, the strengths and weaknesses of each side, what a defendant wants, and the personalities and strategies of the lawyers involved.

The State's interpretation does not fit in this diverse world of plea bargaining. The statute's goal is to encourage free and open negotiations in all criminal cases. *See* ***Nash***, 123 Wis. 2d at 159, 367 N.W.2d at 151. Yet under the State's theory, offers to plead guilty and related statements would be encouraged only if a *defendant* initiated the negotiations, and discouraged if the State did so. Prosecutors often make the initial plea offer. So why should § 904.10 be construed to discourage negotiations in those cases? What difference does it make who starts the bargaining? The distinction is completely arbitrary and novel.

Perhaps even more problematic, the State's interpretation, by discouraging guilty pleas, would necessarily require more criminal trials and thus more judicial resources. This would be an absurd result, because the whole purpose of the rule is to encourage guilty pleas and thereby conserve judicial resources. It is well established that in terms of statutory construction, absurd results like this should be avoided. *See* ***Kalal***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The State's interpretation would also slow the criminal justice system by requiring evidentiary hearings to determine who made an offer and who accepted it. There is frequently no paper trail to trace how a plea bargain was initiated. Offers are often made orally, and even when they are put in writing, they may simply be a memorialization of an earlier one made orally by the same or other party. As noted above, offers can also be informal or even implied. So if parties give conflicting accounts as to who made a plea offer, courts will regularly be left with little else to go on in making a determination. Moreover, the parties' attorneys are likely to be the only witnesses to the negotiation other than the defendant himself. Should they be called to the stand to testify? As officers of the court, is one entitled to more credence than another?

The State's interpretation appears stranger still when we consider that it would discourage the very type of cooperation that it sought to obtain from Myrick in this case. Encouraging defendants to testify against other co-defendants through plea bargaining is a helpful tool that prosecutors often use. Here, the State was obviously interested in obtaining Myrick's cooperation and testimony in the prosecution of Justin Winston. The State was prepared to offer Myrick a reduced charge and lenient sentencing recommendation. Milwaukee County District Attorney John Chisholm even met personally with Myrick and expressed the importance of his help in Winston's prosecution. (11:22-29.) However, if testimony given pursuant to plea agreements becomes admissible against the defendants who give it, then defendants will stop cooperating in this manner.

III. Myrick Made an Offer to the Prosecutor under Black Letter Contract Law.

Even if the State's narrow interpretation of § 904.10 were correct (which it is not), Myrick's preliminary examination testimony would still be inadmissible. Black letter contract law shows that he was the one who made the offer for a plea agreement, not the State.

In its letter, the State hedged its willingness to commit to a plea bargain by stating that if Myrick agreed to the letter's terms, it would be "at the discretion of said district attorney's office . . . as to whether the above negotiation will be conveyed to [Myrick] to settle the . . . case short of trial." (12:2.) The optional nature of this purported promise indicates that it was not an offer in the contractual sense. "Words of promise, which by their terms, make performance entirely optional with the 'promisor' whatever may happen . . . do not constitute a promise." Restatement (Second) of Contracts § 2, cmnt. e; *see also* ***Devine v. Notter***, 312 Wis. 2d 521, 525, 753 N.W.2d 557, 559 (Ct. App. 2008) (A promise is illusory where one party "assumes no detriminet or obligation.").

The State's letter is best characterized as an invitation to engage in preliminary negotiations, or possibly an agreement to agree. Either way, it was not a contractual offer. *See* Restatement (Second) of Contracts, § 26 ("A manifestation of willingess to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."); ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 113 N.W.2d 551 (1962) (Under Wisconsin law, agreements to agree do

not create binding obligations – they are void and unenforceable.).

Even under the State's interpretation, it was Myrick who, in response to the State's letter, actually made a contractual offer. His actions constituted an implied offer to plead guilty to the reduced charge of felony murder in exchange for the State's recommendation of a sentence of twelve to thirteen years. *See* ***Dickman v. Vollmer***, 2007 WI App 141, ¶ 19, 303 Wis. 2d 241, 736 N.W.2d 241 ("An implied contract may be established by the parties' conduct without any words being expressed in writing or orally.); *see also* ***Norwood***, 2005 WI App 218, ¶ 20, 287 Wis. 2d 679, 693 N.W.2d 683 (an offer to plead guilty may be implied). His offer was not difficult to recognize. The prosecutor in this case saw it clearly for what it was. He acknowledged to the trial court that Myrick "was willing to plead guilty to the charge of felony murder." (69:49-50.) How would he have known this if Myrick had not implied as much?

Moreover, the very fact that plea negotiations took place at all shows that Myrick offered to enter into a plea bargain. All "[p]lea bargaining implies an offer to plead guilty upon condition." ***Levy***, 578 F.2d at 901.

CONCLUSION

For the foregoing reasons, the Office of the State Public Defender respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 31st day of March, 2014.

Respectfully submitted,

KELLI S. THOMPSON
State Public Defender
State Bar No. 1025437

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
Email: toddl@opd.wi.gov

Attorneys for the State Public Defender

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,853 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 parties.

Dated this 31st day of March, 2014.

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
Email: toddl@opd.wi.gov

Attorney for the State Public Defender