STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No: 2014-AP-000714 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON LUIS FORTES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDERS DENYING POSTCONVICTION
RELIEF, ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JAMES A. WAGNER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether Fortes' plea was knowingly, intelligently and voluntarily entered in light of a misunderstanding of the plea agreement and the trial court's omission of any plea colloquy on the existence of a plea agreement and his understanding of it?

   Trial Court Answered: Yes

2. Whether Fortes was denied the effective assistance of counsel, as guaranteed by the Sixth Amendment in failing to provide him with a clear, unambiguous plea agreement and in failing to object, seek specific performance of the agreement and inform him of his rights.

   Trial Court Answered: No

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On the evening of January 8, 2012, defendant Luis Fortes and co-defendant, Corinna Kuhnke entered the home of Ms. Cortez through an unlocked rear window. (2:2). One defendant searched the bedroom and removed a jewelry box.(2:2). The other defendant placed a jacket over Ms. Cortez's head and allegedly punched her in the face. (2:2). After the defendants had fled, Ms. Cortez, then 85 years old, was taken to the Emergency Room - swelling and a large contusion was observed over her left eye. (2:2).

The jewelry box and a trail of jewelry and items dropped by the defendants as they fled were recovered by the police. (2:3). Co-defendant Kuhnke was identified from a fingerprint on a Coca-Cola bottle she was observed, on

surveillance video, tossing into a garbage container. (2:3). She stated she had been to the house many times and thus observed its contents. (2:3). She told Fortes about the house. (2:3). She became acquainted with Fortes through his girlfriend – the three of them would do heroin together. (2:3). The home invasion was a "last minute" thing. (2:3).

On January 10, 2012, Fortes walked into the District 2 police station and turned himself in. (2:4). He stated he placed a coat over Ms. Cortez's head to restrain her and conceal his identity. (2:4). He denied hitting her. (2:4-5). He stated his intent in entering the house was not to hurt Ms. Cortez, but rather, to steal in order to buy drugs for his heroin addiction. (2:4).

Fortes was charged with substantial battery (substantial risk - victim 62 years of age or older). (2). He and the co-defendant were charged with Burglary (Home invasion) as a party to a crime. (2).

A preliminary hearing was waived on January 23, 2012. (4). An information was then filed. (5). On February 1, 2012, while Fortes and the co-defendant were in custody, their respective counsel appeared in court on their behalf during which, at the request of co-defendant Kuhnke's counsel, projected guilty pleas were scheduled for March 8, 2012. (32). On March 8, 2012, Fortes appeared with his counsel who informed the court additional time was needed to prepare for entry of a plea. (33:2). The request was granted. On March 12, 2012, Fortes entered a plea of guilty on both counts. (34:5-6). During the hearing, the court was informed the parties were requesting that a PSI be ordered without a recommendation and it was so ordered. (34:7). The terms of a plea agreement was not otherwise placed on the record nor was there any inquiry by the court.

At the commencement of the sentencing hearing on May 4, 2012, the court acknowledged a PSI had been filed without a recommendation. (36:2,9). The prosecutor, at the court's request, then relayed the State's recommendation and got as far as count one (substantial battery) three years

confinement and three years extended supervision consecutive when Fortes' counsel interrupted and the following dialogue ensued:

MR. GUIMONT: Judge, I apologize for interrupting the state, but at least both myself and Mr. Fortes remembered that when we entered the plea that there was going to be a request for a PSI but the sentence would be left up to the court. That's not what the state remembers. But at least I have it written down in my file and that's what Mr. Fortes remembers was the recommendation.

THE COURT: Well, the recommendation is not in the guilty plea questionnaire waiver of rights form.

MR. GUIMONT: Correct. And I indicated to the state that the reason I specifically asked for no recommendation from the PSI is because the state I thought was leaving the sentence up to the court.

MS. HEDGE: Your Honor, my notes reflected February 1, 2012, as to both defendants, upon a guilty plea to all charges both sides are free to argue, PSI ordered. Robbery will be read in. And as you may recall when the defendant Kuhnke was sentenced last week, I gave specific recommendation as to her because both sides were free to argue and I gave the same recommendation as to both defendants and I have it noted in my file and dated.

MR. GUIMONT: I discussed it with Mr. Fortes, and this is not something that he wants to withdraw his plea over and he's prepared to proceed to sentencing.

THE COURT: Is that correct, sir?

DEFENDANT: Yes, sir.

THE COURT: And you want to proceed to sentencing on today's date?

DEFENDANT: Yes, sir.

THE COURT: You understand the court is not bound by any negotiations or plea bargains regardless. And you stand before the court on a substantial battery and I think the burglary; is that correct?

DEFENDANT: Yes, sir.

(36:3-4). The prosecutor then resumed her recommendations, requesting on count two (burglary): three years confinement and five years extended supervision consecutive, for a total sentence of 14 years plus stipulated restitution of $1,073.69. (36:5). Mr. Guimont noted the co-defendant had been ordered to pay restitution in the amount of $600 joint and several. (36:6).

The prosecutor informed the court of the victim's wish for a maximum sentence. (36:10). Mr. Fortes' criminal history was 10 adult convictions involving essentially gun possession, drug possession and an incident of domestic abuse with the mother of four of his children. (36:11-14). He has been addicted to heroin since age 17. (36:14). In concluding her remarks to the court, the prosecutor relayed a further recommendation for addition of an enhancer based upon the victim's age and the fact this was a home invasion. (36.16).

In Attorney Guimont's remarks to the court, the question of the plea agreement again arose, leading to the following dialogue:

MR. GUIMONT: .... Even when we thought that the Assistant District Attorney was going[sic] leave the sentence up to the court as the pre-sentence did, we were going to come in here to day and say we understand given the serious nature of this case, given Mr. Fortes and his background that this is a prison case. We were going to ask for prison any way.

I certainly don't think there needs to be this incredibly lengthy sentence that the state- - -

THE COURT: What you're telling to the court and your client agrees that there is no issue as to any breach of the plea

agreement?

MR. GUIMONT: Correct.

THE COURT: Is that correct, sir?

THE DEFENDANT: Yes, sir.

MR. GUIMONT: He's willing to proceed and let the state make their recommendation. Because we know that Your Honor is the ultimate extermination of the sentence of the sentence.

THE COURT: Okay.

(36:16-17). With that, Attorney Guimont recommended a total global sentence of six years – three years confinement and three years extended supervision, pointing out that this was a slightly greater sentence than what Ms. Kuhnke received. (36:17).

The court recalled having sentenced co-defendant Kuhnke the previous week and pointed out that Mr. Fortes was "in a different position because you're the one that battered...punched [the victim] for a number of minutes..." (36:23,24). The court imposed the 14-year total sentence requested by the prosecutor. (36:26-27). The extended supervision terms were imposed consecutive to each other. (36:27). Thus, unlike the eight years Mr. Fortes received on the burglary, party to a crime, the co-defendant on this offense received a sentence of a little less than 6 years. (36:17).

A Notice of Intent to Pursue Post Conviction Relief was filed on May 8, 2012, (14), followed by a Post-Conviction Motion for resentencing, (19), alleging breach of the after he had entered his plea.. He also alleged ineffective assistance of counsel in regard to the plea agreement.

Briefing was ordered. (20). Thereafter, the trial court ordered a hearing to determine (1) what the original agreement was, (2) what trial counsel's explanations were to the defendant regarding any recommendation made by the state, and (3) whether the defendant's decision to proceed with sentencing was knowing, intelligent and voluntary waiver. Did he understand he had a right to a correct recital

of the plea agreement. (23, Ap. 103).

The prosecutor testified the original agreement was noted on her file as upon a plea, both defendants free to argue. (38:4; Ap. 102, ¶ 2). She recalled Attorney Guimont calling her about a specific recommendation and she told him she would recommend "close to the maximum otherwise both sides would be free to argue." (38:4). She recalled discussing with Attorney Guimont that the PSI should not have a recommendation. (38:10-11).

Attorney Guimont testified the original offer was to plead to both charges and "the State would leave the sentence up to the court." (37:10,12, Ap. 102, ¶ 3). He informed Mr. Fortes, who was not present during the negotiations, of the recommendation the same day. (37:10). Mr. Fortes expressed concern about leaving the sentence up to the court without some specific offer. (37:10,14). After several attempts, Attorney Guimont was able to speak with the prosecutor, the day before the plea hearing, "about the recommendation that she was making and Mr. Fortes's[sic] concern and she said at that point, "well, if she were to put a number on it, it would be close to the maximum," (37:11), "otherwise both sides would be free to argue." (38:4). Therefore, Attorney Guimont advised the defendant they "would be better off leaving the sentence up to the court." (37:11, Ap. 102, ¶ 6). He recalled during the sentencing hearing, turning to Ms. Hedge and stating "no, that's not what we talked about." (37:12). Her response, as he recalls, was "well, this is what's on the file." (37:12).

After the prosecutor's sentencing recommendation, Attorney Guimont had a "brief sidebar" with Mr. Fortes and "briefly" discussed "what our options were given the – what Ms. Hedge indicated what she was going to recommend." (37:17). The options he discussed was

> "the possibility of withdrawing his guilty plea, adjourning the sentencing perhaps to try to get the transcript from the plea, and we – and finally we discussed just proceeding and still making our own recommendation. 'Cause of

> course we were free to argue for something, whatever, irregardless (sic) of what the State was going to recommend."

(37:13). He did not recall advising Mr. Fortes as to what he should do with regard to the options. (37:15-16). He informed the trial court Mr. Fortes wished to proceed with sentencing because due to the nature of the offense and Mr. Fortes' record, he was "planing on recommending prison anyway." (37:16). He did not tell Mr. Fortes he had the ability to seek to have the State recommend what they thought the recommendation was. (37:17). He thinks he talked to Mr. Fortes about obtaining the transcript from the guilty plea since that would normally indicate what the state is recommending but "I mean I knew I didn't have anything in writing from Ms. Hedge." (37:17-18). He recalls discussing two options: one withdraw the plea and two adjourning the sentencing to get the plea hearing transcript. (37:20-21). The option of adjourning was his "hope that the transcript would have said – you know, where Ms. Hedge would have said our recommendation is to leave the sentence up to the court. That's what I had hoped that it would have said." (37:21). With respect to informing Mr. Fortes that he had a right to enforce the plea agreement or specific performance, Attorney Guimont did not recall using such language. (37:22,23). What he remembers is we "could try to get the transcript from the State's offer, but we also knew that there was nothing in writing." (37:22). His discussion with Mr. Fortes was that "we are still going to be recommending prison anyway and perhaps we can still convince the judge to go along with a recommendation similar to what we would be asking for." (37:22-23).

Mr. Fortes testified Attorney Guimont informed him the plea agreement was to plead guilty to both cases, leave sentencing up to the court and a PSI without a recommendation. (37:26). At sentencing, when the State did not keep that agreement, his attorney discussed with him only the option of withdrawing his plea. (37:26). He did not withdraw his plea based upon his discussion with his attorney that it "was going to be up to the judge. Regardless it was

going to be up to the judge. So it made no difference." (37:27). He did choose to move forward with the sentencing after discussion with his attorney. (37:31). His attorney did not inform him he had a right to seek enforcement of the plea agreement. (37:32).

After the hearing, the trial court entered findings of fact and conclusions of law filed by the State. (23; A-Ap. 103). Essentially, the trial court concluded there was a misunderstanding of the plea agreement and thus no breach nor ineffective assistance occurred and by proceeding with sentencing all challenges related to the plea agreement were waived. Id. A Decision and Order Denying Post Conviction Motion was entered on April 2, 2013, concluding Fortes had not established a material and substantial breach of the plea agreement and trial counsel had not provided ineffective assistance. (27; A-Ap. 102). Fortes' filed a Notice of Appeal but subsequently voluntarily dismissed it.

A supplemental postconviction motion followed alleging Fortes' plea was based upon an inaccurate plea agreement and therefore was not intelligently, knowingly and voluntarily entered; ineffective assistance of counsel in failing to accurately convey the plea agreement and object to disputed sentencing remarks; he was sentenced upon inaccurate, disputed, unresolved information when the trial court made statements that he punched the victim and did not resolve misunderstandings on the plea agreement, and citing errors in the judgment of conviction and in the denial of participation in earned release and challenge programs. (49). On March 13, 2014, without a hearing, the trial court issued a Decision and Order Denying Supplemental Postconviction Motion. (55; A-Ap. 105). Fortes now appeals.

ARGUMENT

I. THE TRIAL COURT MUST BE REVERSED BECAUSE IT ERRED IN DENYING FORTES' POSTCONVICTION MOTIONS.

A. Fortes misunderstood the plea agreement and

> therefore plea withdrawal was no longer discretionary but a matter of right to avoid a manifest injustice.

A guilty plea must be knowingly, voluntarily and intelligently entered. State v. Bangert, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The question of whether the plea was intelligently, knowingly and voluntarily entered presents an issue of constitutional fact which is reviewed *de novo*. Id. In order to withdraw a plea after sentencing, a defendant must show by 'clear and convincing evidence' that withdrawal is necessary to avoid a 'manifest injustice.' State v. Brown, 2004 WI App. 179, ¶ 4, 276 Wis. 2d 559, 687 N.W.2d 543, citing State ex. rel. Warren v. Schwarz, 219 Wis. 2d 615, 635 579 N.W.2d 698 (1998).

The manifest injustice standard requires a showing that there are "serious questions affecting the fundamental integrity of the plea." Libke v. State, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). Further, "[t]he 'manifest injustice' test is rooted in concepts of constitutional dimension requiring the showing of a serious flaw in the fundamental integrity of the plea." State v. Nawrocke, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Where a defendant is denied a constitutional right, he may withdraw his plea as a matter of right. Bangert, 131 Wis. 2d at 283.

Fortes alleged the State made a recommendation at his sentencing which was contrary to the plea agreement and that his plea was not intelligently, voluntarily and knowingly entered because he did not know at the time of his plea that the terms recited to him were inaccurate. (49:1,2). The trial court found there was a mutual misunderstanding as to what the State was to recommend. (27:5; A-Ap. 102). Fortes and his counsel understood sentence would be left up to the court while the prosecutor viewed the term "free to argue," in the plea agreement, as allowing any recommendation of its choice. (27:4; A-Ap. 102).

A guilty plea must be shown by the record to have been knowingly, voluntarily and intelligently entered

otherwise it does not comply with constitutional requirements for a valid plea. State v. Dawson, 2004 WI App. 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12. The sentencing transcript clearly shows Fortes and his counsel understood the plea agreement called for the State to make no specific sentence recommendation. (See, 36:2-5,16-17; A-Ap. 106). "A plea agreement that leads a defendant to believe that a material advantage or right has been preserved when, in fact, it cannot legally be obtained, produces a plea that is 'as a matter of law...neither knowing nor voluntary.'" Dawson, 2004 WI App. 173, ¶ 11, quoting, State v. Rickkoff, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983).

Here, Fortes thought he had preserved the right to have the court determine the length of his sentence without influence of specific sentence recommendation by the State. To that end, he obtained the State's agreement and an order from the court that the PSI would contain no sentence recommendation. (34:7). He was informed by trial counsel that without this agreement, any specific recommendation from the State would be "close to the maximum." (37:11). The plea agreement terms were provided to him by trial counsel. (27:4). Neither the prosecutor nor trial counsel reduced the agreement to writing. (37:23). The plea hearing transcript shows the trial court made no inquiry as to the existence of a plea agreement and its terms. (34) Thus, it was not until weeks later, at his sentencing hearing, that Fortes learned he had been given an inaccurate plea agreement.

In Rickkoff, supra., the defendant entered his plea believing, with acquiescence of the trial court and prosecutor, he had preserved a right to appellate review by a stipulation. When it was discovered to be legally unenforceable, his plea was then found to have been unknowing and involuntary, thus entitling him to withdraw his plea. In Dawson, supra., the defendant received a plea bargain with a "reopen-and-amend" provision, with the acquiescence of the State and trial court, which, after entry of his plea, was found to be unenforceable. Thus, he, too, was permitted plea withdrawal on the ground his plea was unknowing and involuntary.

A common theme here is that the defendants were led to the inaccurate understanding not by themselves but by others. Here, defendant was led to his inaccurate understanding of the plea agreement by his trial counsel and by acquiescence, the prosecutor. Since the prosecutor took the view that 'free to argue' meant she could make any recommendation of her choice, when Fortes decided not to go with a specific recommendation upon being informed it would be "close to the maximum," she could have set him straight on her view of the agreement but, instead, she apparently acquiesced. Technically, the trial court also acquiesced in that the request for a PSI without a recommendation did not prompt any inquiry by the court as to the basis for the request and thus dashing an opportunity for the plea agreement to come to light on the record. Further, it is noteworthy that the prosecutor had a duty to ensure the terms of the plea bargain were clear and in writing as did the trial counsel and the trial court a duty to know of the agreement and assure Fortes' correct understanding of it. Of course the omission of these duties worked to the detriment of Fortes alone. See, State v. Brown, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906; State ex rel. Raymond White v. Gray, 57 Wis. 2d 17, 203 N.W.2d 638 (1973), citing Austin v. State, 49 Wis. 2d 727, 183 N.W.2d 56; and American Bar Association Standards Relating to Pleas of Guilty, Approved Draft, 1968, pp 29, 30, sec. 1.5.

Clearly, Fortes's plea is constitutionally infirm and he is entitled to a remedy, without which, there is a manifest injustice. The trial court, therefore, erred in denying the Fortes' motion because it no longer had discretion on the question. Rather, he was entitled to withdraw his plea as a matter of right. See, e.g., Bangert, supra.

B. The allegations of defects in the plea colloquy entitled Fortes to an evidentiary hearing and was not waived by proceeding with sentencing.

To ensure a knowing, intelligent and voluntary plea, Bangert, and Wis. Stat. § 971.08, outlined mandatory plea hearing duties to be followed by the circuit court judge which

duties were further re-emphasized and supplemented in Brown, 2006 WI 100, ¶¶ 30-34. Such duties specifically require the circuit court to ascertain before accepting a plea whether any agreements were made in anticipation of the plea. Id., ¶ 35, also see White, 57 Wis. 2d at 22-23, citing Austin, 49 Wis. 2d 727, 183 N.W.2d 56; and American Bar Association Standards Relating to Pleas of Guilty, Approved Draft, 1968, pp 29, 30, sec. 1.5. In fact, the Supreme Court has recently again reiterated that a trial court must engage in an exchange with a defendant about what the plea agreement means, on the record. State v. Frey, 2012 WI 99, ¶ 100, 343 Wis. 2d 358, 817 N.W.2d 436.

A postconviction motion alleging the circuit court's failure to fulfill a plea hearing duty and also alleging he did not understand that aspect of his plea because of the omission, will necessitate an evidentiary hearing to determine whether he may withdraw his plea. Brown, 2006 WI 100, ¶ 36; Bangert, 131 Wis. 2d at 274. "Assuming the defendant's postconviction motion is adequate to require a hearing, he may withdraw his plea after sentencing as a matter of right unless the state can show the plea was entered knowingly, intelligently and voluntarily despite the deficiencies in the plea hearing." Brown, 2006 WI 100, ¶ 36. A burden-shifting procedure is to be employed at such hearing under which the defendant must lay out a prima facie case showing a violation of the plea duties which will then shift the burden to the state to show the plea was nevertheless knowingly, intelligently and voluntarily. Id, ¶¶ 39-41. Further,

> ....a defendant can wait until he knows his sentence before he moves to withdraw his plea, and he may not be disadvantaged by this delay as long as he is able to point to a deficiency in the plea colloquy. Brown, 2006 WI 100, ¶ Thus, only the court, with the assistance of the district attorney, can prevent potential sandbagging by a defendant by engaging the defendant at the plea colloquy and making a complete record.

Id., ¶ 38, citing Bangert, 131 Wis. 2d at 275.

The purpose of plea hearing colloquy, "[i]n a legal

sense... is to assure a voluntary and intelligent plea, as well as fundamental fairness in the taking of pleas. In a practical sense, the purpose of the colloquy is to promote finality by eliminating one of the grounds for plea withdrawal." State v. Hampton, 2004 WI 107, ¶ 44, 274 Wis. 2d 379, 683 .W.2d 14.

Fortes' alleged the plea hearing colloquy was defective by omission of any inquiry regarding the plea agreement and its terms. (49:2-3). One of the circuit court's plea duties includes a mandate requiring colloquy with the defendant, on the record, concerning the plea agreement and the defendant's understanding of its meaning. Frey, 2012 WI 99, ¶ 100, citing Brown, 2006 WI 100, supra. The plea hearing transcript shows no such dialogue. Clearly, therefore, Fortes' allegations were sufficient to shift the burden to the State and require an evidentiary hearing. Thus, the trial court erred in denying an evidentiary hearing to determine a knowing, intelligent and voluntary plea in light of the defective colloquy and Fortes' misunderstanding.

In White, 57 Wis. 2d at 22,24, quoting sec. 1.5 of the ABA Standards Relating to Pleas of Guilty, the plea agreement was not placed on the record when the defendant pled guilty to burglary. The Supreme Court remanded the case for evidentiary hearing, after stating:

> The plea bargaining process must be opened to judicial scrutiny. It is essential tat a record of the nature of the bargain should be made. This will assist appellate review when a convicted defendant has unsuccessfully attempted to withdraw a guilty plea as made because an alleged plea bargain was not kept.
>
> ....
>
> 'The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussion and a plea agreement, and, if it is, what agreement has been reached.'

The trial court erroneously concluded that by proceeding with the sentencing instead of withdrawing his plea, Fortes had waived the right to seek plea withdrawal. (55:3; A-App. 105). However, since the trial court failed to comply with its mandatory plea hearing duties, Fortes became free to wait until after sentencing to withdraw his plea "and he may not be disadvantaged by this delay as long as he is able to point to a deficiency in the plea colloquy. Brown, 2006 WI 100, ¶ 38. As can be seen above, Fortes has pointed to such deficiency.

II. THE TRIAL COURT MUST BE REVERSED BECAUSE IT ERRED IN DENYING FORTES' CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A circuit court must hold an evidentiary hearing on a claim of ineffective assistance of counsel when there are factual allegations in the motion which show that counsel's performance was deficient and that such deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687. Whether the motion raises such facts is a question of law, reviewed *de novo*. State v. Allen, 274 Wis. 2d 568, ¶ 9, 682 .W.2d 433. It is only when the record conclusively demonstrates that the defendant is not entitled to relief that the trial court will then have discretion to grant or deny a hearing. Id.

The Sixth Amendment of the United States Constitution and Art. 1, sec. 7 of the Wisconsin Constitution guarantee a fair trial as well as the right to assistance of counsel. See, State v. Smith, 207 Wis. 2d 258, 273, 558 N.W.2d 379. The right to counsel serves to protect "the fundamental due process rights of criminal defendants." Scott, 230 Wis. 2d at 656. The law is clear that once the defendant has entered his plea pursuant to a plea agreement, the failure to object to the prosecutor's recommendation in breach thereof is deficient performance. Smith, 207 Wis. 2d at ¶ 26.

A. The trial court erred in concluding there was no breach of the plea agreement and that, therefore,

trial counsel's failure to object could not constitute ineffective assistance of counsel.

Whether the state breached the terms of a plea agreement presents a question of law. Williams, 2002 WI 1, ¶¶ 5,10. Where breach of a plea agreement is found to be material and substantial, the plea agreement may be vacated or the defendant resentenced. Id., ¶ 5. The question of whether a breach is material and substantial presents a question of law, to be determined independently of the lower court's findings but benefitting from its analysis. Id., When there is a factual dispute, the appellate court will review the circuit court's factual findings under the clearly erroneous standard, befitting from its analysis, but will independently determine the questions of law. Id.

"The meaning of words in a document that is not dependent on a fact-finder's appraisal of the demeanor or credibility of a witness is a question of law to be determined independently by the reviewing court." Id., ¶35, Thus, the interpretation of the written transcript [of the terms of the plea agreement]" presents a question of law to be determined independently, "not a question of fact to be given deference." Id.

A mere technical breach of a plea agreement is not actionable. Rather, the breach must be material and substantial. A breach which is material and substantial is one which defeats the benefit for which the defendant bargained. Id. ¶ 38

A defendant "has a constitutional right to the enforcement of a negotiated plea agreement. An agreement by the State to recommend a particular sentence may induce an accused to give up the constitutional right to a jury trial. Consequently, once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process demands fulfillment of the bargain." Id., ¶ 37

Here, Fortes had been led to believe that in exchange for his plea, he would receive no specific sentence

recommendation by the State. This bargain has not been fulfilled. The trial court found there was a misunderstanding, (26:4), essentially excusing the non-fulfillment of the bargain as if it were a figment of Fortes' imagination. As noted above, however, due process requires that the bargain be fulfilled.

It is well-established that "as a matter of due process, if a guilty plea is induced by promises from the government, 'the essence of those promises must in some way be made known. State v. Wesley, 2009 WI App. 118, ¶¶ 20-21, 321 Wis.2d 151, 772 N.W.2d 232, quoting Santobello v. New York, 404 U.S. 257, 261-62 (1971). Plea bargaining is an essential and "highly desirable" component in criminal justice for several reasons. Santobello, 404 U.S. at 260-261. Fairness is always a requirement in the securing of the plea agreement between the defendant and prosecutor. Id. at 261. To that end, the entry of a guilty plea requires safeguards to insure that a promise or agreement on which a guilty plea rests is fulfilled. Id. at 262. Indeed, once a defendant has pled guilty, thus giving up his bargaining chip, "'due process requires that the defendant's expectations be fulfilled.'" Scott, 230 Wis. 2d at 643, 652, quoting State v. Wills, 187 Wis. 2d 529, 537, 523 .W.2d 569 (Ct. App. 1994).

Thus, although a misunderstanding was found, under constitutional due process and fairness, the inquiry cannot end there. Since the State felt 'free to argue' allowed it to include a specific sentence recommendation while trial counsel had the opposite understanding, it must be determined whether the phrase 'free to argue' was ambiguous.

The question of whether ambiguity exists in a plea agreement is a question of law which is decided *de novo*. Wesley, 2009 WI App. 118, ¶ 12. The interpretation of a plea agreement is subject to contract law. Id. Language in a contract is ambiguous when it is "'reasonably or fairly susceptible of more than one construction.'" Id.

In Wesley, 'free to argue' was also the term used in that plea agreement. There, as here, the dispute was not that

such was a term of the plea agreement, but rather, its scope. Under the defendant's interpretation, the term required the State to make no reference to a dismissed charge and its underlying facts while the State's interpretation asserted it was 'free to argue' the underlying facts. The Court of Appeals disagreed with the trial court's conclusion that 'free to argue' unambiguously meant both sides free to argue the significance of the dismissed charge. Instead, noting that the phrase "free to argue" did not refer back to the dismissed charged, and was not defined in the plea agreement, it found the term to be hopelessly ambiguous – it could just as easily mean what the State asserts as it could what the defendant asserts. Ultimately, though the Court of Appeals found the plea agreement was ambiguous, it could not, using contract principles, construe it against the State because Wesley's interpretation raised a public policy question and thus triggered application of a common law rule requiring that ambiguities be construed in a manner which most safeguards the public interests. Id., ¶ 18.

However, still, this did not end the analysis. The fact remained that Wesley had entered a plea pursuant to a plea agreement, ambiguous or not. In his postconviction motion, in addition to breach of the plea agreement, he had alleged ineffective assistance of counsel by counsel's failure to object to the State's breach of the plea agreement and, further, that if the plea agreement was ambiguous, counsel should have informed him and that his plea was not knowingly and intelligently entered. Id., ¶ 24. Therefore, despite its finding of no breach of the plea agreement, the Court of Appeals, citing Santobello, noted, it remained necessary to determine whether Wesley knowingly and intelligently understood the consequences of his plea as well as whether he received ineffective assistance of counsel. Id., ¶¶ 10, 20. This required reversal and remand for input from Wesley's trial counsel in a Machner hearing. Id., ¶ 24.

A similar result is required in the instant case. However, here, no public policy issue arises from the plea agreement. Therefore, it is appropriate to construe the plea agreement against the State. As in Wesley, the 'free to argue'

term of the agreement was not defined in the agreement and could as easily be construed to fit the State's asserted interpretation as it could Mr. Fortes.' It is reasonably susceptible to more than one construction, hence ambiguous. Id., ¶ 12.

The ambiguity warrants construction of the agreement against the State. The terms of the agreement were its own creation (26:1; A-Ap. 103) and no public policy concern is raised by Mr. Fortes' understanding that the State would leave the sentence up to the court. Also, see, Wesley, 2009 WI App. 118, n. 5, citations omitted,(the federal circuits unanimously agree that plea agreements must be construed against the government in accordance with the defendant's reasonable understanding of it. The Court of Appeals further noted it would have joined them if the issue before it had not been sidelined by a public policy concern which required application of a different rule.).

Construction of the agreement against the State necessarily leads to a conclusion that the failure to abstain from a specific sentence recommendation was a material and substantial breach pursuant to Santobello, supra. Also see, State v. Scott, 230 Wis. 2d 643, 661, 602 N.W.2d 296 (Ct. App. 1999) explaining that in Smith, supra there was a finding of automatic prejudice resulting from a failure to object and this "was premised on the rule of Santobello, that when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." Thus, the trial court erred in not holding a Machner to determine ineffective assistance based upon trial counsel's failure to formally object to the breach of the plea agreement and inform Fortes of this right to do so, as well as to determine whether Fortes entered his plea with a knowing, intelligent understanding of the consequences.

B. It was error to deny Fortes motion without a Machner hearing on whether the failure to pursue specific performance of the plea agreement and inform him of his constitutional right to do so was ineffective assistance of counsel.

As noted above, the law establishes that fulfilment of fundamental terms of a plea agreement is a substantive right of the defendant such that the failure to do so or even inform the defendant of his right to do so is deficient performance. It "follows *a fortiori* that a failure to seek enforcement of this constitutional right is unfair and constitutes prejudice to the defendant." Scott, 230 Wis. 2d at 659,662, citing Santobello, supra.

In Santobello, in exchange for his plea, the defendant had bargained/negotiated for dismissal of more serious charges as well as silence by the prosecutor as to a specific sentence recommendation. Although the prosecutor, citing inadvertence, eventually conceded that it had agreed to abstain from a specific sentence recommendation, and the trial court then disavowed any influence upon its sentence from the recommendation, the United States Supreme Court, faulting the prosecutor, noted that the impact of the breach remained. Therefore, it concluded the interests of justice and due recognition of the prosector's duties in the plea bargaining process required remand for specific performance or withdrawal of the plea.

Here, an entitlement to relief was shown on Fortes' motions. He alleged that after he entered his plea, the prosecutor, in violation of the plea agreement to leave sentence upto the court, made a specific sentence recommendation, to which trial counsel did not object. (19:1-2).

At the postconviction motion hearing, the trial court found there was a misunderstanding as to whether the prosecutor was entitled to make a specific sentence recommendation under the 'free to argue' term of the agreement, or leave sentence up to the court, per trial counsel's understanding. (26; A-Ap. 103). Here, too, as discussed earlier, the prosecutor neglected plea hearing and must be faulted for the lack of clarity in the agreement as well as the failure to place the terms on the record before Fortes entered his plea. Thus, given that Fortes has entered his plea such that due process

and fairness now require that his bargain be fulfilled, his case should be remanded for specific performance r withdrawal of his plea, in the interests of justice, as in Santobello.

C. Fortes's substantive constitutional right to pursue specific performance and be informed of the right to do so, was not waived when he did not withdraw his plea during the sentencing hearing.

In response to Fortes' allegation that trial counsel failed to seek enforcement of the plea agreement or inform him of his right to to so, (19:2), the trial court, citing State v. Paske, 121 Wis. 2d 471, 360 N.W.2d 695 (Ct App. 1984), concluded he had waived this claim by proceeding after being told, at sentencing, of an option to withdraw the plea. (55:3; 26:2; A-App. 105, 103). This was error.

In Scott, 230 Wis. 2d 643, the court rejected a similar argument and reversed and remanded for resentencing.. There, after Scott had entered his plea, a different prosecutor appeared at the sentencing hearing and informed the court the district attorney had not approved the plea agreement and therefore it was being withdrawn. A new 'ratcheted up' post plea agreement was substituted without counsel moving to withdraw the plea, request specific performance or advise Scott of the latter option. Citing Paske, it was argued that Scott was not deprived of a benefit of his bargain or given up his bargaining chip because he could have withdrawn his plea.

In Paske after entering his plea, but before sentencing, Paske escaped. Upon his recapture, a new plea agreement was negotiated including the new escape charge. Paske accepted the new offer. After sentencing, he appealed seeking enforcement of the original agreement. It was denied. Looking at the distinguishing factors of the escape and conspiracy to escape, the Scott court found of particular note the Paske court's finding that "the circumstances surrounding this modification of the plea agreement violate no standards of fairness or decency nor any factors bearing upon due

process." Scott, 230 Wis. 2d at 663, quoting Paske 121 Wis. 2d at 475.

In contrast, Scott had relinquished his bargaining chip but had done nothing to contravene plea agreement after entering his plea. He therefore had a constitutional right to seek enforcement of the plea agreement. Scott, 230 Wis. 2d at 664. Since Scott's counsel had neither pursued enforcement of the right to specific performance nor informed Scott of it, the court found counsel had "neglected to inform Scott of his substantive right to due process" and thus "Scott was deprived of a proceeding that was fundamentally fair." Id. Therefore, the court continued, "the fairness of the process itself is suspect. Scott was prejudiced by his counsel's ineffective assistance." Id.

Here, the sentencing record shows the prosecutor make a specific recommendation, following which trial counsel did not object nor did seek to enforce the plea agreement nor advise Fortes of his right to do so. (36:3-5,16-17; A-Ap. 106). At the postconviction hearing, trial counsel described his actions:

> I believe what happened initially is I turned and spoke to Ms. Hedge and said, no, that's not what we talked about. And I think she just kind of said, well, this is what's on the file. And then I did speak to Mr. Fortes about what our potential options were:
> ....
> Well, I said – I said there is – we have options. We discussed the possibility of withdrawing his guilty plea, we discussed the possibility of adjourning the sentencing perhaps to try to get the transcript from the plea, and we – and finally we discussed just proceeding and still making our own recommendation. 'Cause of course we were free to argue for something, whatever, irregardless (sic) of what the State was going to recommend. (37:12-13).

Indeed, while trial counsel recalled briefly discussing withdrawal of the plea with Fortes, he could not recall having informed Fortes of his right to specific performance of the plea agreement. He testified,

> "I don't know if I said anything in those terms." (37:17).
>
> "My recollection is that I discussed, one withdrawing his guilty plea; two, adjourning the sentencing to try to get a transcript from the plea or proceeding today – or on that day." (37:20-21).
>
> "I don't know if I used language like that. I think – I think what I remember again was indicating that we could try to withdraw his plea... We could try to get the transcript from the State's offer, but we also knew that there was nothing in writing... So I think to answer your question, I don't remember specifically saying, you know, to him – to him the words, you know, specific performance or anything like that." (37:23).

Pursuant to Scott the fulfillment of the terms of a plea agreement is a substantive constitutional right and the failure to seek enforcement of this right is unfair and prejudicial. Scott, 230 Wis. 2d at 662. Thus, as in Scott, the failure to inform Fortes of this substantive constitutional right to seek enforcement of the plea bargain deprived Fortes of a fundamentally fair proceeding such that the fairness of the process itself is suspect. Id at 664. Therefore, this case should be similarly reversed and remanded for resentencing.

CONCLUSION

For the foregoing reasons, defendant -appellant respectfully requests the Court to reverse and remand this case with directions to allow resentencing or withdrawal of the plea or, alternatively, an evidentiary and Machner hearing.

Respectfully submitted,

_____

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Attorney for Defendant-Appellant

APPENDIX

CERTIFICATION

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with s. 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 and written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 7107 words.

Dated 06/25/2014 _____

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I hereby 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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