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

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. FORTES PROVED THERE WAS A PLEA AGREEMENT ON WHICH HE ENTERED HIS PLEAS AND, THEREFORE, THE POSTCONVICTION REVELATION OF A MISUNDERSTANDING ON THE TERM 'FREE TO ARGUE' SHOULD NOT DEPRIVE HIM OF A REMEDY OR BE OTHERWISE DISREGARDED ON GROUNDS OF WAIVER.

A. Fortes did not waive his right to seek a remedy, including specific performance or plea withdrawal

All of the parties, (Fortes, his attorney, the prosecutor), testified at the postconviction hearing that there was a plea agreement on which Fortes entered his plea. (37:26; 37:10,11; 38:4,10; Fortes' Brief, p. 11). In exchange for Fortes' pleas, sentence was to be left up to the court with both sides 'free to argue.' (38:4). The prosecutor informed trial counsel that if he wanted to change the recommendation to a specific recommendation, it would be close to the maximum but otherwise both sides free to argue. (Fortes' Brief, p. 11; 37:11).

The trial court concluded Fortes and his attorney understood that sentence would be left up to the court while the prosecutor viewed the term she had placed in the agreement of 'free to argue,' as allowing any recommendation of her choice. (Fortes Brief, p. 10; 26:4-5, A-Ap. 103). From this the court concluded there had been a mutual misunderstanding which rendered specific performance unavailable as a remedy because there was no agreement and thus no agreement to enforce. Id. The court denied his postconviction motion, concluding he had failed to show a material and substantial breach of the plea agreement. On his supplemental motion, alleging the trial court had failed to ascertain the existence and terms of the plea agreement during its plea hearing colloquy, the trial court denied the motion without a hearing, concluding he had waived the right to pursue the issue by proceeding with the sentencing. (55:3; A-Ap. 105).

On appeal, Fortes argues the misunderstanding was not of his making, that as a result of the misunderstanding, his plea was not knowingly, intelligently and voluntarily entered, and,

therefore, a remedy is required without which there is a manifest injustice. (Fortes' Brief, pp. 10-12). Further, he argues in any event, there was no waiver of his right to withdraw his plea as a matter of right due to the defective plea colloquy and an evidentiary hearing is required. (Fortes' Brief, pp. 12-15).

The State responds that Fortes made a "voluntary and intelligent" decision to waive challenges related to his plea when he "decided to forego any remedy and proceed to sentencing with the understanding that both sides were now 'free to argue.'" (State's Brief, p. 13). Clearly, a voluntary and intelligent decision is not the same as a knowing, voluntary and intelligent one. According to the State, the remedies waived were an adjournment of the sentencing to get the plea hearing transcript in order to confirm the plea agreement terms; withdrawal of the plea or specific performance. (State's Brief, pp. 14, 15). The record clearly shows this argument is without merit. Trial counsel informed Fortes of the option of an adjournment but also pointed out that the transcript would be unavailing since the plea agreement was not in writing.(37:22). Trial counsel did not inform Fortes of the option of specific performance. (37:17.23). The only option he was given was to withdraw his plea. Furthermore, since the plea hearing colloquy is defective, the law explicitly allows him to wait until after sentencing to pursue plea withdrawal. State v. Brown. 2006 WI 100, ¶ 38, 293 Wis. 2d 594, 716 N.W.2d 906 (Fortes' Brief, p. 13)

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As for the supplemental postconviction motion, the State argues the issues are barred: (1) under Escalona-Naranjo, and (2) as a finally adjudicated claim since the trial court stated in its decision on the supplemental motion: "The plea agreement issues were formerly resolved.'" (State's Brief, p. 16). These arguments are without merit.

Escalona-Naranjo is inapposite. Unlike Escalona, there is no 974.06 motion nor prior appellate decision on this case. Further, even in that case an original postconviction motion, a supplemental postconviction motion or an amended postconviction motion is permitted. Here, there has been one original and one supplemental postconviction motion. (19; 49).

In any event, prior to the original postconviction motion and the surprising testimony of the prosecutor at the postconviction hearing, (that her use of the term 'free to argue' allowed a specific sentence recommendation), there was no indication that breach of the plea agreement was not the strongest issue or that trial counsel had inaccurately conveyed the plea agreement.

With regard to the 'finally adjudicated' argument, the State argues not that the claims are the same, but rather, that they are "essentially the same claim" as the original postconviction motion. There is no attempt to explain how a claim that the prosecutor breached the plea agreement (19) is the same as a claim that the trial court's plea hearing colloquy was defective or that trial counsel failed to convey an accurate plea agreement. (49). Furthermore, as noted above, the defective plea colloquy allows Fortes to pursue plea withdrawal after sentencing and he is not subject to any disadvantage or preclusion from the fact that he proceeded with the sentencing.

B. An evidentiary hearing is required on the defective colloquy.

The State asserts that remand for an evidentiary hearing on Fortes' supplemental postconviction motion would explore the same issues, involve the same witnesses and "likely" reach the same result. (State's Brief, p. 17). The hearing on Fortes' original postconviction motion was explicitly for the purpose of determining:

1. what the original agreement was, if any;

2. if the original agreement was "no recommendation by the State" or "time left up to the court," what did trial counsel explain to the defendant about moving forward with the sentencing instead of objecting to the State's breach of the original agreement, if in fact, there was a breach; and

3. based on what trial counsel told the defendant about the breach, was the defendant's decision to move forward with sentencing a knowing, intelligent and voluntary waiver? Did he understand he had a right to the State's correct recital of the plea agreement? (23:3; A-Ap. 104)

The issues of defective colloquy and ineffective assistance of counsel on the supplemental postconviction motion, are clearly not the same as the issues addressed at the postconviction motion on Fortes' original motion. Although the State concedes the colloquy was defective by its acknowledgment of "judicial mistakes" (State's Br. p. 17), it argues it has already proven that Fortes' "'plea was entered knowingly, intelligently and voluntarily, despite the deficiencies in the plea hearing.'" Id. This is like a mix of apples and oranges. Suffice it to say, whether there was a knowing, intelligent and voluntary waiver on the decision to move forward with sentencing, as was the issue set by the trial court, is not proof of a knowing intelligent and voluntary entry of a plea "despite an identified inadequacy in the plea colloquy." Brown, 2006 WI 100, ¶40. Thus, to the extent the postconviction testimony is held out in satisfaction of the State's burden of proof at a Banger hearing on the defective colloquy, it fails.

II. A MACHNER HEARING IS REQUIRED ON FORTES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

As noted above, the trial court concluded there was a misunderstanding regarding the terms of the plea agreement, that is, the term 'free to argue.' (Fortes Brief, p. 17; 26:4, A-Ap. 103). From this, the court concluded it necessarily followed there was no ineffective assistance of counsel since counsel's performance cannot be deficient for failing to object to breach of a non-existent agreement. (26:5, A-Ap. 103).

On appeal, Fortes argues that under constitutional principles, including fairness, the inquiry should not end here. By entering his plea, Fortes had given up his 'bargaining chip' and, therefore, "due process requires that [his] expectations be fulfilled." State v. Scott, 230 Wis. 2d 643, 652, 602 N.W.2d 296 (Ct. App. 1999); also see, State v. Wesley, 2009 WI App. 118, ¶¶ 20-21, 321 Wis. 2d 151, 772 N.W.2d 232, citing Santobello v. New York, 404 U.S. 257, 261-62 (1971). Therefore, the inquiry cannot end upon finding a misunderstanding. Rather, because Fortes' plea was induced by

a promise made by the government, it must be determined whether the term 'free to argue' is ambiguous and, if so, the agreement is to be construed against the government. (Fortes Brief, pp. 17-18). Fortes argues that under the reasoning of Wesley, supra., the ambiguity in the term 'free to argue' should be construed against the State. This would then necessarily require a conclusion that the State's sentence recommendation was a material and substantial breach, requiring a conclusion that trial counsel's failure to object was both deficient performance and prejudicial pursuant to Santobello, and Scott supra., and State v. Smith, 207 Wis. 2d 258, ¶ 26, 558 N.W.2d 379. (Fortes Brief, p. 19).

Avoiding Fortes' ambiguity argument, the State asserts Fortes had to prove deficient performance at the postconviction hearing (State's Brief, p. 19) and failed to do so because he did not prove that a breach occurred. (State's Brief, p. 21). Almost mirroring the trial court, the State continues that trial counsel's failure to object was not deficient because he cannot be faulted for failing to make a merciless objection. (State's Brief, p. 23). Finally, the State asserts Fortes failed to prove prejudice at the postconviction hearing on his original postconviction motion and a second evidentiary hearing would involve the same witnesses and testimony and thus serve no purpose. (State's Brief, pp. 23-24).

What the State overlooks is that a Machner hearing has never been held on Fortes' motions. Further, although the State argues an objection would have been merciless, it makes no argument at all as to trial counsel's duty to seek enforcement of Fortes' substantive right to fulfilment of the terms of the plea agreement as well as to inform Fortes of this right and ensure he receives a clear and accurate plea agreement. (Fortes' Brief, pp. 20, 22, 12). Under such cases as Santobello and Scott, supra., the omission of these duties was prejudicial and renders the fairness of the process itself suspect. In Santobello, under these circumstances, and with recognition of the prosecutor's duties, these deficiencies were enough to require remand for specific performance or withdrawal of the plea. (Fortes' Brief, p. 20). Here, in addition to the prosecutor, we have omissions in the plea colloquy duties. (Fortes' Brief, p. 12).

CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests the Court to reverse and remand this case.

Dated this 6th day of October, 2014.

Respectfully submitted,

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Trisha Stewart Martin
Attorney for Defendant-Appellant
State Bar No. 1016571

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 1753 words.

Dated 010/6/2014 _____

CERTIFICATION

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 and a copy of this certificate has been served with the paper copy of this brief on this date.

Dated 10/6/2014 _____