STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP001189-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LAVONTE M. PRICE,

Defendant-Appellant.

Appeal from a Judgment of Conviction,
Honorable Charles F. Kahn, Jr., Presiding, and
an Order Denying Postconviction Relief, Honorable M.
Joseph Donald, Presiding, Entered in Milwaukee County
Circuit Court

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Is Mr. Price entitled to withdraw his guilty pleas because the circuit court repeatedly participated in plea negotiations?

Denying the postconviction motion, Judge M. Joseph Donald acknowledged that Judge Charles F. Kahn, Jr. had "suggested a possible plea resolution after he rejected the defendant's plea to the original offer…" (49:2, App. 102). [1]

The postconviction court did not dispute other claims of judicial participation, but concluded the circuit court had not done or said anything that "led up to" the plea agreement that was ultimately reached. (49:3, App. 103).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because Mr. Price believes the circuit court's actions plainly violated the bright-line rule of ***State v. Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58, he does not believe publication is necessary. Mr. Price would welcome oral argument.

STATEMENT OF THE CASE

The State filed a complaint alleging that Mr. Price committed two robberies on December 27, 2012, and an attempted robbery, as a party to the crime, the following day. *See*, Wis. Stat. §§943.32(1)(b), 939.05, and 939.32 (2011-12).

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[1] This brief will refer to Judge Kahn as the circuit court and to Judge Donald as the postconviction court.

A plea hearing was commenced on August 31, 2012. (61, App. 104-115). Before that hearing, the parties had reached an agreement that required Mr. Price to plead guilty as charged to robbery—count two. It required the State to seek dismissal and the reading-in of the other two counts, and it permitted the State to seek prison but not a specific duration. (61:2, App. 105). As discussed below, the court rejected the plea after completing most of the colloquy, finding that Mr. Price failed to admit a factual basis. (*Id*. at 8-9, App. 111-112).

The circuit court set the case for trial after suggesting the matter could be disposed of by amending the charges to enough counts of theft-from-person (for which Mr. Price had admitted sufficient facts) that would provide the same potential maximum punishment. (*Id*. at 9, App. 112). Later, Mr. Price unsuccessfully attempted to take the original deal. (62, App. 116-164).

On October 8, 2012, under a different plea agreement, Mr. Price entered pleas to counts two and three. Count one was amended to add a party-to-a-crime allegation, and was dismissed and read in for sentencing. (64).

The circuit imposed sentences on January 10, 2013. (65). On count two, Mr. Price was sentenced to 10 years of initial confinement and five years on extended supervision. On count three, the court imposed and stayed five years of initial confinement and 2.5 years on extended supervision, and placed Mr. Price on consecutive probation for five years. (32).

Mr. Price moved for post-conviction relief, seeking plea withdrawal based on judicial participation in plea negotiations. (44). The postconviction court ordered briefs.

(46, 47). The court denied the motion without a hearing. (49, App. 101-103). Mr. Price appeals. (50).

STATEMENT OF FACTS

On August 31, 2012, the circuit court received plea-related paperwork and conducted most of the colloquy mandated by case law and Wis. Stat. §971.08. (17; 61, App. 104-115). When the court asked whether Mr. Price admitted to a factual basis, Mr. Price failed to admit robbery's element that he used force or the threat of force. Instead, Mr. Price contended that, when he encountered the victim in count two, he threw up his arms in a surrendering manner. The victim responded by dropping her purse, and Mr. Price simply took advantage of that, grabbing the purse and running away. (61:7-8, App. 110-111).

In response to further questioning, Mr. Price stated that, while he had no intent to threaten the victim she "…probably felt it herself." The court responded this admission was not "quite good enough. We have a trial [date]. We are ready. We will have the trial on September 24." (61:8, App. 111). The court suggested Mr. Price was too embarrassed to admit what he had done. (*Id*. at 8-9, App. 111-112). Mr. Price denied embarrassment, indicating he did not feel he had threatened the victim. (*Id*. at 9, App. 112). The court stated:

> You know, Ms. Hardtke, Mr. Goodrich, there is a possibility if you want to work out a slightly different kind of agreement, and that would be not more robberies but for thefts from person on multiple counts, if there was three counts of theft from person and no robbery, there would be the same amount of exposure or more, but, you know, that's up to the parties to decide. The trial is on, and I will see you then on September 24. I

> don't see any other trials that will interfere with our ability to have this one. [*Id*.]

The court asked defense counsel if there would be "any benefit in scheduling something between now and then." (*Id*). Defense counsel responded that doing that was "always beneficial" if the prosecution saw a reason. (*Id*. at 9-10, App. 112-113). The court said the issue was whether Mr. Price wanted a trial—at which he might argue a lack of intent to threaten, consistent with guilt of theft-from-person only—but the court was not going to find someone guilty unless the elements of the crime were established. The court advised defense counsel that "if Mr. Price remembers things differently between now and then and you want to get in before the trial, that would, you know, be in his best interests to do that, let me know, but I don't see a need to schedule something else, I mean, between now and then." (*Id*. at 10, App. 113).

On the scheduled trial date, September 24, 2012, the court asked whether the parties were prepared to go forward. The State answered that it was. Defense counsel indicated that he had spoken with Mr. Price about resolving the case, but the discussions had been "futile" so he requested that the trial be adjourned. (62:2-3, App. 117-118). The court noted that a firm trial was contemplated. (*Id*. at 3, App. 118).

Defense counsel responded that, based on the court's having encouraged Mr. Price to consider facing up to his responsibility, counsel had the "impression that we were in the same posture of taking the plea today." The court responded, "Okay. Then let's do that." (62:4, App. 119). Defense counsel stated, "We would love to. … but on Friday [three days prior to this hearing on Monday, September 24, 2012], I learned that the offer or plea that—plea of guilty that we had agreed to had now been withdrawn and we were now

looking at two additional charges that my client was facing. …" (*Id*.). The original offer was "off the table" and the State now agreed to dismiss only one of the counts—not two. (*Id*. at 5, App. 120).

The State confirmed its position that the original deal was off. (*Id*. at 10, App. 125). Nevertheless, the court asked defense counsel, "So if I just go back and continue the guilty plea questionnaire [sic] from where we were, Mr. Price is going to remember it differently now?" (*Id*. at 12, App. 127). Defense counsel responded that Mr. Price now wanted to take the original offer and proceed with the plea. (*Id*. at 12-13, App. 127-128).

The court asked Mr. Price what happened between him and the victim in count two (the count as to which he previously denied threatening force). Mr. Price began an answer but his lawyer asked for "one moment." (*Id*. at 13-14, App. 128-129). Before further questioning on this subject, the prosecutor told the court that, while he was substituting for the assigned prosecutor (who was ill), it was his "impression" that, "after the plea did not go through" originally, the State no longer agreed to a conviction on only one count: Mr. Price could go to trial on all three counts, or plead guilty to two counts (two and three). (*Id*. at 14-15, App. 129-130).

The court believed it was "ludicrous" for defense counsel to appear on the trial date expecting a return to the original agreement, without having scheduled a plea date prior to trial in order to spare the State, its witnesses, and its staff, from having to ready themselves for trial up to the last minute. (*Id*. at 15-16, App. 130-131). On the other hand, the court was "not sure that the State … specifically notified" the

defense that the original offer was "no longer available." (*Id*. at 16, App. 131).

With this question unresolved, the court stated that it was "still interested in knowing what happened on that date, on December 27th, I mean, what really happened, what really happened, not something your lawyer just told you to say, Mr. Price, what really happened." (*Id*. at 17, App. 132). This exchange ensued:

> THE COURT: …Do you want to tell me [what really happened]?
>
> MR. GOODRICH [defense counsel]: It's your call.
>
> THE DEFENDANT: I was in the neighborhood. I was walking. I seen Ms. Maureen, and I walked up behind her, whatever. When she turn't around, I had my hands in the air. And I didn't say anything. I didn't say anything. I walked up to her, and she gave me her purse or whatever. And that's when I took off running with it.
>
> THE COURT: Okay, just a minute. So it went right from her hands to your hand?
>
> THE DEFENDANT: Yes, sir. I didn't snatch anything.
>
> THE COURT: Did you do something with your arms that threatened the use of force right then and there?
>
> THE DEFENDANT: Probably from me throwing my hands in the air so quickly, she [was] probably frightened from that.
>
> THE COURT: I mean, what was your intent?
>
> THE DEFENDANT: To get the purse.
>
> THE COURT: So you tried to scare her to get the purse?

> THE DEFENDANT: Yes.
>
> THE COURT: In a threatening way?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Now, Mr. Mineo [prosecutor], why should I not just simply complete the circle here? We had everything except that one little point on the guilty plea on August 31st, I believe. That's my recollection of what we had. Why can't we just conclude the matter in this way? [*Id*. at 18-19, App. 133-134.]

The prosecutor answered that, after Mr. Price failed to plead guilty to the single count, the State assumed the matter was set for trial. The State expended resources, got additional information from victims and now believed it was only appropriate to dismiss only one count, rather than two. (*Id*. at 19-20, App. 134-135). The court reiterated its question as to when and how the State had informed the defense that the original offer "would not be available at some later time…" (*Id*. at 20, App. 135). Expressing disappointment because the parties had failed to stay in touch as to the status of the case, the court asked the State again if it informed the defense only three days before the hearing that the original offer was revoked. (*Id*. at 22-23, App. 137-138).

The court spoke to Mr. Price about the decisions he faced and, in doing so, the court offered characterizations of the State's newly proposed plea agreement. The court noted, in essence, that Mr. Price was at fault for the collapse of the original deal because he was slow to "remember that you really threatened" the victim. (*Id*. at 30, App. 145). The court suggested that the only real issue "in terms of whether it's going to get resolved today versus going to trial today", was

whether Mr. Price would accept the added exposure of the second charge. (*Id*. at 31, App. 146).

The court stated that Mr. Price had, "basically, already pleaded guilty to" one count of robbery. (*Id*. at 30, App. 145). As it thus explained the newly proposed plea offer to Mr. Price, the court also discussed what it called its "partly legal and partly discretionary" decision "…whether I should just say it's all done and now we just have to set a date for sentencing because Mr. Price completed the guilty plea that he tried to do earlier." (*Id*. at 32, App. 147).

Eventually, the court concluded that the State gave the defense adequate notice that its original offer was revoked. Therefore, the court concluded it could not simply enforce the original offer by scheduling sentencing on one count. However, the court added, "…I would like to do that with Mr. Price's clarification of what happened on the day of the robbery." (*Id*. at 37, App. 152).

Before adjourning, Judge Kahn told Mr. Price that being decisive "is something we all have to do in life." (*Id*. at 47, App. 162). The judge characterized Mr. Price's decision as whether to "just sit[] there and see[] if they can prove" him guilty, or to "recognize what you did." The court added that, if Mr. Price chose a trial, the court would not hold that against him. (*Id*.). The court stated it did "not care" which choice Mr. Price made. (*Id*. at 48, App. 163).

ARGUMENT

I. Because the Circuit Court Participated in Plea Bargaining Leading Up to the Final Plea Agreement, Mr. Price's Pleas are Conclusively Presumed to be Involuntary and He is Entitled to Withdraw Them.

A. Standard of review.

It is a question of constitutional fact whether a guilty plea is involuntary. ***State v. Williams***, 2003 WI App 116, ¶10, 265 Wis. 2d 229, 666 N.W.2d 58.

If the plea was involuntary, withdrawal is a matter of right. The circuit court has no discretion. *Id*., ¶9, *citing* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997), and ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986).

Reviewing courts accept findings of historical or evidentiary fact unless clearly erroneous, but independently determine the constitutional fact of whether a plea is involuntary. ***Williams***, 265 Wis. 2d, ¶10. Because the relevant facts come from the transcripts of the circuit court's remarks, this court is just as capable of determining the facts as was the postconviction court. *Cf*., ***State v. Owens***, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989) (deference is accorded to a circuit court's resolution of conflicts in testimony because the circuit court observed witness demeanor). As discussed below, the facts are not disputed.

The constitutional fact question in this case is governed by ***Williams'*** establishment of a "'bright-line' rule." It is that: "…a defendant who has entered a plea, following a judge's participation in the plea negotiation, is conclusively

presumed to have entered his [or her] plea involuntarily and is entitled to withdraw it." *Id*. at ¶16.

Informing the judge of "a final agreement once it has been reached and before the guilty plea is formally entered" is permissible. ***State v. Wolfe***, 46 Wis. 2d 478, 489, 175 N.W.2d 216 (1970). The bright-line rule of ***Williams*** is between judicial participation prior to formation of the plea agreement—when judicial influence is a risk—and participation incident to implementing the agreement or adapting it to changed circumstances, which, occurring after agreement, cannot pose a risk of undue influence. For example, ***Williams*** acknowledges ***State v. Zuniga***, 2002 WI App 233, ¶16, 257 Wis.2d 625, 652 N.W.2d 423. There, the judge suggested an amendment "*after* Zuniga had entered his plea…" ***Williams*** agreed the judge in ***Zuniga*** acted appropriately. ***Williams*** 265 Wis. 2d, ¶19 (emphasis in original.)

The circuit court in ***Zuniga*** stated that it would give Zuniga the benefit of release on bail pending sentencing. This would give him a chance to prove he could do well in the community, but he would also take a risk: bad performance would permit the State to make a harsher than agreed-to recommendation at sentencing. ***Williams***, 265 Wis. 2d, ¶19.

"A court's suggestion to modify a plea agreement *after* an agreement has been reached and the plea has been entered may not conduce the same dangers as judicial participation in the plea bargaining process itself, *before* a plea agreement has been reached and the defendant has made a plea." *Id*. (emphases in original). In this case, the court actively suggested plea bargains before any valid guilty pleas were entered. Therefore, the "danger" that the pleas are involuntary is conclusively presumed pursuant to ***Williams***.

B. The post-conviction court applied the wrong standard to facts plainly showing that the circuit court participated in plea bargaining.

1. The postconviction court acknowledged facts showing that the circuit court tried to influence the parties before and during the plea negotiations that ensued after an initial plea agreement was not completed.

The postconviction court did not dispute the facts as presented above. (49, App. 101-103). It agreed that the original plea agreement was not consummated and admitted that the circuit court, before another agreement was reached, "suggested a possible plea resolution." (App. 102).

This fact alone triggers ***Williams'*** bright-line rule. The circuit court's explicit statement that the parties should consider pleas to charges more consistent with Mr. Price's factual contentions cannot be characterized as anything other than a directive that the court's views be taken into account. (61:9, App. 112). The court did not state that its suggestion should be ignored.

The circuit court's explicit proposal that the parties consider a specific plea agreement was not the only clear and significant instance of judicial participation. The circuit court sent clear signals to Mr. Price that he could settle his charges in a way the court would reward.

2. The bright-line rule against judicial participation does not require proof that judicial comments induced the plea bargain ultimately reached by the parties.

In its decision denying plea withdrawal, the postconviction court discussed four circumstances. First, even though the circuit court proposed a specific resolution after the initial plea agreement was not completed, the court also stated it "was up to the parties to decide" whether to follow the suggestion. (49:1, App. 101; 61:9, App. 112). Second, the circuit court was "not involved in the original or revised plea offer." (49:2, App. 102). Third, according to the postconviction court, "There is no indication that anything Judge Kahn did or said led up to the plea bargain." (49:3, App. 103). Fourth, the circuit "court gave the defendant additional time to contemplate the revised offer, which he ultimately accepted." (49:2-3, App. 102-103).

None of these circumstances justify the judicial participation the postconviction court acknowledges. After the independent review mandated by ***Williams***, this court should find that the guilty pleas are conclusively presumed to be involuntary.

Combined, the first and fourth circumstances identified above show that the circuit court did not order the parties to accept its first proposed approach to the failure of initial plea agreement. The circuit court said the parties could decide what, if any, plea agreement to enter. However, the circuit court never attempted to dissuade the parties from considering its various plea-bargain proposals.

Williams' establishes a bright-line rule precisely because it would be futile—or at least arguably futile for a

court to prevent a defendant from being influenced by judicial suggestions prior to a plea agreement. Once a court participates, it irrevocably injects the bargaining process with the "unequal positions of the judge and the accused." The judge's potential power to mete out maximum sentences is an ever-present threat even when it was unspoken. *Id*., ¶11 (quoted source omitted).

By the same token, defendants will also be alert to any hints that the judge, who will make the final decision, is inclined to mercy, or at least inclined to give less than the State might want. In this case, the circuit court made clear that it "would like" to see the case resolved with one conviction—the original agreement—rather than two convictions—the revised offer the defendant accepted. (62:37, App. 152). Any defendant could reasonably infer at least a decent possibility that the court was signaling a willingness to blunt, with concurrent sentences, the impact of the additional conviction.

Williams emphasizes that the ban on judicial participation protects even more than defendants' rights. It provides "a foundational rule" reflecting "the proper role of the judiciary…" *Id*. at 15. In Wisconsin, where courts must notify defendants at plea hearings that the court is not bound by plea recommendations, the "proper role" of the court plainly prohibits the conduct at issue here.

For example, the circuit court could have placed itself in a very awkward position. Assume the parties agreed to amend the robbery-related charges to thefts-from-person charges. The court at sentencing, having invited Mr. Price to take this position, would face pressure to accept it. The court would have compromised its discretion to independently

determine whether Mr. Price's version of the facts evidenced denial or minimization.

By following ***Williams***, the courts can keep judges well clear of these obvious potential dangers. The postconviction court apparently concluded that the State was not unduly influenced, because it "did not take the [circuit] court up on its suggestion" to amend charges. (49:1-2, App. 101-102). However, the postconviction decision does not explain how Mr. Price was spared from being misled or unduly influenced. ***Williams*** concerns the voluntariness of the defendant's guilty plea, not prosecutorial independence.

The second circumstance cited by the postconviction court is its conclusion that the circuit court was "not involved in the original or revised plea offer." (49:2, App. 102). This is incorrect. As detailed above, the circuit court involved itself in the original offer: it tried to revive it. Even after the State made clear the original offer was revoked, the circuit court questioned Mr. Price, obtained his admission to the threat element, and proffered that admission to the State with the entreaty that the original agreement be enforced. (62:18-19, App. 133-134).

The circuit court also injected itself into negotiations about the revised offer. After its unsuccessful effort to persuade the State to reinstate the original agreement, the court's comments directly to Mr. Price reflect personalized advice about accepting responsibility. (62: 5-6, 47, App. 120-121, 162).

Williams does not require Mr. Price to prove causation—that he would not have entered the agreement but for the judicial participation. To the contrary, the very purpose of the bright-line rule is to avoid judicial activity raising the spector of "prejudice," *i.e.*, whether the plea was

involuntary in the sense that the judge forced its entry. *Id*., ¶12.

Williams prohibits judicial participation in plea bargaining whether or not a judge participates intentionally, and without regard to a judge's presumed-to-be good motives. *Id*., ¶11. This is important from a defendant's perspective: in Mr. Price's case, much of what the judge said during the proceedings was more promise than threat, and couched in terms of helping Mr. Price develop and show maturity by facing up to his actions and accepting responsibility. Plea bargaining cannot be tainted, either by the specter of judicial threats or the illusion that a judge, rather than being a dispassionate adjudicator, is parental or benevolent toward the defendant.

The court repeatedly urged three specific resolutions: amendment of the charges, return to the original offer, and, finally, that Mr. Price accept the revised offer. (61:9, App. 112; 62:18-19, App. 133-134; 62:30, App. 145). This participation went well beyond the judicial activities in ***State v. Hunter***, 2005 WI App 5, 278 Wis. 2d 419, 692 N.W.2d 256.

In ***Hunter***, the court made statements to the defendant after it denied a suppression motion. The court opined that Hunter was unlikely to win at trial, and urged him to consider the odds and whether he wanted a trial or whether he wanted to get the credit extended to people who accept responsibility. ***Hunter***, ¶2. "After several more court appearances" … Hunter pleaded no contest "to the single charge against him." *Id*, ¶3.

In ***Hunter***, there was "no suggestion in the … record that the trial court was a party or even privy to any plea negotiations" between the parties. *Id*., ¶11. Even so, the

majority shared "the dissent's concern regarding the inappropriateness of the trial court's statements…" The majority concluded, however, that the comments at issue were justified to allow the trial court to "discharge [its] case management responsibilities…" *Id.*, ¶9.

In this case, scheduling certainly occurred, but the court's participation went beyond finding out how to schedule the case. The court also went beyond merely encouraging the parties to be open to negotiating. In this case, the court was not only "privy to," but deeply involved in the details of possible resolutions. The court plainly ran afoul of the purposes for ***Williams***' bright-line rule.

The inappropriate-but-not-prohibited judicial comments in ***Hunter*** were the type that could be cured by the defendant's opportunity to consider the options. In this case, the importance of the court's active participation at the August and September hearings could not have dissipated by the October plea hearing. The participation was emphatic and repetitious. It plainly signaled a judicial desire for settlement in specified ways.

The circuit court acknowledged that it "essentially" "interrogate[d]" Mr. Price. (62:39, App. 154). It did so after the court asked the defense whether Mr. Price would answer questions related to his failure to admit the element which resulted in cancellation of the original agreement. It did so after defense counsel, instead of advising Mr. Price, told him, "It's your call." (62:18-19, App. 133-134).

The court stated it would "like to" complete the circle—it would "like to" give Mr. Price the benefit of the original offer "with Mr. Price's clarification of what happened on the day of the robbery." *Id*. at (62:37, App. 152). The court's attempt to resurrect this plea agreement,

like its suggestion of amended charges, and its eventual encouragement that Mr. Price take the revised plea offer, all constituted clearly impermissible participation in plea bargaining.

CONCLUSION

Mr. Price asks this court to reverse the judgment of conviction and order denying post-conviction relief, and remand this case with instructions that Mr. Price is entitled to withdraw his pleas.

Dated this ___ day of August, 2014.

Respectfully submitted,

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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 4,143 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 opposing parties.

Dated this ___ day of August 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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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