STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1189-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAVONTE M. PRICE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CHARLES F. KAHN, JR., AND THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Lavonte M. Price, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Price was charged with one count of robbery by use of force, one count of robbery by threat of force, and one count of attempted robbery by use of force as a party to a crime (2:1; 5:1). Pursuant to a plea agreement, he entered guilty pleas to the second and third counts and the first count was dismissed and read in (64:2-3, 12-15).

Price filed a postconviction motion seeking to withdraw his pleas (44:1-13). He alleged that the trial court "repeatedly and impermissibly participated in plea bargaining" and that under *State v. Williams,* 2003 WI App 116, 265 Wis. 2d 229, 666 N.W.2d 58, he was conclusively presumed to have entered his pleas involuntarily because of the trial court's actions (44:1). The circuit court denied the motion, ruling that "[t]here is simply no indication that anything Judge Kahn did or said led up to the plea bargain" and that "[u]nder the circumstances, the court does not find that Judge Kahn impermissibly participated in the plea

bargaining process in this case or rendered the defendant's pleas involuntary" (49:3; A-Ap. 103).[1]

Price raises the same arguments on appeal as he did in his postconviction motion. Because the circuit court correctly concluded that Judge Kahn did not impermissibly participate in the plea bargaining process, this court should affirm the judgment of conviction and the order denying postconviction relief.

I. APPLICABLE LEGAL STANDARDS.

"A defendant who seeks to withdraw a plea after sentencing has the burden of showing by 'clear and convincing evidence' that a 'manifest injustice' would result if the withdrawal were not permitted." *State v. Hunter,* 2005 WI App 5, ¶5, 278 Wis. 2d 419, 692 N.W.2d 256 (citation omitted). A defendant can establish a manifest injustice by proving his plea was involuntary. *State v. Lopez,* 2010 WI App 153, ¶7, 330 Wis. 2d 487, 792 N.W.2d 199.

Whether a defendant voluntarily entered a plea presents a question of constitutional fact. *Hunter,* 278 Wis. 2d 419, ¶6. An appellate court accepts a circuit court's findings of historical and evidentiary fact unless they are clearly erroneous, but determines de novo whether those facts demonstrate a constitutional violation. *Id.*

[1]The Honorable Charles F. Kahn, Jr., presided at Price's plea and sentencing proceedings. The Honorable M. Joseph Donald presided at the postconviction proceedings.

II. THE CIRCUIT COURT DID NOT PARTICIPATE IN THE PLEA AGREEMENT.

A. Under *Williams* and *Hunter*, only direct judicial intervention in the plea bargain process is forbidden.

This court's decisions in *Williams* and *Hunter* provide the legal framework for analyzing Price's claim that the trial court impermissibly participated in the plea bargaining in this case and that his subsequent guilty pleas were involuntary as a matter of law.

In *Williams*, the trial judge, at the outset of trial, invited Williams, his attorney and the district attorney to "have a little chat in chambers." *Williams*, 265 Wis. 2d 229, ¶3. Following the unrecorded conference, the parties returned to the court room and the judge announced that "with the assistance or urging . . . of the Court, that a compromise . . . has been reached between the Government and the Defendant." *Id.* After the district attorney described the plea agreement and Williams' attorney concurred with the district attorney's description of the agreement, the trial judge asked Williams whether it was his understanding, "after all of these conversations," that he would plead guilty to one of the charges and whether he was prepared to proceed; Williams said "Yes." *Id.*

During the ensuing plea colloquy, the trial judge attempted to make a record of what occurred in chambers. *Id.*, ¶4. The judge recounted that he had told Williams that he "was not inclined to

send [him] to prison for 30 years" but that "there is still some likelihood that [he] could go to prison" and that "the worst [he] could be looking at would be maybe eight to ten years." *Id*. He also recalled that he had told Williams that he would balance the nature of the offense, which made him "pretty angry," against the fact that he did not "like long-term incarceration for nonviolent offenses for young people," and that he did not know what he would do in terms of sentencing. *Id*.

The court then asked Williams' attorney whether it had "fairly recreated" the in-chambers conversation. *Id*., ¶5. Defense counsel said that the court had talked about "the numbers of eight to ten as possibly years in prison should [Williams] go to trial and lose" and that while the court did not give a specific number if Williams entered a plea, "there was a discussion of a range from one to three as a possibility." *Id*.

The court responded that Williams' attorney's recollection of the plea negotiations was "fairly consistent" with its recollection. *Id*. It then "acknowledged its role in the plea bargaining process," stating, "I'm understanding that to some extent it's not appropriate for Courts to get involved in the plea bargaining." *Id*., ¶6.

Williams filed a postconviction motion to withdraw his pleas, which the circuit court denied. *Id*., ¶8. On appeal, the parties agreed that "the circuit court violated Wisconsin's 'longstanding' prohibition on judicial involvement in plea bargaining." *Id.,* ¶12. However, the State argued that because Williams failed to show that the judge's participation in the plea negotiations rendered his guilty pleas involuntary, he was not entitled to withdraw his pleas. *Id*.

The court of appeals held that a defendant need not demonstrate that the judge's participation actually rendered his pleas involuntarily. Instead, the court adopted a "bright-line rule" that "a defendant who has entered a plea, following a judge's participation in the plea negotiation, is conclusively presumed to have entered his plea involuntarily and is entitled to withdraw it." *Id.*, ¶16.

The court of appeals interpreted and distinguished *Williams* in *Hunter*. In *Hunter*, the defendant was charged with possession of cocaine with intent to deliver. *See Hunter*, 278 Wis. 2d 419, ¶2. After the trial court denied Hunter's motion to suppress, it noted that the suppression motion had been identified as a dispositive motion and asked the parties if the case should be set for a projected guilty plea. *Id.* Hunter's attorney informed the court that the case should instead be scheduled for a final pretrial and trial. *Id.*

The trial court responded by telling Hunter that it was unlikely that he would be acquitted given the evidence against him and that while he "may hold out hope for that," "[t]his is a case where you are likely to be convicted." *Id.* The court told Hunter that "[i]f you want to exercise the opportunity to get some credit and in other words to catch a break, then there is a time for coming forward and admitting your guilt." *Id.* The court advised Hunter "to consider carefully what your odds are at trial and consider carefully whether it's in your best interest to try this case given the weighty evidence against you." *Id.*

Hunter later entered a no contest plea to the single charge against him. *Id.*, ¶3. The trial court accepted the plea and imposed a sentence that was

consistent with the State's recommendation under the plea agreement. *Id.*

Hunter filed a postconviction motion to withdraw his plea, alleging that the trial court had improperly influenced him to plead no contest. *Id.*, ¶4. The circuit court denied the motion without a hearing, concluding that *Williams* did not apply and that Hunter had failed to make a sufficient showing that his plea had been coerced. *Id.*

The court of appeals affirmed. It rejected Hunter's argument that the trial court violated the "bright line" rule of *Williams* that bars any form of judicial participation in plea negotiations before a plea agreement has been reached. *Id.*, ¶7. The court "decline[d] to expand the *Williams* rule to encompass all comments a judge might make regarding the strength of the State's case or the advisability of a defendant giving consideration to a disposition short of trial." *Id.*, ¶8.

The court held that its holding in *Williams* "expressly applies only to direct judicial participation 'in the plea bargaining process itself.'" *Id.,* ¶12 (quoting *Williams*, 265 Wis. 2d 229, ¶16). "[T]here is no suggestion in our analysis [in *Williams*] that the conclusive presumption of involuntariness should extend to any and all comments from the bench that might later be characterized as having prompted a defendant to enter into a plea agreement with the State." *Id.* "[C]ommenting on the strength of the State's case and urging a defendant to carefully consider his chances of prevailing at trial are many steps removed from the direct judicial participation in plea negotiations that occurred in *Williams*," the court observed. *Id.* The court "decline[d] to blur

the *Williams* bright-line rule by extending it to apply to the present facts." *Id*.

In contrast to *Williams*, the court said in *Hunter*, "there is no suggestion in the present record that the trial court was a party or even privy to any plea negotiations between the State and Hunter until the parties announced to the court on April 30, 2001, that they had reached a plea agreement." *Id*., ¶11. "Unlike in *Williams,* the trial court in this case did not convene an impromptu settlement conference, and it did not make or solicit specific offers of potential sentence ranges. There is nothing in the present record to suggest that the trial court gave the parties any input whatsoever regarding what it considered an appropriate disposition of the charge Hunter was facing." *Id*. "In short, at no time . . . did the trial court suggest or advocate for a particular plea agreement." *Id*.

Against that backdrop, the State turns to Price's argument that the judge in this case impermissibly participated in the plea negotiations. Price directs his argument to events at two hearings: the unsuccessful change of plea hearing on August 31, 2012 (61:1-12; A-Ap. 104-12), and a hearing held several weeks later, on September 24, 2012, which was to have been the first day of trial (62:1-2; A-Ap. 116-17).

B. The August 31, 2012, hearing.

At the August 31 hearing, the parties informed the court that they had reached a plea agreement: Price would enter a guilty plea to Count 2, the State would move to dismiss and read in Counts 1 and 3, and the State would

recommend a prison sentence of unspecified length (61:2; A-Ap. 105). However, during the plea colloquy, Price denied having threatened the use of force when taking the victim's purse, leading the court to reject his plea and announce that the matter would be tried on the date set for trial, September 24, 2012 (61:7-8; A-Ap. 110-11).

After Price again stated that he did not believe that he had threatened the victim, the court said that it would be the jury's job to decide that issue (61:9; A-Ap. 112). The court then made the following statement, which is one of the bases for Price's argument:

> You know, [assistant district attorney] Ms. Hardtke, [defense counsel] Mr. Goodrich, there is a possibility if you want to work out a slightly different kind of agreement, and that would be not more [sic: for?] robberies but for thefts from person on multiple counts, if there would be 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 trial that will interfere with our ability to have this one.

(*Id.*)

The court's off-the-cuff comment that the parties might want to work out an agreement in which the robbery charges would be amended to theft charges, though ill-advised, did not rise to the level of impermissible judicial participation in plea bargaining. The court expressly stated that it was "up to the parties to decide" (*id.*). Most significantly, there is nothing in the record that suggests that either party ever gave the court's comment any consideration whatsoever. The only

mention of it at any subsequent court proceeding came during the September 24, 2012, hearing, when the court was describing its notes of the prior hearing (62:7-8; A-Ap. 122-23). At no other point at the September 24 hearing (62:1-49; A-Ap. 116-64), and at no point at the October 5, 2012, final pretrial conference (63:1-28) or the October 6, 2012, change of plea hearing (64:1-17) was there any mention of the possibility of amending the robbery charges to theft. The two charges to which Price eventually pleaded guilty six weeks later were robbery and attempted robbery, not theft (64:2-3, 12).

The circuit court's isolated and disregarded remark about possibly amending the robbery charges to theft is a world apart from the active involvement in plea negotiations that this court found improper in *Williams*. Price's challenge to his plea can succeed, therefore, only if the court's conduct several weeks later at the September 24, 2012, hearing constituted impermissible involvement in the plea negotiations.

C. The September 24, 2012, proceeding.

The September 24 proceeding was scheduled to be the trial date (62:2; A-Ap. 117). However, after the State informed the court that it was prepared to proceed to trial, defense counsel asked for an adjournment (*id.*). The court responded by noting that it had set a firm trial date at the previous hearing and asked defense counsel, "What's the confusion?" (62:3; A-Ap. 118). Counsel said that he had had further discussions with Price and that it was counsel's "impression that

we were in the same posture of taking the plea today" (62:4; A-Ap. 119). The court responded, "[t]hen let's do that" (*id.*).

Defense counsel informed the court that Price wanted to do so but that he had learned several days earlier that the State had withdrawn its offer and that Price was potentially facing two additional charges (*id.*). Counsel said that the State was now willing to resolve the matter if Price would plead guilty to two of the original charges (62:5-6; A-Ap. 120-21). He said that he had been working with the State that morning without success to reach an agreement and so was requesting an adjournment (62:6; A-Ap. 121).

The court then reviewed its notes from the August 31 proceeding and pointed out to defense counsel that it had said that the case was going to trial that day unless the parties resolved the case in advance of the trial date (62:7-9; A-Ap. 122-24). Defense counsel responded that the problem was that the defense had just learned the previous Friday that the State's offer was no longer on the table, that he and Price "were working out whether or not he was going to change his understanding of what he was pleading to, to come to court today and make that plea of guilty," and that Price's understanding had in fact changed (62:9-10; A-Ap. 124-25).

The court, again noting that the trial was supposed to begin that day, asked the prosecutor, "[i]s it settled or not"? (62:10; A-Ap. 125). The prosecutor said that it was not (*id.*).

The court then asked defense counsel whether, if the plea colloquy were resumed at the

point where it had stopped previously, "Mr. Price is going to remember it differently now" (62:12; A-Ap. 127). Defense counsel responded that Price was prepared to plead guilty to Count 2, robbery with threat of force (62:12-13; A-Ap. 127-28). The court then asked Price to describe what had happened when, as Price had stated at the prior plea hearing, he took the victim's purse (62:13; A-Ap. 128). Price started to answer that question, but defense counsel asked the court for a moment and conferred with Price (62:13-14; A-Ap. 128-29).

The court asked the State about the number of witnesses it planned to call (62:14; A-Ap. 129). After the prosecutor answered that question, he informed the court that the State was prepared to try all three counts or to accept guilty pleas to Counts 2 and 3, but that it was not willing to proceed with its original offer (62:15; A-Ap. 130).

The court said that it was "ludicrous" for defense counsel to believe that the original offer was still available without having notified the court or the district attorney (*id*.). It added that, "assuming that Mr. Price just wants to go ahead with what was there before, I'm not sure that the State has specifically notified him that that's no longer available" (62:16; A-Ap. 131). However, defense counsel confirmed that he had had conversations with the assistant district attorney in which he learned that the original offer was not in effect and that he should pick up additional discovery materials (62:17; A-Ap. 132).

The court then questioned Price about "what really happened" during the incident charged in Count 2 (62:17; A-Ap. 132). It prefaced that question by noting that "i[f] it turns out that for some reason the case does not get settled this

morning," the State could not use Price's answers against him at trial (*id*.). After Price acknowledged that he had tried to scare the victim in a threatening way (62:18-19; A-Ap. 133-34), the court asked the prosecutor, "why should I not just simply complete the circle here?" (62:19; A-Ap. 134). "We had everything except that one little point on the guilty plea on August 31st. . . . Why can't we just conclude the matter in this way?" (*id*.).

The prosecutor responded that based on additional discussions with the victims and police officers and its review of the evidence, the State no longer believed that the unconsummated plea agreement was appropriate (62:19-20; A-Ap. 134-35). The court then discussed with the parties how the withdrawal of the original offer and the substance of the new offer had been communicated to the defense, what new discovery information had been provided to the defense, and whether that new discovery information interfered with the defense's ability to proceed to trial that day as scheduled (62:20-27; A-Ap. 135-42).

The court then described the substance of the State's revised plea offer (62:28-32; A-Ap. 143-47). After doing that, the court said, "so that's the status. We do plan to have a trial today. But the question that I still have is -- it's partly legal and partly discretionary -- as to 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" (62:32; A-Ap. 147).

At that point, the court informed the parties that the assistant district attorney who had represented the State at the August 31, 2012,

hearing, who was ill and at home, was available by phone (62:32-34; A-Ap. 147-49). That prosecutor discussed with the court the course of events involving the original plea agreement and the State's amended offer (62:34-37; A-Ap. 149-52).

Following that discussion, the court concluded that it was not appropriate "to allow Mr. Price to get the advantage of an offer that is no longer available to him by the district attorney" and that "we will either bring in the jury and have the trial, or we will grant what now becomes a request for both sides for an adjournment" (62:39; A-Ap. 154). After confirming that both sides were now requesting an adjournment, the court set a new trial date of October 8, 2012 (62:39-42; A-Ap. 154-57). The court further stated that if Price decided to accept the State's plea offer, he should do so by October 1 (62:44; A-Ap. 159).

The judge concluded his remarks by telling Price that when he became a judge, he was advised that a judge should not be afraid to make decisions (62:46; A-Ap. 161). The court then said:

> Mr. Price, that last thing is something we all have to do in life. If you've taken some steps that you're not proud of, you have the choice. *And it's totally your choice. And I don't care which choice you make*, of seeing whether the government can prove that you're guilty and convince a jury as we discussed last time, convince all 12 jurors beyond a reasonable doubt each and every one of them that you, in fact, did those awful things that they say you did.
>
> You have the choice of just sitting there and seeing if they can prove that or not, or you have the other choice, which is to recognize what you did and come forward and, basically, tell the world that you did it,

> that you did these things, and maybe even at some point how you feel about that.
>
> *But, Mr. Price, one way or the other, it's up to you to decide.* Again, frankly, I'm going to say one more thing. I don't hold it against you if you have a trial. Prosecutors and defense lawyers always tell me I should give some special credit for someone who takes responsibility for what they've done, that that's a factor that sort of suggests that they recognize the seriousness of it and I should consider that at the time of sentencing. And I do. I, of course, will do that.
>
> But really, no one gets penalized from me, this judge, for having a trial if that is what you want instead. But what's not, wants [sic] not going to work is failing to make a decision. And so you have one week, now only one week and ten minutes to decide whether you're going to plead guilty and accept responsibility -- I'm sorry, plead guilty to two offenses and have the other one also considered, accept responsibility for the third as well, or whether you're going to have a trial on all three.
>
> *So that's totally your choice, and I don't care which choice you make.* It's going to be up to [defense counsel] to inform me in advance a week from today if anything has changed; otherwise, we're having the trial on all three counts on Monday, the 8th of October, at 8:15 in the morning. I'll see you then.

(62:47-48; A-Ap. 162-63) (emphasis added.)

Price argues that "[t]he court repeatedly urged three specific resolutions: amendment of the charges, return to the original offer, and, finally, that Mr. Price accept the revised offer." Price's brief at 15. The first of those "resolutions" refers to the court's comment at the August 31

plea hearing, which the State already has discussed. The second and third "resolutions" refer to the court's statements at the September 24 hearing. The State disagrees with Price's contention that at the latter hearing the court "urged . . . a return to the original offer" and that it later urged him to "accept the revised offer."

The court's questions about the original offer resulted from its attempt to understand why, on the date scheduled for trial, Price's counsel was seeking an adjournment (62:2-3; A-Ap. 117-18). Counsel's explanation was that Price had decided, subsequent to the original plea hearing, that he would be willing to go forward with that plea but that the original offer was no longer available (62:3-10; A-Ap. 118-25). After the court confirmed with Price that he was now acknowledging that he had threatened the victim (62:17-19; A-Ap. 132-34) – the issue that had derailed the original plea hearing – the court made the remarks that Price characterizes as "urg[ing]" a "return to the original offer."

> THE COURT: Okay. Now, [assistant district attorney] Mr. Mineo, 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?

(62:19; A-Ap. 134.) The prosecutor responded by explaining why the State had withdrawn its original offer (62:19-21; A-Ap. 134-36).

Viewed in context, the court's questions to the prosecutor were not an attempt to urge the parties to resolve the case based on the State's original offer. Rather, the court was attempting to

clarify the confusion that was engendered when Price's counsel informed the court that he was unprepared for trial, that Price was prepared to enter a plea based on the original offer, and that he recently learned the original offer was off the table. The court's questions to the prosecutor elicited confirmation that the original offer indeed had been withdrawn.

Nor, as Price argues, did the court urge him to accept the State's amended offer, which would have required Price to plead guilty to Counts 2 and 3 (62:15; A-Ap. 130). To the contrary, the court repeatedly told Price that the choice whether to accept that offer was his and that it did not care which choice he made (62:47; A-Ap. 162 ("it's totally your choice. And I don't care which choice you make"); *id.* ("Mr. Price, one way or the other, it's up to you to decide"); 62:48; A-Ap. 163 ("So that's totally your choice, and I don't care which choice you make")).

In *Hunter*, this court "decline[d] to expand the *Williams* rule to encompass all comments a judge might make regarding the strength of the State's case or the advisability of a defendant giving consideration to a disposition short of trial." *Hunter*, 278 Wis. 2d 419, ¶8. The court's remarks in this case fall on the *Hunter* side of the *Williams* bright line prohibiting judicial involvement in plea negotiations.

It is significant that the last date that Price identifies as involving the court's participation in the plea negotiations was September 24, 2012. However, when court reconvened on October 5, 2012, the parties had not reached an agreement. To the contrary, the October 5 proceeding was a

final pretrial conference held in anticipation of trial (63:1-28), which was scheduled for October 8 (62:45, 48; A-Ap. 160, 163). There was no discussion during that pretrial conference that the parties were still considering resolving the case short of trial (63:2-28). At no point during the October 5 hearing did the court suggest that the parties settle the case (*id.*). To the contrary, the court made it clear that it expected the case to be ready to be tried on October 8 (63:23-24).

The parties ultimately were able to reach a plea agreement. On the October 8, 2012, scheduled trial date, the parties informed the court that, pursuant to their agreement, the State would amend Count 1 to add a party to a crime allegation; Price would enter guilty pleas to Counts 2 and 3; Count 1 would be dismissed and read in; and the State would recommend a prison sentence with the length left up to the court (64:2-3). As the postconviction court correctly noted (49:2; A-Ap. 102), that was the same deal that the State offered prior to the September 24 hearing; the State did not revise its offer in response to the court's inquiries at that hearing.

Price does not identify any flaws in the October 8 plea proceeding that rendered his pleas involuntary. Rather, his claim that his pleas were involuntary rests entirely on the conclusive presumption of involuntariness that arises when a trial court impermissibly participates in plea negotiations. Because the trial court did not cross the bright line established in *Williams* barring judicial participation in plea negotiations, this court should reject that claim.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 15th day of September, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,612 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of September, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General