STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP001189-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

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

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DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The State Admits Judicial Participation in Plea Bargaining, and, by its Silence, Effectively Admits Participation that Crossed the "Bright Line" Drawn in ***State v. Williams***.

A. The State admits the circuit court participated in plea bargaining when it made an "ill-advised" "comment" on August 31, 2012.

The State acknowledges that "one of the bases for [Mr.] Price's argument" is found in comments the circuit court made on August 31, 2012. (Resp. Br. at 9). Like Mr. Price, the State quotes the remarks. (*Id*.; App. Br. at 3-4, 61:9, A-Ap. 112).

In the quoted passage, the circuit court addressed the parties after Mr. Price failed to admit the force/threat-of-force element of robbery. The court pointed out that the State might be able to secure "the same amount of exposure or more" if the parties "want[ed] to work out" an agreement under which Mr. Price pleaded to "three counts of theft from person…"

The State does not deny that, when the circuit court made these remarks, it made a specific plea-bargaining proposal. The State does not attempt the impossible argument that the court was not participating in the plea bargaining process or injecting its opinions into any ongoing discussions the parties might have.

The State even concedes the remarks were "ill-advised." (Resp. Br. at 9). This court should agree. However, this court should disagree that the remarks can be

ignored or rationalized because they were "off-the-cuff." Further, this court should reject the implicit argument that the circuit court's plea-bargain proposal can be excused because it fell below some undefined "level" of "judicial participation in plea bargaining" so as to be "[]permissible." (*Id*.).

Judicial Proposals, by Definition, Are Not "Off-the-Cuff"

The circuit court was in a vastly superior position to Mr. Price when it specifically suggested a plea bargain that would ratify Mr. Price's current position—he did not use or threaten force and, therefore, he was not guilty of robbery. At pp. 12-13 of his brief, Mr. Price explains why specific plea agreements suggested by the judge who will ultimately impose sentence are always consequential. "'When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. …'" ***State v. Williams***, 2003 WI App 116, ¶11, 265 Wis. 2d 229, 666 N.W.2d 58, *quoting* ***United States ex rel. Elksnis v. Gilligan***, 256 F.Supp. 244, 254 (D.C.N.Y. 1966).

Mr. Price noted that trial courts are not only empowered to punish defendants who fail to plea-bargain, but also to reward those who do. "…[D]efendants 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." (App. Br. at 13). *See also*, App. Br. at 15: "…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."

The State neither admits nor denies that judicial participation in plea bargaining affects the voluntary nature of guilty pleas because of the "unequal positions of the judge and the accused." (App. Br. at 13, *quoting* ***Williams***, 265 Wis. 2d at ¶11). The State does not address Mr. Price's arguments, and the reasoning of ***Williams*** and ***Elksnis***: when a court, prior to the entry of a plea, states its view of how a case might appropriately be resolved, it is impossible to conclude that the defendant is unaffected and uninfluenced.

"Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***Charolais Breeding Ranches v. FPC Securities***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (quoted source omitted). This court should conclude that, despite its conclusory claim that the circuit court's remarks were "off the cuff," the State effectively concedes they cannot be deemed as such. The circuit court's very position categorically rendered consequential the specific plea-bargaining proposal the circuit court made to the parties.

No standard of "permissible" judicial participation justified the circuit court's plea-bargain proposal

Perhaps based on its undefined "off-the-cuff" standard, the State claims that the circuit court's comments, "though ill-advised, did not rise to the level of impermissible judicial participation in plea bargaining." (Resp. Br. at 9). This begs the question: What is the permissible level of judicial participation in plea bargaining, when no final agreement is in place? The answer is that no such participation is permitted: "…judicial participation in the bargaining process that precedes a defendant's plea raises a conclusive presumption that the plea was involuntary." ***Williams***, 265 Wis. 2d at ¶1.

Williams' prohibition against participation that "*precedes*" a plea is notable: the word is *precedes*, not *influences*, and not *causes*. ***Williams*** does not require proof, as the State implies, "that either party ever gave the court's comment any consideration whatsoever." (Resp. Br. at 9). As noted, the State ignores but should be deemed to concede (as is undisputable) that defendants facing incarceration are *always conscious of*, and *always consider*, what judges say about specific ways their cases might be resolved.

The State's implicit argument—that Mr. Price cannot establish "impermissible" judicial participation unless he proves that he and/or the prosecutor gave "consideration" to the judge's views, is directly contrary to ***Williams***.[1] Indeed, the State's argument here repackages the prosecutorial argument that ***Williams*** rejected: a defendant is entitled to withdraw a plea entered after judicial participation in plea bargaining, "without having to show that actual prejudice resulted from the trial judge's participation." ***Williams***, 265 Wis. 2d at ¶19.

The State does not develop an argument that the court undid its participation in plea bargaining by disclaiming intent to control the process. However, the State seems to rely on disclaimers by the circuit court, at both the August 31, 2012, and September 24, 2012, hearings.

As noted in Mr. Price's brief—and not disputed by the State—the circuit court never told the parties to ignore its

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[1] The State further ignores that judicial participation not only defeats the voluntariness of pleas, but runs contrary to "the proper role of the judiciary." ***Williams***, 265 Wis. 2d, ¶15, discussed at App. Br., pp. 13-14. Under ***Charolais Breeding***, the State should be deemed to concede that the judicial participation in this case was not just abstractly "ill-advised," but improperly so under ***Williams***.

suggestions. (App. Br. at 11, 12). Nothing in ***Williams*** supports the State's implicit, but largely undeveloped, argument, that the circuit court could have undone, or that it undid, its participation, merely because of remarks tending to disclaim a judicial desire to control the process. Judicial remarks[2] such as "it's up to the parties to decide" or "I don't care whether you accept a plea offer" are simply not erasers that can remove from the record judicial comments and entreaties such as, "I'd like to go back to the original plea offer but I can't,"[3] or "Why can't we proceed by reinstating the offer the State has withdrawn?"

B. The State's claim of no judicial participation in plea bargaining on September 24, 2012, is based on incomplete and unreasonable characterizations.

The State's summary of the September 24, 2012, hearing omits facts discussed in Mr. Price's summary. (App. Br. at 4-8, Resp. Br. at 10-17). The State also presents a straw-man argument whose defeat is insufficient to show a lack of judicial participation in plea bargaining.

The State contends, "Viewed in context, the court's questions to the prosecutor were not an attempt to urge the

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[2] What follows are examples that Mr. Price submits are fair paraphrases of some of the circuit court's comments. The court's actual words are quoted and cited in the parties' briefs.

[3] Under ***Charolais Breeding***, the State has effectively conceded that, when the circuit court said it would like to revive the original offer, "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," thus encouraging Mr. Price to believe his sentence would be no different if he accepted the second offer than it would have been if, as the circuit court preferred, the original offer had been revived. (App. Br. at 13).

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 [Mr.] Price's counsel informed the court that he was unprepared for trial…" (Resp. Br. at 16-17).

The straw-man portion of the argument is that the court questioned defense counsel, the prosecutor in court, the prosecutor calling in from home, *and Mr. Price*, for the purpose of determining whether the case was going to be resolved with a plea agreement, whether it should be tried that day, or whether it had to be re-set for trial. Of course, a judge participating in plea bargaining also participates, simultaneously, in determining whether plea negotiations will resolve the case, or whether a trial must be scheduled.

Mr. Price explained that, "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." (App. Br. at 16). While focusing on the uncontroversial contention that the circuit court clarified whether the case would be tried, the State does not—because it cannot—deny that the court, at the same time, waded into the merits of reviving the original offer. The court then involved itself in the question whether Mr. Price should accept the State's second offer.

The State objects to Mr. Price's use of the word "urge" to characterize the circuit court's questioning of counsel and Mr. Price and to characterize the court's questions why it could not implement the State's prior, original offer. (Resp. Br. at 15-16). In so objecting, and in implying that the circuit court merely—or solely—directed its questions to how the case would be settled, the State omits critical facts:

- The court did not just ask whether the State's offer could be reinstated, it told counsel and Mr. Price that it would "like to" implement that offer, thus convicting Mr. Price of one less crime. (62:37, A-Ap. 152).

- Even though the court was informed the State did not want to re-offer the original agreement, the court nevertheless, in its own words, "essentially interrogate[d]" Mr. Price to secure the admission that Mr. Price had failed to make in order to take the State's original offer. (62:39, A-Ap. 154).

Under these and all the circumstances described in Mr. Price's brief-in-chief, it seems eminently reasonable to characterize the circuit court as having *urged* the parties to avoid a trial. Even so, this court need not accept that characterization to find the obvious: the circuit court repeatedly participated in plea negotiations preceding the entry of the pleas. In disputing whether the court "urged" resolutions, the State re-introduces its implicit argument that judicial participation in plea bargaining is only "impermissible" if the defendant somehow proves actual judicial influence. That argument misconstrues ***Williams'*** bright line rule. Under ***Williams***, actual influence/prejudice (in the form of an involuntary plea) is the *product*—the conclusive presumption—that flows from participation preceding entry of a plea. It is not a requisite *part* of the participation.

II. The State's Interpretation of ***State v. Hunter*** Misapprehends the Binding Nature of ***Williams***, Incorrectly Assuming that ***Hunter*** Modified ***Williams***.

A. This court's decision in ***Hunter*** could not, and did not attempt to, modify ***Williams***.

Then-Judge Patience D. Roggensack authored ***Williams***, which was released May 1, 2003. Her opinion was joined by the Honorable Charles P. Dykman and the Honorable David G. Deininger.

Judge Deininger authored ***State v. Hunter***, 2005 WI App 5, 278 Wis. 2d 419, 692 N.W.2d 256, which was released December 30, 2004. His opinion was joined by the Honorable Paul Lundsten. Judge Dykman dissented. He believed the majority opinion "overrule[d] ***Williams*** in all but the case that reoccurs but once in ten years." *Id*., ¶30 (Dykman, J., dissenting).

"[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). If the court of appeals concludes that a prior published decision, or a supreme court decision, is erroneous, it is "not powerless." It can certify the appeal to the supreme court or it can decide the appeal, adhere to the case, "but stat[e] its belief that the prior case was wrongly decided." *Id*. at 190 (footnote omitted).

The ***Hunter*** majority did not take issue with ***Williams***. It merely held that the circuit court "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." Further, "there is no suggestion in the present record that the trial court was a party to or even privy to any plea negotiations" until the parties announced an agreement. ***Hunter***, 278 Wis. 2d at ¶11.

Even though it disagreed with the dissent's position, that ***Williams*** required plea withdrawal, the ***Hunter*** majority nevertheless recognized that trial courts "should be cautious in their comments regarding whether they believe a given case should be tried or resolved with a plea." *Id*., ¶13.

Hunter characterized ***Williams'*** "bright line" to prohibit judges from, for example, becoming "a party or even privy to any plea negotiations," from "mak[ing] or solicit[ing] specific offers of potential sentence ranges" and from giving "the parties any input whatsoever regarding what [the trial court] considered an appropriate disposition of the charge…" *Id*., ¶11.

In contrast, ***Hunter*** concludes that a "conclusive presumption of involuntariness should [not] extend to any and all comments from the bench that might later be characterized as having prompted a defendant to enter a plea agreement with the State." *Id*., ¶12.

B. In final effect, the State's argument is that the judicial participation here was less egregious than that condemned in ***Williams***: even if that is so, the circuit court directly, expressly proposed plea bargains, violating ***Williams***.

Clearly, the circuit court here "made" proposals and "solicited" "specific" outcomes. The court suggested replacing a robbery charge with charges of theft-from-person. Thereafter, the court by its own admission "interrogated" Mr.

Price to secure the admission necessary to revive the original plea offer: "We had everything except that one little point [whether Mr. Price threatened or used force] on the guilty plea on August 31st, I believe. … Why can't we just conclude the matter in this way?" (62:19; A-Ap. 134).

The circuit court did not convene an off-record settlement conference, as in ***Williams***. However, the September 24, 2012, hearing can accurately be described as a judicially-led plea-bargaining session. The circuit court's participation in negotiations then, as previously on August 31, 2012, is not excusable merely because the court needed to ascertain how the case would be scheduled. Whether or not the judicial violation of its role is as clear in this case as in ***Williams***, it is clear enough.

By publishing its decision, this court in ***Williams*** exercised its significant power to develop the law. It announced a "conclusive presumption" to enforce a "bright line" rule applied to plea bargaining, a huge part of the criminal justice system. Just as trial courts must observe the proper role of the judiciary in the context of plea bargaining, this court must observe the proper role mandated by ***Cook***. Having developed law in ***Williams***, this court must not use ***Hunter*** to so hobble ***Williams*** as to "overrule [it] in all but the case that reoccurs but once in ten years." *Id*., ¶30 (Dykman, J., dissenting).

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 3rd day of October, 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 2,702 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 3rd day of October, 2014.

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