STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal Nos. 2014AP001248-CR
2014AP001249-CR
2014AP001250-CR
2014AP001251-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON MAY 1, 2014, AND A JUDGMENT OF CONVICTION ENTERED ON JULY 9, 2013, BY THE CIRCUIT COURT FOR POLK COUNTY, HON. MOLLY E. GALEWYRICK, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State breached the plea agreement by recommending consecutive sentences and Tourville's attorney was ineffective in failing to object to this breach.

A. The State's breach

The circuit court held, and the State now argues, that Tourville's attorney was not ineffective in failing to object to the State's sentence recommendation. This argument is based solely on the contention that the State did not breach its plea agreement with Tourville. In support, both the court and the State rely heavily on *State v. Bowers,* 2005 WI App 72, 280 Wis. 2d. 534, 696 N.W. 2d 255.

The flaw in the State's argument is that it ignores significant differences between *Bowers* and the present case. To begin, the factual situation in *Bowers* is significantly different. There, the defendant struck a plea deal regarding a single charge. *Id.* at ¶1. In contrast, in Tourville's plea deal, the State's sentence recommendation regarded four separate charges. When considering a deal that encompasses a single charge—as in *Bowers*—it is understandable why the parties might not specify whether the recommendation would be for a concurrent or consecutive sentence (even though there was a previously existing underlying sentence). This contrasts from the situation in Tourville's case, where the plea deal encompassed sentence recommendations to four separate charges. In that circumstance, the concurrent or consecutive nature of the sentences would naturally be an important consideration, giving added significance to the State's failure

to specify that its recommendation could go beyond the PSI's recommendation by advocating for consecutive sentences.

Next, the language of Tourville's plea agreement is significantly different from Bowers'. Bowers' plea simply stated: "State to recommend 2 yrs. initial confinement; 3 yrs extended supervision." *Id.*, at ¶2. This is significantly different from Tourville's agreement, where the State agreed to "*cap* its recommendation at the high end of what the PSI orders." In Bowers' plea agreement, the State was limited by a set number of years, whereas Tourville agreed to have the State's recommendation *capped* by the recommendations of the PSI. In doing so, the State agreed to have what the PSI's recommendation set the parameters of what the prosecutor could recommend. The dictionary definition of a cap in this context is "an upper limit." http://www.merriam-webster.com/dictionary/cap. That means that in agreeing to be *capped* by the PSI's sentence recommendation, the State agreed to let the PSI set the upper limits of the recommendation. The PSI did not recommend consecutive sentences, and therefore the State went beyond the "upper limits" of the PSI. Hence, the State breached the agreement.

In *Bowers* the court held that "[i]n the absence of any indication that the parties expected the State to either remain silent or recommend concurrent sentences, we are reluctant to engraft these conditions into a fully integrated plea agreement." *Id.* at ¶16. However in Tourville's agreement, there was no "absence of any indication" as to what the State would recommend in terms of a concurrent or consecutive sentence; there was a clear indication that the State would be limited by the recommendation of the PSI.

In refuting Tourville's argument that *Bowers* is distinguishable, the State claims that "Tourville does not point to anything in the plea agreement that addresses whether the State would recommend consecutive or

concurrent sentences." State's Brief at. 8. While that is correct, the conclusion that there was no breach is not. Tourville is not arguing that the State explicitly agreed to be silent on the matter of concurrent or consecutive sentences; Rather, Tourville argues that the State explicitly agreed to be limited by the PSI. Because the PSI was silent on the issue of concurrent or consecutive sentences, the State should have been as well.

Contrary to the circuit court's holding that Tourville got "exactly what he bargained for," Tourville bargained to have the State's recommendation capped by the high end of what the PSI ordered, and since the State went beyond the PSI, Tourville was denied the benefit of his bargain. The circuit court also incorrectly held that because "the parties' plea negotiation did not consider the issue of concurrent or consecutive sentences," the State did not breach the plea agreement in recommending a consecutive sentence. Tourville does not need to show the plea agreement explicitly addressed the issue of concurrent or consecutive sentences in order for that issue to have been negotiated.

The Wisconsin Supreme Court has found that "provisions that were not explicitly stated in plea agreements have been held to be material and substantial breaches." *State v. Deilke*, 2004 WI 104, ¶14, 274 Wis. 2d 595, 612, 682 N.W.2d 945, 954. In discussing the holding in *Deilke*, Justice Brown has stated that "The clear import of the Supreme Court's language was to unequivocally reject the notion that all terms not expressly articulated are also unnegotiated." *Bowers*, n.5, Brown, J. dissenting). In agreeing to have the State limited by the PSI's recommendation, Tourville does not need to show that the plea agreement explicitly addressed the issue of concurrent or consecutive sentencing, as the PSI bound the State on that issue. Had the PSI recommended concurrent or consecutive sentences, there would be no issue

here, but because the PSI was silent on the matter, it precluded the State from going beyond those recommendations.

Further, the State cites *Bowers* for the proposition that "[c]ontract law demands that each party should receive the benefit of its bargain; no party is obligated to provide more than is specified in the agreement itself." State's Brief at 6 (quoting *Bowers*, at ¶16). That holding in *Bowers* works in Tourville's favor because he is not asking the State to provide more than the agreement specified; he is objecting to the fact that they did. The State went beyond the recommendation it agreed to be limited by, and thereby breached the plea agreement.

In his brief, Tourville argued that to the extent that the terms of the plea bargain were ambiguous, they should be interpreted in his favor. Defendant's Brief at 13. The State acknowledges caselaw holding that there is a presumption that sentences should be served concurrently in the face of ambiguity. However, it argues that this principle should only apply to issues involving the court's intent at sentencing. State's Brief at 9.

The State is wrong. While it is true that the two cases cited by Tourville, *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991) and *State v. Ogelsby*, 2006 WI App 95, 292 Wis. 2d 716, 715 N.W.2d 727, both involved different factual situations than the present case, the principle for which they stand should apply here. The holdings of *Rohl* and *Ogelsby* relate closely to the rule of lenity, which states that in the face of ambiguity, there is a presumption that courts will "resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. 81, 83-84 (1955). While the "rule of lenity" was developed in the federal courts, it is "'echoed in

the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" *State v. Kittilstad,* 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999) (citing *Austin v. State,* 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978)).

Here, as in *Rohl* and *Ogelsby,* as well as in cases applying the rule of lenity, there is an ambiguous situation that may have had a direct effect on the imposition of sentences. As in those situations, the court should interpret the PSI "against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. at 83-84. Because of the uncertainty left by the language of the PSI, Tourville should not be "subjected to punishment that is not clearly prescribed**.**" *United States v. Santos*, 553 U.S. 507, 514 (2008).

The State notes that the "interpretation of plea agreements is rooted in contract law." State's Brief at 6. While plea agreements are analogous to contracts, "such analogies are not solely determinative of the question as fundamental due process rights are implicated by the plea agreement." *State v. Rivest,* 106 Wis. 2d 406, 413, 316 N.W.2d 395 (1982). Further, "[t]he constitutional concerns undergirding a defendant's 'contract rights' in a plea agreement demand broader and more vigorous protection than those accorded private contractual commitments." *State v. Robinson,* 2002 WI 9, ¶50, n. 24, 249 Wis. 2d 553, 638 N.W.2d 564 (quoting *State v. Scott,* 230 Wis. 2d 643, 654-55, 602 N.W.2d 296 (Ct.App.1999)). Because of the "broader and more vigorous" protection demanded by the constitutional concerns underlying plea agreements, in the face of ambiguity, the benefit should go to the defendant.

B. Remedy

In its brief, the State notes that during postconviction proceedings, the prosecutor argued that there actually was no agreement as to a sentencing recommendation. State's Brief at 3. The State also correctly points out that the circuit court did not decide whether there was such an agreement, and that its ruling was only that "presuming the State was bound by the high end of the PSI," the State's sentencing recommendation did not violate the agreement. State's Brief at 3. Therefore, the State submits that in the event this court agrees with Tourville—that the "high end" of the PSI's recommendation does not include a recommendation of consecutive sentences—the court should remand the case to the circuit court to make factual findings with respect to the terms of the plea agreement. According to the State, a remand would be "necessary to resolve that issue because the terms of a plea agreement are a question of fact." State's Brief at 3.

Tourville submits that it would be improper and unnecessary to remand this case for further proceedings to determine the terms of the plea deal. At the postconviction hearing, Tourville presented testimony from Tourville's trial attorney as to the precise terms of the plea deal, which included the plea terms contained in the Plea Questionnaire/Waiver of Rights forms that were signed by Tourville and submitted to the court at the time of the plea. (91:7-31)(Doc.44:4 in 2014AP1248, Doc. 32:4 in 2014AP1249; Doc 31:4 in 2014AP1250). While the prosecutor argued that this evidence did not correctly state the terms of the plea deal, he did not offer a shred of evidence in support of his claim. If he believed the terms of the plea deal was different than that stated in the testimony and exhibits, he could have presented that testimony at the hearing, but he did

not. Therefore, the State has waived its opportunity to present such evidence.

Thus, the only evidence submitted at the postconviction hearing fully supports Tourville's claim that the plea deal called for the State to cap its sentence recommendation at the high end of the sentencing range contained in the PSI. Any subsequent decision by the circuit court that the plea deal was somehow different than that presented at the postconviction hearing would be clearly erroneous. Accordingly, there is no reason to remand the case for further hearings, or to require the circuit court to make a factual finding based on the evidence already presented.

II. There was insufficient factual basis for the court to accept Tourville's guilty plea in case number 2012 CF 27.

In his brief in chief, Tourville argued that the court failed to establish a factual basis when accepting his plea to the theft in Case number 12 CF 27. This created a manifest injustice that allows Tourville to withdraw his plea on that case.

The State acknowledges that the offense of theft requires proof of both the "taking" and "carrying away" of property belonging to someone else.[1] State's brief at 12. The

[1] The State does not claim that a factual basis exists that Tourville committed the theft by aiding and abetting the others in "transferring, concealing, or retaining possession" of the property—all of which are alternative forms of theft under Wis. Stats. § 943.20(1)(a). Rather, the State addresses only the "taking and carrying away" methods of committing the theft. This is proper, since the State must plead one of the alternative elements of the offense in the complaint or information. *Jackson v. State*, 92 Wis. 2d 1, 12, 284 N.W.2d 685 (Ct. App. 1979).

State also agrees that Tourville was not involved in "taking" any property. State's Brief at 13.

However, the State claims that Tourville assisted in the "carrying away" of property. According to the State, "it was not necessary for Tourville to have committed the initial act of carrying away" from the victim's home. Instead, it was only necessary that Tourville helped them "*continue carrying away* the safe" from Tourville's house to the campsite and then to a swamp. (State's Brief at 13-14) (emphasis added).

The State's argument rests almost exclusively upon its interpretation of *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979). In *Marshall*, the Wisconsin Supreme Court stated that:

> One need not perform an act which would constitute an essential element of the crime in order to aid and abet that crime. It is only necessary that he undertake some conduct (either verbal or overt), which as a matter of objective fact aids another person in the execution of a crime, and that he consciously desire or intend that his conduct will in fact yield such assistance.

Id., 92 Wis. 2d at 122.

Thus, following *Marshall*, it would not be necessary to show that Tourville both "took" and "carried away" property. It would be sufficient to show that he did one or the other, or committed some act that aided the other men in the execution of the theft.

Under the facts in *Marshall*, there were acts allegedly committed by the defendant showing that he aided in the commission of a homicide. Specifically, Marshall was accused of locating the victim and then relaying that information to other men who then shot and killed the victim.

Id. at 108. Since the crime would not have been possible without Marshall providing the victim's location, he was an essential part of the overall scheme. Further, the court concluded that the jury could reasonably have inferred that Marshall intended to aid in the execution of the crime. *Id.* at 122.

That is a very different situation than occurred in Tourville's case, where the taking and carrying away the property of another had already been completed before Tourville was even aware of theft. Therefore, unlike *Marshall,* Tourville did not aid in crime's commission, nor was he an essential part of its accomplishment.

The State then argues that since Tourville helped the others "continue carrying away the gun safe to his campsite," he did in fact commit an act that aided the theft because the property was still being carried away—even if it wasn't being carried from the place it was intended to be. State's Brief at 13.

In his initial brief, Tourville cited *Berry v. State*, 90 Wis. 2d 316, 330, 280 N.W.2d 204 (1979), for the proposition that, to prove the "carrying away element, the movement must be a movement away from the area where the product was intended to be." The State fails to cite any authority contradicting this assertion or the holding in *Berry.*

Nowhere in the plea colloquy or the criminal complaint was there any information that Tourville undertook any conduct that aided the other men in taking the property from where it was intended to be at the victim's residence. Rather, the criminal complaint explicitly states that three other men went to Tourville's residence only *after* they had removed the safe from the victim's residence, where it was

intended to be. Only then was Tourville told about the theft and asked for his assistance.

Since it is undisputed that Tourville was not aware of the theft until after it was complete, it follows that he played no part in the carrying away of the property from the place it was intended to be. Therefore, the State's argument fails.

The State chose to charge Tourville with a crime that there was no factual evidence available to support. Therefore, the court failed to ensure that a sufficient factual basis for Tourville's plea existed, and a manifest injustice occurred when the court accepted his plea without such a basis.

Therefore, Tourville is entitled to withdraw his guilty plea in case number 2012CF27.

CONCLUSION

For the above reasons, Tourville is entitled to a resentencing with a different judge under the terms of his original plea agreement. In addition, Tourville is entitled to withdraw his guilty plea in case number 2012CF27.

Respectfully submitted this 3rd day of October, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,752 words.

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ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

John A. Pray