STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

John A. Pray
State Bar No. 01019121
Attorney for Defendant-Appellant-Petitioner
Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 263-7461

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes

ARGUMENT

I. The State breached the plea agreement by recommending consecutive sentences.

The State maintains that the prosecutor's sentencing recommendation did not constitute a material and substantial breach of the plea agreement. For that reason, the State does not argue whether Tourville's attorney was ineffective in failing to object to the alleged breach. State's brief at 10. Therefore, the only real issue is whether the prosecutor breached the plea agreement by asking the court to impose consecutive sentences. Unpersuaded by the State's brief, Tourville submits that the answer to that question is yes.

A. The State breached the plea agreement by asking the court to impose consecutive sentences.

As it did below, the State asserts that this case should be governed by the court of appeals' decision in *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255. The State's argument is that the PSI was silent as to whether the multiple sentences should be imposed concurrently or consecutively and therefore, the maximum sentence the court could have imposed consistent with the PSI's recommendation was consecutive sentences at the high end of the individual sentence recommendations. State's brief at 13.

The problem with the State's argument is that it cannot satisfactorily explain why the "high end" of the PSI's recommendation includes the possibility of the prosecutor recommending consecutive sentences. Perhaps the State would have a point if the terms of the agreement were:

> "The state will cap its recommendation at the high end of what the PSI *could* order."

But the agreement did not include the italicized word "could." Instead, the actual agreement was:

> "The state will cap its recommendation at the high of what the PSI orders."

The PSI made absolutely no "order" or recommendation for consecutive sentences. Therefore, the prosecutor's recommendation for consecutive sentences exceeded the recommendation of the PSI.

The State's attempt to distinguish *Bowers* is unpersuasive because it does not account for the different wording in the plea agreement in that case. In *Bowers*, the plea agreement provided the following:

> State to recommend 2 yrs initial confinement; 3 yrs extended supervision.

Bowers, 2005 WI App 72, ¶2. The agreement made no reference as to whether the State was allowed to recommend that the sentence be consecutive to any other sentences. *Id.*

In contrast, the plea agreement in Tourville's case *did* constrain the prosecutor from recommending sentences that went beyond what the PSI recommended. Since the PSI made no recommendation for consecutive sentences, the prosecutor was prohibited from making such a recommendation. Does the "high end" of the PSI recommendation include consecutive sentences? Not when the PSI made no reference to consecutive sentences. Rather, the common sense interpretation of "high end" meant that the State could recommend the highest sentence recommendation as to each of the four sentences—but not to add an additional element that each sentence should

be consecutive to each other. Therefore, Tourville does not believe that this court must reverse *Bowers* to grant him relief.

Nevertheless, this court has the authority to overrule *Bowers*, and for reasons stated in his initial brief, and the reasons set forth in Judge Brown's dissent in *Bowers*, Tourville believes that that case should be reversed. Plea agreements should be clearly stated, and when the agreement contains a provision governing sentence recommendations by either party, that provision ought to be clearly stated to allow a meeting of the minds between the parties. It is well established that "a valid plea agreement requires a meeting of the minds, evidenced through assent to the agreement's terms." *State v. Bembenek*, 2006 WI App 198, ¶ 11, 296 Wis. 2d 422, 724 N.W.2d 685. This is especially important when the recommendation concerns such a crucial determination as to whether multiple sentences are to be served concurrently or consecutively. That determination overwhelms the importance of the sentence recommendations as to each sentence: in Tourville's case the prosecutor's sentence recommendation for consecutive sentences nearly doubled the recommendation in comparison to a recommendation that did not ask for consecutive sentences.

It is important to note that Tourville makes no claim that the State was obligated to recommend concurrent sentences, as that was not part of the PSI's recommendation. Instead, the prosecutor was constrained from adding anything beyond that PSI's recommendation, and that is exactly what he did in asking the court to impose consecutive sentences.

Finally, the State maintains that sentencing cases cited by Tourville in his initial brief are neither "relevant nor helpful." State's brief at 16. These cases include *State v. Rohl*, 160 Wis. 2d 325, 330, 466, N.W.2d 208 (Ct. App. 1991), *State v. Ogelsby*, 2006 WI App 95, 292 Wis. 2d 716, 715 N.W.2d

727, *State v. Austin*, 86 Wis. 2d 213, 271 N.W.2d 668 (1978), *State v. Kittilstad*, 231 Wis. 2d 245, 603 N.W.2d 732 (1999), and other federal cases. *See* Tourville's brief at 17.

The State discounts these cases by arguing that a defendant has no input into the manner in which a court pronounces sentence or how the legislature drafts a statute, whereas a defendant does have input into the terms of a plea agreement. State's brief at 16. According to the State, Tourville "could have attempted to negotiate a plea agreement with the prosecutor that precluded a recommendation of consecutive sentences." Of course, the flip side to that argument is simply that the State could have attempted to negotiate a plea agreement with Tourville that specifically allowed a recommendation of consecutive sentences by the State.

Obviously, both sides could have done a better job of articulating what the plea agreement was. However, the issue here remains the same—what did the language of the plea agreement allow? The sentencing cases cited by Tourville do shed some light on how one should interpret the absence of a clear indication as to whether sentences should be consecutive. That rule urges that, unless clearly stated that they are to be consecutive, the sentences should be concurrent. There is a reason for the law's preference that reflects the values of strictly construing the law to safeguard defendants' rights. Therefore, while these cases are not determinative, they remain instructive in resolving this issue.

B. This court should decline the State's invitation to remand this case for fact-finding as to the terms of the plea agreement.

In its brief, the State asserts that if this court agrees with Tourville that the prosecutor breached the plea agreement by

recommending consecutive sentences, it should remand to the circuit court to allow that court to make a factual finding with respect to the terms of the plea agreement. State's brief at 9.

As noted by the State, the transcripts of the plea and sentencing hearing contain no reference to the precise terms of the plea agreement, and Judge GaleWyrick made no findings at the postconviction hearing as to those terms. However, Tourville met his burden in introducing evidence at the postconviction hearing regarding the precise terms of the plea agreement, which were set forth in the Plea Questionnaires filed with the court at the time of the plea, and supported by letters between the prosecutor and Tourville's attorney, Daniel Steffen. (Doc. 91:19 in 2014AP1248). Tourville also presented the testimony of trial counsel, who stated that he understood the terms of the agreement to be as stated in the Plea Questionnaire, that there had been no changes, and that he did not object to the prosecutor's recommendation for consecutive sentences because it "slipped my mind." (Doc 91:12 in 2014AP1248). Although the prosecutor argued at the postconviction hearing that the recitation of the plea terms was not accurately stated in the Plea Questionnaire, he did not offer any evidence supporting that contention (Doc. 91:62 in 2014AP1248).

In its brief, the State ignores the fact that the State had ample opportunity to offer any evidence that the plea agreement was anything different than stated in the plea questionnaires and letters. The State should have known that the terms of the plea agreement were at the heart of Tourville's postconviction motion claim, and if the prosecutor thought the plea questionnaire did not accurately state the agreement, he could have offered evidence at the postconviction hearing. In view of the evidence presented by Tourville, and the fact that the State chose to not offer any evidence countering Tourville's

evidence, this court should decline the State's invitation to remand for further fact-finding.

Accordingly, Tourville is entitled to resentencing under the terms of the plea agreement.

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

In his initial brief, Tourville argued that the circuit 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 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

[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).

swamp. State's brief at 25 (emphasis added). The State insists that this proposition is supported by *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979), *State v. Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 (Ct. App. 1979), and *Hawpetoss v. State*, 52 Wis. 2d 71, 187 N.W.2d 823 (1971).

In his initial brief, Tourville addressed each of these cases, and pointed out that in each case, the reviewing court noted that the defendant aided others in the actual commission of the crimes. Tourville's brief at 27-29. That is, the defendants were aware of the plot, and helped others achieve a desired goal. That is not what occurred in the instant case, where it is undisputed that Tourville did not know that his co-defendants had taken the property until they brought it to him at his house.

According to the State, Tourville has made an "unarticulated assumption" that, as a matter of law, the "carrying away" ended when the other men arrived at Tourville's home with the safe. State's brief at 26. The State then submits that no authority is provided for that proposition, and therefore asks this court to dismiss it. But the State is wrong. In his brief, Tourville cited to *Berry v. State*, 90 Wis. 2d 316, 330, 280 N.W.2d 204 (1979) for the proposition that to prove the "carrying away" element of theft, the State must prove that there was movement "away from the area where the product was intended to be." Tourville's brief at 25. He also cited to *State v. Johnson*, 200 Wis. 2d 704, 711-12, 548 N.W.2d 91 (1996) for the same proposition. Tourville's brief at 25. There is no allegation that Tourville took the property away from the area where it was intended to be—that is, the home of the owner.

Finally, the State asserts that Tourville has not established a manifest injustice, since the offense of receiving stolen property is the same level of offense as taking and

carrying away property. State's brief at 27. In doing so, the State suggests that Tourville gave a "tacit acknowledgment that there was a factual basis for a related crime of equal severity." State's brief at 26. This misstates Tourville's initial brief, where he merely stated that "*at best*, he received stolen property and then moved it to another location." Tourville's brief at 28 (emphasis added). That was far from an admission—it was merely a statement that Tourville's actions could *potentially* fit into that category. That falls far short of an admission. Wis. Stat. § 971.08(1)(b) requires a court to find sufficient facts to satisfy itself "that the defendant in fact committed the crime charge." *See State v. Smith*, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996). The State cites no authority allowing courts to search for other crimes that the defendant may have committed, and the statute provides no exceptions. To accept a defendant's plea to a crime for which there is no evidence creates a manifest injustice.

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 withdrawal of his guilty plea in case number 2012CF27.

Respectfully submitted this 30th day of October, 2015.

John A. Pray
State bar No. 01019121

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 2,219 words.

John A. Pray

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