RECEIVED
02-18-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Case No. 2014AP1254-CR

v.

WARREN E. SCHABOW,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, BRANCH 8, THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
State Bar No. 01018347
103 W. College Avenue #1010
Appleton, WI 54911-5782
Phone: (920) 993-7777
Fax: (775) 845-7965
E-Mail: LKachinsky@core.com

Attorneys for the
Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent, Case No. 2014AP1254-CR

v.

WARREN E. SCHABOW,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, BRANCH 8, THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

STATEMENT OF ISSUE

DID THE TRIAL COURT ERR IN DENYING SCHABOW'S MOTION FOR RESENTENCING DUE TO VIOLATION OF THE PLEA AGREEMENT BY THE STATE IN SUGGESTING THAT MORE INITIAL CONFINEMENT THAT IT RECOMMENDED WAS WARRANTED?

The trial court answered this question in the negative.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING SCHABOW'S POST CONVICTION MOTION FOR RESENTENCING BECAUSE THE STATE VIOLATED THE PLEA AGREEMENT BY SUBTLELY SUGGESTING THAT THE FACTS JUSTIFIED A LONGER SENTENCE.

1. Standard of review and general principles

The parties agree as to the standard of review and the applicable general principles of law that apply to this case.

2. The State violated the plea agreement by its remarks at sentencing that implied that the amount of incarceration it recommended was less the amount justified by the facts it recited.

The State cited *State v. Liukonen,* 2004 WI App 157; 276 Wis.2d 64; 686 N.W.2d 689, *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, *State v. Naydihor*, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, and *State v. Hanson,* 2000 WI App 10, 232 Wis. 2d 291, 606 N.W.2d 278 as standing for the proposition that a prosecutor may argue that "the court should impose the recommended sentence and nothing less." (p. 3 of State's brief). While that paraphrased what ADA Luestcher did in this case, in none of those four cases cited by the State was language to that effect stated by prosecutor. The closest any of those four cases came factually to that statement was a nonfactual suggestion by the *Liukonen* court that, "The prosecutor could have asserted that the

recommendation was appropriate and at the same time argued that the circumstances were so severe that the court should impose no less." *State v. Liukonen* ¶ 16. By contrast, ADA Luetscher argued that his recommended period of initial confinement was " the very minimum that should be considered.". (54: 13; Schabow's App. 119). The distinction is that in case this Luetscher subtlety told Judge Atkinson that a higher amount of initial confinement "could be considered" rather than urging a cap on the court's sentence as suggested by the *Liukonen* court (which ended up reversing and remanding the case before it for resentencing).

The State argued that Judge Atkinson's properly rejected Schabow's contention that using the phrase that the State recommendation as "the minimum" necessary was a breach of the plea agreement because it used a common phrase from appellate cases. (State's brief , page 6 ; Also see 75: 11; Schabow's App. 121). However, Luetscher's plain language did not comply with the terms of the plea agreement as it at least subtlely suggested that there were good reasons to deviate from the nominal terms of the agreement, especially considering the context in which it was uttered (See argument in Schabow's brief-in-chief, p. 12).

The State also argued that the court's sentence acknowledged the validity of the State's recommendation by imposing no more that the period of time recommended by the State on each of the three counts but deviated from the recommendation only by ordering the theft of firearm sentences run consecutive to the burglary count rather than concurrent as recommended by the State (p. 6 of State's brief). Schabow disagrees. The practical effect of the sentences the court

could impose was what Schabow bargained for when he entered into the plea agreement. The imposition of sentences consecutive to the burglary count (even though concurrent to each other) increased the length of Schabow's initial confinement day-for-day as he did not get (nor was he entitled to) sentence credit. See *State v. Boettcher*, 144 Wis. 2d 86, 89, 423 N.W.2d 533 (1988). Certainly it was the overall quantum of confinement and deprivation of liberty that was the best measure of whether the court believed the State was subtlely suggesting the appropriateness of a sentence greater than it recommended rather than the nominal amounts of IC and ES imposed in each sentence.

Although Luetscher did not endorse or even mention the harsher recommendation made by the victim in the case, the argument Luetscher made suggested indifference as to whether the court should impose a greater sentence than that recommended by the State. While this was less blatant that the error of the prosecutor in *Sprang* (see argument on pages 13-14 of Schabow's brief-in-chief), the practical effect on Schabow was the same: a subtle recommendation of and imposition of more confinement than Schabow reasonably believed would result from his entry into an agreement with the State.

The court's sentencing rationale did not explicitly endorse Melendy's or the State's sentencing argument in imposing sentence in excess of the State's nominal recommendation. However, that does not mean Schabow is not entitled to relief. As the *Sprang* case further noted in a footnote:

> 6 Nor does our inquiry turn on whether the sentencing court was influenced by the State's breach. *State v. Poole*, 131 Wis. 2d 359, 363, 394 N.W.2d 909 (Ct. App. 1986). Therefore, we do not consider the trial court's statement that it did not base its sentencing decision in this case on the State's remarks.

The State's sentencing argument deprived Schabow of the benefit of the plea agreement he agreed to as a condition of entering his no contest pleas. A claim of "harmless error" is insufficient to avoid the requirement for a resentencing to insure him the benefit of the bargain he was entitled to as a matter of due process.

Luetscher's use of a common appellate court phrase in describing the rendering of a criminal sentence and his claim of good faith did not mean it complied with the plea agreement. The test is an objective one: Did the remarks violate the terms of the agreement? It was not enough to have an afterthought about the origins of the offending remark.

Judge Atkinson's decision that the State did not violate the plea agreement by its remarks was incorrect as a matter of law. Denying Schabow's motion for resentencing was error.

CONCLUSION

For the reasons stated above and in his brief-in-chief, the undersigned attorney requests that this court reverse the Judgment of Conviction and the order

denying the post conviction motion in the above matter and remand this case to the trial court for resentencing before a different judge.

Dated this 18th day of February 2015

SISSON AND KACHINSKY LAW OFFICES
By: Len Kachinsky
Attorneys for the Defendant-Appellant
State Bar No. 01018347
103 W. College Avenue #1010
Appleton, WI 54911-5782
Office: (920) 993-7777
Fax: (775) 845-7965
E-Mail: LKachinsky@core.com

CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 1292 words, including certifications.

Dated this 18th day of February 2015

LEN KACHINSKY

CERTIFICATION AS TO ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of 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 18th day of February 2015.

LEN KACHINSKY