STATE OF WISCONSIN

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

District II

Case No. 2014AP001392 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHNNY MILLER,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON OCTOBER 15, 2013, THE HONORABLE
ALLAN TORHORST PRESIDING,
ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY.

BRIEF AND APPENDIX OF APPELLANT

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ISSUE PRESENTED

I. Whether the Trial Court erred in denying Defendant's Objection to the State's recommendation on Defendant's eligibility for the Earned Release Program when such recommendation was never a part of, and was an improper "end around of, the original plea

negotiations?

Trial Court Answered: No

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

Defendant originally pled guilty to Counts One and Five of the Criminal Information. This occurred on August 30, 2012. This was in Racine County Case 11 CF 1298. Defendant pled guilty to Count One: Possession with Intent to Deliver Heroin (10 to 50 grams), on or Near a School, contrary to Wis. Stats. Sec. 961.41(1m)(d)3, 939.50(3)(d), and 961.49(1m)(b)6; and Count Five: Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2) and 939.50(3)(g). (2:1-2).

The original Criminal Complaint had alleged six Criminal Counts. These six Counts were the two Counts to which Defendant eventually pled. Furthermore, Count Two was a Count of Possession with Intent to Deliver Cocaine (<= 5 grams), on or Near a School. Count Three was Possession with Intent to Deliver

Tetrahydrocannabinols (<= 200 grams), on or Near a School. Count Four was Maintaining a Drug Trafficking Place. Count Six was Possession of Drug Paraphernalia. According to the Complaint, law enforcement executed a search warrant at Defendant's apartment. During the search, the law enforcement found the drugs and the gun indicated in the Criminal Complaint. The law enforcement also found packaging materials and multiple scales. The apartment was located within 1000 feet of a school. Finally, Defendant was a convicted felon. (1:1-5). However, as indicated, Defendant only plead guilty to Counts One and Five. The pleas were pursuant to a negotiated plea agreement with the State.

The trial court eventually sentenced Defendant on October 11, 2013. Judge Allan Torhorst sentenced him on Count One to eight years prison, with eight years as initial confinement plus two years as extended supervision. On Count Five, the trial court sentenced Defendant to six years prison, to consist of three years initial confinement plus three years extended supervision. The trial court ran Count Five consecutive to Count One. (42:17-18) (A101-103).

At the sentencing hearing, the trial court initially found Defendant eligible for the Earned Release Program. However, the State then recommended that the trial court find this eligibility only after Defendant had served a specific period within the Wisconsin prison system. Defendant objected on the basis that this was not part of the plea bargain. However, the trial court

nevertheless then ruled Defendant eligible for that Program only after he had completed the sentence on Count One. (42:20-21) (A113-114).

Defendant filed a Notice of Intent to Pursue Postconviction Relief in a timely fashion. (22:1).

Defendant timely filed a Notice of Appeal. (23:1). This Appeal now follows.

STATEMENT OF THE FACTS

Defendant originally pled guilty to Counts One and Five of the Criminal Information. This occurred on August 30, 2012. This was in Racine County Case 11 CF 1298. Defendant pled guilty to Count One: Possession with Intent to Deliver Heroin (10 to 50 grams), on or Near a School, contrary to Wis. Stats. Sec. 961.41(1m)(d)3, 939.50(3)(d), and 961.49(1m)(b)6; and Count Five: Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2) and 939.50(3)(g). (2:1-2).

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Trafficking Place. Count Six was Possession of Drug Paraphernalia. According to the Complaint, law enforcement executed a search warrant at Defendant's apartment. During the search, the police found the drugs and the gun indicated in the Criminal Complaint. The law enforcement also found packaging materials and multiple scales to show distribution out of the residence. The apartment was located within 1000 feet of a school. Finally, Defendant was a convicted felon. (1:1-5). However, as indicated, Defendant only plead guilty to Counts One and Five. The pleas were pursuant to a negotiated plea agreement with the State.

On August 30, 2012, the State recited the plea agreement and plea negotiations. The prosecutor was Sharon Riek. The trial counsel was Douglas Henderson. The State and the Defense indicated the following:

> MS. RIEK: "Yes, your Honor, there has been (an offer.)
>
> He would plead to Count One, a charge of possession of heroin with intent to deliver. The State would move to dismiss the within a thousand feet penalty enhancer, and the State would be recommending eight years in prison bifurcated as six years initial incarceration, two years extended supervision.
>
> He would enter a plea to Count 5, which is possession of firearm by a felon. The State would be recommending six years consecutive bifurcated as three years initial incarceration, three years extended supervision. The State would dismiss and read in the other counts."
>
> MR. HENDERSON: That is a correct statement of the plea agreement." (41:2).

As indicated, Defendant never agreed that the State could request any conditions with respect to either the Earned Release Program or the Challenge Incarceration Program.

The trial court eventually sentenced Defendant on October 11, 2013. Judge Allan Torhorst sentenced Defendant on Count One to eight years prison, with eight years as initial confinement plus two years as extended supervision. On Count Five, the trial court sentenced Defendant to six years prison, to consist of three years initial confinement plus three years extended supervision. The trial court ran Count Five consecutive to Count One. (42:17-18).

At the sentencing hearing, the trial court initially found Defendant eligible for the Earned Release Program. However, the State then recommended that the trial court find this eligibility only after Defendant had served a specific period within the Wisconsin prison system. Defendant objected on the basis that this was not part of the plea bargain. However, the trial court nevertheless then ruled Defendant eligible for that Program only after he had completed the sentence on Count One. (42:20-21)(A113-114).

The relevant sentencing hearing colloquy with respect to Defendant's eligibility for the Earned Release Program went as follows:

THE COURT..."I do find you eligible for Earned

> Release Program. If you are accepted into that program and successfully complete it I will cause you to be released according to law modifying the judgment of conviction accordingly.
>
> ...
>
> MS. RIEK: Your Honor, I would ask that the Court find that he is eligible for the Earned Release Program after serving a specific period within the Wisconsin State Prison System so that he is not immediately eligible and immediately subject to release.
>
> MR. HENDERSON: Well, that wasn't discussed as far as the plea bargain. I understand the Court may have its discretion but I would object to that.
>
> THE COURT: I'm going to receive the State's suggestion, find that Mr. Miller is not eligible for earned release until he's served the sentence on Count 1. It's the weapons charge that would be second to that, bu the drug charge in this case is so serious, I agree with the State's request, and I'll issue the judgment of conviction accordingly." (42:20-21).

This "recommendation" by the State was not part of the plea negotiations. According to the terms of the plea negotiations, the State was only allowed to recommend the specific sentence as negotiated and presented to the court. Hence, the State violated the terms of the plea agreement by making this "recommendation" as to the Earned Release Program.

Based upon the foregoing, the State materially violated the terms of the plea agreement with respect to its "recommendation" concerning Defendant's eligibility for the Earned Release Program (or "ERP"). This recommendation materially affects Defendant's sentence. Until the State had made this recommendation, which the

trial court had followed, Defendant would have been eligible for the ERP immediately. Hence, his original six year initial confinement period on Count One could have been materially and significantly shortened. However, after the State's recommendation, and the trial court's subsequent modification of its original Order allowing the ERP unconditionally, now Defendant must serve the entire initial incarceration period for Count One before he is eligible for the ERP. Hence, this recommendation materially and significantly affected his entire sentence.

Furthermore, the State's "recommendation" concerning the ERP was illegal. This was not a term negotiated by the parties. The State unilaterally recited a term of sentencing that had not been negotiated by the parties. The State's own recitation of the plea agreement on the plea hearing date did not include any terms with respect to the ERP. Trial counsel had agreed with this recitation. Hence, Defendant's reasonable expectations at the time of the plea hearing was that there were no limits on his eligibility for the ERP. The plea agreement contained no limits on this eligibility. Therefore, the State's conduct materially violated the plea agreement.

The Judgment of Conviction reflects that Defendant is only eligible for the ERP (Earned Release Program) after he has served the sentence on Count 1. (20:1-3)(A101-103).

Defendant filed a Notice of Intent to Pursue Postconviction

Relief in a timely fashion. (22:1).

Defendant timely filed a Notice of Appeal. (23:1). This Appeal Brief is now being submitted pursuant to the schedule established by the Court.

ARGUMENT

I. THE STATE MATERIALLY VIOLATED THE TERMS OF THE PLEA AGREEMENT AT THE SENTENCING HEARING BY MAKING ITS "RECOMMENDATION" CONCERNING DEFENDANT'S ELIGIBILITY FOR THE EARNED RELEASE PROGRAM.

Whether the State's conduct at sentencing had violated the terms of the plea agreement is a question of law which the Court of Appeals reviews de novo. State vs. Wills, 193 Wis.2d 273, 533 N.W.2d 165 (1995).

A plea agreement induces a Defendant to waive his or her fundamental right to a trial. State vs. Wills, 187 Wis.2d 529, 523 N.W.2d 569 (Ct.App. 1994). However important plea bargaining may be in the administration of criminal justice...a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt. State vs. Poole, 131 Wis.2d 359, 389 N.W.2d 40 (Ct.App. 1986), citing Santobello vs. New York, 404 U.S. 257, 264 (1971).

A prosecutor may not render less than a neutral recitation of the terms of the plea agreement. State vs. Poole, 131 Wis.2d 359 at 364.

Santobello proscribes not only explicit repudiations of plea agreements, but also end runs around them. The State may not accomplish through indirect means what it promised not to do directly, i.e. convey a message to the trial court that a Defendant's actions warrant a more severe sentence than that recommended. State vs. Ferguson, 166 Wis.2d 317, 479 N.W.2d 241 (Ct.App. 1991) citing United States vs. Voccola, 600 F.Supp. 1534, 1537 (D.R.I. 1985) and United States vs. Stemm, 847 F.2d 636, 638 n.1 (10th Cir. 1988). In construing the language of a plea agreement, the State may not resort to a rigidly literal approach. State vs. Ferguson, 166 Wis.2d 317 at 322 citing United States vs. Greenwood, 812 F.2d 632, 635 (10th Cir. 1987).

In Poole, the Defendant had pled guilty to a burglary charge pursuant to a plea agreement in which the state would recommend a fine of $1,500. At sentencing, the prosecutor recommended the fine, but noted that the recommendation had been agreed to "before we knew of the other instances. But that is our agreement." The "other instance" was a separate case in which Defendant's probation had been revoked. The court imposed a five year sentence, concurrent with the three year term Defendant was already serving. Defendant alleged that the State had breached the plea agreement. State vs.

Poole, 131 Wis.2d 359 at 360.

The Court of Appeals in Poole found that the State's comments at sentencing had violated the plea agreement. The Court had indicated that the general reasoning of United States vs. Brown, 500 F.2d 375 (4th Cir. 1974) has been adopted by the courts of a number of states confronting cases where the prosecutor had provided less than a neutral recitation of the product of the bargain. According to Brown, such conduct by the State is, therefore, a breach of the plea agreement. Id. at 362.

The Court in Poole found that the evil in the State's conduct at sentencing was not the lack of enthusiastic advocacy for the bargained sentence, but the State's use of qualified or negative language in making the sentence recommendation. In Poole, the Court found that the State's comments concerning the "other instance" was a less than neutral recitation of the terms of the plea agreement. The Court found that the appropriate remedy was resentencing. Id. at 364.

Here, the State, as in Poole and the other cited cases had materially violated the terms of the plea agreement. The State's conduct at the sentencing hearing with respect to its "recommendation" concerning Defendant's eligibility for the Earned Release Program (or "ERP") was an "end around" the plea agreement. As in Poole, this was impermissible qualified or negative language. As in Poole, the State had used non-negotiated language to

encourage the trial court to impose essentially a harsher sentence. This "end around" recommendation materially affected the Defendant's sentence. Until the State had made this recommendation, Defendant would have been eligible for the ERP immediately. The ERP eligibility was part of the sentencing structure. Hence, his original six year initial confinement period on Count One could have been materially shortened. However, after the State's "end around" recommendation, and the trial court's subsequent modification of its original Order allowing the ERP unconditionally, now Defendant must serve the entire initial incarceration period for Count One. This, before he is eligible for the ERP. Hence, this "end around" recommendation materially and significantly affected his entire sentence. This comment was tantamount to a less than neutral recitation of the plea agreement and was, hence, illegal and impermissible.

Furthermore, the State's "end around" "recommendation" concerning the ERP was not a term negotiated by the parties. Therefore, the "recommendation" was illegal for this reason. True, the ERP eligibility had not been noted in the plea agreement. However, as discussed in the case law, the Courts must not take plea negotiations with a rigid and literal approach. The State had unilaterally recited a term of sentencing that had not been negotiated by the parties and that had materially changed the terms of the sentencing structure. The State's own recitation of the plea

agreement on the plea hearing date did not include any terms with respect to the ERP. Hence, the State's recitation had provided a sentencing structure recommendation that did not diminish Defendant's right to the ERP. Trial counsel had agreed with this recitation. Defendant had committed to this plea agreement with his plea and giving up of his trial rights. Hence, Defendant's reasonable negotiated expectations at the time of the plea hearing was that there were no limits on his eligibility for the ERP. This was reasonable because the bargained for plea agreement contained no limits on this eligibility. Therefore, the State's conduct had materially violated the plea agreement, as discussed in the relevant and applicable case law.

Based upon the relevant and applicable case law, this Court must reverse the Judgment of Conviction and remand this matter for a resentencing hearing in front of a different judge.

CONCLUSION

The State improperly, significantly, and materially had violated the plea agreement. Based upon this violation, this Court must reverse the Judgment of Conviction and order a resentencing hearing before a different judge than the original sentencing judge. This Court should also order that the transcript of the original October 11, 2013 sentencing hearing be sealed.

Dated this _____ day of September, 2014.

Respectfully Submitted,

_____

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CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Miller, 2014 AP 001392-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is fourteen (14) pages.

Dated this 18th day of September, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant
State Bar No. 1019297

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of September, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Miller, Case No. 2014 AP 001392-CR is identical to the text of the paper brief in this same case.

Dated this 18th day of September, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant