STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II/I

Case No. 2015AP00050 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

Waukesha Co. Case
No. 2011CF1166

DEREK ASUNTO,
Defendant-Appellant.

APPEAL FROM THE DENIAL OF THE MOTION TO ENFORCE PLEA AGREEMENT IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT, DEREK ASUNTO

SUBMITTED BY:

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STATEMENT OF THE ISSUES

I. SHOULD THE MOTION TO ENFORCE THE PLEA AGREEMENT BEEN GRANTED?

THE TRIAL COURT ANSWERED: NO.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does request oral argument and publication in this case because he believes that the issues of this case presents issues that require clarification.

STATEMENT OF THE CASE

On November 29th, 2010, a criminal complaint was filed alleging that Derek Asunto (hereinafter "Asunto") had committed the offense of OWI 4th Offense, PAC 4th Offense, bail jumping, and refusal to take chemical test. Wis. Stat. 346.63(1)(a), 346.63(1)(b), 946.49(1)(a), and 343.305(10). (R2). On May 2nd, 2011, the State filed a complaint in Case No. 11-CM-8883, charging Asunto with disorderly conduct, criminal damage to property, and two counts of misdemeanor bail jumping. (CCAP).

Asunto pled guilty on May 4th, 2011 to a previously filed disorderly conduct charge, bail jumping on the same complaint as the OWI 4th, and put the plea over on the OWI 4th and PAC 4th counts. At the subsequent plea hearing for the OWI 4th on May 25th,2011 the State halted proceedings to determine if Asunto had another prior OWI and potentially recharge him with a felony OWI. (R91.4-5). The State identified an additional prior alcohol related conviction from Michigan, and an amended complaint was filed on November 17th, 2011to reflect the charge of OWI 5th or 6th. (R28). The court granted the State leave to amend and vacated Asunto's previously entered pleas. (R94).

Asunto filed a motion to enforce the plea agreement that was stated on the record at the May 4th, 2011 plea hearing. (R32).

On March 5th, 2012, a separate criminal complaint on a new incident reflecting case number 12-CF-297 was filed against Asunto alleging OWI (5th or 6th), PAC (5th or 6th) felony bail jumping, and two counts of misdemeanor bail jumping. (CCAP).

The motion to enforce the plea agreement was denied April 17th, 2012. (R37, 97). On January 15, 2013, Mr. Asunto pled no contest to OWI 5th, misdemeanor bail jumping, and OWI 6th in Case Nos. 11-CF-1166 and 12-CF-297. He was sentenced to prison. (R50,51).

A post-conviction motion was filed moving the court to vacate the pleas previously entered . (R56). The motion was granted. (R62). The case was returned to the circuit court for further proceedings.

A motion was filed challenging inclusion Asunto's prior Michigan conviction to enhance his OWI 4th to a felony 5th offense. (R75). It was denied. (R78).

This case is before this Court pursuant to Asunto's interlocutory appeal filed on January 6th, 2015 asking that

the Court of Appeals review the trial court's denial of the motion to enforce accepted plea agreement. (R81). The petition allowing review of a non-final decision was granted on October 23rd, 2015.

STATEMENT OF THE FACTS

On September 20, 2010, Asunto was charged with disorderly conduct in Case No. 10-CM-1929. (CCAP). That day, he was released on $150 bond. (CCAP). Two months later, on November 29, 2010, he was charged in Case Nos. 10-CM-2398 and 10-TR-8886 with misdemeanor bail jumping, OWI 4th offense, PAC 4th offense, and refusing to take a test for intoxication. (R2).

On May 4, 2011, the State filed a fourth complaint, in Case No. 11-CM-8883, charging Asunto with disorderly conduct, criminal damage to property, and two counts of misdemeanor bail jumping. (CCAP).

That day, he reached an agreement with the State to resolve all the charges by: (1) admitting that he improperly refused to take a test for intoxication, and (2) agreeing to plead guilty to criminal damage to property, misdemeanor bail jumping (stemming from the consumption of alcohol and the new criminal case), and the OWI 4th offense.

(R90.2-4, 9). According to the agreement, he would not enter his plea to OWI 4th or PAC 4th offense until the day of sentencing. (R90.2-4). Then, the remaining charges would be dismissed and read-in, and the parties would jointly recommend nine months on each count, imposed and stayed, with two years of probation. (R90.3-5). The State would be free to argue the conditions of probation. (R90.4-5).

The court accepted Asunto's guilty pleas to misdemeanor bail jumping and criminal damage to property, and found that he improperly refused to take an implied consent chemical test for intoxication. (R90.7-9). Then, the court set a date for sentencing. (R90.18-19).

On May 25, 2011, the parties appeared for a guilty plea on the OWI 4th, and sentencing on all the counts. (R91.2-4). A plea form was submitted to the court that day on that charge. (R36.attachment). However, the State interrupted the proceedings and said that it had discovered an additional OWI (from Michigan), which would elevate Mr. Asunto's OWI from a misdemeanor 4th offense to a felony 5th offense. (R91.4-5).

The court inquired of the State regarding the status of negotiations given the new development of the OWI possibly being a felony offense:

The Court: Well sure, obviously. Okay, Mr. Bloch, I mean, obviously, we need to adjourn that, but we have these others. Let me ask this question, and I don't recall, was the OWI anything with regard to that, a part of the deal with regard to the ones he already pled to:

Ms. Hulgaard: Yes. It was a consolidated offer. (R91.5).

The State requested (and received) an adjournment to investigate the issue. (R91.5).

On July 1st, 2011, the State filed a "Motion to Amend the Criminal Complaint," alleging that it overlooked the prior OWI when it issued the original complaint. (R17). In briefing, the State acknowledged that "if the Court grants the State's motion to amend the OWI to a 5th offense, the State will be violating the plea agreement;" however, it believed that the breach was permissible. (R25). It requested that the court grant its motion, and return the parties to their pre-plea position (at which time it would file an amended criminal compliant). (R25).

On November 17, 2011, Judge Gundrum granted the State's motion, vacated Asunto's pleas to misdemeanor bail

jumping and criminal damage to property, and vacated the finding that the refusal was unreasonable. (R94.10-13).

In an amended criminal complaint, the State charged Mr. Asunto with OWI 5th, after which, the case was renumbered 11-CF-1166. (R28). Mr. Asunto did not file for an interlocutory appeal, and the case was transferred to the Honorable Jennifer Dorow. (CCAP).

On February 28, 2012, Mr. Asunto filed a "Motion to Enforce Accepted Plea Agreement," asking that the court reinstate the parties' original agreement. (R32). Three days later, he was arrested for operating while intoxicated, and charged in Case No. 12-CF-297 with OWI 5th or 6th offense, felony bail jumping, and two counts of misdemeanor bail jumping. (CCAP). Bail was set at $100,000. (CCAP).

On April 17, 2012, the court denied Asunto's "Motion to Enforce Accepted Plea Agreement," but reduced bail (in Case No. 12-CF-297) to $3,500. (R97.8, 28). He was released that day. (CCAP).

On October 4, 2012, the court granted the State's request to dismiss Case No. 10-CM-1929 (disorderly conduct) without prejudice. (R101.4-5). Then, on January

15, 2013, Mr. Asunto pled no contest to OWI 5th, misdemeanor bail jumping, and OWI 6th in Case Nos. 11-CF-1166 and 12-CF-297. (R103.12, 14, 40). In exchange for his pleas, the State agreed to recommend one year in jail (with Huber) for the OWI 5th, and prison for the OWI 6th. (R103.2-10). The remaining charges were dismissed and read-in and the State agreed to stand silent regarding the fines. (R103.2-10). There was no agreement with regard to the State's recommendation on the misdemeanor bail jumping. (R103.2-10).

That day, Mr. Asunto was sentenced to serve 1 year of initial confinement and 1.5 years of extended supervision for the OWI 5th; 3 years of initial confinement, and 3 years of extended supervision for the OWI 6th, consecutive; and 9 months for misdemeanor bail jumping, concurrent to the other sentences. (R104.32-39).

Mr. Asunto filed timely notices of intent to pursue post-conviction relief, and Attorney John Breffeilh was appointed on both cases. (R49, 65). He filed a post-conviction motion challenging the plea. (R56).

The post-conviction motion requested that the court allow Asunto to withdraw his pleas and enter an order

vacating his judgments of conviction due to trial counsel ineffectively advising Asunto that he could challenge his prior convictions after he stipulated to their existence during the plea hearing. (R.Supp.1). Judge Dorow ultimately ruled that Asunto was improperly advised, and granted the motion on January 15th, 2014. (R62, 64).

Undersigned counsel subsequently filed a motion collaterally attacking the inclusion of Asunto's prior conviction in his record. (R75). That motion was denied on October 15th, 2014 by Judge Dorow. (R78, 108).

On January 6th, 2015 undersigned counsel file a motion to extend the date for a petition for leave to appeal a non-final order as well as a petition for a leave to appeal. (R81). On January 30th, 2015 a stay of proceedings was entered citing the pending decision in *State v. Chamblis*, Appeal No. 2012AP2782-CR.

The petition for leave to appeal was granted by this court on August 18th, 2015.

This brief will focus on the court's decision on April 17, 2012 to deny Mr. Asunto's "Motion to Enforce Accepted Plea Agreement."

ARGUMENT

I. THE MOTION TO ENFORCE ACCEPTED PLEA AGREEMENT SHOULD HAVE BEEN GRANTED

In this appeal, Asunto challenges the denial of his motion to enforce his plea agreement with the State.

A. Standard of Review.

When reviewing a trial court's decision, this court will uphold the circuit court's factual findings unless those findings are clearly erroneous. *State v. Patton*, 297 Wis. 2d 415, 724 N.W.2d 347 (2006). On appeal, the court reviews *de novo* whether the denial was a violation of the defendant's due process rights. *State v. Young*, 294 Wis. 2d 1, 717 N.W.2d 729 (2006). The court will independently determine whether the established facts regarding a plea withdrawal constitute a constitutional violation. See *State v. Sturgeon*, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999).

B. Asunto's motion for enforcement of the plea agreement should have been granted.

This appeal involves specific performance of a plea agreement combined with inalienable rights of constitutional due process. In 1992, the Wisconsin Supreme

Court noted in *State vs. Comstock,* 168 Wis. 2d 915, 950-951, 485 N.W.2d 354 (1992) that:

> We thus have concluded that principles of fairness, finality and repose prohibit the prosecutor from reprosecuting charges that a court dismissed as a result of a plea agreement. If the prosecutor is bound by a valid plea agreement, and due process protects the defendant from the prosecutor's withdrawing from the agreement, we do not believe that considerations of double jeopardy and due process permit a circuit court to *sua sponte* relieve the prosecutor from a valid plea agreement.
>
> ....
>
> [T]he circuit court's sua sponte order vacating the pleas significantly implicates the public's and the defendant's interests in finality, repose, and fairness in the same way as a prosecutor's attempt to withdraw from a validly accepted plea agreement.

Id.

It is well established that a prosecutorial violation of a plea agreement "triggers considerations of fundamental fairness and is a deprivation of due process." *State v. Bond*, 139 Wis. 2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987). Those considerations of fundamental fairness and due process bind a circuit court to an accepted plea agreement. *Comstock*, 168 Wis. 2d at 951.

The established case law surrounding plea agreements and their enforcement was further refined in *State vs. Chamblis*, 362 Wis. 2d 370, 864 N.W.2d 806 (2015). In that case the Wisconsin Supreme Court held that

the forced withdrawal of the defendant's guilty plea violated his constitutional due process rights intrinsic to a negotiated plea agreement. In the case at hand, the court faces a similar situation.

On May 4th, 2011 Mr. Asunto plead guilty to a misdemeanor bail jumping that stemmed from an OWI and BAC 4th offenses charge contained in the same criminal complaint. He further admitted that the refusal was unreasonable. As part of negotiations, Mr. Asunto was allowed to delay the entry of his guilty plea to either the OWI or PAC 4th until the sentencing date to allow him to avoid being taken into custody.

The State's discovery of the additional conviction that counted as a prior OWI ultimately caused not only the amendment of the complaint from a misdemeanor to a felony, but also a request that the plea to the related bail jumping as well as a criminal damage to property charge be vacated. On November 17th, 2011 Judge Gundrum vacated the pleas entered by Asunto as well as the finding that the refusal was unreasonable.

Judge Gundrum vacated the May 4th, 2011 pleas and admission of the refusal of Asunto essentially because all of

the parties were of the opinion that it was the only course of action that the parties could take given the circumstances. (R94.11-13). Later, at the April 17th, 2012 motion hearing Judge Dorow stated on the record that the court would not vacate the pleas that were entered by Asunto. (R94.10-11). This showed that her ruling was based on an incorrect assumption to the status of the case.

The entry of a plea by a criminal defendant involves a number of constitutional rights being waived in return for recommendations and the dismissal of some of the charges. Asunto did so like many other similarly situated individuals. In the case at hand, the result was much different than the typical plea and sentencing.

The *Chamblis* court found that it was fundamentally unfair and thus a violation of due process to require the defendant on that case to be forced to withdraw his guilty plea in this case. "[T]he concern of due process is fundamental fairness." *State ex rel. Lyons v. De Valk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Gilbert v. Homar*, 520 U.S.

924, 930 (1997) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

The analysis by the Wisconsin Supreme Court found that requiring a criminal defendant to withdraw his guilty plea is fundamentally unfair. First and foremost, forced plea withdrawal deprives a defendant of the benefit of his bargain. "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "'Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled.'" Id.

Asunto entered guilty pleas with the expectation that he would then enter a plea to the fourth offense OWI that was included in his set of charges. A key part of these negotiations was that although Asunto had entered pleas to criminal damage to property on different case as well as a bail jumping directly connected to the OWI 4th offense, sentencing was adjourned. The refusal was found to be unreasonable. The sentencing was adjourned to allow for

Asunto to address other obligations before his ultimate entry of a plea to the OWI or PAC 4th offense.

Asunto could not enter a plea on the OWI 4th offense without being taken into custody. The State agreed to allow for the entry of the plea to be delayed to allow for him to remain out of custody until the ultimate sentencing date.

The trial court approved this arrangement. Asunto's pleas and admission to the refusal were accepted, and he was not sentenced on those other counts on the case at that plea hearing. The trial court could have proceeded to sentencing on those counts, however, it approved the agreement of the parties by setting the matter over for a sentencing hearing that would include a plea to the OWI as a 4th offense.

By putting the matter over in the fashion that it did, the trial court approved the negotiations of the parties. Once again, the trial court could have gone forward with the sentencing on the other plead to matters. It did not.
A substantial number of plea bargains are "no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury." *Brady v. United States*,

397 U.S. 742, 752 (1970). This case is no different. The defendant in *Chamblis* entered into the plea agreement with the hope that he would face a less severe penalty than if he went to trial. As noted, the State in *Chamblis* agreed to dismiss charges of OWI as a repeater, obstructing an officer as a repeater, and battery by prisoner in exchange for the defendant's plea and voluntary waiver of constitutional rights. Thus, a forced plea withdrawal in that case subjected the defendant to greater punishment. Similarly, Asunto entered into a plea agreement in order to avoid a greater exposure as well as a favorable recommendation.

The *Chamblis* court noted that the plea withdrawal remedy renders his guilty plea unknowing, unintelligent, and involuntary. It is a violation of his due process rights by subjecting him to a greater sentence of imprisonment than that which he was told he could receive upon pleading guilty to the OWI 4th. Asunto would further it would be fundamentally unfair to resentence him because he has already served the confinement portion of his originally imposed sentence.

Judge Dorow's comments at the April 17th, 2012 motion hearing leads to the conclusion that her decision would have been different in light of the *Chamblis* decision:

> Like I said, Mr. Asunto, do I like doing this, do I wish I could find a way - - there's a part of me that does because I see the unfairness to you, but this is not something - - the existence of whether it is an O.W.I. or not.

(R97.9-10).

The *Chamblis* court essentially rules that the court could have proceeded even with the possibility of other OWI convictions existing for the defendant. *Id*. at 15-18.

Another point that is revealed in the decision of Judge Dorow, is that the court is taking the position it was up to Asunto to move to withdraw his guilty pleas. (R97.10). However, as mentioned earlier, Judge Gundrum had previously vacated the pleas to those charges with defense counsel making the record that he was preserving Asunto's appellate rights. (R94.10). Trial counsel incorrectly informed the court at the beginning of the hearing that the pleas had not been vacated. (R97.3-4).

Chamblis views this as a violation of the due process rights of the defendant. The *Chamblis* court noted that the State had options to avoid this dilemma.

The plea hearing on the OWI 4th was put over to avoid the legislatively imposed condition of immediate remand of a defendant found guilty because the legislature does not trust the judgement of trial court judges concerning release pending sentencing. The court did accept the plea to the bail jumping that was directly connected to the OWI/PAC 4th charge.

The State in their submissions to the trial court acknowledge that they breached the plea agreement. (R19). However, their remedy was to return Asunto to his position before any pleas were taken. This remedy, which stems from a mistake by the prosecutor, is essentially allowing the State to have simultaneous guarantees of compliance to a plea agreement while also giving them the convenience of backing out of plea agreements.

Obviously, Asunto, by pleading to the two other charges, was under a greater amount of punishment than on the OWI 4th. If he had decided at the subsequent hearing to reject entering the plea to the OWI 4th, the State then could have vacated their offer and gone forward with sentencing on the potential eighteen months of jail time associated with

the other two charges. Further, they would then proceed on the OWI 4th case to allow for even more punishment.

His admission of the refusal was essentially an admission to one of the elements of the OWI 4th offense. A person's refusal to submit to a chemical test supports an inference that the person was driving while under the influence of alcohol. *State v. Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986). The bail jumping charge was an admission that he was consuming alcohol. Any subsequent OWI/PAC trial would have been very short because Asunto had already admitted to one of the elements of the case. The State pointed out that they wanted to use the refusal admission to show consciousness of guilt if the OWI 4th went to trial. (R97.5).

However, when the State saw an opportunity to punish Asunto with a felony and possibly prison, they no longer wanted the pleas that were entered by way of Asunto waiving his constitutional rights or his admission that the refusal was improper. Once again, they admitted this was a violation of the plea agreement, however, their position was that there was no harm. Constitutional due process and fundamental fairness was harmed.

A ruling against the defendant on this case would be troubling. The State charged a person with a crime, and mere moments before final disposition halted proceedings. Further, the State was not only granted the relief that they requested but also was allowed to return with a much more serious charge.

Mistakes are made in court, but due process places a criminal defendant in a different position than the State of Wisconsin. Asunto's liberty is at stake when he enters a plea to a criminal charge. Not only did he negotiate to plea to an OWI 4th, but he plead to other charges as a guarantee of future performance by the State and himself. If he had backed out, the State had remedies other than having the pleas vacated.

Although the State takes the position that it can simply go back to where he started to avoid any issues, the *Chamblis* court takes a different view. The vacating of the pleas and the imposition of a much greater charge is a violation of Asunto's due process rights.

The waiver of constitutional rights should not be taken lightly. Asunto's pleas put this case on a course that cannot be altered. If the pleas to the other charges were not

needed and could be vacated, they would not have been accepted on May 4th, 2011. All matters could have been settled on May 25th, 2011. However, the State wanted to lock Asunto into the negotiated plea agreement with pleas that could be used against him on the OWI 4th charge on a later date with one of the elements essentially already proven by his admission.

As such, the original plea agreement stated on the record on May 4th, 2011 should be enforced.

CONCLUSION

For all the reasons stated above, Asunto respectfully requests that this Court reverse the ruling of the circuit court and enforce the negotiated plea agreement.

Signed at Greenfield, Wisconsin, this 16th day of June, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,799 words.

Dated this 16th day of June, 2016.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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