STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II/I

Case No. 2015AP50-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEREK ASUNTO,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION TO ENFORCE AN ACCEPTED PLEA AGREEMENT, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, does not request oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Derek Asunto, appeals a 2012 non-final order of the circuit court denying his motion to "enforce an accepted plea agreement." (37.) Asunto was charged in 2010 with operating a motor vehicle while under the influence of an intoxicant (OWI), and with a prohibited alcohol concentration (PAC). (6.) Because the State alleged that Asunto had three prior OWI-related convictions, a conviction in this case would be for a fourth offense. (6:4.) The State also charged Asunto with refusal to submit to chemical testing and misdemeanor bail jumping in his 2010 case, criminal damage to property (domestic violence related), disorderly conduct, and two additional counts of bail-jumping in other cases. (14; 91:2-3.)

The State and Asunto reached a plea agreement under which Asunto would admit that his refusal was improper, and plead guilty to either OWI or PAC, criminal damage to property (domestic violence related), and one count of bail jumping. The remaining charges would be dismissed but read-in at sentencing. (14; 91:2-4.)

The circuit court, the Honorable Mark D. Gundrum presiding, held a hearing on May 4, 2011. The court accepted Asunto's admission that his refusal was improper, and his guilty pleas to the criminal damage to property charge and one count of bail jumping. (91:7-9.) The parties agreed that Asunto would not enter a guilty plea to OWI or PAC that

day, because if the court accepted such a plea Asunto would be required to go to jail immediately. (91:2-4; 95:3.) The parties also agreed to hold open the charges that would be dismissed but read-in, until the OWI and PAC charges were resolved. (91:4.)

On May 25, 2011, the court held another hearing to resolve the remaining charges. (92:2-3.) Before the court accepted Asunto's additional pleas, or dismissed any charges, the prosecutor informed the court that she believed Asunto's record showed an additional OWI-related conviction, for driving while impaired in Michigan. Asunto therefore had four prior offenses rather than three. (92:4-5.) The court set the case over to allow more time for the prosecutor to determine whether the State would allege that the Michigan conviction was a countable prior offense. (92:5-8.)

Subsequently, the State filed a motion to amend the criminal complaint to charge OWI as a fifth offense rather than a fourth offense. (17.) After briefing (22; 23; 24; 25), the circuit court held a hearing on the motion, and issued an oral ruling granting the State's motion to amend the complaint (95). The court noted that at the May 4, 2011 hearing, it accepted Asunto's pleas to the bail jumping and criminal damage to property charges, but not the OWI charge. (95:3-4.) The court also noted that it had not dismissed any of the other charges against Asunto. (95:6.)

The court concluded that "because the plea agreement was never actually completed in full here on May 24th (sic), that it's necessary and appropriate and a matter of fundamental fairness that the Defendant be permitted to withdraw his pleas or that the court vacate his pleas on the two misdemeanor charges because that was certainly part of

the entire intent of what was gonna happen but just never got completed." (95:6.)

The court then addressed whether the Michigan conviction was a countable conviction under Wisconsin law. The court concluded that the State had submitted evidence sufficient to show that the Michigan offense was countable, so it granted the State's motion to amend the OWI charge to a fifth offense. (95:6-10.) The court then asked defense counsel if Asunto wished to withdraw his guilty pleas to the bail jumping and criminal damage to property charges. Counsel told the court that he and the prosecutor agreed that those pleas should be vacated. (95:11-12.) The court therefore ordered Asunto's two guilty pleas vacated. (95:12.) The State subsequently filed an amended criminal complaint and an Information charging Asunto with OWI and PAC as fifth offenses. (28; 30.)

On February 28, 2012, Asunto filed a "motion to enforce accepted plea agreement." (32.) After briefing (35; 36), and a hearing (98), the circuit court, the Honorable Jennifer R. Dorow presiding, denied Asunto's motion (37). Judge Dorow recognized that Judge Gundrum did not conduct a plea colloquy and did not accept a plea to the OWI charge. (98:6.) She concluded that the proper remedy was to "put Mr. Asunto back to the position that he was prior to the plea agreement." (98:11.) In other words, Asunto was charged with refusal to submit to chemical testing and misdemeanor bail jumping in his 2010 case, criminal damage to property (domestic violence related), disorderly conduct, and two additional counts of bail jumping in other cases. He was also charged with OWI and PAC, but as fifth

offenses. The court entered a written order denying Asunto's motion. (37.)[1]

Asunto then filed a petition for leave to appeal Judge Dorow's April 20, 2012 non-final order denying his "motion to enforce accepted plea agreement." (32.) This court granted the petition, and then stayed the case pending resolution of *State v. Chamblis*, 2015 WI 53, 362 Wis. 2d 370, 864 N.W.2d 806. The Supreme Court issued that decision on June 12, 2015.

[1] After Judge Dorow denied Asunto's "motion to enforce accepted plea agreement," Asunto entered no contest pleas to fifth-offense OWI and one count of bail jumping on January 15, 2013. (104:9-12, 14.) He also entered a no contest plea to a sixth-offense OWI in a different case, No. 12-CF-297. (104:39-40.) All of the remaining charges were dismissed, but read-in at sentencing. (104:49.)

Judge Dorow subsequently allowed Asunto to withdraw his pleas to fifth-offense OWI and bail jumping, and she vacated the judgment of improper refusal (107:43), the judgments of dismissal for the cases that were dismissed but read-in at sentencing, and Asunto's sixth-offense OWI conviction. (108:2.) The court again put Asunto into his original position before the plea agreement. Asunto is not appealing any of these decisions. He is appealing only Judge Dorow's April 20, 2012 order denying his "motion to enforce accepted plea agreement."

ARGUMENT

A. This Court should affirm the circuit court's order denying Asunto's "motion to enforce accepted plea agreement."

This Court granted Asunto's petition for leave to appeal Judge Dorow's non-final order denying Asunto's "motion to enforce accepted plea agreement." In his petition, Asunto stated a single issue, "Can the State be compelled by the court to follow a plea agreement before a plea is taken to all counts and after the complaint has been amended to reflect a more serious charge?" He asserted that Judge Dorow's answer to this question was "no."

But Judge Dorow did not answer or even address that issue. Asunto did not raise it in his "motion to enforce accepted plea agreement." He did not contend in that motion that Judge Dorow could compel the State to follow the plea agreement. Instead, he asserted that Judge Gundrum accepted the plea agreement at the May 4, 2011 hearing, and that the circuit court therefore became bound by the agreement unless it found fraud by the defendant. (32:2.)

In his motion, Asunto asserted that the State withdrew its plea offer after Judge Gundrum accepted it. (32:2.) He argued that at the May 25, 2011 hearing, Judge Gundrum "acknowledg[ed] that [the court] had accepted the parties' plea agreement," when he stated, "Yes, I don't want to sentence the defendant on one thing, and then have it come back later saying no, it was an OWI fourth, I only **agreed** to this because it was going to be an OWI fourth, not an OWI fifth." (32:2.) Asunto argued that the court accepted the plea agreement, and that it was therefore bound by it absent fraud by the defendant. (32:2.)

In his reply brief in support of his motion, Asunto again argued that Judge Gundrum had accepted the plea agreement, and that pursuant to *State v. Terrill*, 2001 WI App 70, 242 Wis. 2d 415, 625 N.W.2d 353, the circuit court was therefore bound by the agreement.

At the hearing on Asunto's motion to enforce the plea agreement, Judge Dorow concluded that she was not bound by the plea agreement because Judge Gundrum did not accept a plea to the OWI charge. Judge Dorow noted that Judge Gundrum "never went through the colloquy. There was never a finding of guilt." (98:6.) Judge Dorow concluded that "[a]t least on the issue of whether the Court is bound by any plea agreement, we don't get there because of that last step, if you will." (98:6.)

Judge Dorow noted that when Asunto entered his pleas to the two misdemeanors on May 4, 2011, "there was a global resolution being anticipated and that the plea agreement at least at that point anticipated three pleas of other than not guilty: The bail jumping, the criminal damage to property, and the O.W.I. fourth." (98:6.) Judge Dorow noted that when the parties came back to court on May 25, 2011, the expectation was that Asunto would plead guilty or no contest to fourth-offense OWI. (98:7.) But he did not plead guilty or no contest because the State discovered a fourth prior offense. (98:7.) Judge Dorow declined to enforce the plea agreement because Asunto's OWI charge was his fifth offense, not his fourth. (98:9-10.) She told Asunto that the court could put him back into the position he was before he reached the agreement with the State. (98:11.)

Asunto's defense counsel asked the court how this differed from *Terrill*, and Judge Dorow explained that in *Terrill*, the court accepted the defendant's plea, while in this case, Asunto never pled guilty of no contest to fourth-offense

OWI. (98:15.) Judge Dorow stated that it did not believe it was bound by a plea agreement that fell apart "at the last minute." (98:18.) She later entered a written order denying Asunto's motion to enforce the plea agreement. (37.)

In his brief on appeal, Asunto restates the issue he raised in his petition for leave to appeal as, "Should the motion to enforce the plea agreement [have] been granted?" (Asunto's Br. iii.) But even though he is appealing Judge Dorow's order denying his "motion to enforce accepted plea agreement," Asunto does not explain how he believes Judge Dorow erred.

Asunto has abandoned the primary argument he made in his motion to enforce the plea agreement, that Judge Gundrum's comments at the May 25, 2011 hearing demonstrate that the court accepted the plea agreement. The circuit court did not explicitly address that argument, but it implicitly rejected it. The court was correct in doing so, because when Judge Gundrum said, "Yes, I don't want to sentence the defendant on one thing, and then have it come back later saying no, it was an OWI fourth, I only **agreed** to this because it was going to be an OWI fourth, not a[n] OWI fifth," he obviously was not referring to the court agreeing to the plea offer, but to Asunto agreeing to it. (32:2; 92:6.)

To prevail, Asunto must show that Judge Dorow erred in some way. But he does not. Asunto does not argue that Judge Dorow was incorrect in finding that Judge Gundrum did not accept Asunto's guilty of no contest plea to the OWI charge. He does not argue that Judge Dorow erred in any way. Because Asunto is appealing the circuit court's order denying his "motion to enforce accepted plea agreement," and he has not demonstrated that the court erred in denying that motion, this court should affirm the circuit court's order.

B. Asunto has not shown that he has been forced to withdraw his guilty plea, or that he has been denied due process.

In his brief to this Court, Asunto argues that he is being forced to withdraw his guilty plea, and that his right to due process is being violated. (Asunto's Br. 9-18.) But Asunto did not present those arguments to the circuit court in his "motion to enforce plea agreement," and Judge Dorow did not address them.

This Court generally does not address issues raised for the first time on appeal. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997)

If this Court reaches the arguments Asunto makes on appeal, but did not make in his "motion to enforce accepted plea agreement," it should reject those arguments. In his brief, Asunto seems to argue that he was denied due process in this case because he was forced to withdraw his guilty pleas. He relies on *Chamblis*, asserting that 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." (Asunto's Br. 10-11.) He argues that "[i]n the case at hand, the court faces a similar situation." (Asunto's Br. 11.)

But this case does not involve anything like a forced plea withdrawal, and the situation in this case is not in any material way similar to the situation in *Chamblis*.

In *Chamblis*, the trial court accepted a plea to sixth-offense PAC. *Chamblis*, 362 Wis. 2d 370, ¶ 16. The State appealed. The court of appeals reversed Chamblis's conviction for sixth-offense PAC, and instructed the circuit

court on remand to enter an amended judgment of conviction for seventh-offense PAC. *Id.* ¶18.

The supreme court reversed the court of appeals' decision, concluding that "[t]he record clearly establishes that Chamblis entered a knowing, intelligent, and voluntary guilty plea to the charge of operating with a PAC as a sixth offense, not as a seventh offense." *Id.* ¶ 44. The court concluded that vacating the judgment of conviction for sixth-offense PAC, and imposing a new judgment of conviction for seventh-offense PAC violated Chamblis's right to due process because it "subjects Chamblis to a greater sentence of imprisonment than that which he was told he could receive upon pleading guilty." *Id.* ¶ 50.

This case is entirely different from *Chamblis*. Asunto pled guilty to two misdemeanors. *He did not plead guilty to the OWI offense.* The circuit court did not tell him he faced the penalties for fourth-offense OWI, and did not conduct a plea colloquy for the OWI charge. The due process violation that the supreme court identified in *Chamblis* is simply not present in this case.

Asunto points out that in *Chamblis*, the supreme court concluded that forcing the defendant to withdraw his plea would be fundamentally unfair. (Asunto's Br. 12-13 (citing *Chamblis*, 362 Wis. 2d 370, ¶ 54).) Asunto argues that it was similarly unfair to force him to withdraw his guilty pleas in this case. (Asunto's Br. 15.)

Again, *Chamblis*'s analysis of what it termed "forced plea withdrawal" does not apply to this case. Asunto did not plead guilty to fourth-offense OWI. At the time he filed his "motion to enforce accepted plea agreement" he had not pled guilty to *any* OWI charge. The court did not vacate his conviction for fourth-offense OWI, or force him to withdraw

his plea to fourth-offense OWI, *because Asunto never entered a plea to fourth-offense OWI*. Neither Judge Gundrum nor Judge Dorow imposed a judgment of conviction for fourth-offense OWI.

Asunto acknowledges, as he must, that he never pled guilty to fourth-offense OWI. He states that he "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." (Asunto's Br. 13.) But he never did enter that plea. Therefore, he was clearly never forced to withdraw it.

It is unclear whether Asunto's real complaint is that he was forced to withdraw his pleas to the two misdemeanors. Regardless, the record in this case demonstrates that such an argument would be meritless.

When Judge Gundrum recognized that this was Asunto's fifth (not his fourth) OWI, and granted the State's motion to amend the complaint to allege fifth-offense OWI, he stated that "it's necessary and appropriate and a matter of fundamental fairness that the Defendant be permitted to withdraw his pleas on the two misdemeanor charges because that was certainly part of the entire intent of what was gonna happen but just never got completed." (95:6.) The court confirmed that Asunto wanted to vacate the two misdemeanor pleas in the following exchange with defense counsel:

> THE COURT: Mr. Bloch, I'm assuming you would like the Court to vacate those two prior pleas of your client on the bail jump?
>
> MR. BLOCH: Well, I've reported in my materials that Ms. Hulgaard and I have agreed that that would have to be the result if leave were granted to file the Amended Complaint.

THE COURT: I think that's correct.

MR. BLOCH: I don't know of any other way of doing it.

THE COURT: I think that's correct. I mean he could say no, it's O.W.I. fifth, I still want to keep my pleas intact.

MR. BLOCH: Our position is that --

Just to be very clear, our position is that the State abrogated that plea agreement. I think the materials I filed with you said we don't think that the Court violated the due process timetable but the State plainly did, so you know -- and we'll --

We can raise that issue in the future as they say. I don't see a reason to rehash it today.

THE COURT: Okay. All right.

So we will vacate those two pleas on the bail jumping and criminal damage to property, yes.

MR. BLOCH: That I think is the -- I don't know any other way of doing it, like I say.

THE COURT: Right.

MR. BLOCH: I certainly am not going to allow two Class A misdemeanors to stand when I fight the felony -- guaranteed to fight the felony.

(95:11-13.)

As the record demonstrates, Asunto was not forced to withdraw any plea. He did not enter a plea to the OWI charge, and he obviously was not forced to withdraw a plea that he did not enter. He did enter pleas to two

misdemeanors, and the court granted his request to withdraw those pleas.[2]

Asunto relies on *State v. Bond*, 139 Wis. 2d 179, 407 N.W.2d 277 (1987), for the proposition that "a prosecutorial violation of a plea agreement 'triggers considerations of fundamental fairness and is a deprivation of due process.'" (Asunto's Br. 10.)

But *Bond* did not concern a plea agreement. In *Bond*, the State and the defendant reached a stipulation under which the State was allowed to broaden the period of time a charge of theft by fraud covered, in exchange for a promise that the State would not bring additional charges. *Bond*, 139 Wis. 2d at 183-84. This Court concluded that the State's later filing of additional charges violated the defendant's right to due process. *Id.* at 189. *Bond* has no bearing on this case.

Asunto also asserts that under *State v. Comstock*, 168 Wis. 2d 915, 485 N.W.2d 354 (1992), the circuit court was bound by an accepted plea agreement. (Asunto's Br. 10.)

But *Comstock* concerns a plea agreement that the court accepted when it accepted the defendant' guilty plea.

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[2] Asunto points out that at the April 17, 2012 hearing on his "motion to enforce accepted plea agreement," Judge Dorow stated that the court would not vacate his pleas to the two misdemeanors. (Asunto's Br. 12.) He fails to mention that his defense counsel had informed the court that the pleas remained in place, stating, "We've never withdrawn a plea." (98:3.) He also fails to mention that the court stated, "I will not obviously on my own motion or anything like that undo those pleas. That is your choice." (98:10.) The court added that it could put Asunto back into the position he was in before the plea agreement if he filed a motion to vacate his pleas. (98:11.)

In *Comstock*, the defendant agreed to plead no contest to reduced charges, and the circuit court accepted the pleas. The court later vacated the pleas *sua sponte*, and reinstated more serious charges. *Id.* at 920-21. The supreme court concluded that the defendant's right to due process and his right to be free from double jeopardy were violated. *Id.* at 950-51.

The situation in this case is entirely different. Here, the circuit court did not accept a plea to the OWI charge. And the court did not vacate Asunto's pleas to the two misdemeanors *sua sponte*. It did so at Asunto's request. Nothing in *Comstock* requires that the circuit court in this case was bound by the plea agreement when it did not accept a plea to the OWI charge.

Asunto did not enter a plea to the OWI charge. He entered pleas to two misdemeanor charges, and was allowed to withdraw those pleas on his own motion. He has not shown that he was denied due process.

C. The circuit court properly exercised its discretion by putting Asunto in the position he was in before the plea agreement, rather than enforcing the plea agreement.

Asunto argues that he was entitled to specific performance of the plea agreement. (Asunto's Br. 9, 17-19.) He seems to be arguing that the State breached the plea agreement when it withdrew its offer that he could plead no contest to fourth-offense OWI, and that he is therefore entitled to plead to a fourth offense. (Asunto's Br. 18.)

But even if the State breached the plea agreement, Asunto would not be entitled to specific performance of the

plea agreement. To be entitled to specific a performance of a plea agreement, relief for a breach of a plea agreement, a defendant must show that the breach of the agreement was material and substantial. *State v. Deilke*, 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945. "A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." *Id.* (citing *State v. Williams*, 2002 WI 1, ¶¶ 38, 46-47, 249 Wis. 2d 492, 637 N.W.2d 733).

If there is a substantial breach, the circuit court has discretion to determine the appropriate remedy. *Id.* ¶ 25. "The appropriate remedy for a material and substantial breach of a plea agreement depends on the totality of the circumstances." *Id.* (citing *State v. Robinson*, 2002 WI 9, ¶ 48, 249 Wis. 2d 553, 638 N.W.2d 564). "A court must examine all of the circumstances of a case to determine an appropriate remedy for that case, considering both the defendant's and State's interests." *Id.* (citing *Robinson*, 249 Wis. 2d 553, ¶ 48). "One remedy is to vacate the negotiated plea agreement and reinstate the original charges against the defendant." *Id.* (citing *Robinson*, 249 Wis. 2d 553, ¶ 48).

If there was a breach of the plea agreement in this case, it occurred before Asunto pled guilty to the OWI charge, when the prosecutor informed the court that this was Asunto's fifth offense, and then failed an amended information charging a fifth offense. Judge Gundrum concluded that the proper remedy was that Asunto's guilty pleas to the two misdemeanors would be vacated, and the parties would be returned to their positions before they reached a plea agreement. (95:6.) Judge Dorow reached the same conclusion. (98:11.)

The remedy in this case—returning the parties to their original positions—is the only reasonable remedy on the facts of the case. The circuit court recognized that Asunto has four prior OWI-related convictions, and that this was his fifth offense. The court also recognized that Asunto pled guilty to the two misdemeanors believing that he would later plead guilty to fourth-offense OWI. The only reasonable remedy was to return the parties to their original positions. The court properly exercised its discretion in doing exactly that.

Asunto argues that the circuit court should have required specific performance of the plea agreement, by accepting his no contest plea to fourth-offense OWI, even though the court knew that this was Asunto's fifth offense. (Asunto's Br. 17.)

But that remedy would be fundamentally unfair and contrary to public policy. The Legislature has created a mandatory escalating penalty scheme for OWI offenses. As the supreme court has recognized, the OWI penalty statute, Wis. Stat. § 346.65(2), has "an escalating penalty scale." Penalties for a first offense are civil. "Penalties for subsequent OWI convictions generally depend on the total lifetime number of convictions under Wis. Stat. §§ 940.09(1) and 940.25, plus countable 'suspensions, revocations, and other convictions' under § 343.307(1)." *City of Eau Claire v. Booth*, 2016 WI 65, 882 N.W.2d 738, 370 Wis. 2d 595 (quoting Wis. Stat. § 346.65(2)(am)2.-7.).

If a person has prior countable offenses, it is improper to not account for them when charging the person. *See Booth*, 882 N.W.2d 738, ¶ 23 ("[P]arties agree that Booth Britton's 1990 Minnesota conviction was a prior countable OWI offense under Wisconsin's OWI penalty scheme; therefore, her 1992 first-offense OWI in Eau Claire County

was in fact a second-offense OWI, and therefore should have been charged as a criminal offense. The parties' analysis is correct."). As the supreme court observed, "[t]he legislature's use of 'shall' in Wisconsin's OWI escalating penalty scheme, Wis. Stat. § 346.65(2), is mandatory." *Id*. A court imposing sentence for an OWI or PAC violation must count prior offenses. "The central concept underlying the mandatory OWI escalating penalty scheme set forth in Wis. Stat. § 346.65(2)(am) is exposure to progressively more severe penalties for each subsequent OWI conviction as the number of countable convictions increases." *Booth*, 882 N.W.2d 738, ¶ 24 (quoting *State v. Williams*, 2014 WI 64, ¶ 30, 355 Wis. 2d 581, 852 N.W.2d 467). "This escalating OWI penalty scheme is frustrated if an OWI is mischarged as a civil first offense rather than a criminal second offense due to an undiscovered prior countable offense." *Id*.

The same is true if a court accepts a guilty plea to a fourth offense when it knows that the defendant has four prior countable convictions. This would frustrate the escalating penalty scheme. In this case, it would have put the circuit court in the untenable position of being required by § 346.65(2) to impose sentence for a fifth offense (because Asunto had five total convictions), but being unable to do so according to Asunto's due process theory. The court did exactly what it should have done—it refused to accept a guilty plea to an incorrectly charged offense.

If the court had required specific performance from the State, Asunto would have received the undeserved windfall of a sentence for fourth-offense OWI, even though this was his fifth offense, and even though he did not rely to his detriment on a fourth-offense OWI guilty plea. Asunto was not sentenced for the misdemeanors to which he pled guilty; he was allowed to withdraw his guilty pleas to those charges.

The court's remedy did not harm him—it put him into exactly the position he should have been in.

Asunto asserts that, where the prosecutor has made a charging error, returning the parties to their original positions "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." (Asunto's Br. 17.) He adds that his two misdemeanor pleas "put this case on a course that cannot be altered." (Asunto's Br. 19.) But Judge Gundrum recognized that because Asunto had not pled guilty to the OWI, Asunto could back out of the agreement. (95:5-6.) If Asunto had second thoughts, and wanted to go to trial on the OWI, he certainly had that option, even after he pled guilty to the two misdemeanors.

Asunto asserts that by admitting that his refusal to submit to chemical testing was improper, he "essentially" admitted to one of the elements of OWI. (Asunto's Br. 18.) He argues that a refusal "supports an inference that the person was driving while under the influence of alcohol." (Asunto's Br. 18.)

It is true that "[a] reasonable inference from refusal to take a mandatory [blood alcohol] test is consciousness of guilt." *State v. Bolstad*, 124 Wis. 2d 576, 585, 370 N.W.2d 257 (1985) (citing *State v. Albright*, 98 Wis. 2d 663, 668, 298 N.W.2d 196 (Ct. App. 1980)). "[R]efusal evidence is relevant, because it makes more probable the crucial fact of intoxication." *Id.* (citing *Albright*, 98 Wis. 2d at 668). But the inference that a person's refusal means consciousness of guilt of intoxication, can be rebutted. *Id.* Refusal does not, alone, necessarily satisfy an element of OWI.

Asunto also argues that the bail-jumping charge to which he pled guilty was an admission that he was consuming alcohol. (Asunto's Br. 18.)

But consuming alcohol is not an element of OWI. To violate the statute a person must be under the influence of alcohol.

Asunto argues that "a ruling against the defendant on this case would be troubling," because "[t]he State charged a person with a crime, and mere moments before final disposition halted proceedings," and was allowed to return with a much more serious charge. (Asunto's Br. 19.)

But the circuit court's decision in this case was entirely fair. Asunto does not deny that this was his fifth OWI. He was allowed to withdraw his pleas to the two misdemeanors, for which he had not been sentenced, and for which he served no time. The court was not required to choose between accepting a plea to the wrong offense (and imposing an incorrect sentence), or violating Asunto's due process right to be sentenced for a fourth offense, even though it was his fifth offense, because of an error that the prosecutor and court corrected before Asunto pled guilty to OWI. The circuit court properly exercised its discretion in returning the parties to their original positions and properly denied Asunto's "motion to enforce accepted plea agreement." This court should affirm the circuit court's decision.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the circuit court's non-final order denying Asunto's "motion to enforce accepted plea agreement."

Dated this 21st day of September, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,009 words.

Dated this 21st day of September, 2016.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 21st day of September, 2016.

_____
MICHAEL C. SANDERS
Assistant Attorney General