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

REPLY BRIEF OF THE DEFENDANT-APPELLANT, DEREK ASUNTO

SUBMITTED BY:

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ARGUMENT

I. THE MOTION TO ENFORCE ACCEPTED PLEA AGREEMENT SHOULD HAVE BEEN GRANTED GIVEN THE CURRENT STATE OF THE LAW

Asunto reasserts all prior arguments set forth in his brief in chief.

The State has indicated in their response brief that Judge Dorow did not err when she entered her order. They also point out that an issue cannot be raised for the first time on appeal. However, the decision in *State vs. Chamblis*, 362 Wis. 2d 370, 864 N.W.2d 806 (2015) had not been decided when she put that decision on the record.

One of the potential remedies for this court to then consider is to remand the matter to the trial court to allow the circuit court judge to reconsider the previous ruling in light of the guidance provided by the *Chamblis* decision.

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.

(97:9-10).

In light of these comments, Judge Dorow's decision to deny the motion to enforce the plea agreement obviously would have been impacted by the final decision rendered in the *Chamblis* decision. The underlying facts that occurred in *Chamblis* are not identical to the case before the court, however they are substantially similar.

The *Chamblis* court found that it was fundamentally unfair and a violation of due process to require the defendant on that case to be forced to withdraw his guilty plea because of the State's mistake. Furthermore, the court on the instant case granted the State additional time to research the possibility of Asunto having prior OWI offenses in order to increase the penalties against him. The State was granted months to continue to do research to see if Asunto had any priors. The *Chamblis* court decision specifically prohibited the trial court from halting a plea hearing and granting the State time to research the possibility of a criminal defendant having additional prior OWI convictions on their record. However, the trial court in the instant case gave the State the additional time it

requested to search for grounds to subject Asunto to even more severe penalties.

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. It would be fundamentally unfair to resentence him because he has already served the confinement portion of his originally imposed sentence.

The *Chamblis* court ruled that the trial court could have proceeded even when other OWI convictions existed on the defendant's record. *Chamblis* at 15-18. As such, the State's position that the ruling is contrary to law fails to follow the decision in that case. The State could have selected an alternative remedy to address their potential objection to proceeding with the previously agreed to plea agreement. They did not.

To reiterate, a 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. (97:10). However, as mentioned in the brief in chief, Judge Gundrum had previously vacated the pleas to those charges with defense counsel making the record that he was preserving Asunto's appellate rights. (94:10). Trial counsel when before Judge Dorow incorrectly informed the court at the beginning of the hearing that the pleas had not been vacated. (97:3-4).

Chamblis views this as a violation of the due process rights of the defendant. Again, the *Chamblis* court noted that the State had options to avoid this dilemma. Forced plea withdrawal was not one of those options.

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. (19). However, their remedy was to return Asunto to his position before any pleas were taken. This remedy, which stems from an admitted 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 that same plea agreement.

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.

Again, 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 clearly pointed out that they wanted to use the refusal admission to show consciousness of guilt if the OWI 4th went to trial. (97:5).

The prohibited PAC on a OWI 4th offense and subsequent is .02 or higher. Wis. Stat. §340.01(46m)(c). Asunto's admission of alcohol consumption more than paves the way for the State to secure a conviction. It is an absurdly low PAC that was put into place to in essence place anyone with three prior OWI convictions to a virtual absolute sobriety level. Once Asunto made this admission, he was in a very poor position to fight the charges against

him. This was purposeful because he wanted to take advantage of the plea agreement he had made with the State. He was ready to be incarcerated on the day he was pleading to the OWI 4th, and this was taken away from him.

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. The State was granted over a month to then research the issue. The briefing of the issue took another four months before there was a ruling.

Half a year later, Judge Dorow rendered a decision to not enforce the accepted plea agreement. Nine months later, he was sentenced to prison. A year after that, Asunto's convictions were overturned, and he was release from custody. Current counsel eventually received the case, and briefed another issue not part of this appeal for approximately a year. Counsel requested leave of this court at the end of that year to appeal a non-final order of the

court, and the request was granted in January of 2015. If the court had enforced the original plea agreement, Asunto would most likely be done with his sentence and off of supervision.

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 in order to investigate if harsher charges could be levied against Asunto.

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.

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 State should be ordered to engage in specific performance of the plea agreement.

The waiver of constitutional rights should not be taken lightly. He gave up those rights to take advantage of the State's recommendation.

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

CONCLUSION

Appellant respectfully renews the request for relief as set forth in his brief-in-chief.

Signed at Greenfield, Wisconsin, this 9th day of November, 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 2,019 words.

Dated this 9th day of November, 2016.

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CERTIFICATION OF COMPLIANCE WITH
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I hereby certify that:

I have submitted an electronic copy of this brief complies with the requirements of s. 809.19(12).

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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 9th day of November, 2016.

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