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COURT OF APPEALS

08-24-2016 DISTRICT IV

STATE OF WISCONSIN,

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal Case No.: 2015-AP-2062 -CR

Plaintiff-Respondent,

v.

BRANDON E. JORDAN,

Defendant-Appellant.

**REPLY BRIEF OF DEFENDANT-APPELLANT
BRANDON E. JORDAN**

Appeal from Dane County Circuit Court, Branch 16, the Honorable
Rhonda Lanford , Circuit Judge, Case No. 2012-CM-2861.

Respectfully submitted by:

Joel Winnig
Attorney for Defendant-Appellant,
Brandon E. Jordan
State Bar No.: 1018627
414 D'Onofrio Dr., Suite 120
Madison, WI 53719
(608) 829-2888 Phone
(608) 829-2802 Fax
joel@joelwinnig.com

ARGUMENT

A. The State did not refute Brandon Jordan's argument that his termination from the Deferred Prosecution Program violated the contractual provisions of the agreement and his constitutional right to due process.

The State's argument regarding due process is specious. In some sense it may be said to be entirely unresponsive and ignoring the issue raised and briefed by appellant. Accordingly, the Court could deem that the argument is conceded.

Nowhere in the State's brief is there an attempt to refute the argument that Brandon Jordan was terminated from the deferred prosecution program without the State following the procedure specified in the contract itself. Under the grievance procedure (Record Item 39, Appellant's Appendix 10-11), a warning letter is specifically required in the event a defendant is alleged to be in non-compliance. The document specifies the procedures that will be followed to resolve the non-compliance issues raised in the warning letter.

The procedure states that the letter will ask the person to appear for a case review. In fact, it is undisputed that this part of the procedure was followed when it was initially alleged that Brandon was not in compliance with the contract. Brandon Jordan appeared for the case review and resolved the issue by agreeing to a contract extension.

This undisputed fact is documented in the letter from the director of the Deferred Prosecution unit, Pat Hrubesky, to the Court, dated July 27, 2014 (A6-7). She specifically states in her letter that Mr. Jordan had received a warning letter and that the issues in the warning letter were resolved by Mr. Jordan signing a six month contract extension that would expire on September 12, 2014.

Ms. Hrubesky's letter states that there were continued issues of non-compliance and accordingly "*We have concluded that Mr. Jordan is no longer eligible to participate in our diversion program*". This procedure clearly short-circuits the grievance procedure that was an agreed part of the disposition when Brandon Jordan gave up his rights to contest the charges, in return for the referral to the deferred prosecution process.

Nothing in the agreement states that his participation in the program could be terminated because the director "*concluded that Mr. Jordan is no longer eligible.*" The grievance procedure specifically provides that non-compliance with the contract results in a warning letter. There is no reasonable interpretation of the contract other than that, if the issues raised in a warning letter are resolved by a contract extension, that any further allegations of violations would require another warning letter to be issued.

First, under contract principles, the contract must be construed against the drafter.

“ ‘The primary goal in contract interpretation is to ‘give effect to the parties’ intent, as expressed in the contractual language.’ *Seitzinger v. Cmty. Health Network*, 2004 WI 28, ¶ 22, 270 Wis.2d 1, 676 N.W.2d 426. We interpret the language ‘consistent with what a reasonable person would understand the words to mean under the circumstances.’ *Id.* ¶ 23 ‘Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms.’ *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis.2d 493, 506, 577 N.W.2d 617 (1998). When the contract language is ambiguous, however, ‘two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties’ intent and (2) ambiguous contracts are interpreted against the drafter.’ *Seitzinger*, 270 Wis.2d 1, ¶ 22, 676 N.W.2d 426.

Maryland Arms Ltd. P'ship v. Connell, 2010 WI 64, ¶¶ 22-23, 326 Wis. 2d 300, 311, 786 N.W.2d 15, 20–21

There is some ambiguity in the contract, because it doesn’t specifically deal with the factual situation presented by the instant case. Nothing in the contract deals with the specific situation of; what happens when a violation is alleged, and it is resolved at the first meeting with the counselor (required under the procedure), and a new violation is alleged.

The State’s interpretation, as shown by its actions, is that the defendant can be terminated by the unilateral determination of the program director. This is obviously an unreasonable interpretation, because it doesn’t provide the due process rights specified in the contract. It provides less protection to a defendant who does resolve an allegation of non-compliance directly with his counselor (presumably the preferred result), than to a defendant who doesn’t resolve the issue with his counselor, because then he would be able to exercise his right to appeal to the director, and then to the district attorney, if necessary.

It is unreasonable to conclude that, because one warning letter is issued, and that issue is resolved; that if another issue arises, (in the opinion of the program staff), that the procedural due process protections for the defendant to remain in the program if a warning letter issue is not resolved directly with a counselor, are somehow waived. That result, the claim that Brandon can be terminated with no appeal procedure, simply by the director “concluding that he is no longer eligible”, is not a supportable interpretation of the procedures specified in the deferred prosecution agreement and therefore contemplated by the parties.

The only reasonable interpretation is that if there are new allegations of non-compliance, there must be a new warning letter. Putting aside the fact that Mr. Jordan’s initial

resolution of the warning letter resulted in only a contract extension, without the benefit of his receipt of a portion of that procedure, namely that he was supposed to receive a letter summarizing the issues discussed and the agreed upon steps to resolve the issue, it simply defies logic and reason to state that a resolution of an issue with the counselor waives his right to any further steps in the grievance procedure, if new allegations of non-compliance arise, as they did here.

Rather, having resolved the issue to the apparent satisfaction of his counselor and having been given until September 12, 2014 to complete the contract, it is clearly bizarre and extra-legal for the director to make a unilateral determination to terminate Mr. Jordan from the program, especially since the unilateral termination took place months before the contract extension end date. Among the rights, both contractual and due process that were eliminated by this purportedly legal action by the district attorney's office, are the following:

1. The right to receive a warning letter from the counselor.
2. The right to have the case review appointment with the counselor.
3. The right to have a letter summarizing the information discussed and the agreed upon steps which are to be taken to complete the contract.
4. If there were no agreement with the counselor, the right to appeal the decision to the director, if necessary.
5. The right to receive a written decision from the director.
6. The right to appeal to the elected district attorney, if necessary.
7. The right to receive a written decision from the elected district attorney.

The State, on page 9 of its brief, completely mischaracterizes the grievance procedure and how it was applied in this case. The State quotes a paragraph from the procedure that did not apply in this case. The quoted procedure states that you will be receiving a letter stating that you are terminated from the program, if you either do not appear for a scheduled appointment or are unable at the appointment to resolve the dispute.

However that is not what happened in this case. Mr. Jordan did appear for his appointment and he did resolve the dispute. It was the Deferred Prosecution program staff who thereafter failed to follow the required procedure. They simply sent the letter purporting to terminate him from the program, not to him, but to the Court. As a result, when he was returned to court, he attempted to resolve these issues informally with the district attorney, but ultimately proved unsuccessful.

It was only when he returned to court for sentencing at the end of the unsuccessful attempts at resolution by agreement, that it became necessary to raise the contractual violation and due process issue with the Court. This issue was raised timely at the trial court level and was not waived by Brandon Jordan. Brandon strenuously objected to proceeding to sentencing in breach of his rights under the deferred prosecution agreement. He raised the issue orally, by written motion (R35), and by briefing in the trial court (R39 and 41). All his attempts to show the trial court that his rights were being violated by the return to court for sentencing when he had not received the due process rights specified in his deferred prosecution agreement were rejected by the court. There is no question he presented the issue to the trial court, and preserved his right to appeal the incorrect determination made by the court.

“The supreme court has held that the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant. *Grant v. State*, 73 Wis.2d 441, 447, 243 N.W.2d 186, 190 (1976); *cf. Farrar v. State*, 52 Wis.2d 651, 660, 191 N.W.2d 214, 219 (1971)”.

State v. Smith, 153 Wis. 2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989)

The State’s argument regarding due process is essentially incoherent and unsupported by any citation to authority. The argument has essentially no weight, as it relies entirely on its own *ipsi dixit* statement as authority.

It appears, to the extent it can be understood at all, that the State’s argument depends on the proposition that termination from the deferred prosecution program does not create a liberty interest to which due process guarantees would attach.

It should be noted that the defendant supported his due process argument with citation to *State v. Scott*, 230 Wis. 2d 643, 651-52, 602 N.W.2d 296, 300 (Ct. App. 1999), and argument based directly on the holding of that case. *Scott* had internal citations to at least three other cases, all of which stood for the proposition that substantive due process principles are implicated by and inherent in the process of enforcing a plea agreement. The State has essentially conceded the argument by making no attempt to directly refute the authorities cited by the defendant.

“ ‘Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.’ *State ex rel. Blank v. Gramling*, 219 Wis. 196, 199, 262 N.W. 614, 615 (1935).” *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

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The State's Argument on the due process question is similar to a situation between where a dispute arises between a consumer who purchased an in-home repair warranty for his computer and the warranty repair company. If a dispute arises as to whether the warranty company complied with the contract when the consumer requests a repair at his home, the dispute should be easy to resolve. If the consumer said "I asked for service and they never came to my home"; the consumer is right. No matter what excuses the warranty repair company has for how it got to the point where they are in a dispute, and what is allegedly the consumer's fault, the fact remains they never came to the house to repair the computer.

Similarly, the State can make all the tortured arguments it wants about what happened and what opportunities were given, but the fact is that the contractual procedures were not followed. If they had been, Brandon Jordan would not have been terminated from the program without a hearing. He would have had a hearing before the director, there would have been a letter from the director denying his appeal (if she did); he would have then requested the review by the district attorney, who then would have made a written decision. Since these documents are not in the record, just the like consumer who said the company did not come to the house to do the in-home repair it warranted that it would do, Brandon Jordan has to be right. He did not get his due process rights because the hearings never took place and no written determinations were ever made.

B. The State did not refute Brandon Jordan's argument that there was no factual basis for the charge and the failure to allow withdrawal of the guilty resulted in manifest injustice.

The State's argument purporting to meet the defendant's showing that there was no factual basis for the charge and the failure to allow the withdrawal of the guilty plea resulted in manifest injustice is almost entirely beside the mark. The State does not attempt to counter the arguments in the appellant's brief, pages fifteen through twenty. In particular, the State totally ignores the citation to the federal case of *Wagner v. Washington Cnty.*, 493 F.3d 833,(7th Cir. 2007), and the argument made therefrom.

The appellant's brief analyzed the situation where the person for whom the injunction was issued used the injunction improperly. The injunction was not intended to be used as a sword to attack the party enjoined, but as a shield from the party enjoined. When the alleged victim sought out the defendant and called the police based on the alleged contact and alleged violation, no crime was committed by the defendant.

The State concedes the argument by not attempting to counter that which the Seventh Circuit Court of Appeals noted was a limitation on the ability to use the injunction as a sword. The court specifically held that the injunction does not prohibit someone from being on a premise occupied by the other, but commands only that the defendant avoid such premises.

This distinction is why the analysis in appellant's brief regarding the defective plea colloquy is so important. The court asked Brandon Jordan's defense counsel if the court could use the facts stated in the complaint as a factual basis. The attorney assented. The court then asked Brandon Jordan a different question; whether the facts stated in the complaint were true. He concurred.

This inquiry missed the essential point which the defendant has been making and the State ignored. Establishing that counsel agreed the facts could be used and that the defendant thought they were true, does not establish that the crime was committed. There is no dispute that Brandon Jordan was at the bar before Jennifer Hamill arrived. Thus because of the elements specified by Wisconsin Jury Instruction Criminal 2040, and as interpreted by the court in *Wagner v. Washington County*, no crime was committed and it is a manifest injustice, as a matter of law, to have a conviction entered were there was no crime. *State v. Thomas*, 2000 WI 13, ¶ 22.

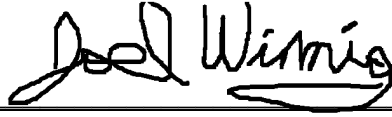
CONCLUSION AND RELIEF REQUESTED

The enforcement of the contractual due process provisions has constitutional significance precisely because of the nature of the rights forfeited by the defendant in entering the deferred prosecution program. The defendant pleads guilty and waives his constitutional right to trial, and all the attendant rights at trial, including waiving the right to have the State prove him guilty beyond a reasonable doubt. As a result, when the defendant is terminated from the program, he comes back to court for sentencing, without any rights, except representation at sentencing. *State v. Scott, supra*, establishes that “*due process requires that the defendant's expectations be fulfilled.*” They were not in this case, and thus the conviction must be reversed.

On remand, because the State did not comply with the terms of the deferred prosecution agreement, the conviction should be vacated and the charge dismissed, with prejudice. In

the alternative, Brandon Jordan should be ordered to be re-admitted to the Deferred Prosecution program for completion and dismissal of his charges. Either the plea agreement must be enforced in its entirety, or the charge should be dismissed. At a minimum, defendant should be allowed to withdraw his guilty plea.

Respectfully submitted this 23rd day of August, 2016



Joel Winnig
Attorney for Defendant-Appellant
Brandon Jordan
State Bar No.: 1018627
414 D'Onofrio Drive, Suite 120
Madison, WI 53719
(608) 829-2888

Certification pursuant to Rule 809.19(8)(d)

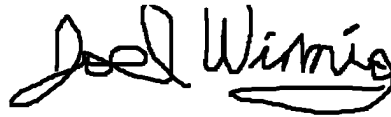
I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2876 words.



Joel Winnig
Attorney for Defendant-Appellant
Brandon Jordan
State Bar No.: 1018627
414 D'Onofrio Drive, Suite 120
Madison, WI 53719
(608) 829-2888

Certification pursuant to Rule 809.19 (12) (f)

I hereby certify that the text of the electronic copy of this brief is identical to the paper copy of this brief.

A handwritten signature in black ink, reading "Joel Winnig". The signature is fluid and cursive, with the first name "Joel" written in a more compact, stylized manner and the last name "Winnig" written in a more extended, flowing script. The signature is positioned above a horizontal line.

Joel Winnig
Attorney for Defendant-Appellant
Brandon Jordan
State Bar No.: 1018627
414 D'Onofrio Drive, Suite 120
Madison, WI 53719
(608) 829-2888