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STATE OF WISCONSIN
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DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP000683-CR

THOMAS G. ST. PETER,

Defendant-Appellant.

DEFENDANT-APPELLANT THOMAS G. ST. PETER'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

APPEAL FROM THE ORDER DENYING MOTION FOR MODIFICATION OF SENTENCE ENTERED ON MARCH 10, 2016, AND THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON DECEMBER 31, 2015, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JOHN SIEFERT PRESIDING

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REPLY TO STATE'S FACTS

The State's brief correctly states the plea agreement that was reached between Thomas St. Peter's attorney Scott Wales and Milwaukee County Assistant District Attorney Lucy Kronforst, *i.e.*, that the State would recommend a sentence of 4 days jail with time served and a fine. (State's brief at 3). When St. Peter was originally taken into custody, he was held for a number of days in this case. In lieu of revocation of his probation, St. Peter not only had to serve time in jail, but also was given an alternative to revocation (ATR) that included 60 hours of treatment for his addiction problem at Rogers Memorial Hospital. (R.18:12). St. Peter successfully completed the ATR and has had no other violations of his probation.

The obstruction charge against St. Peter was based upon his embellishment of the nature of the crime committed against him by Cortez Wright. St. Peter alleged to police that he was carjacked by Wright, originally not admitting that Wright took his car during

a drug purchase transaction that went bad for St. Peter. St. Peter ultimately admitted to police the actual circumstances as to how his car was stolen and thus was charged. To be clear, the State is prosecuting Wright for his felony taking and operating a motor vehicle without consent, *i.e.,* St. Peter's car. (App.105-108). That case is now scheduled for a change of plea and sentencing on March 24, 2017. (See Supp. App. 101). Another case charged against Wright, for armed robbery and taking a vehicle in similar circumstances to St. Peter's (App. 109-113), was dismissed in January 2017, because the victim had died shortly before trial. (See Supp. App. 103-104).

REPLY ARGUMENT

I. JUDGE SIEFERT'S SENTENCE WAS NOT BASED ON ACCURATE FACTS.

At page 5 of its brief, the State argues that Judge Siefert understood Wright was not "a completely innocent and uninvolved party." Yet, the record confirms that the judge referred to St. Peter as having accused "a totally innocent person." (R.18:7). In the

colloquy between Judge Siefert and Assistant District Attorney Kronforst that followed, Judge Siefert said, "when I say 'innocent,' I don't mean that the person is" and Ms. Kronforst interjected "an outstanding citizen?" Judge Siefert responded "that's correct. But whatever things he may have done wrong in his life, he didn't rob him, okay?" (R.18:7). St. Peter's attorney, Scott Wales, said "actually that's not accurate," and asked for a sidebar, which was not recorded.

Postconviction counsel's review of the police reports in this case indicate that there was a factual basis for filing either a felony theft case against Wright, or a felony operating without owner's consent. These important facts are not in the record, which is why St. Peter's postconviction counsel sought reconsideration of the sentence and a hearing to clarify and correct Judge Siefert's misimpression of the facts. The court summarily denied this request.

The denial of St. Peter's motion for resentencing is error and grounds for reversal of the sentence. The State

concedes that St. Peter has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman,* 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1; *accord United States v. Tucker,* 404 U.S. 443, 447 (1972). Nonetheless, the State goes on to argue that *Tiepelman* should not apply as St. Peter's case is different. The State argues that St. Peter must first show there was inaccurate information before the sentencing court. St. Peter has done so.

Judge Siefert was under the incorrect impression that Wright had not victimized St. Peter and stolen his car, and instead it was St. Peter who was victimizing Wright. "I am not sympathetic at all with the idea of people who essentially frame someone," the judge stated. (R.18:14). Contrary to the State's argument at page 6 of its brief, Judge Siefert stuck to his initial impression that St. Peter had "framed an innocent man" and proceeded to impose a lengthy sentence, without work release or treatment privileges, increasing the joint recommendation by a factor of ten.

II. JUDGE SIEFERT ERRONEOUSLY EXERCISED HIS DISCRETION IN IMPOSING SENTENCE.

The State's brief attempts to rationalize Judge Siefert's decision to sentence St. Peter to ten times more than the joint recommendation. Judge Siefert's example of how if a person hit him, or a police officer, and then charges of battery to a judge or a police officer were sought, when the person didn't hit the judge, just because he was a judge, would not be the basis for a felony charge. This analogy fails. St. Peter told police that he was carjacked, not to increase a penalty on Wright, but to avoid having his probation agent learn that he was trying to buy a controlled substance. (R.18:8,11-12).

Moreover, St. Peter was not trying to "settle a personal score" as Judge Siefert opined. Yet, this became Judge Siefert's primary rationale and focus in his sentencing of St. Peter. Once this train had left the station, the actual facts and circumstances made no difference. This is not a proper exercise of discretion by

the court, nor is blinding oneself to the actual facts in a case.

The State argues that Judge Siefert undertook the required review and analysis of the relevant sentencing factors in substantially jumping the plea agreement that the State had agreed to with St. Peter's attorney. The State's brief, like the absence of comment by Judge Siefert, does not indicate how a substantial straight time sentence meets the "minimum amount of custody requirement of *McCleary* and *Gallion*." There must be evidence in the record that the trial court actually exercised discretion, not just decisionmaking, in imposing the sentence it did. *McCleary,* 49 Wis. 2d at 277. Judge Siefert failed to state the relevant and material factors that influenced his decision, relied on immaterial factors, and gave too much weight to one sentencing factor in the face of other contravening circumstances. *State v. Thompson,* 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

Judge Siefert did not find that the substantial straight time jail sentence met the minimum amount of custody requirement of *McCleary.* Nor did he find that this amount of confinement (ten times the joint recommendation) was necessary to protect the public, or that St. Peter needed correctional treatment that was only available in straight time confinement, or that a lesser sentence would unduly depreciate the seriousness of the offense. *State v. Gallion,* 2004 WI 42, ¶44, 270 Wis. 2d 535, 560, 678 N.W.2d 197.

The State's brief sets out the general factors that the court should consider at sentencing. However, the State then basically ignores the analysis that Judge Siefert should have undertaken, and conclusorily advocates in favor of the substantial straight time jail sentence that Judge Siefert imposed. This argument runs totally contrary to the State's original plea agreement and joint recommendation. Contrary to the State's argument, Judge Siefert did not address the

necessary sentencing factors necessary in imposing the ten-fold increased sentence on St. Peter.

The judge began his sentencing decision by stating "I am not sympathetic at all with the idea of people who essentially frame someone." (R.18:14). Judge Siefert then said that he did not think that St. Peter's actions could be "excused" with a time-served disposition, and therefore imposed a 45-day straight time period without work release privileges. Judge Siefert made no findings that the gravity of the offense, the protection of the public and the treatment needs of St. Peter would best be served by a substantial straight-time sentence. Nor did he find that the joint recommendation of the parties was inconsistent with protection of the public, or would unduly depreciate the seriousness of the offense, as the State's brief argues. How jail time actually served constitutes an excuse was never explained by the court.

Indeed, the record is silent as to the required analysis and detailed statement of reasons. (R.18:14-16). The State does not support its argument with record

citations showing that Judge Siefert made the required consideration of the necessary factors that *McCleary* and *Gallion* call for. This court should thus not consider these arguments, which lack proper citations to the record. *State v. McMorris,* 2000 WI App. 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322. The state is required to set out facts relative to the issues on review, with appropriate references to the record, Wis. Stat. § 809.19(1)(d), and conclusory assertions in appellate briefs, particularly when not accompanied by record citations, are not considered by the reviewing court. *Associates Fin. Servs. v. Brown,* 2002 WI App 300, ¶4, n.3, 258 N.W.2d 915, 656 N.W.2d 56.

III. STATE'S POSITION ARGUED ON APPEAL IS INCONSISTENT WITH PLEA BARGAIN.

Furthermore, St. Peter and his appellate counsel are troubled by the State apparently unilaterally backing out of the plea agreement, and instead arguing vigorously in favor of the substantially longer straight-time sentence that the court imposed. The ABA

Standards for Criminal Prosecution, 3-4.2(c), states "a prosecutor should not fail to comply with the plea agreement, unless a defendant fails to comply with the plea agreement or other extenuating circumstances are present." St. Peter has done nothing out of compliance with the plea agreement, and no extenuating circumstances exist, yet the State argues that its plea agreement should be ignored and Judge Siefert's ten-fold longer sentence is appropriate. This position, in essence, constitutes a breach of the plea agreement, as the duty to abide by and support the agreement continues. The State is not excused from its duty to comply with or specifically perform under the agreement.

A defendant who enters into a plea agreement waives a panoply of constitutional rights; therefore prosecutors should be held to the most meticulous standards of both promise and performance. *United States v. Riggs,* 287 F.3d 221, 224 (1st Cir. 2002). A breach of a plea agreement by the government violates a

defendant's due process rights. *Santobello v. New York,* 404 U.S. 260-262 (1971); *Mabry v. Johnson,* 467 U.S. 504, 508 (1984); and *State v. Rivest,* 106 Wis. 2d 406, 413, 316 N.W.2d 395 (1982). Because important due process rights are involved, plea negotiations must accord a defendant fairness and be attended by adequate safeguards. *Rivest,* 106 Wis. 2d at 413 (citing *Santobello).*

Plea bargains are essentially contracts. When one of the exchanged promises is not kept, the contract is seen to be broken. *Puckett v. United States,* 556 U.S. 129, 137 (2009). "When a defendant agrees to a plea bargain, the government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy," which is exactly what St. Peter is doing in this appeal. *See, Puckett,* 556 U.S. at 137.

A plea agreement is an executory agreement and "such a contract contemplates activity in the future to which the parties have bound themselves and which remain to be done." *State v. Paske,* 121 Wis. 2d 471, 475, 360 N.W.2d 695 (Ct. App. 1984). Absent a "material and

substantial" breach of the agreement by the defendant, which the government has the burden of proving, a defendant cannot be denied the terms and/or effect of the original negotiated agreement. *State v. Rivest,* 106 Wis. 2d at 414. In *Santobello,* resentencing was ordered so that there would be full compliance and specific performance of the plea agreement. 404 U.S. at 263.

As the United States Supreme Court recognized in *Berger v. United States,* 295 U.S. 78, 88 (1935), "a prosecutor is a representative not of an ordinary party to a controversy, but of a soveighnty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The State, by the Milwaukee County District Attorney's Office, made an agreement with St. Peter and his counsel and have a continuing duty to stand by it, and not try to withdraw or undermine it. The State's current argument is that the plea agreement should be ignored, and its brief goes to great ends to

argue why the judge acted appropriately. This is not specific performance but a breach of the agreement.

Professor Larry Cunningham, in his article *The Innocent Prisoner and the Appellate Prosecutor,* 24 CRIMINAL JUSTICE ETHICS, pp. 12-24 (Fall 2005), *https://papers.ssrn.com/so13/papers.cfm?abstract_id=1152792*, commented upon the United States Supreme Court decision in *Dretke v. Haley*, 541 U.S. 386 (2004). In *Dretke,* the Court vacated a judgment of conviction and sentence and remanded for resentencing. The prosecutor conceded on appeal that the defendant had asserted viable and significant claims for relief. So too, has St. Peter, yet the prosecutor in the instant appeal has not done what the prosecutor did in the *Dretke* case.

After conducting a review of the various duties that an appellate prosecutor has, Professor Cunningham states in his article:

> What *Dretke v. Haley* illustrates is that there are prosecutorial duties on appeal that go above and beyond the ordinary rules of appellate ethics regarding advancing non-frivolous claims and disclosing controlling legal authority . . . The postconviction case presents the prosecutor with a number of discretionary choices. These choices are

> not of legal ethics, but of the prosecutor as the soveign decisionmaker.
>
> Cunningham, 24 Crim Justice Ethics at 21.

The duty of a prosecutor to keep promises, once made in a plea bargain, is a matter of due process. *Rivest,* 106 Wis. 2d at 413.

> Postconviction, the prosecutor has a number of choices. These choices are not of legal ethics, but of the prosecutor as the sovereign decisionmaker.
>
> Cunningham, 24 Crim Justice Ethics at 21.

In the appellate context, and particularly in St. Peter's case, the prosecutor should not argue contrary to the record, and contrary to the terms of the plea agreement, for a substantially greater sentence then what was previously intended and agreed to. As the ABA Standard notes, the duty to comply with the plea agreement is a continuing one. Thus, an appellate prosecutor's obligation should include considering and conceding a point, as the prosecutor did in *Dretke* (which the Court approved and resulted in resentencing), or taking no position in the appeal as to the propriety of the length of the sentence imposed.

In St. Peter's case, in order to abide by the State's continuing contractual and due process obligations, there should have been a concession or a taking of no position in support of Judge Siefert's ten-fold increase in the sentence imposed, particularly given the sparse record. To hold otherwise would constitute an endorsement of a unilateral withdrawal from a plea agreement in violation of St. Peter's due process rights and the plea agreement.

CONCLUSION

For all of these reasons and those stated in St. Peter's previous brief, defendant-appellant Thomas G. St. Peter respectfully urges this Court to reverse the circuit court's denial of his postconviction motion, vacate the judgment of conviction and sentence, and remand the case for resentencing before a different judge.

Dated this ____ day of March, 2017.

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CERTIFICATION PURSUANT TO SECTION 809.19(8)(d), *STATS*.

Pursuant to section 809.19(8)(d), *Stats.,* I certify that this reply brief conforms to the rules contained in section 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 2,493 words.

_____
RAYMOND M. DALL'OSTO

CERTIFICATION PURSUANT TO SECTION 809.19(2)(b), *STATS*.

I hereby certify that filed with this reply brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with section 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.

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.

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I hereby certify that I have submitted an electronic copy of this reply brief, excluding the supplemental appendix, if any, which complies with the requirements of section 809.19(12), *Stats.*

I further certify that this electronic reply brief is identical in content and format to the printed form of the brief filed as of this date.

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