STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2016AP002258-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. FUGERE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Both Entered in the Chippewa County Circuit Court,
The Honorable Roderick A. Cameron Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Fugere's NGI Plea Was Not Knowing, Intelligent, or Voluntary Because the Court Told Mr. Fugere He Faced a 60-year Commitment When He Actually Faced a 40-year Commitment, and Mr. Fugere Did Not Otherwise Understand the Maximum Commitment, Thus He Is Entitled to Plea Withdrawal.

A. The court must inform the defendant about the maximum commitment associated with a stipulated NGI plea because it is a direct consequence of the plea with an automatic effect on the range of punishment.

The state does not dispute the fact that the court, defense counsel, and the state misinformed Mr. Fugere about the maximum length of commitment he faced with his NGI plea. Mr. Fugere was told he faced a potential 60-year commitment, when he actually faced a potential 40-year commitment.

The state also agrees that the ***Bangert/Brown***[1] procedures apply to NGI pleas. However, it argues the colloquy required by ***Bangert*** and ***Brown*** only applies to Mr. Fugere's admission of guilt and not to the determination of Mr. Fugere's mental responsibility. It then argues the court was not required to tell Mr. Fugere *anything* about the length of his commitment because it was simply a collateral consequence. The state's analysis is simply wrong.

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[1] ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906.

First, practically speaking, Mr. Fugere entered one plea – not guilty by reason of mental disease or defect – therefore it is impractical to parse out guilt versus mental responsibility when conducting a colloquy. The notion that Mr. Fugere could enter a knowing, intelligent, and voluntary stipulated NGI plea, without being informed about *the primary consequence* of that plea - a commitment - is absurd.

According to the state, with a stipulated NGI plea the court's colloquy must address the potential consequences of a guilty or no contest plea but does not have to address the consequences of the NGI plea, namely, the potential length of commitment. In other words, the state argues the court must tell the defendant about the maximum potential prison sentence he would face with a guilty plea, but would not need to tell the defendant the maximum commitment length. The state argues this is true even when the state stipulates to the NGI plea, and therefore the primary consequence of the plea is a commitment.

The state's argument ignores the fact that an NGI plea, itself, changes the *range of punishment* the defendant faces. Per ***Brown***, the court must address the defendant personally and "establish the defendant's understanding of the nature of the crime with which he is charged *and the range of punishments to which he is subjecting himself by entering a plea*." ***Brown***, 293 Wis. 2d 594, ¶ 35 (emphasis added). It must also "notify the defendant of the *direct consequences* of his plea." ***Id.*** (Emphasis added). "A direct consequence of a plea has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." ***State v. Kosina***, 226 Wis. 2d 482, 486, 595 N.W.2d 464 (Ct. App. 1999).

Here, if the defendant was found guilty the court could have sentenced him up to 60 years. Wis. Stat. §§ 948.02(1)(b); 973.01(2)(b)1 & (d)1. However, the range of punishment changed with the acceptance of the NGI plea. The court could no longer give Mr. Fugere a 60-year prison sentence. Instead, it could order a commitment for up to 40 years. Wis. Stat. § 971.17(1)(b). Thus, the range of punishment changed from a potential 60-year prison sentence to no prison and a potential 40-year commitment.

The state claims the potential commitment is not a direct consequence of his plea because a commitment is not punishment. (State's Response, 19). However, it does not address the impact of Mr. Fugere's NGI plea on the range of punishment. The state's claim that the commitment is not a direct consequence focuses solely on the term "punishment" rather than "range of punishment". The state's use of italics solely for the term "punishment" rather than "range of punishment" highlights the state's narrow and improper focus. (State's Response, 19). The state likely singled out the term punishment because it could not explain why the NGI plea did not impact the range of punishment.

The state asserts "there are no greater burdens imposed on the circuit court than those for accepting a guilty plea" because an NGI plea is not a fundamental constitutional right.[2] (State's Response, 20). This is a red herring. Mr. Fugere does not assert there is a greater burden placed on

[2] The state cites ***State v. Francis***, 2005 WI App 161, 285 Wis. 2d 451, 701 N.W.2d 451, for the proposition that an NGI plea is not a fundamental constitutional right. The issue in ***Francis*** was whether the court needed to engage in a personal colloquy with the defendant before allowing her to abandon her NGI plea. ***Id.*** at ¶ 14. ***Francis*** does not say the court need not tell the defendant the maximum potential commitment he faces upon acceptance of an NGI plea.

the circuit court for an NGI plea. It is the same burden. The state concedes the court's colloquy requirements from ***Bangert*** and ***Brown*** apply to NGI pleas, which is the same as for guilty and no contest pleas. This includes telling the defendant the range of punishment and the direct consequences of the plea. As explained above and in Mr. Fugere's brief-in-chief, the NGI plea has an automatic effect on the range of punishment, in this case changing the range of punishment from a potential 60-year prison sentence to no prison sentence and a potential 40-year commitment.

Additionally, it is not overly burdensome for the court to explain the maximum potential commitment. It is no more burdensome than explaining the maximum potential sentence.

The state also argues that the court could have rejected Mr. Fugere's NGI plea and thus Mr. Fugere would have had to prove that he had the requisite mental disease or defect at the time of the crime. (Response, 19). The court can exercise its discretion and reject a plea agreement with any type of plea (NGI, guilty, or no contest). *See* ***State v. Conger***, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341. However, with all three types of pleas – NGI, guilty, no contest - if the court rejects the plea, then there is no plea and the defendant would be facing trial. Rejecting Mr. Fugere's NGI plea is not the same as rejecting a sentencing recommendation, as the state seems to suggest. The court cannot change Mr. Fugere's NGI plea into a guilty plea. If the court rejected his NGI plea, Mr. Fugere could (1) choose to go to trial on everything, (2) choose to admit guilt and go to trial on the mental capacity phase, or (3) choose to enter a guilty plea.

Here, the court did not reject Mr. Fugere's NGI plea. Thus, it was still required to explain the range of punishment and the direct consequences of that plea. As explained in

Mr. Fugere's brief-in-chief, since Mr. Fugere was told the wrong maximum commitment – by 20 years – and he did not otherwise know the maximum commitment, his plea was not knowing, intelligent, or voluntary. Therefore, he is entitled to plea withdrawal.

The state argues the 20-year difference here was not substantial and therefore there is no ***Bangert*** violation, citing ***State v. Cross***, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64.[3] (State's Response, 20-21). In ***Cross***, the defendant was told he faced 40 years imprisonment with a maximum initial confinement of 25 years. He later discovered he faced a maximum 30 years imprisonment with 20 years initial confinement. ***Cross***, 326 Wis. 2d 492, ¶ 1. Thus, in ***Cross*** the court was wrong by 5 years initial confinement and 5 years extended supervision and that was not substantial.

Here, the difference is 20 years. 20 years is certainly a substantial amount of time. It is absurd to think a 20-year differential is not important. Mr. Fugere was told he faced a maximum commitment that is 150% greater than what he actually received. Thus, Mr. Fugere is still entitled to plea withdrawal.

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[3] The state also asserts Mr. Fugere's "commitment is not a definite term" because he can petition for both release and termination. This is misleading. First, Mr. Fugere is committed even if he is conditionally released. If he is conditionally released he is not "committed for institutional care" but he is still subject to the commitment order. Wis. Stat. § 971.17(4)(a). Second, the fact that Mr. Fugere could request early termination does not impact the potential maximum commitment. In criminal cases there are options for early release from confinement and early termination. *See* Wis. Stat. §§ 302.113(9g), 973.01 (3g) & (3m), 973.195, 973.198. That does not change the ***Bangert*** analysis.

B. Mr. Fugere raised a cognizable plea withdrawal claim and he cannot be judicially estopped from requesting plea withdrawal.

The state's argument that Mr. Fugere does not have a cognizable claim for plea withdrawal fails for all the reasons explained above. ***Bangert*** applies to NGI pleas, and thus, the court was required to explain to Mr. Fugere the range of punishment and the direct consequences of his NGI plea, which includes the maximum length of commitment because it has "a definite, immediate, and largely automatic effect on the range of a defendant's punishment." Since ***Bangert*** applies there was no need for Mr. Fugere to raise the alternative claims suggested by the state.

Finally, the state argues Mr. Fugere is estopped for raising his plea withdrawal claim. The state cites no authority for the proposition that judicial estoppel applies to plea withdrawal claims. As with a guilty or no contest plea, Mr. Fugere's NGI plea must be knowing, intelligent, and voluntary. ***State v. Shegrud***, 131 Wis. 2d 133, 137-138, 389 N.W.2d 7 (1986). The state suggests that Mr. Fugere could be estopped from raising a plea withdrawal claim even if his plea is not knowing, intelligent, and voluntary simply because Mr. Fugere entered an NGI plea rather than a guilty or no contest plea in a criminal case. This is absurd. Mr. Fugere's NGI plea does not transform his criminal case into a civil matter.

Additionally, the state's estoppel claim requires that "the facts at issue are the same." (State's Response, 15-16). The facts at issue here are not the same. When Mr. Fugere entered his plea he was incorrectly told he faced a 60-year commitment. He did not. He actually faced a 40-year commitment, thus the circumstances are not as Mr. Fugere

thought at the time of the plea. When he negotiated the plea agreement everyone believed they were asking for half the maximum length of commitment. That was wrong. There was far less leeway than the parties believed.

Misinforming the defendant about the range of punishment taints the plea. That is precisely why he raised the plea withdrawal claim and precisely why his plea was not knowing, intelligent, or voluntary. As explained earlier and in his brief-in-chief, Mr. Fugere is entitled to plea withdrawal because his plea was not knowing, intelligent, and voluntary.

CONCLUSION

For all of the reasons stated above and in his brief-in-chief, Mr. Fugere contends that the circuit court improperly denied his postconviction motion and he should be permitted to withdraw his pleas. Therefore, Mr. Fugere requests plea withdrawal.

Dated this 17th day of April, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,894 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17th day of April, 2017.

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