

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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OF WISCONSIN

Case No. 2018AP000313-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEVON MAURICE BOWSER,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction
Entered in the Douglas County Circuit Court,
the Honorable George L. Glonek Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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**CONSTITUTIONAL PROVISIONS
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ISSUE PRESENTED

Did the circuit court erroneously exercise its discretion when it refused to vacate the entire plea agreement and instead granted Mr. Bowser's pre-sentence plea withdrawal motion as to only one charge?

The circuit court found that Mr. Bowser presented a fair and just reason for plea withdrawal and granted Mr. Bowser partial plea withdrawal by allowing him to withdraw his guilty plea in another case while denying his request to withdraw his guilty pleas in the case now before the court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication is likely unwarranted, as the issue presented can be decided on the basis of well-established law.

STATEMENT OF THE FACTS AND CASE

On May 24, 2016, the state charged Mr. Bowser with one count of delivery of heroin ($\leq 3G$), contrary to Wis. Stat. § 961.41(1)(d)1., and one count of felony bail jumping, contrary to Wis. Stat. § 946.49(1)(b), in Douglas County Case 16-CF-198. (1).

The criminal complaint alleged that Mr. Bowser sold heroin to a confidential informant, CRI16-003. (1:1-2). It was also alleged that Mr. Bowser was on bond in Douglas County Case 16-CF-11¹ at the time of the sale. (1:3).

Subsequently, on October 31, 2016, Mr. Bowser entered into a plea agreement that resolved both case 16-CF-11 and case 16-CF-189. (52:2). Specifically, Mr. Bowser agreed to plead guilty to Count 1 in 16-CF-11 and Counts 1 and 2 in 16-CF-189. (52:2). In exchange, the state agreed to dismiss and read in Counts 2, 3, and 4 in 16-CF-11, and to cap its sentencing recommendations in each case. (52:2). After a colloquy, the court accepted Mr. Bowser's guilty pleas, ordered that a presentence investigation report be prepared, and set the matters over for sentencing. (52:2-9).

Prior to sentencing, however, Mr. Bowser filed a motion to withdraw his guilty pleas. (20). Mr. Bowser sought to withdraw his guilty pleas in both cases based upon new information and additional discovery that he received after the plea hearing. (20:1-2). Specifically, Mr. Bowser alleged that the confidential informant in 16-CF-11 mailed a notarized letter to the state and Mr. Bowser's attorney indicating that he had lied to the police about Mr. Bowser's involvement in the controlled buys and that Mr. Bowser was not the individual who sold him heroin. (20:2).

¹ According to Wisconsin Circuit Court Access (WCCA) records, a complaint was filed on January 11, 2016, in Douglas County Case 16-CF-11, charging Mr. Bowser with one count of manufacture/deliver heroin (<3g), contrary to Wis. Stat. § 961.41(1)(d)1., and three counts of falsely present noncontrolled substance, contrary to Wis. Stat. § 961.41(4)(am)1a.

The motion to withdraw guilty pleas was set for an evidentiary hearing at which the recanting confidential informant, Justin Schiffer, testified. (46). Mr. Schiffer testified that he never worked with, or completed controlled buys for, the Douglas County Drug Task Force. (46:13-14, 21-22). He also testified that he did not know who Mr. Bowser was and that he never participated in a photo lineup with law enforcement to identify Mr. Bowser as the individual he purchased heroin from. (46:14). Mr. Schiffer refused to answer any questions regarding the letter that he wrote, invoking his Fifth Amendment rights. (46:15-18).

Law enforcement officers also testified at the hearing. They testified that Mr. Schiffer had worked with them as a confidential informant and completed controlled buys on the dates of the offenses charged in 16-CF-11. (46:30-58). The notarized letter written by Mr. Schiffer was received into evidence and a detective testified that Mr. Schiffer informed him that he had lied in the letter when he stated that he did not purchase heroin from Mr. Bowser. (46:32, 34-38; 27).

At the conclusion of the motion hearing, trial counsel argued that he had met the burden of proving that a fair and just reason existed for Mr. Bowser to withdraw his guilty pleas. (46:61-63; App. 103). When asked why Mr. Bowser should be allowed to withdraw his pleas in 16-CF-189, trial counsel explained that the pleas in both cases “were a package deal,” and were taken at the same time. (46:63; App. 105). The following exchange then occurred:

THE COURT: There was no plea deal. That’s why we have a PSI and argued sentence, don’t we?

ATTORNEY HOFFMAN: Well, I mean, there is -- there was an agreement to dismiss charges on parts of these

cases -- or parts of these -- at least one of these cases in exchange for his plea, some charges are dismissed.

(46:63; App. 105). In regards to whether there was a plea agreement, the prosecutor, in his argument, acknowledging that he was not the attorney who made the offer, stated his understanding was that the plea offer was that Mr. Bowser would plead to the charges, there would be a PSI, and the state would cap at the midpoint of the PSI. (46:67; App. 109).

Ultimately, the circuit court found that Mr. Bowser had established a fair and just reason to withdraw his guilty plea in 16-CF-11, but not in 16-CF-189. (46:69; App. 111). In explaining its decision, the circuit court stated:

The standard to withdraw a plea before sentencing is less stringent than that after sentencing.

Basically what the law says is that the Court should freely allow a Defendant to withdraw a plea before sentencing for any fair and just reason, unless the prosecution would be substantially prejudiced.

I haven't heard any particular argument about substantial prejudice to the prosecution.

And I think based upon the number of versions of statements given by Mr. Schiffer, obvious issues of credibility, even with regard to this testimony here today, and him being the informant on these buys, that the Court - - and the fact that I'm going to freely allow the withdrawal of a plea if there's a fair and just reason, I think at least with regard to 16-CF-11, on Count 1, that that's been established.

So I will - - so I will allow Mr. Bowser to withdraw his plea on Count 1 in 16-CF-11.

But I do not see that there's any basis in the record for this Court to allow Mr. Bowser to withdraw his pleas in 16-CF-189. Those were separate incidents, separate informant, and I don't believe there's been any testimony here today from which I can make a finding that there's been a fair and just reason for Mr. Bowser to withdraw his plea in that file.

(46:69; App. 111). The circuit court then proceeded to reinstate the charges that had been dismissed and read in as part of the plea agreement and all of the charges in 16-CF-11 were set for trial.² (46:70; App. 112).

Mr. Bowser was later sentenced to a total of nine years imprisonment in 16-CF-189, as five years of initial confinement and four years of extended supervision on Count 1, and two years of initial confinement and three years of extended supervision on Count 2, concurrent to Count 1. (31; App. 101).

This appeal follows. (40).

ARGUMENT

The Circuit Court Erroneously Exercised Its Discretion When It Failed To Vacate The Plea Agreement In Its Entirety And Return The Parties To Their Pre-Plea Positions.

Mr. Bowser presented a fair and just reason for plea withdrawal and the circumstances demanded that the entire plea agreement be vacated and the parties be restored to their pre-plea positions. The circuit court erroneously exercised its

² According to Wisconsin Circuit Court Access (WCCA) the charges in 16-CF-11 were dismissed on the state's motion on May 10, 2017.

discretion when it concluded that there was no global plea agreement, applied the wrong legal standard, and failed to consider the totality of the circumstances in the case. Weighing the parties' interests, and considering the circumstances as they then existed, in determining the proper remedy for Mr. Bowser's repudiation of the plea agreement reveals that Mr. Bowser's pre-sentence motion to withdraw his guilty pleas in this case should have been granted.

Prior to sentencing, a "defendant should be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced." *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). While pre-sentence plea withdrawal should be freely allowed, it is not guaranteed. *State v. Jenkins*, 2007 WI 96, ¶¶28-32, 303 Wis. 2d 157, 736 N.W.2d 24. "The defendant has the burden to prove by a preponderance of the evidence that he has a fair and just reason," which "must be something other than the desire to have a trial or belated misgivings about the plea." *Id.* ¶32 (internal citations omitted).

Successful withdrawal of a guilty plea entered pursuant to a plea agreement, however, constitutes a material and substantial breach of that plea agreement if the withdrawal defeats a benefit of the agreement for the non-breaching party. *State v. Robinson*, 2002 WI 9, ¶47, 249 Wis. 2d 553, 638 N.W.2d 564 (overruled on other grounds by *State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886); *State v. Deilke*, 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945.

"Wisconsin case law clearly holds that a defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement." *State v. Lange*, 2003 WI App 2, ¶32, 259 Wis. 2d 774, 656 N.W.2d 480. The

appropriate remedy in such a circumstance, ordinarily, is to vacate the negotiated plea agreement and reinstate the original charges. *Robinson*, 2002 WI 9, ¶48. “But the appropriate remedy depends on the totality of the circumstances. A [circuit] 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.*

The circuit court’s choice of remedy for a plea breach – withdrawal from all or part of the plea agreement – is an exercise of discretion which this court reviews under the erroneous exercise of discretion standard. *State v. Roou*, 2007 WI App 193, ¶13, 305 Wis. 2d 164, 738 N.W.2d 173. Under that standard, this court will uphold a circuit court’s decision unless the record shows that the circuit court did not exercise its discretion, the facts do not support the circuit court’s decision, or the circuit court applied the wrong legal standard. *Id.* ¶14.

- A. The facts do not support the circuit court’s decision and the circuit court failed to apply the correct legal standard in determining the remedy for Mr. Bowser’s plea breach.

Contrary to the circuit court’s findings, the parties had reached a plea agreement encompassing both 16-CF-11 and 16-CF-189. As the parties had reached a global plea agreement, the question for the circuit court was not whether Mr. Bowser had presented a fair and just reason for plea withdrawal in each case, but rather, whether partial or total plea withdrawal should be granted under the totality of the circumstances. The circuit court failed to apply the correct legal standard in this case and the facts do not support its choice of remedy. Accordingly, the circuit court’s denial of

Mr. Bowser's motion to withdraw his guilty pleas in this case must be reversed and the judgment of conviction vacated.

Although it did not specifically say so in its ruling, the circuit court's analysis of the plea withdrawal motion demonstrates that it concluded that there was no global plea agreement. Initially, the circuit court stated that there was no plea agreement at all: "There was no plea deal. That's why we have a PSI and argued sentence, don't we?" (46:63; App. 105). Nevertheless, by reinstating the charges that were dismissed and read in, the court seemed to acknowledge that, at least in 16-CF-11, there was a negotiated agreement. The circuit court's analysis of the fair and just reason standard, treating each case differently, shows that it did not consider there to be a global plea agreement. This conclusion that the plea agreement did not encompass both cases, however, is contrary to the great weight and clear preponderance of the evidence.

As counsel pointed out at the motion hearing, Mr. Bowser's guilty pleas on each case were taken at the same time. (46:63; App. 105). This was "a package deal." (46:63; App. 105). The state agreed to dismiss and read in three felony charges in 16-CF-11, in exchange for Mr. Bowser's guilty pleas to two felonies in 16-CF-189 and one felony in 16-CF-11. (52:2). Mr. Bowser's three convictions stemmed from a single agreement, accepted and entered into at the plea hearing on October 31, 2016. Only one plea questionnaire containing both case numbers was submitted and only one plea colloquy was conducted. (15; 52). A conviction in just 16-CF-11 was not enough for the state, as demonstrated by Mr. Bowser's simultaneous guilty pleas in this case. *See Lange*, 2003 WI App 2, ¶¶35-36. The disposition of both cases was encompassed in a single agreement.

In *State v. Lange* this court found that the parties had a singular, global plea agreement despite the fact that the defendant entered guilty pleas in two separate cases, before two different judges, on two different dates. *Id.* ¶¶9-10, 35-36. In that case the parties agreed that the defendant would enter no contest pleas to one count in each case he had pending and the remaining charges in both cases would be dismissed and read in. *Id.* ¶9. This court found that the fact that the convictions were contained in multiple judgments of conviction did not alter the analysis and that a withdrawal of the defendant's plea in one case may warrant vacating the judgments of conviction in both. *Id.* ¶¶36-37. Just as in *Lange*, the state's need for a conviction in both of Mr. Bowser's cases caused them to be interconnected and demonstrates that this was a global plea agreement which should have been vacated in its entirety. *See Id.* ¶¶35-36.

The circuit court's erroneous conclusion that the cases were not part of a global plea agreement caused it to apply the wrong legal principles in determining whether Mr. Bowser's guilty pleas in this case should be withdrawn. Rather than considering the totality of the circumstances or the interests of the parties, the circuit court applied only the fair and just reason analysis for pre-sentencing plea withdrawal. After finding that Mr. Bowser established that a fair and just reason for plea withdrawal existed, the circuit court determined that it only existed in relation to the plea in 16-CF-11. (46:69; App. 111). The circuit court noted that the cases involved separate incidents and separate confidential informants. (46:69; App. 111). It then found that Mr. Bowser had not presented a fair and just reason to withdraw his guilty pleas in this case. (46:69; App. 111).

While deference is given to a circuit court's exercise of discretion, the exercise of discretion "contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." See *State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). Here, the circuit court failed to consider the totality of the circumstances or the interests of either party when it fashioned its remedy. The circuit court did not conduct the necessary and appropriate legal analysis and, as such, its decision to vacate only the guilty plea in 16-CF-11, leaving the pleas in this case intact, was clearly erroneous. Accordingly, this court should vacate the judgment of conviction and withdraw Mr. Bowser's guilty pleas, remanding the case to the circuit court for further proceedings.

- B. Review of the record demonstrates that the appropriate remedy, under the circumstances and considering the interests at stake, was to vacate the entire plea agreement and allow withdrawal of the guilty pleas in this case.

Mr. Bowser's successful withdrawal of his guilty plea in 16-CF-11 was a material and substantial breach of the negotiated plea agreement. See *State v. Pohlhammer*, 78 Wis. 2d 516, 524, 254 N.W.2d 478 (1977) ("Invalidating the plea invalidates the plea bargain."). The appropriate remedy for Mr. Bowser's repudiation of the plea agreement was vacating the plea agreement in its entirety and returning the parties to their pre-plea positions.

When the circuit court found that there was a fair and just reason for plea withdrawal and allowed Mr. Bowser to withdraw his plea in 16-CF-11, the basis on which the state

had entered the plea agreement had substantially changed. *See Robinson*, 2002 WI 9, ¶47. Rather than having secured three convictions with a total exposure of 31 years in prison, the state had two convictions with a maximum sentence of 18½ years in prison. Mr. Bowser's successful withdrawal of one guilty plea was a material and substantial breach of the plea agreement, requiring the circuit court to consider the totality of the circumstances and balance the interests of the parties in fashioning the appropriate remedy. *Roou*, 2007 WI App 193, ¶¶22-23.

Mr. Bowser was initially charged with six felonies in two separate criminal cases. Both cases involved allegations that Mr. Bowser delivered heroin, or other substances, to confidential informants. Moreover, Mr. Bowser was released on a signature bond in the first case when he allegedly committed the offense in the second case. These cases were significantly related and, if requested by the state, could have been tried together as the evidence in one case would have been admissible in the other case. Rather than have a trial, however, the parties agreed to resolve both cases through a plea agreement. As agreed, Mr. Bowser pled guilty to Count 1 in 16-CF-11 and Counts 1 and 2 in 16-CF-189, in exchange for Counts 2, 3, and 4 of 16-CF-11 being dismissed and read in and the state capping its sentencing recommendations.

Both parties made concessions and received benefits in this negotiated plea agreement. Mr. Bowser initially faced six felony charges which he bargained down to three, decreasing his prison exposure from 41½ years to 31 years, in exchange for relinquishing his constitutional right to a jury trial in each case. The state, on the other hand, gave up its ability to prosecute and obtain a conviction on three felony counts in exchange for Mr. Bowser's guilty pleas on the other three felony counts. Under the agreement, the state secured

three felony convictions with significant prison exposure without the time and expense of a trial.

By withdrawing Mr. Bowser's guilty plea in 16-CF-11, and reinstating the dismissed and read in charges, the circuit court left Mr. Bowser exposed to additional convictions and more prison time than he bargained for. At the same time, the circuit court put the state in a better position than it bargained for. The state retained the benefit of the two convictions in this case and gained the opportunity to convict Mr. Bowser of four additional felonies, with the possibility of a significantly longer overall sentence. The state retained the benefit of the plea agreement without the cost – it secured the two convictions in this case through Mr. Bowser's waiver of his right to a jury trial, without having to forgo its right to prosecute the charges in 16-CF-11.

The totality of the circumstances required that the entire plea agreement be vacated and the parties be placed in their pre-plea positions. Any other remedy would ignore the interests at stake. Mr. Bowser gave up his constitutional rights in this case in exchange for a significant reduction in the number of convictions and prison time he faced. When the circuit court granted withdrawal in 16-CF-11 and reinstated all of the charges in that case, the only benefit of the plea agreement that Mr. Bowser was left with was the state's agreement to cap its sentence recommendation in this case. (52:3). The circuit court's failure to vacate the entire plea agreement placed the state in a much better, and Mr. Bowser in a much worse, position than each had been in prior to the negotiated plea agreement.

The fact that the state later chose to dismiss the entirety of 16-CF-11 does not change this analysis. That fact was not known at the time of the motion hearing. In fact, the

state adamantly requested that the previously dismissed and read in counts be reinstated and all were set over for a jury trial. (46:70; App. 112). Moreover, the statute of limitations has not yet run and the charges could be filed again.

Under the totality of the circumstances, and weighing the parties' interests as they existed at the time of the hearing, the appropriate remedy for Mr. Bowser's successful plea withdrawal motion was to undo the entire plea agreement and restore the parties to their pre-plea positions. Consequently, the circuit court erroneously exercised its discretion when it denied Mr. Bowser's motion for plea withdrawal as to this case and the judgment of conviction must be vacated.

CONCLUSION

The circuit court erroneously exercised its discretion when it found that Mr. Bowser had to present a fair and just reason for plea withdrawal in each case that comprised the global plea agreement. Under the circumstances, the appropriate remedy was to vacate the entire plea agreement and restore the parties to their pre-plea positions. For those reasons, Mr. Bowser respectfully requests that this court vacate the judgment of conviction, withdraw his guilty pleas, and remand the case to the circuit court for further proceedings.

Dated this 7th day of May, 2018.

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 3,434 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 7th day of May, 2018.

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APPENDIX

**I N D E X
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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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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