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STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP313-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEVON MAURICE BOWSER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
ENTERED IN DOUGLAS COUNTY CIRCUIT COURT,
THE HONORABLE GEORGE L. GLONEK PRESIDING.

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1) Did the circuit court erroneously exercise its discretion in denying Defendant-Appellant Devon M. Bowser's pre-sentencing motion for plea withdrawal in Douglas County case number 16-CF-189?

The circuit court implicitly answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent State of Wisconsin does not request oral argument or publication. The parties' briefs adequately develop the law and facts necessary for disposition of the appeal. Publication is unwarranted because the case can be decided by applying well-established legal principles to the facts.

INTRODUCTION

Bowser was convicted of delivery of a controlled substance (heroin), and felony bail jumping in Douglas County case number 16-CF-189. Bowser entered a guilty plea to the charge pursuant to a plea agreement with the State encompassing the 16-CF-189 matter and another case, 16-CF-11, also involving delivery of a controlled substance (heroin) and related charges. The agreement called for Bowser to plead guilty to select charges in both cases, for some charges to be dismissed, and for the State to cap its sentencing recommendation at a pre-determined amount of confinement.

Just prior to sentencing, Bowser filed a motion for plea withdrawal. The basis for Bowser's motion was a letter from a confidential informant who had conducted a controlled buy from Bowser in the transaction that underlies the charges in 16-CF-11. The informant, Justin Schiffer, wrote a letter declaring that the person he bought heroin from was another man. When law enforcement investigated the letter's validity, Schiffer admitted

that he had written it at Bowser's instruction and out of fear. However, when called to testify about the letter, Schiffer invoked the Fifth Amendment and refused to answer questions.

Finding that Schiffer's credibility was in doubt, the circuit court allowed Bowser to withdraw his plea in 16-CF-11 because Schiffer had conducted the controlled buy in that case. However, the circuit court denied Bowser's motion as to 16-CF-189 because there, a different informant was used to conduct the controlled buy.

This Court should affirm the circuit court's discretionary decision to deny plea withdrawal in 16-CF-189 because the controlled buy in that case did not involve Schiffer. Therefore, Schiffer's credibility or lack thereof is not a fair and just reason that warrants plea withdrawal in that case. Because Bowser got the benefit of the agreement with the State and the State performed as expected at his sentencing hearing in the 16-CF-189 case, Bowser is not entitled to any relief from this Court.

STATEMENT OF THE CASE

On October 31, 2016, Bowser entered guilty pleas to resolve two pending Douglas County cases, numbers, 16-CF-11 and 16-CF-189. [1] (R. 52:2–3.) Both cases alleged that Bowser sold heroin to a confidential informant; first in December 2015 in the 16-CF-11 case, and then in March 2016 in the 16-CF-189 case. (R. 1:1–2; 23:9–13.) In both cases, law enforcement had a confidential informant purchase heroin in controlled buys with Bowser. (R. 23:10–13.)

Law enforcement used different informants for each transaction: Justin Schiffer in the 16-CF-11 case, and an

[1] Bowser's plea also resolved a related civil matter in Douglas County case number 16-CV-20. (R. 52:2.)

unidentified informant in case number 16-CF-189. (R. 46:46–48, 59.)

Bowser elected to plead guilty pursuant to a plea bargain with the State. (R. 52.) The agreement called for Bowser to plead guilty in 16-CF-11 and in 16-CF-189. (R 52:2.) In 16-CF-11, the agreement called for Bowser to plead guilty to one count of delivery of a controlled substance while the State would move to dismiss the three remaining counts and have them read in at sentencing, and for the State to "cap its [sentencing] recommendation [at] midline of the PSI or eight years of prison, whichever is higher." (R. 52:2.) In 16-CF-189, the agreement called for Bowser to plead guilty to the delivery of a controlled substance and felony bail jumping charges, with the State again agreeing to cap its sentencing recommendation at the "midline" of the PSI's recommended sentence or nine years of prison, whichever was higher. (R. 52:2–3.) After memorializing the agreement on the record, the circuit court conducted a plea colloquy with Bowser and accepted his guilty pleas in both cases. (R. 52:3–7.)

The matter was set to proceed to sentencing on January 17, 2017. (R. 52:7–8; 20:2.) However, prior to the January 17, 2017 date, Bowser's attorney, Assistant State Public Defender Michael C. Hoffman, received a letter from Schiffer that claimed he had lied when he identified Bowser as the person who sold him heroin in January 2015. (R. 23:4.) On February 1, 2017, ASPD Hoffman filed a motion for plea withdrawal in both cases based entirely on Schiffer's letter. (R. 20.)

Dated December 30, 2016, Schiffer's letter claimed he "wore a listening device when I met up with a male that I knew by the name of "Zeek" [Bowser's nickname] but once I got into the vehicle I purchased the heroin off [of] another person that was in the vehicle." (R. 23:4.) Though the letter crudely referenced Bowser several times as the person who was wrongly implicated, in each

instance Bowser's name appeared to have been written by someone else after the rest of the text was written. (*See* R. 23:4.)

The Douglas County Sheriff's Department began an investigation into the letter. (R. 23:5.) On February 3, 2017, Investigators Brad Hoyt and Sean Holmgren went to the St. Louis County Jail in Minnesota, where Schiffer was being housed, to question him about the letter. (R. 23:7.) When asked why he wrote the letter, Schiffer responded, "Well, I got put in the same unit[2] as [Bowser], and obviously you guys know that he's a gang banger as well. It was either [write the letter], or my stay here would have been horrible." (R. 23:7.) Schiffer explained that Bowser came up to him and said Schiffer "needed to write a paper" or "we are going to have to see what we can do." (R. 23:7.)

Schiffer further explained how Bowser instructed him to leave blank spaces for Bower's name to be inserted later, which explains why the person is identified as both "Devon Bowser" and "Deon Smith." (R. 23:7.) Bowser then had three associates named D-Man, Fresh, and Tate explicitly tell Schiffer that "[e]ither write this [recantation letter] or you're going to get your ass beat and starve until you go home." (R. 23:7.) Indeed, when asked directly if the purported recantation was truthful, Schiffer said it was not. (R. 23:7.)

The State presented all this information to the circuit court prior to its hearing on Bowser's motion to withdraw his guilty plea. (*See* R. 23:1.) However, once the hearing began, Schiffer attempted to invoke the Fifth Amendment in response to every question, saying he was pleading the Fifth to "[e]verything." (R. 46:12.) Schiffer otherwise denied his involvement in the December 2015 controlled buy and claimed he hadn't said anything about

[2] Investigators Hoyt and Holmgren confirmed that Schiffer and Bowser had been housed in the same unit in December 2015. (R. 23:8.)

the letter to Investigators Hoyt and Holmgren in the St. Louis County jail. (R. 46:13–25.)

In response, both Hoyt and Holmgren testified that they met with Schiffer as their reports indicated, and that he told them that he only wrote the "recantation letter" under threat from Bowser and his associates. (R. 46:30–41, 45–55.) The State also presented testimony from Investigator Todd Maas, who confirmed that it was Bowser who sold heroin to Schiffer in the December 2015 controlled buy. (R. 46:57.) Importantly, Investigator Maas also confirmed that a "separate [unidentified confidential informant]" conducted the March 11, 2016 controlled buy underlying the charges in Douglas County case 16-CF-189. (R. 46:59.)

After hearing the parties' arguments on Bowser's plea withdrawal motion, the circuit court concluded that Schiffer's testimony "certainly raises issues of credibility of [himself as an] informant." (R. 46:68.) The circuit court noted the relatively low threshold Bowser had to meet to withdraw his plea pre-sentence: "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." (R. 46:69.) The court concluded that "based on the number of versions of statements given by Mr. Schiffer, obvious issues of credibility, even with regard to his testimony today . . . . 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." (R. 46:69.)

However, the court continued its remarks by rejecting Bowser's plea withdrawal claim as to the charges in 16-CF-189. The court observed, "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 that there's been any testimony here today from which I can make a finding that there's a fair and just reason

for Mr. Bowser to withdraw his plea in that file." (R. 46:69.) The circuit court then allowed the State to reinstate the charges in 16-CF-11 as they were originally filed and set the matter in 16-CF-189 for a "status" hearing in the near future. (R. 46:70.)

In June 2017, the circuit court sentenced[3] Bowser in the 16-CF-189 case. (R-App. 101.) Before hearing sentencing argument, the court noted, "Ultimately, [the 16-CF-11 file] was dismissed, so, presumably, we have less charges now for sentencing than originally." (R-App. 102.) Then, just as it said it would, the State performed its duties under the agreement "that originally encompassed two files but now encompasses the one" by capping its sentencing recommendation at "nine years of prison, five years of initial confinement and four years of extended supervision; that is the State's recommendation, consistent with the plea agreement." (R-App. 104.)

After noting that the "recommendation [from] the District Attorney with regard to sentencing [on the delivery of a controlled substance count] is appropriate," the court imposed nine years of imprisonment, consisting of five years of initial confinement followed by four years of extended supervision. (R-App. 117–18.) On the bail jumping count, the court imposed five years of imprisonment, consisting of two years of initial confinement

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[3] A transcript of Bowser's June 14, 2017 sentencing hearing is not part of the appellate record in this case, so the State has appended it as an exhibit to its brief. (*See* R-App. 101–20.) As Appellant, it is Bowser's duty to ensure that the appellate record is complete, and this Court may assume that any information missing from the record supports the circuit court's decision to deny Bowser's plea withdrawal in case number 16-CF-189. *See State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 ("It is the appellant's responsibility to ensure completion of the appellate record" and "when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.") (citation and internal quotation marks omitted).

followed by three years extended supervision. (R-App. 118.) The sentences are concurrent with one another. (R-App. 118.)

Bowser appeals. Bowser did not file a postconviction motion,[4] but is seeking to appeal the circuit court's denial of his motion for plea withdrawal in both Douglas county cases, 16-CF-11 and 16-CF-189. (R. 40.)

STANDARD OF REVIEW

1) The determination of whether a fair and just reason exists to withdraw a plea before sentencing rests within the sound discretion and wide latitude of the circuit court, and is therefore reviewed on appeal only for an erroneous exercise of discretion. *State v. Jenkins*, 2007 WI 96, ¶¶ 29–30, 303 Wis. 2d 157, 736 N.W.2d 24.

ARGUMENT

I. The circuit court properly exercised its discretion in denying Bowser's motion for plea withdrawal in Douglas County case 16-CF-189.

A. Applicable legal principles

A defendant seeking to with draw a guilty or no contest plea prior to sentencing must show that there is a "fair and just reason" for allowing him to withdraw the plea. *State v. Kivioja*,

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[4] The circuit court denied Bowser's motion as to Douglas County case number 16-CF-189 because that case did not involve Schiffer. (*See* R. 46:69.) However, it does not appear that it was presented with Bowser's argument that it misunderstood the "global" nature of the plea agreement when denying the motion as to the 16-CF-189 case, and his corresponding claim that the only appropriate remedy is wholesale plea withdrawal. (*See* R. 20:1–3.) Consequently, this Court could reject Bowser's appeal because he failed to properly and completely raise his claim below. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court.").

225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999). A fair and just reason contemplates the mere showing of some adequate reason for defendant's change of heart, other than the desire to have a trial. *State v. Bollig*, 2000 WI 6, ¶ 29, 232 Wis. 2d 561, 605 N.W.2d 199.

Withdrawal of a guilty plea before sentencing is not an absolute right. *State v. Canedy*, 161 Wis. 2d 565, 582–83, 469 N.W.2d 163 (1991). Although plea withdrawal should be freely allowed before sentencing, freely does not mean automatically. *State v. Garcia*, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). Wisconsin has distinguished itself from jurisdictions that hold that "any desire to withdraw the plea before sentencing is 'fair and just' as long as the prosecution would not be prejudiced." *Canedy*, 161 Wis. 2d at 583.

The burden is on the defendant to prove a "fair and just reason" for withdrawal of the plea by a preponderance of the evidence. *Garcia*, 192 Wis. 2d at 862 (citing *Canedy*, 161 Wis. 2d at 584).

On review of the circuit court's decision, this Court applies a deferential, clearly erroneous standard to the circuit court's findings of evidentiary or historical fact, which include the circuit court's credibility determinations. *Jenkins*, 303 Wis. 2d 157, ¶ 33. Moreover, in reviewing factual determinations as part of a review of discretion, this court looks to whether the circuit court has examined the relevant facts and whether the court's examination is supported by the record. *Id.*

In short, it is within the circuit court's discretion to determine whether a defendant's reason adequately explains his or her change of heart, and this court should affirm the circuit court's decision unless it is an erroneous exercise of that discretion. *Kivioja*, 225 Wis. 2d at 284–87.

B. The circuit court correctly rejected Bowser's attempt to withdraw his pleas in Douglas County case 16-CF-189 because the basis for his motion applied only to the 16-CF-11 case involving Schiffer.

Bowser argues that the circuit court erroneously exercised its discretion in denying his motion for plea withdrawal in the 16-CF-189 case. (Bowser's Br. 5–13.) He claims that Wisconsin case law requires that he be allowed to withdraw his pleas in both cases when they were resolved in a global plea agreement. (Bowser's Br. 10–13.)

Bowser is wrong because the "fair and just" reason recognized by the circuit court relates only to the controlled buy underlying the 16-CF-11 case and not the 16-CF-189 case. And though there is case law saying that this Court can review multiple judgments of conviction in the context of a plea withdrawal claim, that case law does not hold that a circuit court must allow total plea withdrawal in a case involving a consolidated plea agreement. Rather, it says that a circuit court should fashion an appropriate remedy in the exercise of its discretion to fit the facts of the case. *Compare State v. Lange*, 2003 WI App 2, ¶ 32, 259 Wis. 2d 774, 656 N.W.2d 480 ("[A] defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement.") (citation omitted); *State v. Roou,* 2007 WI App 193, ¶ 13, 305 Wis. 2d 164, 738 N.W.2d 173. *(*[A] circuit "court's choice of remedy when faced with a motion to withdraw all or part of a plea agreement should be reviewed under an erroneous exercise of discretion standard.").

Rather, as our Supreme Court observed in *State v. Robinson*, 2002 WI 9, 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), when confronted with a situation involving a successful motion for plea withdrawal as to one conviction but not another, "under some circumstances, [vacating the sentence imposed and reinstating the original charges] might not be

appropriate." *Id.* ¶ 3. Instead, "[a] court should . . . examine the remedies available and adopt one that fits the circumstances of the case after considering both the defendant's and the State's interests." *Id.* Because Schiffer's letter about Bowser had no impact on or connection to his case in 16-CF-189, the circuit court properly concluded that Bowser had not shown a fair and just reason warranting plea withdrawal in that case.

Bowser cites *Lange* in support of his claim that the circuit court erred in not allowing him to withdraw his pleas in both cases, arguing that it's statement that "a defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement" is controlling in this case. (Bowser's Br. 9, *Lange*, 259 Wis. 2d 774, 32.) But *Lange* does not dictate the outcome of Bowser's plea withdrawal claim because both *Robinson* and *Roou* both make clear that a circuit court properly exercises its discretion in addressing plea withdrawal claims as long as it crafts an appropriate remedy that fits the facts of a particular case.

In *Lange*, this Court was presented with a situation in which a defendant sought plea withdrawal in two cases before two different circuit court judges. *Lange*, 259 Wis. 2d 774, ¶¶ 5–8. The cases were resolved in a plea agreement. *Id.* ¶ 8.

On appeal, Lange sought plea withdrawal as to only one of the cases. *Id.* ¶ 31. The State argued that if Lange were successful in withdrawing his plea in the case he appealed, then the entire plea agreement involving both cases should be invalidated. *Id.* Lange disagreed, arguing his notice of appeal encompassed only the one case, not both. *Id.*

This Court concluded that it could reach both cases, even though Lange had not appealed from one of them. *Id.* ¶ 36. It noted that "when a criminal appeal is taken from a conviction resulting from a plea bargain, it brings before us all of the judgments of conviction . . . even when the appellant attempts to limit our review to only a portion of the judgment of conviction or

order by the way in which the notice of appeal is stated." *Id.* ¶ 35 (citation omitted). The Court then remanded the matter for a *Bangert*[5] hearing, concluding that if the State failed to show that Lange's plea was knowingly, intelligently, and voluntarily entered, that the circuit court "is authorized to vacate both judgments of conviction and to reinstate the original charges alleged against Lange in both cases." *Id.* ¶ 37. Thus, *Lange* recognizes that an appropriate remedy for a defendant's breach can be to vacate the plea agreement and reinstate the original charges. *Id.*

But that is not the only remedy. The same year, the Wisconsin Supreme Court considered a similar challenge to a plea bargain in *Robinson*, 249 Wis. 2d 553, ¶ 3. In *Robinson*, the court addressed what the "appropriate remedy [is] when an accused is convicted on the basis of a negotiated plea agreement and the counts later are determined to be multiplicitous" *Id.* ¶ 2. The court observed that "ordinarily the remedy is to reverse the convictions and sentences, vacate the plea agreement, and reinstate the original information so that the parties are restored to their positions prior to the negotiated plea agreement." *Id.* ¶ 3.

However, the *Robinson* court rejected this "ordinary" remedy, concluding that it might not be appropriate in all cases. *Id.* Rather than only allowing wholesale plea withdrawal when one party breaches a plea agreement, a court should "examine the remedies available and adopt one that fits the circumstances of the case after considering both the defendant's and the State's interest." *Id.* That way, a circuit court can take into account the actions of the party who caused the breach because the "remedy for a breach of a plea agreement depends on the nature of the breach and the totality of the circumstances." *Id.* ¶ 19.

After examining those factors, the *Robinson* court determined that the best remedy in a situation in which both

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[5] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

counts were multiplicitous was for the parties to "be restored to the same positions they respectively held before the defective plea agreement was entered." *Id.* ¶49. The court concluded that when Robinson successfully withdrew his plea on one of the convictions, the "basis on which the State had entered the plea agreement was substantially changed" because the agreement depended on Robinson pleading guilty to both counts, not just one. *See Id.* ¶ 47. As a result, the State came out worse than Robinson because it still performed its duties but was deprived of one of the two guilty pleas Robinson had promised in exchange for performance of those duties. *Id.*

Thus, *Robinson* stands for the proposition that vacating the conviction and restoring the original charges against a defendant is not the only remedy available; rather, a court "must examine all of the circumstances of a case to determine an appropriate remedy for that case, considering both the defendant's interests and [the] State's." *Id.* ¶ 49.

This Court has also validated that approach in *Roou,* 305 Wis. 2d 164, ¶ 17. In *Roou*, a defendant successfully moved to withdraw his plea in one case of a plea bargain involving two separate cases because he was not properly apprised of the elements in one case. *Id.* ¶ 1. However, the other case involved in the plea bargain was an entirely different charge with entirely different elements, so the circuit court concluded there that plea withdrawal was not warranted. *Id.* ¶ 8.

This Court affirmed, noting that while "*Robinson* . . . involved a legally defective plea that, if withdrawn, would have gutted the core agreement. Here, by contrast, withdrawing the defective plea leaves Roou with one less conviction and in the same position sentence-wise." *Id.* ¶ 17. Because allowing Roou to withdraw one plea involving a defective colloquy was an appropriate remedy where the other case involved did not suffer the same deficiency, this Court upheld the circuit court's decision, declaring again that "the appropriate remedy in such cases

depends upon the totality of the circumstances and a consideration of the parties' interests." *Id.* ¶ 1.

That is precisely what happened here. Just as in *Roou*, Bowser entered pleas to separate counts, then attempted to withdraw those pleas. And just as in *Roou*, the basis for his plea withdrawals only applied to one of the cases, i.e., Schiffer's recantations. In the 16-CF-11 case, the parties were restored to their original positions, with Bowser being allowed to withdraw his plea and facing a trial where he would be found guilty or not guilty. The State is also in the same position it was prior to the plea: it was required to prove Bowser's guilt on all counts, but retained the knowledge that Bowser would be exposed to substantially more incarceration if he were convicted on all of those counts. Thus, the State did not retain any "benefit" without also incurring a cost: the need to now prove Bowser's guilt at a trial.

Schiffer had no involvement at all in the controlled buy underlying Bowser's conviction in the 16-CF-189 case because a "separate [unidentified confidential informant]" conducted the March 2016 controlled buy. (*See* R. 46:59.) As the circuit court recognized, "I do not see that there's any basis in the record to allow Mr. Bowser to withdraw his pleas in 16-CF-189. Those were separate incidents, separate informant, and I don't believe that there's been any testimony here today from which I can make a finding that there's a fair and just reason for Mr. Bowser to withdraw his plea in that file." (R. 46:69.) Thus, the circuit court concluded that Bowser did not carry his burden in this case to prove a "'fair and just reason' for withdrawal of the plea by a preponderance of the evidence" *Garcia*, 192 Wis. 2d at 862.

The circuit court is correct: the facts as alleged in Bowser's motion for plea withdrawal had nothing to do with the March 2016 controlled buy underlying Bowser's charges in the 16-CF-189 case, so no "fair and just" reason exists to allow withdrawal in that case.

Thus, the circuit court properly exercised its discretion in denying Bowser's motion for plea withdrawal as to the 16-CF-189 case but not 16-CF-11. Because Bowser's motion did not establish any "fair and just reason" to allow him to withdraw his plea in that case, and because the State and Bowser both performed their respective duties as defined in their plea agreement, the circuit court correctly fashioned a "remedy" that fit "all of the circumstances of a case . . . considering both the defendant's [interests] and the State's." *Robinson*, 249 Wis. 2d 553, ¶ 48. That it did not find a basis to allow Bowser to withdraw his plea in the 16-CF-189 case does not mean the circuit court "misunderstood" the nature of the agreement. It simply means that the two cases were only bound together because of their similarities and for ease of resolution by a plea bargain. Indeed, allowing Bowser wholesale plea withdrawal in both cases when the facts brought to bear in his motion only involved one of them makes no sense, as the circuit court recognized. (R. 46:69.)

Bowser claims that the whole plea agreement should be invalidated because he was allowed to withdraw his plea in the 16-CF-11 case that was resolved along with the 16-CF-189 case in the plea agreement. (Bowser's Br. 10–13.) Bowser also contends that the circuit court "misunderstood" the interconnected nature of his plea bargain with the State. (Bowser's Br. 8.)

Bowser is wrong. First, the pleas were connected only in the sense that they were taken at the same time. While the underlying cases both involved heroin sales, they occurred on separate occasions, involved separate confidential informants and had their own separate plea offers. This was not a situation where there was one plea offer which involved one sentence recommendation covering all the offenses to which Bowser had pled. Rather, each case had a separate plea offer involving its own sentence recommendation. Therefore, a withdrawal of one plea had no effect on the recommendation for the other case.

Even if the pleas had been part of a "global agreement," as explained above, the court could nevertheless exercise its discretion and allow only a partial withdrawal if as here, the circumstances warranted it. And that is exactly what the court did.

Bowser also argues that in the event he is not allowed to withdraw his pleas in both cases, he will not receive the benefit of his bargain. (Bowser's Br. 11–12.) Specifically, he contends that if he is allowed to withdraw his plea in only 16-CF-11, he will then be exposed to additional convictions and prison time for the charges which would otherwise have been dismissed and read in. *Id.* And, he points out that the state will retain the convictions in 16-CF-189 as well as the opportunity to convict him of the four counts in 16-CF-11. He characterizes the situation as the state retaining all the benefits at no cost. *Id.* This is simply untrue as it ignores the fact Bowser the state will again have the burden of going through the time and expense of proving Bowser's guilt on charges for which he had previously been convicted – and Bowser will have the opportunity to be tried and possibly acquitted of those charges, which he did not have before the withdrawal of his plea. The possibility he may still be convicted and get more time is something he presumably weighed before he breached the agreement by withdrawing his plea. But that was his decision, not the state's.

It is also important to note that the State performed its obligation at sentencing just as it said it would: it argued for a sentence at the "midline" of the PSI's recommended sentence or nine years of prison, whichever is higher. (R. 52:2–3.) Thus, the State did exactly what it agreed to do, capping its sentencing recommendation at "nine years [of] prison, five years of initial confinement and four years of extended supervision . . . that is the State's recommendation, *consistent with the plea agreement*." (R-App. 104.) (emphasis added). Indeed, after noting that the "recommendation [from] the District Attorney with regard to

sentencing [on the delivery of a controlled substance count] is appropriate," the court imposed nine years of imprisonment, consisting of five years of initial confinement followed by four years extended supervision, just as the State had recommended. (*See* R-App. 117–18.) Thus, Bowser got the benefit he bargained for in exchange for his guilty plea in the form of the State's sentencing recommendation, and the State got what it bargained for in exchange: Bowser's guilty plea.

Bowser is also wrong when he contends that the circuit court's statement, "There was no plea deal. That's why we have a PSI and argued sentence, don't we?" means it did not understand the connected nature of Bowser's pleas in both cases. (*See* R. 46:63.) The circuit court was responding to Bowser's attorney's claim that plea withdrawal was appropriate in both cases, even though the facts in Bowser's motion only pertained to the 16-CF-11 case, by asking, "What about the [16-CF-189] file?" (R. 46:63.) When defense counsel responded that "I can't imagine . . . a situation in which part of a plea deal would be held against him." (R. 46:63), the circuit court then interjected, "There was no plea deal. That's why we have a PSI and argued sentence, don't we?" (R. 46:63.)

Read in context, the circuit court's comments reflect the reality that the parties agreed to a resolution where the State would make a sentencing recommendation that was based in part on the outcome of the PSI report. Indeed, that is precisely what happened, with defense counsel arguing against the PSI's author's recommendation as an overly harsh "14-fold increase" compared to Bowser's previous longest term of incarceration. (*See* R-App. 111.) Thus, a fair reading of the circuit court's comment is that it was just responding to defense counsel's statement, not that it misunderstood the nature of the parties' agreement. For the foregoing reasons, this Court should find the circuit court properly exercised its discretion and affirm its decision to deny Bowser's plea withdrawal motion in 16-CF-189.

CONCLUSION

This Court should affirm Bowser's judgment of conviction and the circuit court's decision denying his plea-withdrawal motion in Douglas County case no. 16-CF-189.

Dated this 26th day of July, 2018

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,114 words.

Dated this 26th day of July, 2018.

_____
ROBERT G. PROBST
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that 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 26th day of July, 2018.

_____
ROBERT G. PROBST
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Devon Maurice Bowser
Case No. 2018AP313-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

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

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, 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.

Dated this 26th day of July, 2018.

_____
ROBERT G. PROBST
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 26th day of July, 2018.

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ROBERT G. PROBST
Assistant Attorney General