STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

A. Mr. Bowser's plea withdrawal claim was properly raised in the circuit court.

In a footnote, the state asserts that Mr. Bowser did not bring the issue of a global plea agreement to the circuit court's attention and, consequently, that this court could reject Mr. Bowser's appeal. (*See* Response Br. 7, fn 4). The state's assertion is incorrect.

Trial counsel's motion for plea withdrawal requested that the circuit court allow Mr. Bowser to withdraw his pleas in both 16-CF-11 and 16-CF-189. (20). At the conclusion of the motion hearing, trial counsel again requested that the court allow Mr. Bowser to withdraw his pleas in both cases. (46:63). Trial counsel was then questioned by the circuit court about the request to withdraw the pleas in 16-CF-189 and in response, stated:

> Well, Your Honor, Mr. Bowser's pleas were taken at the same time. These were a package deal, all these deals were at the same time. These pleas were bundled together essentially. I -- can't imagine that we would have a situation in which part of a plea would be held against him --

(46:63). When the circuit court then stated that there was no plea agreement, trial counsel reiterated that there was an agreement and that it involved dismissal of some of the

charges in exchange for Mr. Bowser's guilty pleas in both cases. (46:63).

Mr. Bowser's claim was properly raised as both the circuit court and the state had notice that Mr. Bowser was seeking withdrawal of his pleas in both 16-CF-11 and 16-CF-189. Further, at the motion hearing both were made aware of Mr. Bowser's position that the pleas were connected and part of a global plea agreement.

If this court finds that the issue was not properly raised below, however, it should exercise its discretion and address the merits of this case. The forfeiture rule is one of judicial administration and an appellate court may consider the alleged forfeiture on review when it raises a question of sufficient public interest and involves a question of law which has been briefed by both parties. ***State v. Anderson***, 2006 WI 77, ¶26, 291 Wis. 2d 673, 717 N.W.2d 74 (overruled on other grounds by ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 327). The parties have briefed the issue in this case and its resolution raises a question of sufficient public interest related to pre-sentence plea withdrawal. This court, therefore, should address the merits of Mr. Bowser's case.

B. 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.

Mr. Bowser has established that the circuit court erroneously exercised its discretion when it denied his motion for pre-sentence plea withdrawal in this case. Specifically, the circuit court erroneously concluded that there was no global plea agreement and applied the wrong legal standard in

determining whether to allow Mr. Bowser to withdraw his pleas.

The great weight and clear preponderance of the evidence demonstrates that the parties entered into a global plea agreement which encompassed case 16-CF-11 and this case, 16-CF-189. In its Response Brief, the state seems to both concede and dispute the existence of a global plea agreement. (*See* Response Br. 13-14)("the two cases were only bound together because of their similarities *and for ease of resolution by a plea bargain*.")("the pleas were connected only in the sense that they were taken at the same time.") The state seems to assert that there was no global plea agreement because the withdrawal of a plea in one case would not affect the sentence recommendation in the other case. (*See* Response Br. 14). This position ignores the reality of plea agreements and the circumstances in these cases.

Plea agreements come in a variety of forms. Some call for a guilty plea to all charges and a specific sentence recommendation, some call for guilty pleas to some charges and dismissal of others with no sentence recommendation, and some call for a combination of the two. To say that the withdrawal of a plea in one case has to affect the sentence recommendation in the other in order for there to be a plea agreement that encompasses both is simply wrong. As pointed out in the Initial Brief, in ***State v. Lange*** this court held that there was a single, global plea agreement between the parties even though the defendant entered guilty pleas in two cases, before two different judges, on two separate dates. (Br. 9); ***State v. Lange***, 2003 WI App 2, ¶¶9-10, 35-36, 259 Wis. 2d 774, 656 N.W.2d 480. There, the defendant entered a plea to one count in each case in exchange for the other counts being dismissed and read in and there was no agreed upon sentencing recommendation. ***Id.***

The plea agreement at issue in this case required Mr. Bowser to enter guilty pleas in both 16-CF-11 and 16-CF-189. Specifically, it required Mr. Bowser to plead guilty to both counts in this case, as well as one count in 16-CF-11, in exchange for the dismissal of three counts in 16-CF-11 and a specific sentencing recommendation on each case. (52:2). Only one plea questionnaire was completed and only one plea colloquy was conducted. (15; 52). These cases were not resolved separately and simply heard at the same time. Rather, they were resolved together as part of a single agreement in which Mr. Bowser pled to a total of three felonies in exchange for the dismissal of three felonies.

Despite the interconnection of Mr. Bowser's two cases, the circuit court erroneously stated that there was no plea agreement in this case and consequently, applied the wrong legal standard when it denied Mr. Bowser's motion to withdraw his guilty pleas to the charges in this case.

Repeating the circuit court's erroneous analysis, the state argues that Mr. Bowser was not entitled to plea withdrawal in this case because there was no fair and just reason to warrant plea withdrawal. (*See* Response Br. 2, 9-10, 13). The state misunderstands the legal standard to be applied in this case. Mr. Bowser agrees that the fair and just reason standard applies to pre-sentence plea withdrawal claims. Here, however, the circuit court found that a fair and just reason for plea withdrawal did exist and allowed Mr. Bowser to withdraw his plea in 16-CF-11. (46:69). As the plea entered in that case was part of a plea agreement encompassing this case, 16-CF-189, however, the circuit court's analysis should not have ended there.

The question for the circuit court at that point was not whether there was a fair and just reason to allow plea withdrawal in 16-CF-189, but rather what remedy was appropriate in light of its finding that plea withdrawal in 16-CF-11 should be granted.[1] When Mr. Bowser successfully withdrew his plea in 16-CF-11, he breached the plea agreement that he entered into with the state. *See* ***Lange***, 2003 WI App 2, ¶32. While ordinarily the appropriate remedy is to vacate the negotiated plea agreement and reinstate the original charges, that is not required and the 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." ***State v. Robinson***, 2002 WI 9, ¶48, 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).

The circuit court did not engage in any such analysis at the motion hearing in this case. It did not consider alternative remedies or weigh the interests of the state and Mr. Bowser. Rather, it applied the fair and just reason standard to each case separately, finding that no fair and just reason existed to allow plea withdrawal in this case. (46:69). The circuit court's sole explanation of its denial of plea withdrawal in this case was:

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[1] The state asserts that Mr. Bowser claims that the law required the court to allow him to withdraw his pleas in both cases. (Response Br. 9). The state misrepresents Mr. Bowser's argument. As laid out in his Initial Brief, Mr. Bowser acknowledges that the appropriate remedy for breach of a plea agreement is within the circuit court's discretion; however, he asserts that withdrawal of his pleas in this case was the appropriate remedy under the circumstances.

> 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). The circuit court then granted plea withdrawal in 16-CF-11 and reinstated the previously dismissed and read in charges in that case. (46:69-70). It did not consider the different positions this left the state and Mr. Bowser in, or the interests each had in returning to their pre-plea positions. It based its decision on the erroneous belief that it had to apply the fair and just reason standard to each case individually.

The state relies on ***Roou*** to support its position that the circuit court properly denied Mr. Bowser's motion for plea withdrawal because there was no fair and just reason for plea withdrawal in this case. (*See* Response Br. 12-13). That reliance, however, is misplaced as ***Roou*** does not support its argument.

In ***State v. Roou***, this court upheld a circuit court's decision to grant only partial plea withdrawal. ***Roou***, 2007 WI App 193, 305 Wis. 2d 164, 738 N.W.2d 173. Pursuant to a plea agreement, Roou pled no contest to two counts in his case and the remaining four counts were dismissed and read in. ***Id.***, ¶5. Subsequently, Roou moved to withdraw his pleas stating that he been misinformed about the elements of one of the counts and therefore his plea was not knowingly, voluntarily, and intelligently entered. ***Id.***, ¶8. The state responded to the motion, agreeing to plea withdrawal on the count to which Roou was misinformed, but opposing total plea withdrawal and agreeing not to reinstate any of the

charges if the court granted only partial plea withdrawal. ***Id.***, ¶21. The circuit court granted the motion as to the one count but refused to vacate the entire plea agreement. ***Id.***

Contrary to the state's argument, on appeal from that decision, this court did not simply evaluate whether there was a manifest injustice requiring plea withdrawal on the remaining count. This court upheld the circuit court's decision after considering the totality of the circumstances and balancing the interests at stake. ***Id.***, ¶¶22-23. What the state ignores is that the interests at stake are much different in Mr. Bowser's case than they were in ***Roou***. Unlike that case, Mr. Bowser's position was not made better by the circuit court's grant of only partial plea withdrawal. In ***Roou***, this court noted that Roou initially faced 111 years in prison on six charges which he negotiated down to two with a maximum exposure of 50 years. ***Id.***, ¶23. The court noted that partial plea withdrawal in that case did not change this and that the risk of additional convictions and prison time did not exist because the state agreed not to pursue the charge for which the plea was withdrawn or the dismissed and read in charges. ***Id.*** In Mr. Bowser's case, the state made no such concession. Instead, the state adamantly requested that all of the dismissed and read in charges be reinstated and that 16-CF-11 be set for trial, while the convictions in this case remained intact. (46:70). When the circuit court went along with that request it left Mr. Bowser in a much worse position than he had been in prior to the plea agreement. The circuit court in this case failed to consider these interests.

As the circuit court incorrectly determined that there was no global plea agreement and failed to balance the interests of the parties in determining the appropriate remedy for Mr. Bowser's plea breach which resulted from his successful plea withdrawal in 16-CF-11, it erroneously

exercised its discretion. *See* ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). This court, therefore, owes no deference to the circuit court's decision and, as the appropriate remedy under the totality of the circumstances and balancing the interests of the parties is plea withdrawal, should vacate the judgment of conviction and remand this case to the circuit court for further action.

C. 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.

The state very briefly attempts to argue that the circuit court's remedy of partial plea withdrawal was appropriate under the circumstances of the case and considering the interests of both parties. (*See* Response Br. 15). Specifically, the state relies on the fact that partial plea withdrawal left the state with the burden of having to prove Mr. Bowser's guilt on the charges in 16-CF-11 and that Mr. Bowser got the sentence that the state agreed to recommend in this case.[2] (*See* Response Br. 15-16).

The state simply ignores the realities of this case. The state makes no mention of the fact that partial plea withdrawal allowed the state to retain the benefit of the

[2] The state points out that the sentencing transcript is not part of the appellate record and that it was Mr. Bowser's duty to ensure that the appellate record is complete. The sentencing transcript, however, is not necessary to resolution of this appeal as the sentencing hearing occurred after the circuit court denied Mr. Bowser's motion for pre-sentence plea withdrawal and Mr. Bowser does not allege that the state violated the plea agreement at the sentencing hearing. While Mr. Bowser would not object to the transcript being made part of the record, the record on appeal is to be supplemented by motion under Wis. Stat. § 809.15(3)-(4).

two convictions in this case, while gaining the opportunity to convict Mr. Bowser of additional felonies in 16-CF-11. The circuit court's partial plea withdrawal essentially "reworked" the plea agreement in this case to one where Mr. Bowser pled guilty to all charges in exchange for a sentence recommendation of the midline of the PSI's recommended sentence of nine years, whichever is higher. Mr. Bowser no longer got the benefit of having three felonies dismissed and read in, in exchange for his pleas. Rather, he was again faced with the potential of conviction on a total of six felonies with significantly more prison exposure.

Balancing the interests of the parties at the time of the motion hearing reveals that the proper remedy for Mr. Bowser's breach of the plea agreement was vacating the plea agreement in its entirety and returning the parties to their pre-plea positions. Accordingly, Mr. Bowser's motion to withdraw his guilty pleas in this case should have been granted.

CONCLUSION

For these reasons, as well as those in the Initial Brief, this court should vacate the judgment of conviction, withdraw Mr. Bowser's guilty pleas, and remand the case to the circuit court for further proceedings.

Dated this 3rd day of August, 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 2,573 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 3rd day of August, 2018.

Signed:

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