STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I
Case No. 2018AP000595-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PIERRE DESHAWN JOHNSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Pedro A. Colon Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The circuit court erred in denying Mr. Johnson's motion for a modification of his sentence.

In its reply brief, the State begins its argument with a "summary" of Mr. Johnson's position on appeal. The State contends that Mr. Johnson is alleging that the "[circuit] court's decision amounts to error because the court 'was required to decide' whether Johnson presented a new factor." (State's Reply, 7). This is an inaccurate portrayal of Mr. Johnson's position on appeal and takes out of context the quote cited. First, the quote lifted the defendant's opening brief is from a sentence outlining the general two-prong analysis for deciding sentence modifications set for in *State v. Harbor*. (Opening Brief, 7). *See State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

Instead, Mr. Johnson argues on appeal that the circuit court's reliance on *State v. Turk* as controlling law in the context of a sentence modification was in error, as the court in *Turk* was deciding a completely different legal question[1] – whether the defendant

[1] In *State v Turk*, the court of appeals was considering whether injured victims' seatbelt use was relevant to the affirmative defense permitted by Wis. Stat. § 940.25(2), which states an "actor has a defense [to the crime of injury by intoxicated use of a vehicle] if it appears by a preponderance of (continued)

could call an expert witness to testify at trial regarding the victims' seatbelt use to support the affirmative, statutory defense found under Wis. Stat. §940.25(2). (Opening Brief, 4-7); *State v. Turk*, 154 Wis. 2d 294 (Ct. App. 1990). In other words, when the circuit court held that seatbelt use was not a new factor relevant to the purposes of sentencing because the holding in *Turk* says so, it did not engage in the proper exercise required by *State v. Harbor*, which requires that the court determine (1) whether the factor proposed for consideration by the defendant is in fact new information, and (2) whether the new evidence is material to the sentencing decision and warrants modification of the sentence previously imposed. *See Harbor*, 2011 WI 28, ¶38.

When reviewing the circuit court's decision denying a sentence modification, the process is two-fold. *Id.* at ¶33. First, a decision as to whether the defendant has presented a new factor is a question of law. *Id.*, citing *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). Mr. Johnson alleged in his postconviction motion and on appeal that the parties and the court unknowingly overlooked that

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the evidence that the great bodily harm would have occurred even if the actor had not been under the influence of an intoxicant." 154 Wis. 2d 294. The court of appeals held that the victims' seatbelt use was not material to Wis. Stat. § 940.25(2) because it is not an intervening cause of the injuries of the victims, and thus did not answer the question of whether the injuries would have occurred regardless of the driver's intoxicated state and his role in the car accident. *Id.* at 296-97.

the injured passenger in the vehicle Mr. Johnson's car hit was not wearing her seatbelt. (33; Opening Brief). It is undisputed by the State and circuit court (as neither argues otherwise) that the court was unaware of this information at the time of the sentencing hearing. (36; 40). Thus, Mr. Johnson concludes this information is a "new factor" for the purposes of a sentence modification as a matter of law and the circuit court erred in concluding otherwise ("The court finds that the rationale of *State v. Turk* [(citation omitted)] is applicable here and that a new factor does not exist." (40)). *Id.*

Next, if the reviewing court concludes that a new factor was presented by a defendant and the circuit court erred in holding the opposite, the reviewing court looks to whether the lower court alternatively decided that the new information did not justify sentence modification. This review is done under the rubric of erroneous exercise of discretion, which dictates that a reviewing court will "not set aside a discretionary ruling of the trial court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507, citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

Here, both the State and circuit court misunderstood the relevance of the holding in *Turk* in the context of sentence modifications and allowed

these beliefs regarding its applicability to improperly factor into the conclusion that the new factor did not warrant sentence modification. (36; 40). *See State v. Turk*, 154 Wis. 2d 294, 453 N.W.2d 163 (Ct. App. 1990). In its postconviction reply, the State concluded:

> The fact that [the victim] was not wearing a seatbelt is not relevant to a sentence because *Turk* and *Nester* [(the case relied upon in the *Turk* holding)] established that fact does not diminish the defendant's culpability for Ms. Murphy's injuries. Therefore, the defendant's sentence should not be modified because it is not a new factor.

(36, 2).

The circuit court's decision mirrors the State's misunderstanding of *Turk's* relevance, and plainly holds *Turk* to be instructive on whether a victim's seatbelt use is relevant to the issue of sentencing as a matter of law, as it directly cites the holding as standing for the principle that victim's seatbelt use is irrelevant and thus not a new factor warranting modification ("The court concurs completely with the State's position in this matter."; "The court finds that the rationale of *State v. Turk*, 154 Wis. 2d 294 (Ct. App. 1990) is applicable here and that a new factor does not exist." (40)).

Thus, the court erroneously exercised its discretion because it did not engage in the analysis prescribed in *Harbor*. *Turk*, 154 Wis. 2d 294; *Harbor*,

2011 WI 28. As a result, Mr. Johnson asks this court to reverse the circuit court's decision denying Mr. Johnson's sentence modification request and to remand this matter to the circuit court for reconsideration of the motion while applying the proper analysis.

II. The State breached the plea agreement when directly advocating for the sentence imposed by the circuit court, which was in excess of what the State promised to recommend as part of the plea agreement.

The State again improperly summarizes Mr. Johnson's position on appeal regarding his second claim that the State breached the plea agreement during the postconviction stage of the litigation. The State contends that Mr. Johnson takes the position that the State, by opposing his request for a sentence modification and "refuting his new factor claim," acted in violation of the plea agreement. (State's Reply, 4). The State argues that this claim is thus without merit because "[t]here was no agreement that the State would not oppose a postconviction motion requesting sentence modification if the court sentenced Johnson to a term that exceeded the agreed upon recommendation." (State's Reply, 9).

The State attempts to oversimplify the argument on appeal to distract from the real problem presented by its postconviction argument. Mr. Johnson does not allege that simple opposition to a sentence modification request is a breach of the plea

agreement – it would not be unless this was contemplated in the original plea offer. Mr. Johnson does not dispute that the State is able to take the position that a sentence modification is not supported as a matter of law. However, the State went further here.

By arguing that the sentence imposed by the court should be sustained because of the seriousness of the defendant's actions, the State was in violation of its agreement to meaningfully recommend five years initial confinement and four years of extended supervision in exchange for inducing Mr. Johnson's plea. The State specifically asked the court to deny the postconviction motion because:

> The defendant smoked marijuana before driving without a license and then sped through a red light to avoid the police. These are the events that caused Ms. Murphy's severe injuries not lack of a seatbelt. Even if this is a new factor it pales in comparison to the seriousness of the defendant's actions and therefore the Court should use its discretion and deny the sentence modification.

(36, 3). Had the State simply taken the position that seatbelt use by the victim was not highly relevant to the court's sentencing decision, there would not be a breach. But by pointing directly to the facts of the case, arguing that due to the aggravated and "serious" nature of Mr. Johnson's conduct, he did not deserve a shorter sentence, the State violated its

agreement to recommend a sentence less than what the court imposed.

Both the circuit court and State allege that this is a novel take on the law regarding plea agreements and postconviction obligations, but that is just not so. (36; 40). While there is not case law directly referencing a State's breach of a plea agreement in postconviction proceedings, there are several decisions in which Wisconsin courts have concluded that a defendant materially breached a plea agreement in postconviction litigation and the State was harmed as a result. *See, e.g., State v. Deilke*, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945 (A defendant materially and substantially breached a plea agreement, which involved the dismissal of certain charges in a prosecution involving several intoxicated driving allegations, by successfully challenging postconviction prior intoxicated driving offenses that were used for sentence enhancement purposes because the State retained only some of the benefits of the original agreement); *State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (If a defendant acts to "fraudulently induce[]" the state to enter into a plea negotiation through his presentation of false information, he has materially breached the plea agreement).

These same principles apply when it is the State who breached the plea agreement. The law on this issue is clear. If the either party presents an argument affecting sentencing that "violates the spirit of the plea agreement," there has been a

material and substantial breach of the contract. *See, e.g., State v. Wills*, 187 Wis. 2d 529, 523 N.W.2d 569 (Ct. App. 1994) (A prosecutor violated the plea agreement, which required the State to recommend that parole eligibility be determined by the parole commission and not the court, when the prosecutor made arguments that encouraged the trial court to set the parole eligibility date); *State v. Scott*, 230 Wis. 2d 643, 656, 602 N.W.2d 296 (Ct. App. 1999) (Once a contract is negotiated and a plea entered, the State cannot renege on the agreement and in the event of such breach, a defendant can seek enforcement of the agreement previously bargained for); *State v. Matson*, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945 (A letter to the court of an investigating officer involved in the case advocating for a sentence longer than that which the State had bargained during plea negotiations was a material and substantial breach of the plea agreement); *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733 (A "less than neutral" presentation of the plea bargain by the State constituted a material breach of the plea agreement).

The contract between Mr. Johnson and the State is not broken simply because he has already been sentenced once before. Therefore, Mr. Johnson contends, by presenting arguments contrary to its original sentencing recommendation and by arguing in support of a sentence that which the State agreed to recommend, the State materially and substantially breached the plea agreement. To remedy the State's error, Mr. Johnson asks that his motion be remanded back to the trial court to be decided by a different

judge, free from the improper arguments of the State. *See State v. Howard*, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244, citing *Santobello v. New York*, 404 U.S. 257, 263 (1971). ¶¶36-37.

CONCLUSION

Dated this 28th day of August, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,002 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 28th day of August, 2018.

Signed:

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Nicole M. Masnica
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