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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP002024 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS J. RICHER,

Defendant-Appellant.

Appeal of a Judgment and an Order
Entered in the Eau Claire County Circuit Court,
the Honorable Shaughnessy P. Murphy and
Sarah Mae Harless, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

The circuit court violated Richer's right to be free from double jeopardy when it *sua sponte* vacated his conviction.

A. Introduction.

As Richer recited in his opening brief, the circuit court accepted his plea and found him guilty. Later, during sentencing, the court vacated Richer's plea over his objection. That vacatur deprived Richer of the valuable consideration he'd received in exchange for waiving his constitutional right to trial: the state's recommendation that he serve six years in prison. Eventually the state would instead recommend 15 years, which is what the court imposed. App. 2-9.

Richer also explained that, by long-settled law, when the court decided to accept his plea and declare him guilty—after a lengthy and searching colloquy—jeopardy attached. Mr. Richer, at that moment, lost his presumption of innocence and the right to a trial, but he gained the right not to face further prosecution for the charge. The court violated that right when it undid his plea and restarted the prosecution over his objection. App. 12-13.

The state makes three arguments against Richer's double-jeopardy claim. As each of the three following sections will show in more detail, none have merit. But, briefly, the state's arguments are:

First, that this case falls within the exception to the rule against vacatur noted in *State v. Comstock*, 168 Wis. 2d 915, 953, 485 N.W.2d 354 (1992): that a court can undo a plea if it "finds that there was fraud in procuring the plea or that a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea." Resp. 11-16. Richer has already explained why the *Comstock* exception is not met. App. 14-18. The state's contrary argument confuses the circuit court's broad discretion *before* accepting a plea with the much narrower power to *vacate* a plea. The "material information" the state claims Richer withheld is, by binding case law, not sufficient grounds for vacatur.

The state next argues that jeopardy didn't attach in the first place, because the court vacated the plea at the same hearing at which it had accepted it. Resp. at 18-19. The state can't cite any authority for its same-hearing double jeopardy exception; in fact, it's squarely foreclosed by binding cases that Richer cited and that the state does not mention.

Finally, the state submits that Richer faced not double jeopardy, but "continuing jeopardy" as described in *Salters v. State*, 52 Wis. 2d 710, 191 N.W.2d 691 (1971). But *Salters* does not apply here;

Comstock limited its reach to situations involving an inadequate plea colloquy. There's also no legal basis for the state's claim that double jeopardy only comes into play where a plea involves the reduction of charges.

The court's vacatur of Richer's plea and conviction exposed him to double jeopardy. He is entitled to reinstatement of his original plea bargain.

B. The *Comstock* exception for fraud or intentional withholding of material information does not apply.

As it did below, the state goes to some length to show that there were adequate reasons for the circuit court not to accept Richer's plea. Resp. 11-16; (122:4-7). These include that Richer was unhappy with his prior lawyer, his wife's lawyer, and the Dunn County prosecutor's failure to turn over evidence, and that he was clearly hesitant to admit possession of and intent to distribute the drugs.

But the question here isn't whether the court, in its discretion, could have *rejected* the plea. Perhaps it could have, but it didn't. Instead, it conducted a long discussion with Richer to assure itself that he was pleading knowingly, voluntarily and intelligently. The result of this colloquy was the acceptance of Richer's plea, and the declaration that he'd been convicted. The question is whether Richer's subsequent statements permitted the court to *vacate* that conviction.

They were not. As Richer has already noted, a no-contest plea doesn't require the defendant to be happy about his own prosecution. App. 18. Richer's complaints about his counsel or the Dunn County prosecutor are not the sort of "material information" that a defendant is obligated to reveal before entering a plea. Indeed, such concerns are typically a matter kept between a defendant and his counsel. Richer's dissatisfaction did not, contrary to the state's suggestion, render his plea unknowing or involuntary. *See* Resp. 11. Richer's situation also has nothing to do with the state's parade of horribles: a defendant who "lied," "omitted key facts," "or was coerced into accepting a plea." Resp. 12. So the state's claim that Richer's argument would do away with the *Comstock* exception is specious.

The state also argues that Richer's claims, during his allocution, about the origin of the drugs constituted a denial of an element of the offense. Resp. 14. The state gets a fact wrong here: Richer was initially misinformed that the weight of the drugs proved intent to deliver, but this misinformation was then corrected, both by the prosecutor and the court. (61:6-8,16-17; App. 106-08,116-17). More importantly, much of the state's argument concerns Richer's statements and demeanor *before* the court accepted the plea. Again, while the court *could have* rejected the plea, it didn't. It instead assuaged its own concerns by conducting a thorough colloquy. Richer's reluctance to admit guilt before the plea's acceptance is not a basis for vacating his conviction.

As to Richer's remarks after the plea, the state insists they were denials of guilt. Resp. 14. As Richer has noted, though, *State v. Rushing*, 2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894, says claims of innocence do not justify vacatur. The state asserts that *Rushing* did not concern plea vacatur by the court, but rather plea withdrawal by the defendant. Resp. 16. This is flat wrong.

Rushing addressed a circuit court's vacatur of a defendant's plea after the defendant told the PSI author he was innocent. *Id.*, ¶11. This Court said that vacatur was improper, "absent circumstances not present here." *Id.*, ¶12. So, under *Rushing*, just as a claim of innocence will not permit pre-sentence plea withdrawal, it is not a circumstance that allows a circuit court to vacate a plea and conviction.

In sum, Richer's statements during allocution don't meet the *Comstock* exception. There was no basis for the court to vacate his plea due to intentional withholding of material information.

C. The state's claim that jeopardy doesn't attach at the moment of plea acceptance is contrary to binding case law.

The state seeks to narrow *Comstock* to its facts, arguing that "[j]eopardy does not attach in any meaningful sense" at the moment a court accepts a plea and finds a person guilty. Resp. 18. So, the state says, a court is free to vacate a plea, if it does so at the same hearing it was accepted.

This position has no logical basis. "Double jeopardy" here means "a second prosecution for the same offense after conviction." *See State v. Schultz*, 2020 WI 24, ¶21, ___ Wis. 2d ___, ___ N.W.2d ___. Richer was plainly "convicted" at the moment the court found him guilty—he'd given up the ability to contest the charges. If he'd changed his mind and wished to withdraw his plea, he'd have lacked the right to do so. Even more than a defendant at trial—where jeopardy attaches at the beginning, at the *moment* the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 38 (1978)—a defendant who has had his or her plea accepted has been subjected to jeopardy.

But the state's argument is not just illogical: it's directly contrary to binding case law. It's contrary to *Comstock*, first, which held that "jeopardy attached upon the circuit court's acceptance of the guilty pleas." 168 Wis. 2d at 938. It's also directly contradicted by *Hawkins v. State*, 30 Wis. 2d 264, 267, 140 N.W.2d 226 (1966), which said "[t]he general rule, adhered to by this court, is that jeopardy attaches the moment a plea of guilty is accepted by the court." The same rule is repeated in *State v. Petty*, 201 Wis. 2d 337, 362, 548 N.W.2d 817 (1996): "Where there is no trial, jeopardy attaches upon the court's acceptance of a guilty or no contest plea." Richer cited *Hawkins* and *Petty* in his opening brief. App. 12. The state doesn't mention them, but they foreclose its argument that jeopardy did not attach when the court accepted Richer's plea.

D. The double-jeopardy violation was not cured by Richer's entry into a less-favorable plea bargain.

The state claims that *Salters v. State*—a 1971 case discussing "continuing jeopardy"—governs here. Resp. 19-20. The state is wrong, because *Comstock* limited *Salters*. It noted that in the older case, the court had erroneously *accepted* the initial plea without hearing a factual basis or ascertaining whether it was voluntary. *Comstock*, 168 Wis. 2d at 945-46. But in *Comstock*—where, as here, "[n]either party claims that the circuit court's acceptance of the plea was erroneous"—the "continuing jeopardy" concept of *Salters* (and the federal cases the state mentions) doesn't apply. *Id.* at 943, 946.

The state also insists throughout its brief that the terms of Richer's second plea were not meaningfully distinct from those of his first. Resp. 7 ("almost identical"), 22 ("the 'original bargain' was functionally the same as the second plea agreement because the circuit court would not have been bound by the parties' joint sentencing recommendation at the first sentencing.") The notion is apparently that double jeopardy isn't implicated if total prison exposure for the second conviction is the same as for the first.

The state (again) cites no authority for this proposition. Neither *Comstock* nor any other case says a court is free to undo a conviction so long as the potential penalty remains the same. And for good

reason: the double-jeopardy clause doesn't simply prevent the imposition of additional *penalties*; it protects an already-convicted defendant from being subjected to continued *prosecution*. It consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. *It protects against a second prosecution for the same offense after conviction*. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (citations omitted; emphasis supplied); *see also Comstock*, 168 Wis. 2d at 936-37. The state's claim that double jeopardy only comes into play with increased penalties is simply incorrect.

It also ignores the reality of what happened in this case. While Mr. Richer's maximum exposure didn't change between his first and second pleas, the terms of the bargain he entered certainly did: the state went from agreeing to recommend six years of initial confinement to being uncapped—and it ultimately recommended 15 years (which is what the court imposed). The state seems to be saying a prosecutor's recommendation isn't worth anything. This would come as a surprise to prosecutors and defense lawyers; they bargain over such recommendations every day. It'd be news to defendants, too, who routinely exchange their constitutional rights for such recommendations. And it should shock the courts. They seem to think the state's recommendation *is* important—they hold that a prosecutor's failure to deliver on one is so grave that it violates due process. *See*, *e.g.*, *State v.*

Williams, 2002 WI 1, ¶37, 259 Wis. 2d 492, 637 N.W.2d 733.

So it's nonsensical to claim that Mr. Richer didn't face a greater risk in the second plea than in the first. Still more puzzling is the state's assertion that "Richer cannot show what elements of the 'original bargain' were unsatisfied." Resp. 22. The original bargain, again, included a joint recommendation of six years initial confinement. Obviously, this term was not satisfied by the state's recommendation of 15 years.

CONCLUSION

Because the circuit court erroneously vacated his plea over his objection, Douglas Richer respectfully requests that this Court vacate his sentence and remand with directions that the circuit court hold a new sentencing hearing under the terms of the original plea bargain.

Dated this 13th day of March, 2020.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

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 1,988 words.

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.

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 § 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.

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 13th day of March, 2020.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender