STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP2192-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DANIEL J. REJHOLEC,

Defendant-Respondent.

STATE'S APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE REBECCA L. PERSICK, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT AND APPENDIX

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INTRODUCTION

Defendant-Respondent Daniel J. Rejholec pleaded no contest to repeated sexual assault of the same child. At sentencing, the court asked Rejholec if he wished to make a statement. Rejholec exercised his statutory right to allocution and, for the first time, took responsibility for the assaults. "It's hard for me to understand why I did this," he said. The court imposed sentence and entered judgment.

Rejholec appealed, and this Court reversed Rejholec's conviction, concluding that inculpatory statements Rejholec made in a custodial interview were obtained in violation of *Miranda*.[1] The case was returned to the circuit court, and Rejholec was allowed to withdraw his guilty plea.

Rejholec subsequently filed a motion to prohibit the State from introducing Rejholec's allocution statements at trial. The court granted the motion, concluding, variously, that admission of such statements was barred by statute and as an illegal fruit of the custodial interview, and that admission of the statements would be a miscarriage of justice.

The circuit court erred in suppressing Rejholec's allocution statements. In *Greve*,[2] the Wisconsin Supreme Court held that, following withdrawal of a guilty or no-contest plea, a defendant's admissions contained in a defense-prepared sentencing memorandum were admissible at trial. Such statements, the supreme court determined, were voluntary and their admission was not barred by statute or constitutional principles. Likewise, Rejholec's allocution statements were voluntary, and no constitutional provision, statute, or other authority prohibits the introduction of his statements in a new proceeding. Finally, none of the grounds

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

on which the circuit court suppressed the statements has merit. Accordingly, the suppression order should be reversed.

ISSUE PRESENTED

Following withdrawal of a guilty or no-contest plea after sentencing, does any relevant law prohibit the introduction at trial of a defendant's voluntary allocution statements?

The circuit court answered yes.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court's opinion may merit publication. While the Wisconsin Supreme Court's decision in *Greve* provides guidance here, no Wisconsin case has squarely addressed whether, following the defendant's withdrawal of a guilty or no-contest plea, the State may introduce at trial the defendant's allocution statements made at the original sentencing.

STATEMENT OF THE CASE

In 2017, the State charged Daniel Rejholec in an amended complaint and amended information with repeated sexual assault of a child, exposing intimate parts, and exposing a child to harmful material for serially assaulting and otherwise harming Natalie,[3] the 14-year-old daughter of his girlfriend. (R. 11:1–2; 30:1–2.) Natalie has a cognitive impairment and "function[ed] at about half her age" at the time of the offenses. (R. 11:2.) She disclosed Rejholec's offenses to her father, who contacted police. (R. 11:2.)

During a custodial police interview, Rejholec admitted he had had sexual contact with Natalie on several occasions.

[3] Natalie is a pseudonym. *See* Wis. Stat. § (Rule) 809.86(4).

(R. 11:3.) This included "her touching his penis, him touching her vagina, her putting his penis in her mouth, and him licking her vagina." (R. 11:3.) He also admitted exposing Natalie to depictions of nudity on his computer.[4] (R. 11:3.)

Rejholec moved to suppress his statements to law enforcement. (R. 37:1.) Rejholec noted that the detective advised him of his *Miranda* rights orally and in writing, and Rejholec signed a form acknowledging the waiver of his rights. (R. 37:2.) But Rejholec argued that "the tactics used by [the detective] during the interrogation were coercive, resulting in Mr. Rejholec's statements being involuntary." (R. 37:2.) The circuit court disagreed, denying the motion after viewing the recording of the interrogation and holding an evidentiary hearing. (R. 83:1–46; 86:2–5.)

In April 2018, Rejholec pleaded no contest to the count of repeated sexual assault of a child. (R. 62:1–2.) In exchange, the State agreed to dismiss the other counts and recommend a sentence of 15 years of initial confinement and 10 years of extended supervision. (R. 62:2.)

At the sentencing hearing, the State made the promised recommendation, arguing that a 25-year sentence was appropriate because of the gravity of Rejholec's offense, repeated sexual abuse of a cognitively disabled 14-year-old. The State also noted that Rejholec had consistently blamed the child for the assaults.[5] (R. 89:3–17, A-App. 18–32.)

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[4] Rejholec told police he destroyed his computer a week or two before the custodial interview. (R. 11:3.)

[5] In his pre-sentencing interview with the PSI author, Rejholec repeated his statements to law enforcement that the 14-year-old cognitively disabled victim "c[a]me on to him" and then blackmailed him into continuing to have sexual contact with her by threatening to tell her mother if he stopped. (R. 89:12–13, 23–24, A-App. 27–28, 38–39.) These statements are inadmissible in new proceedings under *State v. Crowell*, 149 Wis. 2d 859, 861, 440

Defense counsel noted that Rejholec had no prior criminal record, but acknowledged, "This is a prison case," and requested five years of initial confinement. (R. 89:18–21, A-App. 33–36.)

Addressing the defendant, the court said: "Mr. Rejholec, you're not required to, but is there anything you want to say before I impose a sentence?" (R. 89:21, A-App. 36.) Rejholec elected to speak, and he said that he was "the adult" and so he "shouldn't have allowed this to happened," he "need[ed] to be held accountable," and he would "accept any help . . . so I can understand why I did this":

> I would like to -- everyone to know that I'm truly sorry for what happened between [Natalie] and I. I know that I'm the adult, and I now -- I understand that I should have, shouldn't have allowed this to happen. This does not take away at all my responsibility for what I did to [Natalie] and that I will fully understand I need to be held accountable and punished.
>
> I also want the judge to consider that I went 53 years of my life and always made good decisions until this. I believe that I'm a good person, and you can rest assured that nothing like this has ever happened before.
>
> I want the judge to know I will accept any help or counseling so I can understand why I did this. I've never had any sort of sexual attraction to children.

(R. 89:21, A-App. 36.)

Rejholec concluded: "It's hard for me to understand why I did this." (R. 89:21, A-App. 36.)

The court sentenced Rejholec to 12 years of initial confinement and 10 years of extended supervision. (R. 89:25, A-App. 40.) The court noted the gravity of Rejholec's repeated

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N.W.2d 352 (1989) (a defendant's statements in a court-ordered PSI following a guilty plea that is subsequently withdrawn may not be used at trial).

assaults, the need to protect the public from his predation, and Rejholec's need for sex offender treatment. (R. 89:22–27, A-App. 37–42.)

Rejholec appealed his conviction, arguing that the circuit court erred in denying his motion to suppress his custodial admissions. (R. 140:12, 17.) This Court reversed in an opinion recommended for publication. *State v. Rejholec*, 2021 WI App 45, 398 Wis. 2d 729, 963 N.W.2d 121. (R. 140:1–23.) The Court agreed with the circuit court's conclusion that the detective's tactics were not coercive and did not render his statements involuntary. (R. 140:12–16.)

But it concluded that certain misrepresentations the detective made during the interview regarding Rejholec's constitutional rights undermined the substance of *Miranda* warnings and rendered Rejholec's *Miranda* waiver invalid. (R. 140:17–21.) Specifically, the court concluded that the detective violated *Miranda* when he suggested to Rejholec that, if he didn't talk to police before getting a lawyer, "You're not going to get a chance to tell your story. So the jury is never going to hear your side of the story." (R. 140:18–19.) The Court concluded that this statement "impermissibly suggested to Rejholec that if he exercised his right to silence and obtained a lawyer that Rejholec would not get the chance to tell his story to the jury." (R. 140:18.)

On remand, Rejholec filed a motion to withdraw his no-contest plea. (R. 145:1–8.) Pursuant to the court of appeals' decision and order, the circuit court vacated Rejholec's judgment of conviction and granted his plea withdrawal motion. (R. 161:1.) As a result, Rejholec again faces the three charges in the amended information of repeated sexual assault of a child, exposing intimate parts, and exposing a child to harmful material. (R. 30:1–2.)

In July 2023, Rejholec filed a motion to prohibit the State from introducing his statements made at his 2018

sentencing at his trial. (R. 223:1–5.) Rejholec recognized that no Wisconsin court has squarely addressed whether, following reversal of a conviction, the defendant's statements at sentencing may be used in the defendant's subsequent trial. (R. 223:2.) But he argued that use of a defendant's statements at a prior sentencing hearing were barred by Wis. Stat. § 904.10, which prohibits the use of a defendant's statements "in connection with" plea offers or a guilty or no contest plea that is later withdrawn. (R. 223:3.) He also argued that public policy considerations should preclude the introduction of Rejholec's sentencing statements. (R. 223:3–4.)

The circuit court, the Honorable Rebecca L. Persick, heard argument on the motion at a September 2023 hearing. (R. 234:1–12, A-App. 4–15.) The State opposed the motion, arguing that a defendant's voluntary statements at sentencing should be admissible in future proceedings under the rationale set forth in *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. (R. 234:2–4, A-App. 5–7.) There, the Wisconsin Supreme Court held that a defendant's statements provided in a defense-prepared sentencing memorandum are admissible in subsequent proceedings. *Greve*, 272 Wis. 2d 444, ¶¶ 21–28. Defense counsel responded that *Greve* did not resolve the issue presented in this case. (R. 234:4–6, A-App. 7–9.)

Following argument, the circuit court issued an oral ruling granting the motion. (R. 234:8–10, A-App. 11–13.) The court gave three reasons for its ruling. First, the court agreed with Rejholec that the statute barring the use of statements connected to a withdrawn plea, Wis. Stat. § 904.10, also prohibited the use of Rejholec's sentencing statements in a new proceeding. (R. 234:9, A-App. 12.) Second, the court determined that the detective's misleading statements of law in the custodial interview "contaminated" Rejholec's subsequent statements at sentencing. (R. 234:9, A-App. 12.) Third, the court said that "it would be a miscarriage of justice

to allow those statements in." (R. 234:10, A-App. 13.) The court rejected the State's view that *Greve* provided guidance on the issue presented.

On October 11, 2023, the court issued a written order granting Rejholec's motion for the reasons set forth in the bench ruling. (R. 228:1, A-App. 3.) The State appeals under Wis. Stat. § 974.05(1)(d)2. (State may appeal from an order suppressing evidence).

STANDARD OF REVIEW

A court's evidentiary determinations are generally reviewed for an erroneous exercise of the court's discretion. *Martindale v. Ripp*, 2001 WI 113, ¶ 29, 246 Wis. 2d 67, 629 N.W.2d 698. But when, as here, the evidentiary ruling turns on the determination of a legal issue, review is *de novo*. *State v. Felton*, 2012 WI App 114, ¶ 11, 344 Wis. 2d 483, 824 N.W.2d 871.

ARGUMENT

Following withdrawal of a guilty or no-contest plea after sentencing, the State may introduce at trial the defendant's voluntary allocution statements made at the original sentencing, and the circuit court erred in concluding otherwise.

A. Summary of argument

The circuit court erred in granting Rejholec's motion to suppress his 2018 allocution statements. The Wisconsin Supreme Court held in *Greve* that similar sentencing statements—a defendant's admissions in a defense-prepared sentencing memorandum—may be introduced in new proceedings. *Greve*, 272 Wis. 2d 444, ¶¶ 1–2, 14–28, 35–39. Rejholec's allocution statements were voluntary, and no constitutional provision, statute, or other authority prohibits their introduction in a subsequent trial. Finally, the circuit

court's reasons for suppressing the statements are unpersuasive and unsupported by law. The circuit court's order suppressing Rejholec's allocution statements should be reversed.

B. Wisconsin defendants have a statutory right to allocution, an allocution is a voluntary statement, and a defendant who elects to allocute necessarily waives the constitutional right to silence.

A Wisconsin defendant has a statutory right of allocution before the circuit court pronounces sentence. Wis. Stat. § 972.14(2). *Greve*, 272 Wis. 2d 444, ¶ 35. This right includes the right "to make a statement with respect to any matter relevant to the sentence."[6] *Id.* (quoting Wis. Stat. § 972.14(2)). A court's failure to ask the defendant if he wishes to address the court at sentencing in violation of section 972.14(2) is not reversible error. *Nicholas v. State*, 49 Wis. 2d 678, 682–83, 183 N.W.2d 8 (1971). There is a corresponding federal statutory right to allocution. *See* Fed. R. Crim. P. 32(i)(4)(A)(ii) ("Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence.").

The right to allocution under Wis. Stat. § 972.14(2) "allows" the defendant to speak at sentencing; it does not require him to do so. *See Greve*, 272 Wis. 2d 444, ¶ 35. An allocution statement is thus a voluntary statement. A defendant at sentencing retains the right to silence and against self-incrimination under the Fifth Amendment of the

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[6] "Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence." Wis. Stat. § 972.14(2).

United States Constitution and article I, section 8 of the Wisconsin Constitution.[7] *See State v. Alexander*, 2015 WI 6, ¶ 24, 360 Wis. 2d 292, 858 N.W.2d 662 (constitutional right to silence continues through sentencing). A defendant who chooses to speak at sentencing necessarily waives the constitutional right to silence: "[I]n the expectation of leniency, [a defendant] may waive that right [against self-incrimination] and acknowledge his guilt and express his contrition and remorse." *Scales v. State*, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974) (discussing the right to silence at sentencing in concluding that the sentencing court may not penalize the defendant for exercising this right).

Unlike the right against self-incrimination, the right to allocution is not a constitutional right. Neither the federal nor state constitution specifically addresses allocution, and neither the United States Supreme Court nor the Wisconsin Supreme Court has held that due process includes a constitutional right to allocution.

In fact, "the United States Supreme Court has held there is no federal constitutional right to allocution." *State v. Lindsey*, 203 Wis. 2d 423, 447, 554 N.W.2d 215 (Ct. App. 1996) (citing *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see also Nicholas*, 49 Wis. 2d at 682–83; *State v. Turner*, 200 Wis. 2d 168, 178 n.6, 546 N.W.2d 880 (Ct. App. 1996). In *Hill*, the Supreme Court concluded that the failure of a trial court to ask a defendant represented by counsel whether he has anything to say before sentence was "neither jurisdictional nor constitutional" error. *Hill*, 368 U.S. at 428. Such error, the Court explained, does not implicate due process; "[i]t is not a fundamental defect which inherently results in a complete

[7] The Wisconsin Supreme Court construes the right to silence under article I, section 8, to be coterminous with the same right under the Fifth Amendment. *State v. Stevens*, 2012 WI 97, ¶ 40, 343 Wis. 2d 157, 822 N.W.2d 79.

miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Id.*

Likewise, the Wisconsin Supreme Court has never held that there is a right to allocution under the state constitution, as a majority of the court indicated in *Greve*. There, a three-justice plurality said that it would hold that there is no due process right to allocution under the Wisconsin Constitution. *Greve*, 272 Wis. 2d 444, ¶¶ 29–34 (Roggensack, J., plurality opinion as to ¶¶ 29–34). The plurality also said that conclusory language in two earlier cases, *Bruneau* and *Borrell*, referring to a "due process" right to allocution was dicta that it would disavow.[8] A fourth justice, Justice Crooks, also treated the *Bruneau* and *Borrell* language as dicta, indicating that the court had never resolved the issue of whether the state constitution guarantees the right to allocution. *Greve*, 272 Wis. 2d 444, ¶ 42 (Crooks, J. concurring). But Justice Crooks said that he "would wait" to decide this issue because, in his view, it was not necessary to resolve the dispute in the *Greve* case. *Id.*

Thus, Wisconsin defendants have no recognized constitutional right to allocution under the state or federal constitution. They have a statutory right to allocution under Wis. Stat. § 972.14(2), and the exercise of this right necessarily waives the right to silence and against self-incrimination under the state and federal constitutions.

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[8] *See Bruneau v. State*, 77 Wis. 2d 166, 174–75 n.2, 252 N.W.2d 347 (1977); *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992). *Bruneau* cited two federal cases applying the federal allocution *statute* to support its unexplained assertion of a due process right to allocution. *Borrell* merely relied on *Bruneau*.

C. Rejholec's allocution statements were voluntary and thus may be introduced at trial, consistent with *Greve* and applicable legal principles.

No Wisconsin court has squarely addressed whether, following the defendant's withdrawal of a plea after sentencing, a defendant's allocution statements may be introduced in a future proceeding. But the Wisconsin Supreme Court's decision in *Greve* provides useful guidance. There, the court held that a similar category of voluntary statements presented at sentencing—the defendant's admissions contained in a defense-prepared sentencing memorandum—may be introduced in a future proceeding. *Greve*, 272 Wis. 2d 444, ¶¶ 1–2.

The court in *Greve* distinguished a defendant's admissions made in a private, defense-prepared memorandum from those made in a court-ordered presentence investigation report (PSI). The court had held in *State v. Crowell*, 149 Wis. 2d 859, 861, 867–69, 440 N.W.2d 352 (1989), that, when a defendant withdraws his plea after sentencing, his statements to the author of a court-ordered PSI may not be introduced at trial, pursuant to the PSI statute, Wis. Stat. § 972.15. Allowing a defendant's admissions to the PSI author to be used in later proceedings would discourage a defendant's cooperation in a court-ordered sentencing process. *Crowell*, 149 Wis. 2d at 869.

But in *Greve*, the court concluded that its holding in *Crowell* did not bar admission of statements made in a private defense memorandum. "*Crowell*," the court explained, "is a statutory interpretation case and cannot be expanded to a defendant's sentencing memorandum not described in the statute." *Greve*, 272 Wis. 2d 444, ¶ 21. The court also concluded that the policy considerations relevant to provisions of the PSI statute do not apply to a private, defense-prepared advocacy document. *Id.* ¶¶ 21–25.

Moreover, a three-justice plurality of the court rejected Greve's argument that there was a constitutional right to allocution, and thus the state constitution did not provide an arguable basis for barring admission of the statements in the defense sentencing memorandum. *Greve*, 272 Wis. 2d 444, ¶¶ 29–34 (Roggensack, J., plurality opinion as to ¶¶ 29–34). As noted, Justice Crooks did not join this part of the opinion because he did not believe that it was necessary to address whether there is a state constitutional right to allocution because the out-of-court statements in the sentencing memorandum were not allocution. *See Greve*, 272 Wis. 2d 444, ¶ 42 (Crooks, J. concurring).

Thus, absent any statutory or other legal authority providing otherwise, the *Greve* majority concluded that the defendant's voluntary admissions contained in a defense sentencing memorandum could be introduced in future proceedings. *Greve*, 272 Wis. 2d 444, ¶¶ 21, 40. Likewise, applying the principles in *Greve* to the present case, this Court should conclude that Rejholec's allocution statements are admissible in future proceedings.

As a general rule, a criminal defendant's statements can be used against him without violating his rights so long as the statements are voluntary. *See United States v. Washington*, 431 U.S. 181, 186–87 (1977) (citation omitted) (Fifth Amendment right to silence "does not preclude a witness from testifying voluntarily in matters which may incriminate him"). And constitutional principles generally do not preclude the use of a defendant's prior admissions in a new proceeding. For example, it is well-established that a defendant's trial testimony may be introduced in a subsequent re-trial. *See Harrison v. United States*, 392 U.S. 219, 222 (1968).

Here, Rejholec's allocution statements, like Greve's admissions to the author of the defense's sentencing memorandum, were voluntary. The court asked Rejholec if he

wished to speak before it imposed sentence, adding that Rejholec was "not required to" do so. (R. 89:21, A-App. 36.) Rejholec decided to speak, and, for the first time, took responsibility for his actions, admitting that he was "the adult," he "need[ed] to be held accountable," and he did not "understand why I did this." (R. 89:21, A-App. 36.)

There were clear incentives for Rejholec to allocute and accept responsibility for his crimes, of course. *See State v. Dodson*, 2022 WI 5, ¶ 9, 400 Wis. 2d 313, 969 N.W.2d 225 (listing "defendant's remorse" as a sentencing factor). But these incentives did not render his allocution statements "coerced" or "involuntary" in any recognized sense that would compel their suppression under the Fifth Amendment. In fact, Rejholec, by deciding to speak and accept some responsibility for his crimes, *waived* his protection against self-incrimination in the hopes of obtaining a more lenient sentence. *See Scales*, 64 Wis. 2d at 496. Rejholec's admissions to the offense are plainly "relevant evidence," Wis. Stat. § 904.01, and an "[a]dmission by [a] party opponent," Wis. Stat. § 908.01(4)(b).

Beyond *Greve* and other legal principles discussed above, persuasive authority confirms that a defendant's allocution statements are generally admissible in future proceedings. As one commentator has observed: "Although the question [of the admissibility of allocution statements in a subsequent proceeding] has rarely been litigated, allocution has generally been treated the same as any other admission *because it is neither compelled by the state, nor explicitly protected by the Constitution*." Caren Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 Colum. L. Rev. 787, 800 (1997) (emphasis added). "By making a statement at sentencing, a defendant waives his privilege against self-incrimination; anything he says to mitigate his sentence can be used by the prosecution to prove his guilt on the merits in the event of a retrial."

Myers, *Encouraging Allocution at Capital Sentencing*, 97 Colum. L. Rev. at 788.

Consistent with these observations, one of the few courts to squarely address the issue concluded that admission of defendant's prior allocution statements did not violate constitutional principles. In *Harvey v. Shillinger*, 76 F.3d 1528, 1535 (10th Cir. 1996), the Tenth Circuit Court of Appeals explained: "A defendant's choice to exercise his right to allocution, like the choice to exercise the right to testify, is entirely his own; he may speak to the court, but he is not required to do so." The court continued: "Once a defendant chooses to testify, though, he waives his privilege against compelled self-incrimination with respect to the testimony he gives and the testimony is admissible in evidence against him in later proceedings." *Harvey*, 76 F.3d at 1535.

One final point: Though the matter of whether there is a state constitutional right to allocution is relevant to the discussion here, the State does not believe that the recognition of such a right by the Wisconsin Supreme Court would automatically protect a defendant's allocution statements from being introduced in future proceedings.

A constitutional right to allocution would guarantee the right to speak at sentencing, much like the right to testify guarantees the right to speak at trial. It would not automatically confer immunity against future use of those statements. As discussed, an allocution statement is a voluntary statement, not a compelled one for which suppression would be appropriate. The right to testify, as noted, does not preclude the State from introducing that testimony in a new proceeding. *Harrison*, 392 U.S. at 222. Likewise, the State believes that a right to allocution, if it were found to exist, would not alone provide immunity against future introduction of a defendant's allocution statements.

For the reasons discussed above, Rejholec's allocution statements are admissible in his upcoming trial. Moreover, as shown below, the bases on which the circuit court suppressed the statements are unconvincing and lack support in the law.

D. The grounds on which the circuit court suppressed the allocution statements are without merit.

The circuit court suppressed Rejholec's allocution statements on three grounds. None of these grounds provide a persuasive basis on which to affirm.

1. Wisconsin Stat. § 904.10 applies to evidence of plea offers and withdrawn guilty pleas, it does not bar introduction of sentencing statements.

The first ground on which the circuit court granted the motion to suppress Rejholec's allocution statements was that admission of such statements would violate Wis. Stat. § 904.10. The court concluded that this statute "seems to address" the issue of the admissibility of allocution statements "[a]nd maybe that's why there is no case law on point." The circuit court was mistaken, section 904.10 does not address whether a defendant's allocution statements may be introduced on retrial.

Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). When the statutory language is unambiguous, courts apply the plain, clear meaning of the statute. *Id.*

Wisconsin Stat. § 904.10 prohibits the introduction of evidence of a properly withdrawn guilty or no contest plea, or of past plea offers, as evidence of an admission of guilt or of civil liability in a subsequent action. *See State v. Mason*, 132 Wis. 2d 427, 432–33, 393 N.W.2d 102 (Ct. App. 1986)

(language of section 904.10 is clear and unambiguous). Under Wis. Stat. § 904.10,

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

By its plain language, Wis. Stat. § 904.10 does not address the admissibility of a defendant's allocution statements in a subsequent proceeding. The statute bars the State from introducing evidence that Rejholec pleaded no contest to one of the crimes charged in his case to demonstrate his guilt in a new proceeding. It does not prohibit the introduction of voluntary statements made at sentencing concerning his responsibility for the crime.

Moreover, the fact that Rejholec pleaded no contest in the first proceeding does not render his allocution statements "[e]vidence of statements made in court . . . in connection with" the plea. Wis. Stat. § 904.10. Rejholec's voluntary allocution statements taking responsibility for his crimes made two months after he entered his no contest plea were not statements made "in connection with" the plea itself. The only "connection" that exists between the allocution statements and the plea is a purely procedural or chronological one: Had Rejholec not pleaded no contest to the repeated sexual assault of a child charge, there would have been no sentencing hearing and no allocution statements.[9]

[9] The phrase "in connection with" is also used in the sentence credit statute, Wis. Stat. § 973.155(1)(a). In that context, courts have likewise construed this phrase to require a *factual* connection,

This tenuous, procedural connection is insufficient to establish that Rejholec's allocution statements are "in connection with" the plea and are the type of evidence the statute seeks to prohibit.

For these reasons, the court erred in concluding that Wis. Stat. § 904.10 bars introduction of allocution statements in subsequent proceedings.

2. Rejholec's allocution statements are not a fruit of the illegal interrogation.

The circuit court next concluded that it was "reasonable to believe [that Rejholec] wouldn't have made [his allocution] statements without earlier being misled by the detective" about his rights to silence and to testify at trial. (R. 234:9–10, A-App. 12–13.) The court explained: "[T]he finding of [the court of appeals] was that the detective made misleading statements to the defendant which violated the law. And under those facts, I think the defendant's statements at sentencing are contaminated by the defendant's interview." (R. 234:9–10, A-App. 12–13.)

The court appeared to conclude that Rejholec's allocution statements were the fruit of the illegal interrogation. They are not.

"[A] court need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." *State v. Tobias*, 196 Wis. 2d 537, 544, 538 N.W.2d 843 (Ct. App. 1995). Evidence "need not be suppressed if it was obtained by means sufficiently attenuated so as to be purged of the taint of the illegal[ity]." *Id.* Among the factors relevant in determining the

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not just a procedural one, between custody and the course of conduct for which sentence is imposed for the defendant to be entitled to credit. *See State v. Johnson*, 2009 WI 57, ¶ 33, 318 Wis. 2d 21, 38, 767 N.W.2d 207.

question of attenuation are "the temporal proximity of the official misconduct and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct." *State v. Anderson*, 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991).

Here, Rejholec's allocution statements were plainly attenuated from the taint of the illegality in this case. The allocution statements were *volunteered* by Rejholec at a hearing *18 months after the interrogation*. For the sake of comparison, the supreme court in *Anderson* concluded the defendant's confession *in response to custodial interrogation only seven hours* after the illegal searches in that case was sufficiently attenuated. *Anderson*, 165 Wis. 2d at 450–51.

That Rejholec might not have been sentenced in June 2018 but for the illegally obtained confession in January 2017 does not "contaminate[ ]" or "taint" Rejholec's voluntary sentencing statements. The circuit court erred in suppressing the allocution statements on this basis.

3. The court erred in determining that it would be a "miscarriage of justice" to introduce Rejholec's allocution statements.

Finally, the court concluded that "under the specific facts of this case, I think it would be a miscarriage of justice to allow those statements in." (R. 234:10, A-App. 13.)

The court's statement that introduction of Rejholec's statements would be a "miscarriage of justice" appears to represent a policy determination about the fairness about admitting allocution statements at trial following reversal of a conviction. From its full comments, the "specific facts" of concern to the court involve the general use of allocution statements in a retrial following reversal and plea withdrawal. The court erred in granting suppression of the statements on this ground as well.

Of course, there are also sound policy reasons for permitting introduction of allocution statements at a new proceeding. A defendant's admission is highly relevant evidence in a criminal proceeding; prosecution of crime, especially heinous and difficult-to-prove offenses like child sexual assault, is a societal good; and suppression of a defendant's admissions is appropriate only when his statements are obtained in violation of established law. *Cf. Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) (an "'admissio[n] of guilt . . ., if not coerced, [is] inherently desirable,' because it advances the goals of both 'justice and rehabilitation.'").

But here, the relevant considerations for the circuit court in determining the admissibility of Rejholec's allocution statements were the legal principles discussed in the sections above. To review, they include: the voluntariness of Rejholec's statements and their high relevance to the case, and the absence of constitutional or statutory protections for allocution statements. The absence of law prohibiting the admission of such voluntary, highly relevant statements reflets both the implicit policy determination of the Legislature to allow such evidence in subsequent proceedings, and the U.S. Supreme Court's and Wisconsin Supreme Court's understanding of the relevant constitutional principles.

To the extent the circuit court based its decision to exclude Rejholec's allocution statements not on these principles but its own views of the fairness of admitting such statements on retrial, it erred.[10]

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[10] The circuit court also stated in its oral ruling, "I think the goal of a plea withdrawal is to put the person who entered the plea in the position they were in before they entered the plea." (R. 234:9, A-App. 12.) This principle, which invokes contract law, has been

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In sum, *Greve* indicates that a defendant's admissions made at sentencing that are not part of a court-ordered process may be introduced in future proceedings. Rejholec's allocution statements were voluntary, and no constitutional principle, statute, or case law prohibits their introduction. The circuit court erred in suppressing the allocution statements, its order should be reversed, and the case remanded with instructions to allow introduction of the statements.

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applied when a conviction is vacated as the result of a defective plea agreement. *State v. Briggs*, 218 Wis. 2d 61, 73–74, 579 N.W.2d 783 (Ct. App. 1998) (reinstating the parties to the positions they had before they negotiated a plea agreement based on an inaccurate view of the law). The State is unaware of any case in which this principle has been used to prevent the introduction of a defendant's voluntary admissions in a subsequent proceeding.

CONCLUSION

The suppression order should be reversed and the case remanded with instructions to allow introduction of the allocution statements.

Dated this 22nd day of April 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,585 words.

Dated this 22nd day of April 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of April 2024.

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