STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2024AP0001110-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TIMOTHY LESTER TROON, JR.
Defendant-Appellant.

On Appeal from the Final Orders Entered
in the Circuit Court for Rock County,
The Honorable Barbara W. McCrory Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Timothy Troon entered his initial plea pursuant to a plea bargain; the circuit court accepted it and sentenced him. Did the circuit court violate Troon's right not to be subjected to double jeopardy when it later vacated the plea after the State contested a term of the sentence?

The circuit court held that it did not. Because this conclusion is contrary to *State v. Comstock*, 168 Wis. 2d 915, 485 N.W.2d 354 (1992), and related authority, this Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested should the Court find it helpful for resolution of the issues in this matter.

Publication is requested under Wis. Stat. §809.23. because Mr. Troon's relief requires a new factual application of analyzing the exceptional scenarios contemplated in *State v. Comstock* that would allow a circuit court to vacate a valid plea without violating the double jeopardy clause.

STATEMENT OF THE CASE

This appeal arises following Troon's entry of two guilty pleas for the same case on two separate dates. The Court accepted Troon's first plea ("initial plea") and sentenced him. Thereafter, the Court held a hearing and sua sponte vacated Troon's initial plea. Months later Troon entered another plea ("second plea"), and the Court sentenced him again.

1. Activities of underlying incident

On September 18, 2021, a Rock County Deputy Sheriff arrested Timothy Troon ("Mr. Troon") for operating while intoxicated after

another driver reported Troon driving erratically. (5:2). Troon had pulled over into the park and ride lot, and when the Deputy arrived (around 5:50 pm) he found Troon sleeping in the driver's seat with the vehicle turned off. (5:2). The vehicle was warm to the touch. (5:2). The Deputy observed open alcohol containers in the vehicle, but Troon denied driving and consuming alcohol. (5:2). Troon said he had been dropped off at the location. (5:2)

The deputy contacted the reporting party who described a man matching Troon's description as the driver of the vehicle. (5:2).The reporting party had also followed Troon's vehicle into the park and ride lot. (5:2). Thereafter, the Deputy conducted field sobriety tests and a preliminary breath test. The PBT yielded a .226 result. (5:2). Troon later consented to a blood draw. (5:3)

As a result of this incident, Troon was charged with the following counts:

Count 1: OWI (5th), Felony G, Guilty Due to Guilty Plea
Count 2: Operating w/ PAC (5th or 6th),
Count 3: Failing to Install an Ignition Interlock Device, and
Count 4: Operating While Revoked. (5:1-2).

2. The initial plea agreement

In December 2021, ADA Sullivan emailed Troon's counsel, Attorney Kevin Smith this plea offer:

> "Troon pleads guilty to OWI 5th and the State will dismiss and read-in all other counts. The parties will jointly recommend a $600 fine, 3 year revocation of DL and IID, and 18 months initial confinement and 2 years extended supervision."

The emailed offer was silent as to whether the sentence was concurrent or consecutive to any other sentence. (49:6; App. 80).

Atty. Smith filed a completed plea questionnaire form agreeing to that plea offer on February 21, 2022. (21). That plea questionnaire form stated:

> "Upon a plea of guilty to OWI 5th, the State will move to dismiss and read-in all other counts. The parties will then jointly recommend a $600 fine, 3 year revocation of DL and IID, and 18 months initial confinement and 2 years extended supervision. (21:2)."

Troon confirmed on the form that he had not been threatened or forced to enter the plea, nor had any other promises been made to him other than those contained in the plea agreement.(21:2).

Attorney Smith recited this agreement on the record at the plea and sentencing hearing on April 14, 2022. (32:4; App. 54). ADA Sullivan was chaperoning his son's class trip on the day of the plea and sentencing hearing, so ADA Urbik represented the State in his place. (29:1; 70:12; App. 73, 15).

After Attorney Smith recited the plea agreement, the Court asked if the sentence was concurrent or consecutive. This inquiry prompted the following exchange in which Smith asserted it was concurrent and ADA Urbik said he would rely on what Smith believed.

> "THE COURT: And is that running concurrent to what he's currently serving or is it consecutive to his current sentence?
>
> MR. SMITH: Concurrent.
>
> THE COURT: Mr. Urbik, is that a correct recitation of the agreement?
>
> MR. URBIK: Judge, this is Mr. Sullivan's case and he did not specify concurrent or consecutive, but if Mr. Smith is positive it's concurrent, then I will rely on that and I will just refer back to Mr. Sullivan to confirm when he gets back from vacation if there's any issues that would have to bring it back, but I assume that was agreed to." (32:4; App. 54)

ADA Urbik added that he believed the recommendation was for three years extended supervision, not two. Attorney Smith and Troon agreed to that change. (32:5-6; App.55-56).

The court advised Troon that it was ultimately up to the court to determine the appropriate sentence up to the maximum sentence. (32:10-11; App. 60-61). Troon confirmed he understood, and the Court accepted Troon's guilty plea. The court stated that it found the parties' joint recommendation "appropriate" and sentenced Troon to 18 months confinement and three years extended supervision–running concurrently. (32:18-19; App. 67-68).

3. *ADA Sullivan returns and contests the concurrent sentence.*

Four days later ADA Sullivan filed a letter to the court requesting a hearing to address the concurrent issue about Troon's sentence. It stated:

> "Due to the incorrect information that Mr. Smith gave to both Mr. Urbik and the Court, we did not have a meeting of the minds on this sentence. I request that the court hold a hearing so that we can address this. Per my notes, it appears that the Court had put on the record that this can be addressed." (29:1; App. 73).

On May 4, 2022, the Court held a hearing per ADA Sullivan's request in his letter (hereinafter "Letter Hearing").

ADA Sullivan explained that the State's offer had been silent on the concurrent or consecutive nature of the sentence; and that he would have argued for consecutive time. (49:4). He reiterated that there was "no meeting of the minds." (49:4; App. 78).

At that May Letter Hearing, Attorney Smith questioned how to properly proceed procedurally in light of Sullivan's concerns about the concurrent aspect of Troon's sentence. Smith stated:

> "Now, as it relates to the procedural posture, I'm not entirely sure what our procedural posture is here. Attorney Urbik did say on the record that he assumed if it -- that he would check with Attorney Sullivan. He assumed that if [the concurrent nature of the sentence] was not correct that we could bring it back. I'm not sure the Court ever squarely addressed whether it could come back." (49:10; App. 84).

In response, the court told the parties that it believed that it earlier gave the State "the ability to kind of put [the case] back on."(49:3; App. 77).

Atty. Smith also asserted that the State could ask now for consecutive sentences without breaching the plea deal because the initial offer was silent; he cited *State v. Bowers*, 2005 WI App 72, 696 N.W.2d 255, 280 Wis.2d 534 for the underlying authority. (49:11; App. 85). The State did not ask the court to make the sentence consecutive at the hearing. Instead, the court explained it needed to review *Bowers* and would get back to the parties (49:16; App. 90).

4. Circuit court vacates Troon's initial plea and sentence.

The court next held a hearing on July 22, 2022, and vacated Troon's guilty plea and sentence. (51:9; App. 106). At that point, Troon had served three months of his confinement sentence.

The court explained how it applied *Bowers* to this case.

> "[F]irst of all -- and I'm going to just quote a few things from the *Bowers* case. It says, 'As explained, a material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats the benefit for the non-breaching party.'
>
> "The Court went on to say -- state that, 'We recognize that the issue of concurrent and consecutive sentences is extremely important to a guilty plea,' and it is.
>
> "... And then because a plea agreement is in the nature of contract, they -- we talk about contract law. And the Bowers case goes on to state, 'The contract law demands that each party should receive the benefit of its bargain. No party is obligated to provide more than is specified in the agreement itself.' And, 'Accordingly, the State should be held only to those promises it actually made to the defendant. While the government must be held to the promises it made, it will not be bound to those it did not make.' And, 'To do otherwise is to strip the bargaining process itself of meaning and content.'
>
> "… And at this point, from the record that I have, the promise that was made did not include any discussion of concurrent versus consecutive, and because that is an extremely important part of a plea, I can't find, at this point, that when I took the plea, that it was going to be anything – that it was there with a meeting of the minds because of the difference between Mr. Sullivan's position and Mr. Smith's position." (51:8-9; App. 105-106)

The court concluded:

> "[W]hat I think what I need to do at this point is vacate the judgment, and we're back where we were before we went to the plea and sentencing. I think that's all I can do at this point. So, I will vacate the judgment." (51:9; App. 106)

The court memorialized this vacatur in a written order which contained these findings of fact:

1. The court conducted a plea and sentencing hearing on April 14, 2022.

2. At the hearing, Assistant District Attorney Urbik, represented the state.
3. Urbik was not the attorney assigned to the case by the District Attorney and did not make the offer.
4. Assistant District Attorney Sullivan was assigned the case and made the offer the defendant accepted.
5. At the Plea and Sentencing hearing, the court asked if the proposed sentence was concurrent or consecutive to any sentences the defendant was currently serving.
6. Defense counsel told the court and Urbik that the sentence would run concurrent to the defendant's other sentences.
7. Urbik could not find any information in the file regarding the offer being for concurrent or consecutive sentences.
8. Urbik indicated that he would rely on defense counsel's statement.
9. The court indicated that Sullivan could object to the concurrent sentence.
10. Judgment was entered on April 14, 2022, with a concurrent sentence.
11. Sullivan objected to the concurrent sentence stating the offer was silent because at the time it was made, the defendant was not serving any sentences.
12. Defense counsel indicated that he thought the offer was concurrent, but he could not produce any documentation indicating that.
13. Defense counsel argued that a Department of Corrections sentencing recommendation that is silent on concurrent versus consecutive sentences means the sentence is supposed to be concurrent. He thought the same would be true for an offer from the state.
14. A hearing was held on May 4, 2022 regarding an issue with the joint recommendation and sentencing that was imposed by the Court.
15. Concurrent versus consecutive sentences is extremely important to a stipulated guilty plea.

16. The exchange may not be supplemented with unmentioned terms.
17. While the government must be held to the promises it made, it will not be bound to those it did not make (37; App. 96-97).

5. Troon enters second guilty plea

Over six months later, Troon entered another guilty plea on February 1, 2023. (50:12: App. 122). The parties relied on the same plea questionnaire form Troon filed for his initial plea. (50:2; App. 112). The State recommended eighteen months confinement time to run consecutively; the defense asked for eighteen months running concurrently. (50:17-18). Both parties asked for two years extended supervision. The court sentenced Troon to two years confinement and two years extended supervision running concurrently to the revocation sentence Troon was then serving. (50:29; App. 139).

6. Troon files for postconviction relief.

Troon filed a postconviction motion asking the court to vacate his conviction, reinstate his initial plea and order a resentencing. (56:1; App. 29). The court held a hearing on Troon's postconviction motion and denied the motion. (62:1; App. 3).

At the postconviction hearing, the argument centered on whether the circuit court properly vacated Troon's initial plea. The court explained that Troon's initial plea was a valid plea "in terms of following everything that [the court] was supposed to do." (70:18; App.21). The court found that it gave the State the ability to revisit the issue regarding concurrent or consecutive sentences if Attorney Smith's assertion about the concurrent sentence was incorrect. (70:19; App. 22). The court acknowledged that the State raised the issue via a letter to the court not a motion alleging the defense breached the plea deal. (70:19; App. 22).

Finally, the court analyzed the two *Comstock* exceptions which authorize courts to vacate a plea: (1) fraud and (2) withholding material information. (70:15, 20-21; App. 18, 23-24).

The trial court agreed that there was no fraud. (70:15; App. 18).

The trial court found that there was material information withheld; specifically, Attorney Smith withheld material information by not saying the plea agreement was silent as to the sentence's concurrent or consecutive nature. (70:15-16, 20; App. 18-19, 23).

The circuit court found that this withheld information permitted it to sua sponte vacate Troon's initial plea. (70:20-21; App. 23-24).

This appeal follows. Additional facts are included in the

STANDARD OF REVIEW

Whether an individual's right to be free from double jeopardy has been violated presents a question of law that is reviewed de novo on appeal. *State v. Trawitzki*, 2001WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801. Factual findings made by the circuit court that are pertinent to the analysis are upheld unless clearly erroneous. *State v. Hill,* 2000 WI App 259, ¶ 12, 240 Wis. 2d 1, 622 N.W.2d 34.

ARGUMENT

A. The trial court improperly vacated Troon's initial plea because any withheld information would not have affected the validity of Troon's plea.

The Supreme Court in *State v. Comstock* directed courts not to vacate validly accepted guilty pleas because it violates double jeopardy. *State v. Comstock*, 168 Wis. 2d 953-954, 485 N.W.2d 354 (1992). Here, the circuit court did just that. The court accepted Troon's plea of guilty, sentenced him, and then vacated that validly accepted plea. Although two exceptions to *Comstock's* directive exist, the circuit court's

comments demonstrate that neither exception applies to this case. As a result, the court erred by vacating Troon's initial plea and this Court may now vacate Troon's conviction, reinstate his original plea and order a resentencing.

1. Troon entered a valid plea agreement at which point jeopardy attached.

Troon entered a valid plea of guilty that the court accepted. First, the court satisfied all the requirements needed to ensure Troon entered a valid plea. At that point, jeopardy attached. However, after the State later questioned a term of the sentence, the circuit court determined that no initial plea agreement existed due to "no meeting of the minds." For that reason, the court vacated Troon's plea. Based on the authorities cited herein, this sua sponte vacatur was in error. In sum, it remains that Troon entered a valid plea agreement, and at that point, jeopardy attached.

To start, the circuit court satisfied all requirements to validly accept Troon's guilty plea at the initial plea hearing. The court acknowledged that Troon's initial plea was a valid plea.

Recently, this Court, in reviewing a court's improper sua sponte vacatur of a validly accepted plea, pointed out the requirements for a validly accepted plea. Namely, a validly accepted plea exists when a court conducts a proper and thorough plea colloquy, satisfies itself that a factual basis exists, and expressly ascertains that the plea is made knowingly, intelligently and voluntarily. *State v. Richer,* unpublished slip op. 2019AP2024, 5/18/21. ¶27. In another case where the court improperly vacated a plea sua sponte, this Court emphasized the importance of the circuit court expressly accepting a plea agreement and then proceeding to sentencing as demonstrating a validly accepted plea. *State v. Terrill*, 242 Wis.2d 415, ¶22, 2001 WI App 70, 625 N.W.2d 353 (Wis. App. 2001).

Here, the court satisfied all these conditions and took the next step to proceed to sentencing. The court conducted a valid colloquy, satisfied itself that a factual basis existed, and expressly accepted

Troon's plea. (32:13-14; App. 63-64). The court expressly stated: "I will accept his guilty plea to Count 1." (32:14; App. 64). And the court proceeded to sentence Troon. Thus, Troon entered a validly accepted guilty plea at the initial plea and sentencing hearing on April 14, 2022.

The court maintained that it accepted a valid plea when discussing Troon's initial plea at the postconviction motion hearing. (70:17; App. 20). At Troon's postconviction motion hearing the court expressly made that point:

> "I think the real issue is, as I see it, is the fact that what we did here was we took the [initial] plea, and it was a valid -- I mean it was a valid plea." (70:17; App. 20).

In sum, Troon entered a valid guilty plea. The court expressly accepted his valid plea after conducting a satisfactory colloquy and the trial court acknowledged the plea's validity. Thus, Troon validly entered a guilty plea at the initial plea hearing, and when the court accepted that guilty plea, jeopardy attached.

2. The circuit court violated Troon's right to be free from double jeopardy when it vacated his initial plea.

The circuit court's sua sponte decision to vacate Troon's initial plea violated his right to be free from double jeopardy under the federal and state constitutions. *See* U.S. CONST. art. V; WIS. CONST. art. I, § 8(1). This right includes protection "against a second prosecution for the same offense after conviction." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

The directive against sua sponte vacating a valid plea from *State v. Comstock* controls here. In *State v. Comstock*, the Wisconsin Supreme Court exercised its superintending authority to "direct each circuit court to refrain from *sua sponte* vacating a guilty or no contest plea after the circuit court validly accepted the plea by assuring itself of the voluntariness of the plea and the factual basis for the charges unless the circuit court 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." *State v. Comstock*, 168 Wis. 2d 953-954, 485 N.W.2d 354 (1992). This directive in *Comstock*, made it an error for the circuit court to sua sponte vacate Troon's initial guilty plea after it validly accepted his plea.

The facts in *Comstock* follow and are relevant to resolving the issues in Troon's case. In *Comstock*, the circuit court accepted the defendant's two no-contest pleas and dismissed the two remaining counts pursuant to the parties' plea agreement. It then ordered a PSI; the PSI indicated that the court could not sentence the defendant appropriately because the plea agreement was too lenient. *Id*. 931.

Because of the PSI recommendation, the District Attorney wrote the court a letter indicating he would likely have handled the case differently if he had been in charge of the case (it was assigned to another prosecutor). The DA did not request that the guilty plea be vacated. *Id*.

At sentencing, the circuit court recognized the procedural uncertainty. It asked the parties if it could void the plea agreement and reinstate the original charges. In response, the defendant moved for specific performance of the plea agreement and alleged that the court and prosecutor breached the plea agreement. The circuit court, however, later decided it could vacate the pleas in the public interest and the court vacated the plea agreement. *Id*.

The Supreme Court held that the circuit court improperly vacated the plea agreement and remanded the case for reinstatement of the initial plea agreement. *Id*. at 953-954. The Court reaffirmed that jeopardy had attached when the circuit court accepted the defendant's guilty plea. *Id.* 938 (citing *State v. Waldman,* 57 Wis. 2d 234, 237, 203 N.W.2d 691 (1973); *Salters v. State,* 52 Wis. 2d 708, 714, 191 N.W.2d 19 (1971); *Hawkins v. State,* 30 Wis. 2d 264, 267, 140 N.W.2d 226 (1966); and *Belter v. State,* 178 Wis. 57, 62, 189 N.W. 270 (1922).).

In summarizing its holding the Court stated:

> "The circuit court then vacated its own order accepting the pleas and dismissing the felony counts and reinstated the felony charges on the basis of the presentence investigation without any showing that the acceptance of the guilty plea was erroneous on grounds of involuntariness or lack of a factual basis. Under these circumstances, the circuit court's *sua sponte* order vacating the pleas significantly implicates the public's and the defendant's interests in finality, repose, and fairness in the same way as a prosecutor's attempt to withdraw from a validly accepted plea agreement." I*d.* 951

The facts in Troon's case closely mirror those in *Comstock*. First, the circuit court accepted Troon's initial plea of guilty and dismissed and read-in the remaining counts pursuant to the parties' plea agreement. At that point jeopardy attached to all counts. See *Comstock* at 938-39; see also 30 Wis. 2d 264, 267, ("The general rule, adhered to by this court, is that jeopardy attaches the moment a plea of guilty is accepted by the court."); *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.").

Then, like in *Comstock*, amidst uncertainty regarding the proper procedures, the court sua sponte vacated Troon's plea agreement. The court vacated Troon's plea agreement without any showing that the acceptance of Troon's guilty plea was erroneous on grounds of involuntariness or lack of a factual basis. Rather, the court expressly found that Troon entered his initial plea voluntarily and that a factual basis existed. (32:13-14; App. 63-64).

Finally, the State again charged Troon with all counts and Troon entered his second plea on February 1, 2023. Thus, the court's sua sponte vacatur of Troon's initial plea agreement violated his right to be free from double jeopardy as directed in *Comstock*.

3. Neither *Comstock* exception applies to Troon's case, thus the court's vacatur remains improper.

The *Comstock* Court acknowledged two scenarios (exceptions) when a court may sua sponte vacate a plea: (1) if there was fraud in procuring the plea, or (2) if a party intentionally withheld from the circuit court material information which would have induced the circuit

court not to accept the plea." *Id.* at 953.

Neither exception applies here.

First, the circuit court acknowledged that there was no fraud. (70:15; App. 18). Thus, that exception does not apply.

Likewise, the withheld information exception does not apply because any withheld material information would not have prevented the circuit court from accepting Troon's initial plea. While case law following *Comstock* does not precisely define what constitutes "material information," this Court earlier explained that logic dictates that to undo a plea, such withheld information must be information that would have affected the plea's validity in the first instance. *Richer,* supra at ¶33.

Here, the trial court found one issue of withheld information: did Defense Counsel (Atty Smith) withhold material information when he withheld that the initial plea agreement was silent regarding concurrent/consecutive sentences?[1]

But that withheld information was not material–it would not have affected the plea's validity in the first instance. The circuit court explained that that withheld information would not have prevented it from accepting Troon's initial plea. Rather, the court explained that it would have still accepted Troon's initial plea and proceeded to sentencing him even if that information had not been wittheld. Thus, the *Comstock* exception regarding withheld information does not excuse the court's sua sponte vacatur in this case.

The circuit court's remarks at the May 4, 2022, "Letter Hearing" subsequent to Troon's initial plea and sentencing show Troon's initial plea remained valid. These remarks show the withheld information would have influenced sentencing, but not the plea's validity. The court explained that had Attorney Smith not withheld information, but

[1]Smith later explained that he assumed the plea agreement included concurrent sentences because of past experience and because the offer was silent on that term. (49:10; App. 84).

instead told the court that the initial offer was silent, the court would have still accepted the plea and allowed ADA Urbik to argue a consecutive sentence—at sentencing. (51:6).

The Court specifically stated:

> "[Attorney Smith] should've said, 'Your Honor, the [initial]offer is silent.' Mr. Urbik then could've said, "I can't go to plea and sentencing today." Or knowing Mr. Urbik, he would've said, 'Well, I can go. We'll argue whether or not it should be concurrent or consecutive.' Knowing Mr. Urbik, that's probably what he would've done."

Because the court said that Mr. Urbik would have had the discretion to argue for concurrent or consecutive sentences at sentencing; it shows that the withheld information would not have affected its acceptance of Troon's plea. The court still would have accepted the plea and proceeded to sentencing.

In sum, the court's remarks show that the withheld information would only have influenced the arguments at sentencing. It would not have impacted the court's acceptance or the validity of Troon's plea. Therefore, Attorney Smith did not withhold material information that would have induced the court to refuse Troon's initial plea.

At the postconviction motion hearing, the circuit court changed its position and newly stated that Attorney Smith's withheld information (that the offer was silent) would have changed the court's acceptance of the plea.

The court explained that Attorney Smith did withhold information: that the initial offer was silent on concurrent sentencing.

When asked at the postconviction motion hearing why that withheld information was material–why it would have prevented the court's acceptance of Troon's initial plea the court turned to the State and asked why it would have influenced it.

The State responded, "I can address that." (70:22; App. 25). Then the State proceeded to explain that had the State known that Defense Counsel was going to insist on concurrent sentences for the plea, then the State would not have dismissed the other counts.

Several problems arise from the court's response.

First, the court's response sidestepped the question entirely and replaced it with a new confusing question. The question was one for the circuit court, not the State. And that question was: if the circuit court had known that the initial offer was silent—would the court still have accepted Troon's initial plea? As explained above, the circuit court had said it would have still accepted Troon's plea and continued to sentencing.

Instead, the State replaced that question with a new question: if defense counsel had insisted on a concurrent sentence for the initial offer, would the State have acted differently? And the State said it would have acted differently; specifically, the State would not have dismissed the other counts.

But whether the State would have acted differently is irrelevant.

Rather, the circuit court had already said that it would not have acted differently; the court would have accepted Troon's initial plea even if it had known that the initial offer was silent. The court said that Attorney Smith should have stated that the offer was silent; and then the State could have argued for a consecutive sentence at sentencing.

The circuit court again reiterated this point at the postconviction motion hearing. It stated:

> "And if Mr. Smith had just said it was silent, then Mr. Urbik either would have said, "Your Honor, I don't feel comfortable arguing this, can we come back for a later sentencing date when Mr. Sullivan is present, and he can make the argument?" (70:18).

Thus, the withheld information was not material. It was not sufficient to invalidate the initial plea. The court repeatedly said it would have continued to sentencing even if the withheld information had been made known. In turn, Troon's initial plea remained valid, and following *Comstock*, the circuit court should not have vacated his initial plea.

B. The proper remedy is to vacate Troon's conviction and reinstate the original plea agreement and sentence.

In *Comstock*, the Supreme Court remanded the case and instructed the circuit court to reinstate the initial plea agreement. *Comstock*, at 947. Later cases have followed the *Comstock* Court's directive with regard to the proper remedy in these situations. See *State v. Terrill*, 242 Wis. 2d 415, ¶26, 2001 WI App 70, 625 N.W.2d 353 (Wis. App. 2001), *Richer,* supra, ¶2, *State v. Rushing*, 2007 WI App 227, ¶¶7,12, 305 Wis. 2d 739, 740 N.W.2d 894. Thus, Troon's second plea should be vacated, his initial plea agreement reinstated, and he is entitled to a resentencing.

In *Richer*, this Court also explained that a defendant in this situation is entitled to resentencing with the benefit of the sentencing recommendation the State made at the initial plea agreement. *Richer*, supra, ¶42. In Troon's case the State agreed to join in the recommendation for an 18-month confinement period to run concurrently.

CONCLUSION

For the reasons given above, Troon requests this Court to vacate his conviction, order a resentencing, reinstate his original conviction and direct the Rock County clerk of courts to issue the judgment of conviction reflecting the date of his conviction as April 14, 2022.

Respectfully Submitted,

Dated this 3rd day of July 2024.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 2,596 words.

Dated July 3, 2024.

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