COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP50-CR **Cir. Ct. No. 2011CF1166**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK ASUNTO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: JENNIFER DOROW, Judge. *Affirmed*.

Before Kessler, Brash, and Dugan, JJ.

¶1 KESSLER, J. Derek Asunto appeals a non-final order of the circuit court denying his motion to enforce what he contends was an accepted plea agreement. Because the circuit court never actually accepted the plea agreement at issue, we affirm the circuit court.

BACKGROUND

¶2 This case involves a relatively complicated set of facts involving multiple charges and multiple case numbers. On September 20, 2010, Asunto was charged with one count of disorderly conduct in Waukesha County Circuit Court Case Number 2010CM1929. Asunto was released on bond. On November 29, 2010, Asunto was charged with misdemeanor bail jumping, operating while intoxicated as a fourth offense (OWI 4th), operating with a prohibited alcohol content as a fourth offense (PAC 4th), and refusing to take a test for intoxication. These charges resulted in Waukesha County Circuit Court Case Numbers 2010CM2398 and 2010TR8886. On May 4, 2011, Asunto was charged with disorderly conduct, criminal damage to property, and two counts of misdemeanor bail jumping, resulting in Waukesha County Circuit Court Case Number 2011CM0883.

¶3 At a hearing on May 4, 2011, Asunto's counsel told the circuit court that with regard to case No. 2010CM2398, Asunto planned to "admit on the record that his refusal [to submit to intoxication testing] was improper, … and then he's going to enter a plea today to bail jumping in that case." Counsel told the court that with regard to case No. 2011CM0883, Asunto would plead guilty to criminal damage to property. The State and Asunto agreed that "nothings going to happen with the OWI or PAC fourth today in 10CM2398, but it is the Defendant's intention on the date that we select for sentencing on the other matters to enter his plea and go to sentencing on that case as well." The remaining charges would be dismissed and read in, but the parties agreed to hold open those charges until the OWI and PAC charges were resolved. The court accepted Asunto's admission that his refusal was improper and his guilty pleas to criminal damage to property and one count of disorderly conduct.

¶4 On May 25, 2011, the circuit court held a hearing to resolve the remaining charges. However, before the court conducted a colloquy with Asunto as to his pleas to OWI 4th and PAC 4th, and before the court dismissed any of the other charges, the State informed the court that it believed Asunto's record contained another OWI-related conviction in Michigan. The State told the court its discovery "might make this a fifth offense [OWI]" which would "change … many things." The State asked for an adjournment to look into the matter. The court granted the adjournment.

¶5 On July 1, 2011, the State filed a motion to amend the criminal complaint to change the OWI 4th charge to OWI 5th. The motion stated that Asunto was convicted of operating while intoxicated in Michigan on October 25, 2000, and that the conviction "had not been considered when the charges for [Asunto's] present case was charged." Asunto opposed the motion, arguing that the circuit court already accepted the parties' plea agreement and was bound by Asunto's plan to plead to OWI 4th.

¶6 The circuit court held a hearing on the State's motion. In an oral ruling, the court granted the State's motion to amend the OWI 4th charge to OWI 5th, noting that it never actually accepted Asunto's plea to OWI 4th. The court explained that it accepted Asunto's pleas to bail jumping and criminal damage to property, but that it had not yet accepted Asunto's plea to OWI 4th, nor were the remaining charges dismissed at that point. Specifically, the court said:

> The first issue the Court sees that came to light is an argument really by the Defense on whether or not this Court accepted the plea agreement in this case, and therefore, that everybody should be bound by the O.W.I. fourth charge and not allow this to be amended to an O.W.I. fifth charge.
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> ….

In this case, this Court took and accepted pleas from the Defendant on bail jumping, and I believe it was criminal damage to property, and specifically, a plea was not entered on the O.W.I. fourth that day…. I think the Defendant was [going] to be going somewhere, and we didn't want him taken into custody right away … so the plea was never entered on that.

And the Court got the transcript from the May 25th hearing[.]… [A]nd I looked at that, and the Court never even got to the plea colloquy.

We had preliminary discussions between the Court, [and the parties], on what the plan was. It was a refresher of what was sort of intended to happen, and before the Court ever got to the plea colloquy … [the State] noticed the issue of the Michigan conviction that [it] stated would very possibly make this a fifth offense instead of a fourth offense, and [it] asked that it be halted. And it was halted -- -the hearing. It wasn't a halt of the plea colloquy because that had not even begun yet.

… Even though the Defense stated in the briefs that the Court accepted the plea agreement, the Court doesn't see how it could possibly have really officially accepted the plea agreement when an absolutely key part of that agreement had never been pled to, and that's the O.W.I. fourth charge.

….

And I looked at … the May 4th hearing … and in looking at part of it here, [defense counsel] was stating that it was his understanding they were gonna admit to the refusal [to submit to intoxication testing] on that day … so that if anything that they weren't expecting was needed by [the State], the State would have an admission to the refusal for consciousness of guilt purposes.

Well, that certainly suggests that even though it was fully expected, fully planned, that weeks later, there was going to be an entry of a plea, there wasn't actually an entry of a plea on the O.W.I. fourth. There was still clearly the possibility that the Defendant might choose not to plead. It wasn't planned but it was clearly there, that possibility existed, and there's no doubt that had we got to May 25th and [defense counsel] came in here and said … my defendant's going to take O.W.I. fourth to trial, that he would have been able to do that. He would have been

> perfectly able and allowed … because he hadn't pled the O.W.I. fourth yet.
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> ….
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> Also, of note related to this is that … the Court specifically did not dismiss and read in the other charges, and that was being held to see what happened on May 25th, and it would all be concluded then if the Defendant went through with pleading to the O.W.I. fourth charge, which didn't happen, and so those were never dismissed and read in….
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> The Court does acknowledge, of course, that because the plea agreement was never actually completed in full here … that it's necessary and appropriate and a matter of fundamental fairness that the Defendant be permitted to withdraw his pleas or that the Court vacate his pleas on the two misdemeanor charges because that was certainly part of the entire intent of what was gonna happen but just never got completed.

¶7 The circuit court then addressed whether the Michigan conviction was a countable conviction under Wisconsin law. The court concluded that the State submitted evidence sufficient to show that the Michigan offense was countable and granted the State's motion to amend the OWI charge to OWI 5th. The court then asked defense counsel if Asunto wished to withdraw his guilty pleas to bail jumping and criminal damage to property. Counsel responded that he and the State agreed that those pleas should be vacated. The court ordered Asunto's two guilty pleas vacated. The State subsequently filed an amended criminal complaint and an information charging Asunto with OWI 5th and PAC 5th.

¶8 On February 28, 2012, Asunto filed a "Motion to Enforce Accepted Plea Agreement." (Some capitalization omitted.) At a hearing on the motion, the circuit court denied Asunto's motion, finding that the court was not "bound by any plea agreement." The court stated:

> I do believe that at the time when Mr. Asunto entered his bail jumping and criminal damage to property pleas, it appears from the record then that there was a global resolution being anticipated and that the plea agreement at least at that point anticipated three pleas other than not guilty: The bail jumping, the criminal damage to property, and then the O.W.I. fourth.
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> ….
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> You know, when I do a plea colloquy, obviously, there's certain things we go through, but the very last thing that the Court does is define that there's a factual basis for the acceptance of the plea, find the defendant guilty, adjudge the defendant convicted, and order a judgment of conviction.
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> Clearly, that never happened.

The court also told the parties that "if there's not a plea agreement, then this Court can put Mr. Asunto back to the position that he was prior to the plea agreement and that's to reinstate and to vacate those pleas, including the refusal [to submit to intoxication testing], but I think you have to make that motion."

¶9 At a subsequent hearing, Asunto's counsel moved to withdraw Asunto's guilty pleas to criminal damage to property and misdemeanor bail jumping. The circuit court found: "that based on what was … a substantial change in the nature of the O.W.I. case … and what I previously ruled … that I found the State was not bound by the offer in that case for reasons that were stated on the record … that I think it's in the interest of justice to vacate [Asunto's] pleas and to reinstate all of the charges and essentially put all these matters back in a posture that they were prior to the entry of the pleas." Consequently, in addition to being charged with OWI 5th and PAC 5th, the following charges were reinstated against Asunto: disorderly conduct, refusal to submit to chemical testing, misdemeanor bail jumping, criminal damage to property, and two additional counts of bail jumping.

¶10 Asunto then filed a petition for leave to appeal the circuit court's non-final order denying his "Motion to Enforce Accepted Plea Agreement." (Some capitalization omitted.) We granted the petition.

DISCUSSION

¶11 On appeal, Asunto argues that the circuit court should have granted his motion to enforce the "accepted" plea agreement because Asunto pled guilty to criminal damage to property and misdemeanor bail jumping on May 4, 2011, "with the expectation that he would then enter a plea to the 4th offense OWI that was included in his set of charges." Asunto argues that a "key part" of his negotiation with the State was that the State allowed for the entry of the guilty plea to OWI 4th to be delayed so that Asunto could remain out of custody until sentencing. Because the circuit court approved this arrangement, Asunto argues that the court was bound by the parties' agreement to: (1) have Asunto plead guilty to criminal damage to property and one count of misdemeanor bail jumping; (2) allow Asunto to enter a delayed guilty plea to OWI 4th; and (3) dismiss and read in the remaining charges. We disagree.

¶12 It is well-established that under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08 (2015-16),[1] the circuit court must conduct a plea colloquy with the defendant that ensures that the defendant is knowingly, intelligently, and voluntarily entering the plea before the court actually accepts the plea. *See* ***State v. Chamblis***, 2015 WI 53, ¶26, 362 Wis. 2d 370, 864 N.W.2d 806. The court must:

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
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> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
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> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
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> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
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> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in WIS. STAT. § 971.08(1)(c).

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (footnotes and citations omitted; brackets in ***Brown***).

¶13 Relying primarily on ***Chamblis***, Asunto argues that the circuit court was bound by the parties' agreement and that the circuit court essentially forced Asunto to withdraw his pleas. In ***Chamblis***:

> Andre Chamblis (Chamblis) pleaded guilty to operating with a prohibited alcohol concentration (PAC) as a sixth offense in violation of WIS. STAT. § 346.63(1)(b) (2011–12). Prior to accepting the plea, the circuit court informed Chamblis that the offense constituted a Class H felony which carried a minimum penalty of 6 months imprisonment and a $600 fine and a maximum penalty of 6 years imprisonment (three years confinement and three years extended supervision) and a $10,000 fine. WIS. STAT. §§ 346.65(2)(am)5., 939.50(3)(h)., 973.01(2)(b)8. The circuit court ultimately sentenced Chamblis to four years imprisonment comprised of two years confinement and two years extended supervision.
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> The State appealed the judgment of conviction. It argued that the circuit court erred by excluding additional evidence the State sought to submit to prove that Chamblis possessed a sixth prior drunk-driving related conviction. Had the circuit court admitted the evidence and found it sufficient to establish the alleged prior conviction, Chamblis would have faced the decision to plead guilty to the charge of operating with a PAC as a seventh offense. That offense constituted a Class G felony and would have subjected Chamblis to an increased range of punishment. WIS. STAT. § 346.65(2)(am)6. Specifically, the minimum penalty for a seventh offense was a term of imprisonment that included three years confinement and a period of extended supervision. ***Id.*** The maximum penalty was 10 years imprisonment (five years confinement and five years extended supervision) and a $25,000 fine. WIS. STAT. §§ 973.01(2)(b)7., 939.50(3)g.
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> The court of appeals agreed that the circuit court erred in excluding the additional evidence. It further determined that the evidence was sufficient to prove the alleged prior conviction. As a result, the court of appeals reversed the judgment of conviction and remanded the case to the circuit court with instructions to enter an amended judgment of conviction for operating with a PAC as a seventh offense and impose sentence for a seventh offense.

Chamblis, 362 Wis. 2d 370, ¶¶1-3 (footnotes omitted). The Wisconsin Supreme Court reversed our decision, concluding that instructions to enter an amended judgment of conviction for operating with a prohibited PAC as a seventh offense and impose sentence accordingly violated Chamblis's due process rights. ***Id.***, ¶6. The supreme court reasoned that because Chamblis entered a knowing, intelligent, and voluntary plea to operating with a prohibited PAC as a sixth offense, which carried a lower penalty than a seventh offense, an amended judgment of conviction would render Chamblis's plea unknowing, unintelligent, and involuntary. ***Id.***

¶14 Asunto argues that the facts of this case are analogous to the facts in ***Chamblis*** in that he "entered guilty pleas with the expectation that he would then enter a plea to the fourth offense OWI that was included in his set of charges," but his pleas were forcibly vacated. Asunto's comparison to ***Chamblis*** ignores a key factual distinction between his case and ***Chamblis***—here, the circuit court never actually accepted Asunto's guilty plea to OWI 4th, thus was never bound by Asunto's agreement with the State. The circuit court here properly accepted the negotiated pleas to criminal damage to property and misdemeanor bail jumping. At Asunto's request, the parties and the court agreed to wait until sentencing for Asunto to enter his guilty plea to OWI 4th. At sentencing, the circuit court had not even begun a colloquy with Asunto establishing any of the factors discussed in ***Brown***, which were required before the court could actually accept the negotiated guilty plea to OWI 4th. Consequently, that negotiated plea had not been accepted by the court. Thus, when the circuit court granted leave to amend the complaint to the more serious OWI charge, the entire agreement had not yet been accepted. There was, therefore, no agreement to enforce.

¶15 The fact that the State and Asunto verbally agreed to the terms of a plea agreement is not sufficient to create a binding agreement. The court must accept the terms and do so in a manner prescribed by statute and case law. We conclude, as did the circuit court, that the agreement here involved a total package of reciprocal obligations. The circuit court recognized that it would be fundamentally unfair to Asunto to leave standing the guilty pleas to criminal damage to property and misdemeanor bail jumping and the admission for failing to submit to intoxication testing, while also allowing the State to increase the potential punishment with a charge of OWI 5th. The agreement could not become enforceable unless and until the circuit court accepted that total package. When the plea hearing was adjourned without beginning, much less completing, the plea colloquy as to *all* pleas that were part of the agreement, the court could not accept the total agreement. Accordingly, there was no agreement to enforce. We affirm circuit court.[2]

By the Court—Order affirmed.

Recommended for publication in the official reports.

[2] Asunto did not sufficiently raise a constitutional due process argument in his "Motion to Enforce Accepted Plea Agreement." (Some capitalization omitted.) The extent to which Asunto raised a constitutional due process argument consists of one quote from ***State v. Terrill***, 2001 WI App 70, 242 Wis. 2d 415, 625 N.W.2d 353. We generally do not address issues raised for the first time on appeal, nor must we address constitutionality questions when we can resolve an appeal on other grounds. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997); ***State v. Hale***, 2005 WI 7, ¶42, 277 Wis. 2d 593, 691 N.W.2d 637. Accordingly, we do not address Asunto's due process argument.