Appeal No. 2003AP2637-CR **Cir. Ct. No. 1999CF50**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT ELVERS,

DEFENDANT-APPELLANT.

FILED

Jun 29, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In ***State v. Hampton***, 2004 WI 107, ¶¶15-17, 274 Wis. 2d 379, 683 N.W.2d 14, the circuit court's plea colloquy failed to advise the defendant that the court was not bound by the plea agreement, and the court then proceeded to

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[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

impose a sentence beyond the bounds of the plea agreement. Upon review, the supreme court held that a circuit court must personally advise a defendant that the court is not obligated to follow the terms of a plea agreement and ascertain whether the defendant understands that warning.[2] ***Id***. at ¶20. The issue we certify is whether ***Hampton*** applies in this case, where the circuit court also failed to deliver the ***Hampton*** warning, but where the court's sentence was within the bounds of the plea agreement.

FACTS

The facts of this case are brief and straightforward. The State charged Scott Elvers with felony bail jumping pursuant to WIS. STAT. § 946.49(1)(b) (1999-2000). On the morning of the scheduled jury trial, the parties advised the circuit court that they had reached the following plea agreement: Elvers would enter a plea of guilty to the charge, the State would recommend that Elvers receive a two-year prison sentence consecutive to a prison sentence he was then serving, and Elvers was free to make his own personal mitigating statement which would be offered through his attorney.[3] The trial court

[2] The supreme court opinion affirmed the court of appeals opinion. *See* ***State v. Hampton***, 2002 WI App 293, 259 Wis. 2d 455, 655 N.W.2d 131.

[3] The plea agreement had a further unusual provision, which is unrelated to the ***Hampton*** issue. Under this provision, both the State and Elvers' attorney waived the right to make any statements in support of the plea agreement. However, as noted, Elvers was free to make his own statement, which would be offered to the circuit court through his counsel. Elvers, in fact, made such a statement during the sentencing proceeding.

(continued)

then personally engaged Elvers in a plea colloquy. This colloquy, however, did not advise Elvers that the court was not bound by the terms of the plea agreement. Following the colloquy, the court accepted Elvers' guilty plea as freely, voluntarily and knowingly made. The circuit court then adopted the State's recommendation and sentenced Elvers to two years in prison consecutive to the sentence Elvers was then serving.

Elvers then brought a postconviction motion seeking to withdraw his guilty plea on the grounds, *inter alia*, that the trial court had failed to advise him that the court was not bound by the terms of the plea agreement.[4] After hearing testimony from both Elvers and Elvers' trial counsel, the circuit court denied Elvers' motion. The court confirmed its prior finding at the plea hearing that Elvers' guilty plea was knowingly made and that Elvers had failed to establish a manifest injustice requiring a withdrawal of the guilty plea.

Elvers followed with the instant appeal. Aware that ***Hampton*** was then pending in the supreme court, we placed this appeal on hold pending the

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This odd plea agreement provision forms the basis for Elvers' alternative appellate argument. Elvers contends that his trial counsel was ineffective by entering into an agreement under which counsel abdicated the duty to advocate on Elvers' behalf. While Elvers may have an arguable case on the performance prong of ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), he woefully fails on the prejudice prong because he failed to offer any evidence or other information at the ***Machner*** hearing as to what additional information trial counsel would, or should, have provided to the court. *See* ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, ¶49, 683 N.W.2d 31. ("[I]t is appropriate to assume for the sake of argument that counsel's performance was deficient and determine whether the claim can be disposed of on prejudice grounds.") Therefore, if we are called upon to decide this issue, we intend to hold that Elvers failed to demonstrate any prejudice as the result of his counsel's performance. Thus, the ***Hampton*** question will govern this case.

[4] Elvers also contended that his trial counsel was ineffective by entering into a plea agreement under which counsel waived the right to make a sentencing argument on Elvers' behalf. *See supra* note 3.

supreme court opinion. After the opinion was released, the State moved for summary reversal and a remand to the trial court for further fact finding. We denied the motion for summary reversal and ordered the parties to address whether ***Hampton*** applied in a case such as this where the trial court, although failing to give the ***Hampton*** warning, nonetheless imposed a sentence within the bounds of the plea agreement.

DISCUSSION

State v. Hampton

We begin with a brief summary of the ***Hampton*** holdings. First, the supreme court held that a circuit court must personally advise a defendant that the court is not bound by the terms of a plea agreement, including a prosecutor's recommendation. ***Hampton***, 274 Wis. 2d 379, ¶¶20, 38. In addition, the circuit court must ascertain that the defendant understands this information. ***Id***. Second, the supreme court held that the remedy for a ***Hampton*** violation was the plea withdrawal procedure set out in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***Hampton***, 274 Wis. 2d 379, ¶¶33, 49. Third, the supreme court held that a circuit court is required to conduct an evidentiary hearing on the alleged ***Hampton*** violation when the defendant's motion points to the circuit court's failure to deliver the ***Hampton*** warning in the plea colloquy and the defendant additionally alleges that he or she did not understand that the circuit court was not bound by the plea agreement. ***Id***., ¶50.

Since the circuit court in ***Hampton*** had failed to conduct an evidentiary hearing, the supreme court analyzed the defendant's motion and concluded that the motion was sufficient to trigger the need for an evidentiary hearing. ***Id***., ¶¶66-72. In reaching that conclusion, the supreme court first noted

that it was undisputed that the trial court had failed to expressly advise the defendant that the court was not bound by the terms of the plea agreement. ***Id***., ¶66. Next, the court rejected the State's arguments that the plea questionnaire and the circuit court's statement as to the maximum penalties sufficed to show that the defendant nonetheless knew that the circuit court was not bound by the terms of the plea agreement. ***Id***., ¶¶69-70. The supreme court said that such matters, while proper grist for the evidentiary hearing, were not relevant to the question of the sufficiency of the defendant's motion. *See* ***id***.

The supreme court's holding in ***Hampton*** was premised on constitutional grounds. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts *done with sufficient awareness of the relevant circumstances and likely consequences*." ***Id***., ¶22 (emphasis added; citation omitted).

Application of ***Hampton*** to This Case

As noted, the circuit court in ***Hampton*** imposed a sentence beyond the bounds of the plea agreement. Here, however, the circuit court's sentence was that recommended by the State under the terms of the plea agreement. The question we certify is whether ***Hampton*** nonetheless applies. We see cogent arguments on both sides of the issue.

In support of a broad "across-the-board" application of ***Hampton***, we note that the ***Hampton*** court drew no distinction between a case where the circuit court exceeds the sentencing provisions of the plea agreement and one where the circuit court stays within the bounds of the agreement. While that may be because the supreme court was confronted only with the former situation, the court's language and analysis can be read to take in both scenarios. For instance,

the supreme court said, "Taking pleas is an increasingly important and complex stage in a criminal proceeding and is the source of frequent litigation." ***Id***., ¶21. The application of ***Hampton*** to all cases, regardless of the ultimate sentence, would serve to reduce the risk of future litigation over the issue.

In addition, the supreme court stressed, "Courts are required to notify defendants of the direct consequences of their pleas." ***Id***., ¶22. That remark suggests that the application of ***Hampton*** should not be measured by the end result of the proceeding when the circuit court's sentence is known to the defendant but rather by the uncertainty as to the sentence when the court is engaging the defendant in the plea colloquy.

Moreover, the supreme court's discussion harkens back to well-established Wisconsin case law holding that a sentencing court must advise a defendant that the court is not bound by a plea agreement. Quoting from ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 24, 203 N.W.2d 638 (1973), which, in turn, quoted from the then American Bar Association standards, the ***Hampton*** court said, "If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court*." ***Hampton***, 274 Wis. 2d 379, ¶28; *see also* American Bar Association, *Standards Relating to Pleas of Guilty*, Approved Draft, §1.5 at 29 (1968) (emphasis added). This principle has been confirmed in more recent cases. *See* ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990); ***State v. Comstock***, 168 Wis. 2d 915, 927 n.11, 485 N.W.2d 354 (1992); and ***State v. Williams***, 2000 WI 78, ¶2, 236 Wis. 2d 293, 613 N.W.2d 132. None of these authorities state that the rule is limited to instances where the court has exceeded the bounds of a plea agreement.

Moreover, neither ***Hampton*** nor any of the authorities it cites adopts a harmless error or "lack of prejudice" approach, which measures the circuit court's failure to advise that the court is not bound by the terms of a plea agreement against the sentence actually meted out.

Finally, we note that the plea colloquy stage of a criminal proceeding is obviously not the sentencing phase of the proceeding. While a circuit court may have a range of potential penalties silently in mind when taking a plea, the court has yet to receive and hear the abundance of information that will bear on the ultimate sentence. Thus, prudence and thoroughness would call upon the court to deliver the ***Hampton*** warning regardless of the sentence eventually imposed.

On the other side of the issue, we observe that ***Hampton*** did not present the situation in this case where the circuit court sentenced within the bounds of the plea agreement. The same is true of the other authorities cited by ***Hampton***. As a result, the State argues that ***Hampton*** should not apply because Elvers cannot demonstrate any prejudice. On a related theme, the State argues that any error under ***Hampton*** (assuming ***Hampton*** applies) was harmless.

In support, the State cites to ***United States v. Chan***, 97 F.3d 1582, 1583 (9th Cir. 1996), where the appellant sought to withdraw her plea on the basis of the district court's violation of Rule 11(e)(2) of the Federal Rules of Criminal Procedure. This Rule requires a district court to advise a defendant entering into a plea agreement under Rule 11(e)(1)(B) that if the court rejects the plea agreement, the defendant has no right to seek a withdrawal of the plea on the basis of such a rejection. *See* ***Chan***, 97 F.3d at 1583. The ***Chan*** court held that the appellant was not entitled to withdraw her plea, observing that the sentence imposed was in

keeping with the government's sentencing recommendation under the plea agreement. *See* ***id***. at 1584. This fact distinguished the case from earlier cases where the sentencing court had imposed a sentence in excess of the government's recommendation. *See* ***id***. As a result, the court said that the violation of the warning requirement in Rule 11(e)(2) was an error with no adverse effect on the defendant's substantial rights. ***Chan***, 97 F.3d at 1584. In short, the defendant received the sentence for which she bargained. The same can also be said of Elvers in this case.

The State also likens this case to ***State v. Quiroz***, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, where the defendant sought to withdraw his plea because the circuit court had mistakenly informed him that the maximum penalty was fourteen years instead of thirteen years. The court of appeals concluded that even if the court had misspoke, such an error did not constitute a manifest injustice for purposes of plea withdrawal since the defendant received a sentence less than the maximum under the law. ***Id***., ¶16.

If the purpose of the ***Hampton*** warning is to guard against situations where the defendant receives a sentence beyond the bounds of a plea agreement, then limiting ***Hampton*** to such situations makes sense.

CONCLUSION

Hampton clearly confirms that when a defendant has been sentenced beyond the bounds of a plea agreement, a defendant is entitled to a hearing on a motion for withdrawal of the plea when the motion demonstrates: (1) a plea colloquy in which the circuit court failed to advise that the court is not bound by the terms of the plea agreement, and (2) the motion further alleges that the defendant did not otherwise understand that the court was not bound by the

agreement. However, what is not clear is whether ***Hampton*** extends to a case such as this where the circuit court's sentence was within the bounds of the plea agreement. Because the issue is one of constitutional dimension, because the supreme court has appropriately taken the lead on this question in ***Hampton***, and because this case presents the opportunity for the supreme court to discuss the reach (or limits) of its holding in ***Hampton***, we respectfully request the supreme court to take jurisdiction over this appeal.