

Appeal No. 2007AP964-CR

Cir. Ct. No. 2006CM354

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

FILED

v.

Apr 03, 2008

MIGUEL E. MARINEZ, JR.,

David R. Schanker
Clerk of Supreme Court

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Lundsten and Bridge, JJ.

At issue in this criminal case is the propriety of a circuit court judge advising a defendant that the judge intends to exceed the sentencing recommendation in a plea agreement and offering the defendant an opportunity to withdraw his or her plea. The State contends that this practice is barred by *State v. Williams*, 2000 WI 78, 236 Wis. 2d 293, 613 N.W.2d 132. Because we believe this is a widespread practice involving important constitutional rights, we certify this appeal.

In the present case, Miguel Marinez reached a plea agreement with the prosecutor that called for Marinez to enter a guilty plea to the charge of misdemeanor disorderly conduct in exchange for a joint sentencing recommendation of a \$100 fine. After Marinez entered his plea, the court moved immediately to sentencing. During this part of the hearing, the court took steps to

better inform itself about Marinez's prior record. After learning certain information, the judge stated she was "not going to order a small fine in this case." The judge then offered to let Marinez withdraw his plea. The State objected, but Marinez opted to withdraw his plea, and the court granted withdrawal. The State petitioned for leave to appeal from that nonfinal order, and we granted the petition.

The State argues that, under *Williams*, the judge's actions constituted impermissible involvement in plea negotiations. The *Williams* court declined to adopt a rule that "when a trial court anticipates that it will exceed the sentence recommendation in the plea agreement, the court must inform the defendant that the court probably will not follow the State's recommendation and offer the defendant an opportunity to withdraw the plea." *Id.*, 236 Wis. 2d 293, ¶15. One reason the *Williams* court gave for rejecting this rule is that the practice would improperly involve courts in plea negotiations. *Id.*, ¶¶20-21, 26. *Williams* states: "Requiring a trial judge to approve or disapprove of a particular sentence recommendation prior to sentencing would in effect cause the trial court to participate in plea bargaining and therefore would undermine the voluntariness of the plea." *Id.*, ¶26. It follows, according to the State, that *Williams* not only declined to require the practice, but also effectively held that it is impermissible.

Marinez argues that the *Williams* court did not intend that its decision be read as barring the practice. He argues that the case law and policy reasons for barring courts from involvement in plea negotiations refer to involvement in *pre-plea* negotiations, rather than ratification after an agreement has been reached. He further argues that, if a court's offer of plea withdrawal is impermissible involvement in plea negotiations, that conclusion is inconsistent with case law demonstrating that courts are required to get involved when the State agrees to dismiss or reduce a charge as part of a plea bargain. In these

situations, a court must decide whether to accept or reject the dismissal or reduction. See *State v. Comstock*, 168 Wis. 2d 915, 927-29, 485 N.W.2d 354 (1992); *Salters v. State*, 52 Wis. 2d 708, 715, 191 N.W.2d 19 (1971); *State v. Roubik*, 137 Wis. 2d 301, 305-08, 404 N.W.2d 105 (Ct. App. 1987). Marinez argues that a court's rejection of a dismissal or reduction often prompts renegotiation by the parties, but is not considered to be improper participation in plea negotiations.

We note that this particular case involves a post-plea offer to withdraw a plea. But it is not readily apparent to us why it matters whether a judge makes a post-plea offer or instead warns a defendant prior to entry of a plea. So far as we can tell, the two practices are functionally equivalent, and a decision in this case will cover both practices.

It does not appear to us that the *Williams* court considered whether a judge should be prohibited from informing a defendant that the judge intends to exceed a sentencing recommendation in a plea agreement and offering the defendant an opportunity to withdraw his or her plea or to not enter a plea in the first place. Accordingly, we certify this appeal so that the supreme court may resolve the issue.

