COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP637-CR
2009AP638-CR

Cir. Ct. Nos. 2006CM5863
2007CM5240

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY A. STOKES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Remanded with directions*.

¶1 CURLEY, P.J.[1] Tracy A. Stokes appeals the judgment entered following his guilty plea to a charge of disorderly conduct, contrary to WIS. STAT. § 947.01 (2005-06), which was amended from a charge of knowingly violating a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

domestic abuse injunction.[2] Stokes argues that the postconviction court erred in determining that there was no prosecutorial vindictiveness for filing new charges when in a previous proceeding Stokes' request for a new attorney was granted after he appeared in court for the first time since his initial appearance some eleven months earlier, discovered that a jury trial was scheduled for which he had had no previous notice, and had had limited contact with his attorney during the pendency of his case. The trial court found the request for a new attorney "legitimate" and adjourned the matter. The prosecutor then advised the court that it would be issuing additional charges. Approximately two weeks later, the prosecutor who had appeared in court in Stokes' case filed a criminal complaint charging Stokes with six counts of knowingly violating a domestic abuse injunction and three counts of misdemeanor bail jumping, contrary to WIS. STAT. §§ 813.12(8) and 946.49(1)(a). Consequently, Stokes also appeals the judgment entered following his guilty pleas to two additional amended counts of disorderly conduct and four amended disorderly conduct forfeiture charges, contrary to § 947.01 (2005-06) and MILWAUKEE, WIS., ORDINANCE § 106-1 (erroneously referenced as § 63.01). The new case was subsequently consolidated with the older charge. Because no testimony was taken to permit the postconviction court to evaluate the reasons why the prosecutor chose to charge the additional charges after Stokes exercised his constitutional right to an effective attorney, this matter is remanded for an evidentiary hearing.

[2] The Honorable Frederick C. Rosa presided over the proceedings when Stokes' attorney withdrew. The Honorable Clare L. Fiorenza presided over the guilty pleas and decided the postconviction motion.

I. BACKGROUND.

¶2 On August 10, 2006, Stokes was charged with knowingly violating a domestic abuse injunction. The criminal complaint alleged that in a letter to his three-year-old daughter, Stokes wrote "[t]ell mommy daddy is sorry." His daughter's mother, Leah Hubbard, had previously obtained a domestic abuse injunction against Stokes prohibiting him from having any contact with her. Because Stokes was being held in custody on another matter, he was brought in from the Kenosha County Detention Center for the initial hearing, and then returned to that institution.

¶3 The case was scheduled for hearings numerous times. Much of the time the proceedings could not be held because the State failed to produce Stokes from the institution. In fact, a reading of the judgment roll suggests that the case was scheduled for court appearances twenty-one times over the course of one-and-one-half years between the initial appearance and the time Stokes pled guilty, and in that time span, Stokes was produced only three times.

¶4 On July 23, 2007, Stokes was conveyed to Milwaukee and appeared in the courtroom. He discovered that his case was set for a jury trial. He objected, stating to the judge that he had no notice of the jury trial date, had no civilian clothes, and he had left his papers which he had prepared for the trial back at the institution. He also argued to the court that he had had very little communication with his attorney. During the on-the-record discussions, the prosecutor stated that the victim was present and "would like to dispose of this case as soon as possible." However, the prosecutor, after advising the court that Stokes had a revocation pending for which he could be sentenced for up to twenty years, said: "It may be in everyone's interests to just postpone this for another two weeks until we get the

final revocation decision." After giving Stokes an opportunity to discuss his case with his attorney, the trial court recalled it and decided to take the case off the trial calendar. In so doing, the trial court said "it doesn't sound like the relationship between yourself and your lawyer would allow him to zealously represent you as he is required to do under the code of professional responsibility." Further, in explaining the current attorney-client relationship, the trial court noted that "[n]either seems to feel that the attorney-client relationship is functional at this point in time, and they're unable to work together in allowing … [Stokes' attorney] to present a defense…." Consequently, shortly thereafter the trial court was in the process of adjourning the trial when the prosecutor said:

> Your Honor, if I may interject here, at this point, the offer that we had on the table is – is of course off. It was only good for today. And I think the Court should know that the State will be filing 13 more charges in this case, eight counts of [Violation of Domestic Abuse Injunction] and five counts of bail jumping.

¶5 Stokes' attorney objected and said the adjournment had nothing to do with the plea bargain; rather, it was the attorney-client relationship that was preventing the case from going forward. Shortly thereafter, Stokes attempted to enter a *pro se* guilty plea which the trial court would not permit. The trial court had an off-the-record conversation with the attorneys which culminated with the trial court stating the following:

> THE COURT: Okay. We're back on the record. Court has had an off-the-record discussion with counsel. I told counsel I thought Mr. Stokes' complaints today were legitimate, given what he said about the less than ideal level of contact between himself and his attorney and opportunity to prepare for trial today if the case were to be tried. The State, I understand, is upset and they have reasons which are legitimate, also.

> The Court has suggested to all parties that today is not a good time to make the difficult decision that everyone is trying to make and for Mr. Stokes to possibly enter a plea, for the State to contemplate whether additional charges are being filed. And the Court has merely suggested let's get a new attorney for Mr. Stokes and has suggested that perhaps the State reflect on what course of action they're choosing to take; no need to make a decision at this moment today.
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> So that having been said, we've got a status of counsel date. [Stokes' then-attorney] is going to do whatever he can to find out who the new lawyer is and possibly turn over discovery and get that person up to speed. Mr. Stokes, I – I would hope you talk with your new lawyer as quickly as possible. The State is in a position where they can extend offers and they can revoke offers. They're under no obligation, and the Court will not involve itself in the negotiation process.

¶6 Approximately two weeks later, the State issued nine new charges. Eventually, on February 26, 2008, Stokes pled guilty in the original case to one count of an amended charge of disorderly conduct, and in the new case he pled guilty to two additional counts of misdemeanor disorderly conduct and four disorderly conduct forfeiture charges. The bail jumping charges, which were added when the State issued new charges, were dismissed. After sentencing, Stokes indicated his intention to pursue postconviction relief. Seven months later, he filed a motion claiming prosecutorial vindictiveness and seeking to withdraw his guilty pleas. In his motion he sought a hearing. Later, he abandoned his claim that his guilty plea was not knowingly, voluntarily, and intelligently entered. No hearing was ever held delving into the prosecutor's reasons for charging the additional counts.[3] Notwithstanding that the prosecutor never testified concerning the motive for the additional charges, the trial court denied the postconviction

[3] When he abandoned his claim seeking to withdraw his guilty plea, Stokes asked that the previously scheduled motion hearing be canceled.

motion, writing that "the defendant has failed to establish that the State's decision to file the additional charges in 07CM005240 was actually motivated by a desire to retaliate against the defendant for discharging counsel." This appeal follows.

II. ANALYSIS.

¶7 A prosecutor presumably brings criminal charges against a defendant for the purpose of securing a conviction, and we recognize that the plea negotiation process is one of the means through which a prosecutor may acquire such a conviction. We also note that a prosecutor has wide discretion in deciding whether to file criminal charges, and that the prosecutor's initial charging decision is often influenced by his or her desire to induce a guilty plea from the defendant. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 364-65 (1978). The Supreme Court recognized in ***Bordenkircher*** that plea negotiation is a legitimate process and held that a prosecutor can constitutionally threaten to file additional charges against a defendant if the defendant refuses to plead to the charges before him or her. *See* ***id.*** at 363-65. The Court explained that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." ***Id.*** at 364.

¶8 A prosecutor, however, cannot retaliate against a defendant for exercising his or her constitutional rights. *See* ***id.*** at 363. Due process "prohibits an individual from being punished for exercising a protected statutory or constitutional right." ***United States v. Poole***, 407 F.3d 767, 774 (6th Cir. 2005) (citing ***United States v. Goodwin***, 457 U.S. 368, 372 (1982)). But "the Due Process Clause is not offended by all possibilities of increased punishment ... only by those that pose a realistic likelihood of 'vindictiveness.'" ***Blackledge v. Perry***,

417 U.S. 21, 27 (1974). A defendant alleging prosecutorial vindictiveness must show either "'actual vindictiveness'" or a "'realistic likelihood of vindictiveness.'"[4] ***United States v. Dupree***, 323 F.3d 480, 489 (6th Cir. 2003) (citation omitted). Actual vindictiveness is demonstrated by "'objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights.'" ***Id.*** (citation omitted). The realistic-likelihood-of-vindictiveness standard examines the prosecutor's "'stake' in deterring the exercise of a protected right and the unreasonableness of his actions." ***Id.*** (citation omitted).

¶9 In ***State v. Tkacz***, 2002 WI App 281, ¶28, 258 Wis. 2d 611, 654 N.W.2d 37, a case where the claim of prosecutorial vindictiveness was based upon the prosecutor's refusal to reoffer a plea bargain after Tkacz successfully appealed his previous conviction, this court said:

> In order to determine whether a prosecutor's decision to decline to reoffer a plea bargain after a defendant's successful appeal constitutes prosecutorial vindictiveness in violation of the defendant's due process rights, we must first decide whether a realistic likelihood of vindictiveness exists; if it does, then a rebuttable presumption of prosecutorial vindictiveness applies.

The defendant bears the burden of establishing that under the circumstances of his or her case a realistic likelihood of vindictiveness exists. ***State v. Johnson***, 2000 WI 12, ¶33, 232 Wis. 2d 679, 605 N.W.2d 846. If we conclude that the rebuttable presumption does not apply, then we must determine whether the defendant has demonstrated a claim of actual prosecutorial vindictiveness. ***Id.***, ¶17.

[4] Stokes makes only a claim of actual vindictiveness.

¶10 "[T]he United States Supreme Court has set forth a prophylactic rule that a presumption of vindictiveness arises when a prosecutor files more serious charges against a defendant after the defendant appeals a conviction and wins a new trial." ***Id.***, ¶32. A realistic likelihood of vindictiveness exists in such a case because the prosecutor has the ability to discourage appeals by "'upping the ante'" against the defendant with a more serious charge. *See* ***Blackledge***, 417 U.S. at 27-28. This rule recognizes the basic principle that it is a violation of due process when the State retaliates against a person "for exercising a protected statutory or constitutional right." ***Goodwin***, 457 U.S. at 372. The Court has observed, however, that it would clearly be a different case if the State had established that the new charge was based on new events and could not have been brought in the original proceeding. *See* ***Blackledge***, 417 U.S. at 29 n.7.

¶11 In examining the record, this court observes that the original trial court believed Stokes' claim that the attorney-client relationship was irreparably damaged and Stokes was entitled to another attorney. Therefore, Stokes was exercising his constitutional right to effective counsel when he asked for a new attorney. Further, the record reflects that the prosecutor did not believe time was of the essence, as it was originally the prosecutor's idea to postpone the matter. In addition, the trial court characterized the prosecutor as being "upset" when the trial court adjourned the matter. In light of these facts, there is the possibility of actual vindictiveness in the filing of the additional charges. Therefore, this court cannot assume, as apparently the postconviction court did, that the prosecutor was motivated to file additional charges "'in an attempt to obtain a guilty plea.'" (Citation omitted.) Consequently, an evidentiary record needs to be made to

determine the prosecutor's motive in filing the additional charges.[5] For the reasons stated, the matter is remanded for a hearing.

By the Court.—Remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Further, this court also disagrees with the trial court's determination that the State did not put the defendant in a "Morton's Fork situation." (Morton's Fork is an expression that describes a choice between two equally unpleasant alternatives, or two lines of reasoning that lead to the same unpleasant conclusion. It is analogous to the expressions "between the devil and the deep sea," or "from the frying pan to the fire.") *See, e.g.*, ***Richmond Med. Ctr. for Women v. Herring***, 570 F.3d 165, 179 (4th Cir. 2009) (en banc) (describing a Morton's Fork "where the doctor must choose between criminal liability or care that the doctor believes is not in the best interest of the patient"). The trial court wrote that because Stokes' attorney claimed to be ready for trial, Stokes had the option of going to trial. Whether or not Stokes' attorney was prepared to try the case was irrelevant. The original trial court judge determined that Stokes had a right to have a functioning attorney-client relationship, which the trial court determined did not exist. Consequently, it mattered little whether the attorney was prepared for trial. The circumstances surrounding Stokes were that Stokes was not prepared for trial, as he had no advance knowledge that a jury trial had been scheduled; his relationship with his attorney was dysfunctional; and the trial court refused to allow him to enter a guilty plea while acting *pro se*. Therefore, Stokes had no options available to him to prevent the filing of additional charges.