COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2633-CR **Cir. Ct. No. 2007CF525**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES STONER, III,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] This appeal is about a "reopen-and-amend" provision of a plea agreement, a phrase coined by prior Wisconsin case law

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

referring to those plea bargains where the State and defendant agree that a judgment of conviction, once announced, will be amended by the State upon the happening of some future event. Prior decisions of our court hold that such agreements are illegal because judgments, once announced, may not be amended by a prosecutor.[2] The parties do not dispute the illegality here. Rather, they dispute the remedy. Stoner would like for the illegal provision to be simply severed and the remainder enforced. The trial court, however, struck the whole sentence as the product of illegality and put the parties back where they were before the agreement was made. Case law supports the trial court here and we affirm.

¶2 Stoner was charged with felony possession of THC with intent to deliver and, after he screwed up while on bond, felony bail jumping. The parties agreed that he would plead guilty to two misdemeanor THC possession charges and a misdemeanor bail jumping. Sentence would be withheld and he would be placed on probation. But there was a proviso that "if the defendant does not successfully complete probation or if he commits a new criminal offense during that period of probation supervision, there would be a stipulation to reopen the [THC] charges … vacate the plea, and Mr. Stoner would enter a plea to one of the felony counts in that file."

¶3 This is what is known as a reopen-and-amend provision. The first court to deal with these provisions was ***State v. Hayes***, 167 Wis. 2d 423, 481 N.W.2d 699 (Ct. App. 1992). There, our court held that judgments, once

[2] *See* ***State v. Hayes***, 167 Wis. 2d 423, 481 N.W.2d 699 (Ct. App. 1992); ***State v. Dawson***, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12.

pronounced, may not be amended. ***Id.*** at 427-28. That decision upheld a trial court's action in deleting from the sentence a provision that if Hayes successfully completed his probation, the case would be reopened and he would be convicted of a misdemeanor, possessing cocaine, rather than the felony delivery of a controlled substance. ***Id.*** at 425.

¶4 These provisions were given a name in ***State v. Dawson***, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12. There, the defendant pled no contest to first-degree sexual assault of a child with the proviso that the State would move to reopen and amend the judgment to a lesser charge of intentional physical abuse of a child if he successfully completed probation. ***Id.***, ¶2. Ostensibly, this would mean he would not have to register as a sex offender. Postconviction, Dawson moved to withdraw his plea on the grounds that the reopen-and-amend provision was not authorized by Wisconsin law. ***Id.***, ¶4. After the trial court denied relief, Dawson appealed. ***Id.***, ¶¶4-5. Citing ***Hayes***, the court resolved to draw a bright line rule that reopen-and-amend agreements are illegal. ***Dawson***, 276 Wis. 2d 418, ¶¶8-10. We commented that "[o]ur point in ***Hayes*** was that, once a charge becomes a conviction, a prosecutor may *not* amend it, because amending the charge would also necessarily require amending the judgment of conviction to reflect the reduced charge, which no statute authorizes either a prosecutor or trial court to do." ***Dawson***, 276 Wis. 2d 418, ¶18.

¶5 On appeal, both the State and Stoner agree that the reopen-and-amend provision in the case at bar was illegal. They disagree about the remedy. Rather than enforcing the agreement, as the State had originally requested, or proceeding to a sentencing after revocation, as the defense requested, the trial court vacated the pleas and reinstated the original information. The trial court, in effect, said that this was a contract, the contract is unenforceable, the State totally

lost the benefit of its bargain, and thus, the plea was not knowingly and intelligently entered into. As we said above, Stoner would have us decide that the offending provision must be severed from the rest of the judgment and, as reconstituted, the judgment should be specifically performed. In other words, rather than go back to square one, Stoner would like the court to proceed to sentence him on the misdemeanors from which the revocation of probation stemmed. He obviously wants to avoid exposure to conviction of a felony, which is what he would be subject to if "square one" were accomplished. The State, for its part, has abandoned its request that it be allowed to amend the judgment and require Hayes to plead to a felony. It now wants to start from scratch with the felony information intact. As such, it argues that the trial court's order should be affirmed.

¶6 We side with the State. The trial court correctly reasoned that a plea agreement is a contract. *See* ***State v. Deilke***, 2004 WI 104, ¶12, 274 Wis.2d 595, 682 N.W.2d 945. In such agreements, there are material benefits to be gained by both parties. It is the give-and-take of plea bargaining that produces the ultimate agreement. Here, it is obvious what Stoner stood to gain: he would not be saddled with a felony and he would be getting probation. It is also obvious what the State stood to gain: a hammer over Stoner's head so as to make him go the straight-and-narrow, plus a kind of liquidated damages provision whereby Stoner agreed that he would plead guilty to a felony if he got in trouble again during the probationary term. Both parties were under the misapprehension that this "hammer" was a proper quid pro quo for the benefits that Stoner stood to gain.

¶7 We think that Stoner does not really argue against the preceding paragraph. Rather, we read his argument to be that since he got the benefit of *his* part of the bargain, the plea was therefore voluntarily and knowingly entered into

as far as he is concerned. In other words, his claim appears to be that his plea was knowing and voluntary—even if he would now be able to keep *his* benefit while the State would not be able to keep *its* benefit. We get this idea after reading his reply brief where he identifies the State's position as being that the entire plea must be excised on the ground that the plea "was not knowingly and voluntarily entered on behalf of either Mr. Stoner *or the [S]tate*." Stoner then submits that the State has no right to claim that a plea bargain is unenforceable, even though it can no longer claim the benefit the parties agreed to.

¶8 We reject this argument. In our view, because the reopen and amend provision was a legal impossibility from the get-go, *Stoner* could not have knowingly bargained for it. Had the parties known that reopen-and-amend agreements are unenforceable, this agreement never would have happened. Thus, *both* parties were knowingly and voluntarily agreeing to a legal impossibility. Under ***Dawson***, a legal impossibility renders the resulting plea "neither knowing nor voluntary." ***Dawson,*** 276 Wis. 2d 418, ¶14. Just because the plea agreement leads a defendant to believe that a material advantage or right inuring to the *State* has been reserved when in fact it cannot be legally obtained, does not mean that the defendant nonetheless made a knowing and voluntary plea as it pertains to him alone. This plea agreement was global in the sense that Stoner knowingly and voluntarily understood that he was giving up something in order to get something, just like the State. His benefit was conditioned upon the State receiving a benefit. When the State no longer had that benefit, then his benefit could no longer be obtained either. The quid pro quo being rendered unenforceable, it stands to reason that he could not have knowingly or voluntarily entered into it. The global plea, consisting of the total give-and-take of the parties, cannot be parsed out into

sections so that Stoner can take but not have to give. If part of the give-and-take goes down in flames, the whole global agreement goes down with it.

¶9 Stoner also makes a double jeopardy claim, saying that, following the plea, he was found guilty and jeopardy attached at that point. He also notes that he was put on probation, which is a "substantial restriction of freedom." *See* ***Gall v. United States***, 552 U.S. 38, 44 (2007). Thus, he paid a price for the bargain and the State thereby gained. He argues that, if the order stands, he will be subjected to jeopardy twice for the same offenses.

¶10 He acknowledges that his double jeopardy argument only works if he had an expectation in the finality of the previous judgment. *See* ***State v. Jones***, 2002 WI App 208, ¶10, 257 Wis. 2d 163, 650 N.W.2d 844 (noting that "the analytical touchstone for double jeopardy is the defendant's legitimate expectation of finality in the sentence"). And he further acknowledges the State's argument that a plea which is legally unenforceable is not a plea to which a defendant can legitimately argue is final and binding. *See* ***State v. Helm***, 2002 WI App 154, ¶17, 256 Wis. 2d 285, 647 N.W.2d 405 (holding that where a court imposes an illegal or invalid sentence, a resentencing that increases the sentence did not violate the defendant's double jeopardy protections). He tries to get around the State's argument by again asserting that, because he was placed on probation, and because probation was a valid sentence, then it still violates his double jeopardy protections even if the court misunderstood the law. Apparently he believes that because he paid some price and because he did so expecting finality in the sentence, double jeopardy therefore should apply and he should be sentenced based on his revocation of probation.

¶11 But, we agree with the State that Stoner is only arguing half the story about probation being a curtailment of liberty and thus he has paid a price. In ***State v. Dean***, 111 Wis. 2d 361, 365, 330 N.W.2d 630 (Ct. App. 1983), we held that:

> [b]ecause probation is a form of punishment and a person cannot be placed twice in jeopardy of punishment, we now hold that the reimposition of a sentence after a defendant has been placed on probation, absent a violation of a condition of probation, is a violation of both the United States and Wisconsin Constitutions' double jeopardy clauses.

As the State points out, Stoner is not being faced with "reimposition" of a sentence. Rather, the sentence is a nullity. It is as if it never existed. To the extent that Stoner may argue that the placement on probation really happened and thus a curtailment of his liberty likewise really happened and cannot be erased, the plain fact is that the probation came with all kinds of conditions that were never fulfilled. If he had successfully completed his probation, he would have gained the advantage of a permanent shield from exposure to the two felony counts that were reduced to misdemeanors. And because he did not successfully complete his probation, he would have had to plead to a felony but for the illegality of the reopen-and-amend provision. In other words, he cannot reasonably argue that he expected finality of a sentence where probation was only a facet of the totality of the bargain.

By the Court.—Order affirmed.

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