Appeal No. 2008AP755-CR **Cir. Ct. No. 2007CF324**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-CO-APPELLANT,

HONORABLE PETER L. GRIMM,

INTERVENOR-RESPONDENT,

V.

JOSHUA D. CONGER,

DEFENDANT-APPELLANT.

FILED

July 2, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

We certify this appeal to the Wisconsin Supreme Court under WIS. STAT. RULE 809.61 (2007-08).[1]

Wisconsin recognizes limited judicial supervision of prosecutorial decisions to reduce or dismiss charges. ***State v. Roubik***, 137 Wis. 2d 301, 307, 404 N.W.2d 105 (Ct. App. 1987). The dispute in this case raises the question of the extent of the trial court's limited supervisory role. The trial court here refused

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

to accept a plea agreement that reduced one felony charge to three misdemeanor charges, finding that the agreement was not in the public interest. The trial court rejected the agreement after learning that the law enforcement agency that had investigated the crime did not, in general, approve of reducing felonies to misdemeanors.

The appeal raises three issues: (1) what is the trial court's scope of review when deciding whether to accept or reject a plea agreement; (2) what factors must a trial court consider when determining whether a plea agreement is in the public interest; and (3) whether a trial court may take into account the view of law enforcement when considering the public's interest in a plea agreement. We conclude that guidance is needed from the supreme court on what deference the trial court should give to a prosecutor's charging decision and what factors the trial court should consider when determining whether a plea agreement is in the public interest. Consequently, we certify this appeal to the Wisconsin Supreme Court for its review and determination under WIS. STAT. RULE 809.61.

BACKGROUND

The defendant, Joshua D. Conger, was charged with possession with intent to deliver more than 200 grams but less than 1000 grams of marijuana within 1000 feet of a park, a Class H felony, WIS. STAT. ch. 961, and possession of drug paraphernalia, WIS. STAT. § 961.573(1).[2] The police found forty-eight individually wrapped baggies of marijuana totaling 774 grams, hidden behind a ceiling tile in the home Conger shared with his girlfriend and a third person. The

[2] A charge of maintaining a drug trafficking place was dismissed after the preliminary hearing.

officers also found a digital scale, a box of sandwich baggies, and "a large amount" of marijuana stems. Conger also apparently told a police officer that he owed $2900 to a drug supplier.

The parties negotiated a plea agreement, which reduced the felony charge to three counts of misdemeanor possession of marijuana with intent to deliver, and the drug paraphernalia charge was to be dismissed and read-in. When the plea agreement was presented to the court, the State explained that the decision to reduce the charge was based on the facts that Conger was twenty-two at the time of the offense with no prior record, the drugs were found in the ceiling of a shared residence, his girlfriend was also being prosecuted, Conger had not admitted that the drugs were his, Conger had been doing well on bail and had participated in drug and alcohol counseling, and the State wanted to give him a chance to "clean up his act."

The trial court was concerned about what the police drug unit's opinion of the reduction in charges was because, under ***State v. Kenyon***, it had a duty to consider the public interest, and that "the officer or police agency sentiment can be a bearing on that inquiry the Court has to undertake."[3] The prosecutor later reported that the police drug unit did not agree "in general" with the decision to reduce the charge from a felony to a misdemeanor.

The trial court refused to accept the plea agreement based on the public interest. The court stated that based on the facts of this case, including the large quantity of marijuana packaged for resale, "the offense is too serious for

[3] ***State v. Kenyon***, 85 Wis. 2d 36, 270 N.W.2d 160 (1978).

misdemeanors and that the public interest is preserved by maintaining the case as a felony."[4] Conger petitioned for an interlocutory appeal, which we granted. The State and Conger are co-appellants in this appeal, and the Honorable Peter S. Grimm is the respondent.

DISCUSSION

The parties disagree on the appropriate scope of the trial court's review of a plea agreement. The State acknowledges that, while the trial court has the authority to reject proffered plea agreements in the public interest, it erred in this case because it did not give proper deference to the prosecutor's reasonable exercise of discretion in entering into the plea agreement. The State asks the court to conclude that, as long as the State has indentified legitimate reasons for entering into the agreement, the trial court may not substitute its view of the public interest for that of the prosecutor, unless the prosecutor has "wholly failed" to consider the interests of the victim or victims. Further, it asks the court to rule that a trial court may not reject a plea agreement on the grounds that it is contrary to law enforcement's opinion in a case in which a law enforcement officer is not a victim of the crime. The State argues that this standard conforms to the federal standard, citing ***United States v. Ammidown***, 497 F.2d 615, 622 (D.C. Cir. 1973), and to the standard used by other states.

[4] The court went on to say:

> And I am mindful that when felonies are dropped to misdemeanors solely on what I would call sentencing factors, it does decrease the morale of law enforcement. They feel they are out there on the streets knocking themselves out, putting together cases only to have them reduced later, and that is one of the proper considerations of the public interest and proper law enforcement and the enforcement of its laws.

Conger argues that the trial court misapplied the holding in ***State v. Kenyon***, 85 Wis. 2d 36, 43, 270 N.W.2d 160 (1978), because that case involved a dismissal and this case involves an amendment to the charge. Conger argues the trial court should apply an erroneous exercise of discretion standard when reviewing the prosecutor's decision to reduce a charge under a plea agreement. Conger argues that the trial court acted as a prosecutor by deciding what the appropriate charge should be, and thereby violated its duty to act as a neutral and detached magistrate. Conger further argues that the trial court's decision to consider the opinion of law enforcement independent of the prosecutor's opinion violated this court's holding in ***State v. Matson***, 2003 WI App 253, ¶25, 268 Wis. 2d 725, ¶25.

Judge Grimm argues that this case is merely a review of whether the circuit court properly exercised its discretion, and the law is settled that the circuit court may take the public interest into consideration when deciding whether to accept or reject a plea agreement. Judge Grimm acknowledges that, under ***State ex rel. Kurkierewicz v. Cannon***, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969), a prosecutor has unfettered discretion to bring a criminal charge. He argues, however, that it is well-settled that "once a district attorney commences prosecution in a criminal action, the discretion to amend or dismiss the charge then becomes a shared power with the courts and legislature under the separation-of-powers doctrine," citing ***State v. Dums***, 149 Wis. 2d 314, 323-24, 440 N.W.2d 814 (Ct. App. 1989). He further argues that ***Kenyon*** allows a court to review plea agreements to determine if the public interest is being served by the plea, and that the substantial deference standard argued by the State and Conger ignores the requirements of ***Kenyon***.

While ***Kenyon*** establishes the trial court's authority to consider the public interest, it is not clear what analysis the circuit court is to undertake in deciding whether a plea agreement is in the public interest. As we have noted, trial courts have limited supervision over prosecutorial decisions to reduce or dismiss charges. ***Roubik***, 137 Wis. 2d at 307. Further, "[when] a public interest is involved, or the interest of a third party, it is the duty of the court to consider those interests in determining whether or not to dismiss an action." ***Kenyon,*** 85 Wis. 2d at 43 (citation omitted). The ***Kenyon*** court stated that the standard is "admittedly broad" and "[i]t would be impossible to make an exhaustive list of just what to take into account in this regard." ***Id.*** at 46-47. The court then stated: "However, in all cases some finding should be made with respect to the impact of the ruling on the public interest in proper enforcement of its laws and the public interest in allowing the prosecutor sufficient freedom to exercise his [or her] legitimate discretion, to employ to the best effect his [or her] experience and training, and to make the subjective judgment implicit in the broad grant" of statutory authority. ***Id.*** at 47.

This language could be read to mean that not every case automatically implicates the public interest, and hence the court may consider the public interest only in certain cases. If that is the correct interpretation and the public interest is not involved in every case, then guidance is needed to identify those cases in which the trial court should consider the public interest in the plea agreement.

There is one further, and somewhat overlapping, consideration on this topic. Under well-established case law in Wisconsin, a trial court is not bound by a plea agreement entered into between a defendant and a prosecutor and may independently decide whether to grant charge or sentence concessions. *See* ***State***

v. McQuay, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990); ***Young v. State***, 49 Wis. 2d 361, 367, 182 N.W.2d 262 (1971); ***Roubik***, 137 Wis. 2d at 305; ***State v. Beckes***, 100 Wis. 2d 1, 6, 300 N.W.2d 871 (Ct. App. 1980). It is not apparent how this rule interacts with the rule in ***Kenyon***.

In ***Roubik***, we rejected the appellant's argument that the trial court lacked the authority to refuse to accept her guilty plea to a reduced drug charge that was the product of a plea bargain. ***Roubik***, 137 Wis. 2d at 305. We concluded that the court was not bound by the plea agreement. We also acknowledged that, while the prosecutor has broad discretion in performing his or her duties, "this discretion is not absolute in Wisconsin." ***Id***. at 307. Citing ***Guinther v. Milwaukee***, 217 Wis. 334, 339, 258 N.W. 865 (1935), we noted the "general standard in Wisconsin allowing limited judicial supervision of prosecutorial motions to dismiss or reduce charges[:] 'Where a public interest is involved, or the interest of a third party, it is the duty of the court to consider those interests in determining whether or not to dismiss an action.'" ***Id***.

Roubik may appear to answer the question we certify in this case. However, ***Roubik*** provides little, if any, guidance on the role of the prosecutor's discretion in deciding whether to enter into the plea agreement and the degree of deference, if any, the trial court should give to that judgment. In other words, we seek clarification on the question whether the trial court can in essence substitute its own judgment on what constitutes the public interest for the prosecutor's, considering all the factors the prosecutor considered, and arrive at a different conclusion; or is the court's role limited to assessing whether there are factors that relate to the public interest that the prosecutor did not consider, and on that basis reject a plea agreement.

The second question we certify is whether a circuit court may consider, as it did here, the investigating agency or officer's view of the plea agreement independently of the prosecutor's view. Judge Grimm, citing ***Guinther***, 217 Wis. at 339, appears to argue that the public interest or an interest of a third party includes the police and law enforcement, and therefore, it was proper for him to consider law enforcement's view on the plea agreement. Judge Grimm relies on language from ***Guinther***, where the court recognized that the police and the prosecutor share a "common purpose" and appreciate each other's responsibilities. The court then said:

> When it does happen that a prosecution begun by the police department is sought to be terminated by the city attorney, the law places upon the court the duty of deciding whether or not the *welfare of the people, the public interest*, will be served by sustaining a motion on the part of the city attorney to dismiss, or whether the court should retain jurisdiction and proceed with the trial.

Id. (emphasis added). This language, however, could also be reasonably read to require the court to consider the interests of the victim or victims, and others affected by the crime, and not the interests of law enforcement.

This court's decision in ***Matson***, 268 Wis. 2d 725, is also relevant to the question of whether a trial court may consider the views of law enforcement on a plea agreement independent of the prosecutor. In ***Matson***, we explained in a slightly different procedural context that the State speaks with one voice, through the prosecutor, and the circuit court should not consider what law enforcement thinks about a plea agreement. The issue before us in that case was whether the circuit court erred when it considered at sentencing, after the defendant had already entered his plea, a letter written by a police officer on police department stationery that asked the court to impose a harsher sentence than the agreed upon

recommendation. ***Id.***, ¶¶3, 7-8. We concluded that an investigative officer is the investigating arm of the prosecutor's office, and "principles of fairness and agency require us to bind the investigating officer to the prosecutor's bargain." ***Id.***, ¶23. We went on to say that: "Investigating officers are so integral to the prosecutorial effort that to permit one to undercut a plea agreement would, in effect, permit the State to breach its promise. If the prosecutor is obligated to comply with plea bargain promises, then the prosecutor's investigating officers may not undercut those promises by making inconsistent recommendations." ***Id.***, ¶25. Our reasoning was that the accused agrees to plead guilty in reliance on the State's offer, and "the accused's due process rights demand fulfillment of the bargain." ***Id.***, ¶16. We concluded that the State may not accomplish by indirect means what it agreed not to do directly. ***Id.***, ¶25.

In the present case, in contrast, the plea agreement had not yet been accepted by the trial court. The issue here is whether the prosecutor's action still binds the State and all its agencies, as we stated in ***Matson***, or whether the circuit court, acting in furtherance of its duty to consider the public interest, may seek input from the prosecutor's investigative arm about whether the agreement should be accepted. Further, if it was improper for the trial court to consider law enforcement's view of the plea agreement, we question whether we are required to reverse and remand on that basis alone, or whether we should review the trial court's other stated reasons in support of its decision to reject the plea agreement.

In sum, we require clarification from the Supreme Court on the roles of the trial court and the prosecutor with respect to the public interest in a plea agreement. We also require guidance on the standard to be used to determine when the trial court should consider the public interest, and what factors the trial

court should apply when considering the public interest. For these reasons, we believe this matter is appropriate for certification to the Wisconsin Supreme Court.