

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 15, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 97-3160-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES R. BROWNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County:  
ROBERT A. HAASE, Judge. *Affirmed.*

SNYDER, P.J. James R. Brownson appeals from an order denying a motion to withdraw his no contest plea to three counts of violating WIS.

ADM. CODE § ATCP 110.05(2)(d) governing home improvement projects.<sup>1</sup> He contends that the State breached the terms of his negotiated plea agreement by unilaterally creating a new probation condition<sup>2</sup> that was contrary to the court-imposed condition and that the new condition required Brownson to terminate his nonviolative employment with a family-owned business. The trial court held a *Rivest*<sup>3</sup> hearing and concluded that the directive was not in conflict with the original probation condition. We agree and affirm the order.

Brownson was sentenced to three years' probation with a stipulated condition, inter alia, that he not engage in any noncommercial home improvement construction covered by WIS. ADM. CODE § ATCP 110.01. Brownson was employed by Green Valley Excavators, Ltd. (Green Valley) and his supervising probation agent, Dennis Schuchardt, attempted to determine whether Brownson's employment was in compliance with the above probation condition. Green Valley refused to cooperate with Schuchardt's request to provide employment information showing that Brownson's employment was in compliance, and Schuchardt responded by commencing a revocation proceeding in early 1994. Brownson contested the revocation and prevailed because Green Valley was not obligated to provide the requested employment information to Schuchardt.

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<sup>1</sup> This is Brownson's second appeal. In his earlier appeal we (1) affirmed the trial court's refusal to grant Brownson relief from his probation revocation because he had failed to seek certiorari review of that revocation and (2) reversed the trial court's denial of Brownson's motion to withdraw his no contest pleas because we concluded that he had been denied a due process hearing. See *State v. Brownson*, No. 96-3555-CR, unpublished slip op. (Wis. Ct. App. June 4, 1997). The instant appeal is subsequent to the plea withdrawal hearing.

<sup>2</sup> For purposes of this appeal, we will refer to the original condition of probation as the "condition" and the probation agent's change of the condition as the "directive."

<sup>3</sup> *State v. Rivest*, 106 Wis.2d 406, 316 N.W.2d 395 (1982).

Following the denial of revocation, Schuchardt was still unable to determine whether Brownson's employment with Green Valley was in compliance with his terms of probation and issued the following directive to Brownson on June 20, 1994:

I cannot effectively supervise you while employed, or contracted, by Green Valley Excavators. You are therefore directed to cease all business relationships, of any kind, including but not limited to, employee, advisor or sub-contractor with Green Valley Excavators Ltd. by 7/7/94 your next scheduled appointment with me.

Brownson administratively appealed the above directive<sup>4</sup> and Schuchardt again commenced revocation proceedings.

Brownson did not contest the second revocation proceeding (thereby stipulating to the revocation of probation), and he was returned to the trial court for sentencing. The court imposed consecutive six-month jail terms. The trial court denied Brownson's postconviction motion to reinstate his probation or withdraw his pleas. We affirmed the revocation of probation but reversed and remanded the plea withdrawal issue for a due process hearing. After the hearing, the trial court held that Schuchardt's probation directive was not in conflict with the original employment condition and denied Brownson's motion to withdraw his pleas.

Brownson's appellate argument is predicated upon his claim that the State withdrew from the plea agreement when Schuchardt imposed a probation condition (no Green Valley employment) contrary to the original, stipulated probation condition (no involvement with noncommercial home improvement

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<sup>4</sup> The record does not contain information as to the authority for such a procedure or the outcome.

contacts). Brownson does not contend that the State violated the plea agreement at the plea or sentencing hearings,<sup>5</sup> but rather that Schuchardt's probation directive violated the plea agreement which allowed Brownson to engage in commercial construction activity. Brownson contends that the directive prohibited his employment with Green Valley in commercial construction activities and his ability to do commercial contract work from his home so he could care for his invalid spouse. He also contends that the directive was wrongly imposed because there was no evidence that he had violated the original employment condition.<sup>6</sup>

We agree with the trial court that the sole issue on remand was "whether a condition of probation imposed by the Department of Corrections [the Schuchardt directive] was in conflict with the condition of probation imposed by

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<sup>5</sup> In exchange for Brownson's plea to three criminal counts, the State moved to dismiss two other counts and recommended that Brownson be placed on probation. The district attorney stipulated that a condition of probation would be that "Mr. Brownson will not engage in any noncommercial construction, other than he can answer the phone and take phone messages for his son's business, who apparently does do the home improvement." When asked if he understood the probation condition, Brownson responded, "Yes. Noncommercial is the issue."

<sup>6</sup> Brownson's attorney also argued that the trial court had withdrawn from the plea agreement and claimed that Brownson "was never given an opportunity to withdraw his plea after this court no longer concurred with what was [in] the plea agreement." Brownson theorizes that because the trial court refused to reinstate probation at the postrevocation sentencing hearing, the trial court had withdrawn from the plea agreement and erred in not allowing Brownson to do the same. Brownson does not cite to any authority for the proposition that the trial court was involved in the plea negotiations (other than accepting the recommendation), and we know of none. We need not address inadequately briefed issues. See *State v. Beno*, 99 Wis.2d 77, 91, 298 N.W.2d 405, 413 (Ct. App. 1980), *rev'd on other grounds*, 116 Wis.2d 122, 341 N.W.2d 668 (1984).

the trial court.”<sup>7</sup> If the directive was not in conflict with the trial court’s condition of probation, Brownson’s motion to withdraw his plea fails.

Brownson stipulated at the plea hearing that if he was placed on probation he would not engage in noncommercial home improvement activity covered by WIS. ADM. CODE § ACTP 110.01. With that understanding, the State recommended probation with the stipulated probation condition being a part of the negotiated plea agreement, and the trial court followed the recommendation. *See State ex rel. Taylor v. Linse*, 161 Wis.2d 719, 724, 469 N.W.2d 201, 202 (Ct. App. 1991) (even where the State recommends probation pursuant to a plea agreement, the trial court alone determines whether the facts of the case warrant probation as a proper disposition).

Section 973.09(1)(a), STATS., authorizes the trial court to place a defendant on probation and to impose reasonable conditions of probation. Subsection (3) permits a court to modify the “terms and conditions” of probation, which includes not only court-ordered conditions but also special rules of supervision imposed by the department. *See Linse*, 161 Wis.2d at 725, 469 N.W.2d at 203. However, if there is any conflict between a court-ordered

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<sup>7</sup> We do note some confusion concerning this court’s remand for a *Rivest* hearing. We read that case to require that when the State seeks release from its obligations under a plea agreement because of an alleged breach of the agreement by the defendant, an evidentiary hearing is necessary to determine if there was a breach and if that breach was sufficiently material to release the State from its obligations. *See Rivest*, 106 Wis.2d at 411, 316 N.W.2d at 398. That is not the case here.

The State is not actively seeking release from its obligations; rather, Brownson contends that the State de facto withdrew from the agreement because the probation directive violates the plea agreement. *Rivest* requires a due process hearing to establish if the withdrawal was an appropriate remedy for the State *based upon a defendant’s breach*. Neither the State nor Brownson argues that Brownson breached the agreement. The State’s contention all along has been that Brownson violated his probation and was properly incarcerated as a consequence. We are satisfied, however, that the remand to the trial court has served its intended purpose.

condition of probation and a general rule of probation, the court-ordered condition will prevail because § 973.09(1)(a) specifically authorizes the court to impose such conditions. See *Linse*, 161 Wis.2d at 725, 469 N.W.2d at 203. When the department imposes additional conditions on a probationer, the trial court is the arbitrator of whether a department-imposed condition of probation is consistent with the probationary program envisioned by the court. See *id.* at 724, 469 N.W.2d at 203.

Schuchardt was the only witness to testify at the hearing on remand. He conceded that he changed the rules of probation after the first revocation proceeding failed but maintained that the new rule directing Brownson to terminate his Green Valley employment was consistent with the trial court's original condition. In response to the trial court's inquiry, Schuchardt stated that Green Valley would not provide him with assurance that Brownson was not violating the original noncommercial employment condition and that he was therefore unable to establish compliance with this probation condition.

Schuchardt testified that it was "difficult and impossible" to supervise Brownson concerning the noncommercial work condition but that it was his responsibility to ensure that Brownson was not engaged in any activity that would violate this condition. Schuchardt further testified that his directive was a "proactive approach" to monitoring Brownson's probation. He stated that what he was seeking from Green Valley was "information regarding the job sites, who the customers were and the names of the employees" and that he preferred "to prevent violations rather than deal with them after the fact."

Schuchardt testified that when he requested the employment information from Green Valley, Brownson told him that "the board of directors

had a meeting and they refused to release that information.” When Schuchardt pressed for employment information a second time, he was told “no via Mr. Brownson.” Schuchardt also explained that under the directive, Brownson “could still work in construction and commercial construction but ... not for Green Valley.”

In response, Brownson argued that “in his plea agreement [he] was allowed to continue his relationship with Green Valley,” permitting him to work at home and care for his invalid wife. Brownson’s counsel contended that “[f]or all practical purposes, when the probation officer said Mr. Brownson could not work with Green Valley, he was saying that Mr. Brownson could not engage in any construction business at all; and by doing so, he violated what was the plea agreement that was worked out between the parties and concurred [to] by this court.”

Based on the testimony at the hearing, the trial court made the following findings:

The whole point of probation is supervision. The whole intent of such a sentence is that the behavior of the person placed on probation will be supervised so as not to engage in the prohibited activities.

... [T]he Department is not only entitled but required to establish written rules of supervision supplemented to existing court-imposed conditions. The only evidence in this case is that the Department was thwarted from trying to obtain confirmation of the [employment] activities. Certainly, independent verification is a part of their job of supervision .... The information sought to obtain that kind of verification was not forthcoming.

... [T]he original condition ... allowed employment at Green Valley. The new condition, as modified, said he no longer can be employed at Green Valley. That is certainly not inconsistent ... because the agent was faced, under those circumstances, with a condition which he could not

do his job under. He was prohibited from doing what he is charged with doing. No other employment was prohibited.

... [Brownson was] obligated to cooperate with the Department in providing information requested so that the [probation] supervision could be effectuated.

So I find, under all these circumstances, that the modification was consistent with the original condition of probation, even though it may have been contrary in terms of employment with Green Valley.

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... [T]he condition violated was that of the modified condition.... I do not find ... any manifest injustice which will sustain withdrawal of a plea ... because there was no inconsistency.

....

The ... original condition allowed employment at Green Valley so long as it was noncommercial .... The agent was thwarted and unable to verify whether there was compliance or noncompliance. That subverted the whole purpose of supervision on a probationary basis.

I therefore, find that the modification which was made by the agent was consistent with the original condition ....

We commend the trial court for its thorough and well-reasoned consideration of the issue before it, which we have included above. We also agree with the trial court's conclusion that "had information been disclosed on [Brownson's] activities with Green Valley in the first place, we probably wouldn't have been here" and its recognition that the probation agent has to "find some way to enforce the [probation] conditions." The trial court also offered the following in response to defense counsel's argument, "[T]he only thing [Schuchardt] prohibited was employment with Green Valley. There's no intimation that [Brownson] couldn't have gone off on his own in noncommercial construction or with some other construction and engaged in noncommercial. You're making it sound as if [Schuchardt] prohibited all construction, and that's not what he said. That wasn't his testimony."



We agree with the trial court's clear reasoning highlighted above. Brownson's motion was to withdraw from his plea agreement based on a manifest injustice. *See State v. Rivest*, 106 Wis.2d 406, 414, 316 N.W.2d 395, 399-400 (1982) (a plea agreement may be vacated where a material and substantial breach of the agreement has been proven). The burden to vacate the plea agreement is on the party seeking to establish both the breach and that the breach is sufficiently material to warrant releasing the party from the agreement. *See id.* at 414, 316 N.W.2d at 399. We agree with the trial court that Schuchardt's directive was not contrary to the court-imposed condition of probation, and, therefore, Brownson has failed to establish a material breach of the plea agreement that would warrant postconviction relief.

*By the Court.*—Order affirmed.

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

