COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1189-CR **Cir. Ct. No. 2012CF170**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVONTE M. PRICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 CURLEY, P.J. Lavonte M. Price appeals the judgment convicting him of one count of robbery with the threat of force, contrary to WIS. STAT. § 943.32(1)(b) (2011-12), and one count of attempted robbery as party to a crime,

contrary to WIS. STAT. §§ 943.32(1)(a), 939.32, & 939.05 (2011-12).[1] He also appeals the order denying his postconviction motion.[2] On appeal, Price argues that his guilty pleas were involuntary and his convictions must be reversed because the trial court impermissibly participated in plea negotiations. We disagree and affirm.

BACKGROUND

¶2 In January 2012, the State charged Price with two counts of robbery and one count of attempted robbery as party to a crime. According to the complaint and the amended information that followed, the two robberies were purse snatchings that took place on December 27, 2011. In the first, Price punched and kicked the victim in order to obtain her purse; in the second, Price raised his hands in a threatening manner while the victim was attempting to take her two-year-old son out of his car seat. The third charge stemmed from an incident on December 28, 2011, in which Price and a co-actor unsuccessfully attempted to steal a woman's purse while she was unloading groceries from her car.

¶3 Price initially pled not guilty to the charges; however, at the final pretrial conference on August 31, 2012, defense counsel told the trial court that Price planned to enter into a plea agreement in which he would plead guilty to count two—the charge involving the victim who was taking her young child out of

[1] The Honorable Charles F. Kahn, Jr., entered the judgment of conviction. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable M. Joseph Donald entered the order denying Price's postconviction motion.

the car—and in which counts one and three would be dismissed and read in. The trial court consequently sought to establish a factual basis for the plea.

¶4 Although pleading guilty to count two required Price to admit that he threatened to use force in robbing the victim, *see* WIS. STAT. § 943.32(1)(b), Price refused to characterize his actions that way. Rather, he told the court that the victim was scared merely by his presence and that he took the purse without threatening her or trying to scare her. The trial court explained that Price's version of events was insufficient to establish a factual basis for the plea and questioned whether Price was embarrassed to admit that he had in fact threatened the victim:

> THE COURT: Okay. Now, do you remember what I said the crime was?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That you took money from [the victim] by threatening to use force against her. Did you do that? … Did you threaten to use force against her either by words or by your actions, by your conduct?
>
> THE DEFENDANT: In my mind, no, but she probably felt it herself.
>
> THE COURT: Well, this isn't quite good enough … [Y]ou know, sometimes it's hard for people to face the truth, particularly if it embarrasses you in front of other people.
>
> THE DEFENDANT: I am not embarrassed about anything, sir. I took full responsibility for it, but I didn't feel that I was threatening her in any way.

¶5 The trial court told the parties that perhaps a different charge would be more appropriate, but that any plea agreement was up to the parties to decide:

> THE COURT: [T]here is a possibility if you want to work out a slightly different kind of agreement, and that would not be more robberies but thefts … on multiple counts, if there would be three counts of theft from person and no robbery, there would be the same amount of

> exposure or more, *but, you know, that's up to the parties to decide.*

(Emphasis added.) The case was adjourned until September 24, 2012, the trial date.

¶6 On the scheduled trial date, Monday, September 24, 2012, defense counsel asked for an adjournment. The trial court reminded defense counsel that the trial date was supposed to be firm, but defense counsel stated that he interpreted the court's comments about Price possibly being too embarrassed to plead guilty to mean that there was still a chance that Price could take the original plea. When asked how this necessitated an adjournment, defense counsel explained that he and Price were in the process of "working out" whether Price remembered the facts in such a way that would allow him to plead guilty when the State announced, the preceding Friday, that the August 31 plea agreement was off the table.

¶7 The trial court responded that it was "ludicrous" for defense counsel to believe that the original plea offer was still available without having notified the court or the district attorney. The trial court also said that, on the other hand, it was not sure that that the State "specifically notified" Price that it had retracted the August 31 plea agreement. The discussion that followed in the hearing transcript—which, for brevity's sake, we will not replicate here—is unclear as to exactly when the State retracted the offer.

¶8 The trial court then said that it was nevertheless "still interested in knowing what happened … on December 27th, I mean, what really happened, not something [Price's] lawyer just told [him] to say." The trial court made clear that

any answers by Price would not be allowed at trial, and then took part in the following exchange:

> THE COURT: …. Do you want to tell me [what really happened]?
>
> [DEFENSE COUNSEL]: It's your call.
>
> THE DEFENDANT: I was in the neighborhood. I was walking. I seen [the victim] Miss Maureen, and I walked up behind her, whatever. When she turn[ed] around, I had my hands in the air. And I didn't say anything. I didn't say anything. I walked up to her, and she gave me her purse or whatever. And that's when I took off running with it.
>
> THE COURT: Ok, just a minute. So it went right from her hands to your hands?
>
> THE DEFENDANT: Yes, sir. I didn't snatch anything.
>
> THE COURT: Did you do something with your arms that threatened the use of force right then and there?
>
> THE DEFENDANT: Probably from me throwing my hands in the air so quickly, she probably [became] frightened from that.
>
> THE COURT: I mean, what was your intent?
>
> THE DEFENDANT: To get the purse.
>
> THE COURT: So you tried to scare her to get the purse?
>
> THE DEFENDANT: Yes.
>
> THE COURT: In a threatening way?
>
> THE DEFENDANT: Yes.

¶9 After Price admitted that he did in fact scare the victim in order to obtain her purse, the trial court asked why the August 31 plea agreement could not be resurrected. The trial court asked the parties about this twice: first,

immediately after Price admitted committing the necessary elements of the robbery; and again after the court and the parties discussed the substance of a new plea offer that the State had proposed. The first time the trial court asked about the August 31 agreement, the prosecutor responded that based on additional discussions with the victims, police officers, and its review of the evidence, the State no longer believed that the original plea agreement was appropriate. The court then discussed with the parties how the withdrawal of the original offer and the substance of the new offer had been communicated to the defense, what new discovery information had been provided to the defense, and whether that new discovery information interfered with the defense's ability to proceed to trial that day as scheduled. After summarizing the parties' positions, the court then brought up the August 31 plea offer a second time:

> [S]o that's the status. We do plan to have a trial today. But – the question that I still have is – it's partly legal and partly discretionary – [is] whether I should just say it's all done and now we just have to set a date for sentencing because Mr. Price completed the guilty plea that he tried to do earlier.

¶10 At this point, the assistant district attorney who had represented the State at the August 31, 2012 hearing—who was ill and at home—appeared by phone. That prosecutor explained the course of events involving the original plea agreement and the State's amended offer.

¶11 Following that discussion, the court concluded that it was in fact not appropriate "to allow Mr. Price to get the advantage of an offer that is no longer available to him by the district attorney," and that "we will either bring in the jury and have the trial, or we will grant what now becomes a request for both sides for an adjournment." After confirming that both sides were now requesting an adjournment, the court set a new trial date of October 8, 2012. The court further

stated that if Price decided to accept the State's amended plea offer, he should do so by October 1.

¶12 The judge concluded the hearing by telling Price not to be afraid to make a decision:

> Mr. Price, that … is something we all have to do in life. If you've taken some steps that you're not proud of, you have the choice. And it's totally your choice. And I don't care which choice you make, of seeing whether the government can prove that you're guilty and convince a jury as we discussed last time, convince all 12 jurors beyond a reasonable doubt each and every one of them that you, in fact, did those awful things that they say you did.
>
> You have the choice of just sitting there and seeing if they can prove that or not, or you have the other choice, which is to recognize what you did and come forward and, basically, tell the world that you did it, that you did these things, and maybe even at some point how you feel about that.
>
> But, Mr. Price, one way or the other, it's up to you to decide. Again, frankly, I'm going to say one more thing. I don't hold it against you if you have a trial. Prosecutors and defense lawyers always tell me I should give some special credit for someone who takes responsibility for what they've done, that that's a factor that sort of suggests that they recognize the seriousness of it and I should consider that at the time of sentencing. And I do. I, of course, will do that.
>
> But really, no one gets penalized from me, this judge, for having a trial if that is what you want instead. *But what's … not going to work is failing to make a decision.* And so you have one week, now only one week and ten minutes[,] to decide whether you're going to plead guilty and accept responsibility – I'm sorry, plead guilty to two offenses and have the other one also considered, accept responsibility for the third as well, or whether you're going to have a trial on all three.
>
> *So that's totally your choice, and I don't care which choice you make.* It's going to be up to [defense counsel] to inform me in advance … a week from today if anything has changed; otherwise, we're having the trial on all three

> counts on Monday, the 8th of October, at 8:15 in the morning. I'll see you then.

(Emphasis added.)

¶13 On October 8, 2012, the rescheduled trial date, Price's attorney told the trial court that the parties had "resolved this case" and that Price would plead guilty to counts two and three, and that count one—which was amended to robbery as party to a crime—would be dismissed and read in. Price pled guilty as described, and was later sentenced.

¶14 After sentencing, Price filed a postconviction motion, arguing that his pleas were involuntary and his convictions should be reversed because the trial court impermissibly participated in plea negotiations. That motion was denied, and Price now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶15 On appeal, Price argues that the trial court impermissibly participated in the plea negotiations, and that consequently his pleas were involuntary and his resulting convictions must be reversed. He first directs us to the trial court's suggestion, made at the August 31, 2012 hearing, that the parties work out a "different kind of agreement" after Price refused to admit that he threatened to use force in robbing his victim. He also points to the trial court's questioning the parties, on September 24, 2012, why they could not simply resurrect the August 31 plea agreement. Finally, Price argues that the trial court pressured him to accept the State's revised offer by lecturing him about the importance of making a decision. For the reasons that follow, we disagree.

¶16 "[A] defendant who has entered a plea, following a judge's participation in the plea negotiation, is conclusively presumed to have entered his plea involuntarily and is entitled to withdraw it." ***State v. Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58. This is because judicial participation in the plea bargaining process "'destroys the voluntariness of the plea.'" *See* ***id.***, ¶19 (citation omitted). Whether the judge participated in plea negotiations and consequently rendered the plea involuntary is a question of constitutional fact. *See* ***State v. Hunter***, 2005 WI App 5, ¶¶4-6, 278 Wis. 2d 419, 692 N.W.2d 256. "We affirm the trial court's findings of evidentiary or historical facts unless they are clearly erroneous, but we independently determine whether the established facts constitute a constitutional violation that entitles a defendant to withdraw his or her plea." ***Id.***, ¶6.

¶17 In ***Williams***, we adopted the "bright-line rule" that "a defendant who has entered a plea, following a judge's participation in the plea negotiation … is entitled to withdraw it," *see* ***id.***, 265 Wis. 2d 229, ¶16, in circumstances where the trial court actively participated in the construction of the plea agreement, *see* ***id.***, ¶¶3-6. There, at the outset of Williams' trial, the trial court "invited Williams, his attorney and the district attorney to 'have a little chat in chambers,'" after which the judge announced that "'with the assistance or urging ... of the Court … a compromise … has been reached between the Government and the Defendant.'" ***Id.***, ¶3 (first and third ellipses in ***Williams***). After the district attorney described the plea agreement and Williams' attorney concurred with the district attorney's description of the agreement, the trial judge asked Williams whether it was his understanding, "'after all of these conversations,'" that he would plead guilty to one of the charges and whether he was prepared to proceed. ***Id.*** Williams said, "Yes." ***Id.***

¶18 In ***Williams***, the trial court also commented on how it would likely sentence Williams should he decide to take the plea that the court had helped to construct. The trial court recounted that he had told Williams that he "'was not inclined to send [him] to prison for 30 years" but that "there is still some likelihood that [he] could go to prison'" and that "'the worst [he] could be looking at would be maybe eight to ten years.'" ***Id.***, ¶4 (first set of brackets in ***Williams***). The court also recalled telling Williams that it would balance the nature of the offense, which made him "'pretty angry,'" against the fact that he did not "'like long-term incarceration for nonviolent offenses for young people.'" ***Id.*** The trial court then asked Williams' attorney whether it had "'fairly recreated'" the in-chambers conversation. ***Id.***, ¶5. Defense counsel said that the court had talked "'about the numbers of eight to ten as possibly years in prison should [Williams] go to trial and lose,'" and that while the court did not give a specific number if Williams entered a plea, "'there was a discussion of a range from one to three as a possibility.'" ***Id.*** (brackets in ***Williams***). The trial court responded that Williams' attorney's recollection of the plea negotiations was "'fairly consistent'" with its recollection. ***Id.*** The court further "acknowledged its role in the plea bargaining process, stating, 'I'm understanding that to some extent it's not appropriate for Courts to get involved in the plea bargaining.'" ***Id.***, ¶6.

¶19 We interpreted and distinguished ***Williams*** in ***Hunter***, a case where the trial court commented extensively on the strength of the State's case prior to the defendant's plea but did not actually participate in the plea bargaining process. After the trial court denied Hunter's motion to suppress, it noted that the suppression motion had been identified as a dispositive motion and asked the parties if the case should be set for a projected guilty plea. ***Id.***, 278 Wis. 2d 419, ¶2. When Hunter's attorney informed the court that the case should instead

be scheduled for a final pretrial and trial, the trial court told Hunter that it was unlikely that he would be acquitted given the evidence against him, and that while he "'may hold out hope for that,'" "'[t]his is a case where you are likely to be convicted.'" ***Id.*** The court also told Hunter that "'[i]f you want to exercise the opportunity to get some credit and in other words to catch a break, then there is a time for coming forward and admitting your guilt.'" ***Id.*** The trial court advised Hunter "'to consider carefully what your odds are at trial and consider carefully whether it's in your best interest to try this case given the weighty evidence against you.'" ***Id.*** Several months later, Hunter entered a no contest plea to the single charge against him. ***Id.***, ¶3.

¶20 In ***Hunter***, "[w]e decline[d] to expand the ***Williams*** rule to encompass all comments a judge might make regarding the strength of the State's case or the advisability of a defendant giving consideration to a disposition short of trial." ***Hunter***, 278 Wis. 2d 419, ¶8. We explained that, in contrast to ***Williams***, there was "no suggestion in the present record that the trial court was a party or even privy to any plea negotiations between the State and Hunter until the parties announced to the court … that they had reached a plea agreement." ***Hunter***, 278 Wis. 2d 419, ¶11. In addition, we stated:

> Unlike in ***Williams***, the trial court in this case did not convene an impromptu settlement conference, and it did not make or solicit specific offers of potential sentence ranges. There is nothing in the present record to suggest that the trial court gave the parties any input whatsoever regarding what it considered an appropriate disposition of the charge Hunter was facing.

Hunter, 278 Wis. 2d 419, ¶11. "In short," we added, "at no time ... did the trial court suggest or advocate for a particular plea agreement." ***Id.***

¶21 We clarified in ***Hunter*** that "***Williams*** expressly applies only to direct judicial participation 'in the plea bargaining process itself.'" ***Hunter***, 278 Wis. 2d 419, ¶12 (quoting ***Williams***, 265 Wis. 2d 229, ¶16). "[T]here is no suggestion in our analysis [in ***Williams***] that the conclusive presumption of involuntariness should extend to any and all comments from the bench that might later be characterized as having prompted a defendant to enter into a plea agreement with the State." ***Hunter***, 278 Wis. 2d 419, ¶12. This is because "commenting on the strength of the State's case and urging a defendant to carefully consider his chances of prevailing at trial are many steps removed from the direct judicial participation in plea negotiations that occurred in ***Williams***." *See* ***Hunter***, 278 Wis. 2d 419, ¶12.

¶22 Applying ***Williams*** and ***Hunter*** to the circumstances before us leads us to conclude that the trial court did not impermissibly participate in the plea negotiations. Again, we note that Price has directed us to three instances where the trial court allegedly participated in plea negotiations: by suggesting, at the August 31, 2012 hearing, that the parties work out a "different kind of agreement" after Price refused to admit that he threatened to use force in robbing his victim; by questioning the parties, on September 24, 2012, why they could not simply resurrect the August 31 plea agreement; and by allegedly pressuring Price to accept the State's revised offer by lecturing him on the importance of making a decision.

¶23 Turning first to the court's suggestion at the August 31, 2012 hearing that the parties work out a "different kind of agreement," we conclude that this comment was not part of the plea negotiation process. *See* ***Hunter***, 278 Wis. 2d 419, ¶12 ("***Williams*** expressly applies only to direct judicial participation 'in the plea bargaining process itself.'") (citation omitted). Unlike what happened

in ***Williams***, the trial court here did not actively participate in the plea bargaining process; rather, it suggested a slight modification after the parties had already negotiated a deal. *See* ***id.***, 265 Wis. 2d 229, ¶19 ("A court's suggestion to modify a plea agreement *after* an agreement has been reached and the plea has been entered may not conduce the same dangers as judicial participation in the plea bargaining process itself."). Nor did the trial court "urge" the parties to consider its suggestion. *See* ***id.***, ¶3. In fact, the trial court in this case made clear that the parties could disregard its suggestion entirely:

> [T]here is a possibility if you want to work out a slightly different kind of agreement, and that would not be more robberies but thefts … on multiple counts, if there would be three counts of theft from person and no robbery, there would be the same amount of exposure or more, *but, you know, that's up to the parties to decide*.

(Emphasis added.)

¶24 Moreover, the parties disregarded the court's suggestion. As the State points out in its brief, there is no evidence that the parties even considered the court's comment. The only mention of it at any subsequent hearing occurred during the September 24, 2012 hearing when the trial court described what happened at the previous hearing. And, the two charges to which Price pled guilty were robbery and attempted robbery, not theft. The nature of the court's comment and its utter lack of significance in the plea bargain that the parties ultimately reached lead us to conclude that the trial court did not impermissibly participate in plea negotiations at the August 31, 2012 hearing.

¶25 Addressing, next, the trial court's questioning the parties, on September 24, 2012, why they could not simply resurrect the August 31 plea agreement, we likewise conclude that this questioning did not violate ***Williams***'

bright-line rule. As noted, the trial court did question the parties twice as to why the August 31 plea agreement was no longer on the table. It is clear from reviewing the transcript, however, that the court's questions were not intended to pressure the parties into resurrecting that agreement, but instead resulted from an attempt to understand why defense counsel sought an adjournment. As described in the background section above, the trial court initially did not understand why defense counsel was seeking an adjournment when the trial date was supposed to be firm. Later in the hearing, the court wanted to be sure that the State had in fact been clear about retracting the original plea agreement. This confusion was cleared up when the prosecutor who appeared at the August 31 hearing—who was at home on September 24 due to illness—appeared by phone. Most importantly, despite the court's questioning about the original offer, the trial court decided that it was in fact not appropriate "to allow Mr. Price to get the advantage of an offer that is no longer available to him by the district attorney," and that "we will either bring in the jury and have the trial, or we will grant what now becomes a request for both sides for an adjournment."

¶26 The trial court's questions about the applicability of the original plea agreement at the September 24, 2012 hearing simply do not constitute "participation" in the plea agreement. *See, e.g.*, ***Williams***, 265 Wis. 2d 229, ¶¶3-6, 16. The trial court was trying to understand why circumstances had changed; it was not trying to persuade the parties to enter into a specific agreement.

¶27 We also note that while Price points to the trial court's additional comment that it would "like to" see the case resolved with one conviction as evidence that the court was in fact pressuring the parties to commit to the August 31 agreement, that comment is taken wholly out of context. The relevant portion of the transcript reads:

> Now [addressing counsel], I do – *I do think that I am not in a proper position to simply conclude this case, even though I would like to do that* with Mr. Price's clarification of what happened on the day of the robbery.
>
> And part of the – a substantial portion of the reasoning I have here is (A) as I repeatedly indicated, that it's incredible for – it would have been incredible for [defense counsel] to believe or even for Mr. Price to believe that this same [plea] offer would remain available on the day of trial….
>
> *Really, the problem here is not with the manner in which the district attorney communicated with the defense lawyer. The problem here is Mr. Price's refusal to move forward with decisions that he just has to face. I mean ... whatever it is that he did last winter.*
>
> And … if he cannot do that, then the State is going to call witnesses and see what the jury says, just like I said last time….
>
> *But I really do not believe under these circumstances that it is appropriate to allow Mr. Price to get the advantage of an offer that is no longer available to him by the district attorney; and, therefore ... we will either bring in the jury and have the trial, or we will grant what now becomes a request by both side for an adjournment.*

(Emphasis added.)

¶28 When considered in context, the trial court's comment that it would "like to" resolve the case with a single plea is meaningless because the court ultimately believed the State's explanation that the original plea agreement was no longer on the table. In other words, the court's comment simply does not support Price's argument that the court pressured the parties to resurrect the August 31 agreement.

¶29 Finally, we conclude that the trial court's lecture about the importance of making a decision did not constitute judicial participation in the plea agreement. Price characterizes this lecture as encouraging him to take the

State's amended plea offer. However, as detailed more fully in the background section above, the court explained several times that it did not care whether Price chose to plead guilty or stand trial. At no point did the trial court say anything that we can construe as trying to persuade Price to plead guilty. Rather, the trial court here made clear, perhaps even more so than in ***Hunter***, that it had no stake in Price's decision, and that the decision was for Price alone to make. *See* ***id.***, 278 Wis. 2d 419, ¶19 ("The court explained … in no uncertain terms that [Hunter's] fate would be decided by jurors who would either believe his version of events or the State's, and that the court's impressions regarding the State's evidence were irrelevant to the outcome at trial."). The court wanted Price to make *a* decision, not a *particular* decision:

> *I don't hold it against you if you have a trial.* Prosecutors and defense lawyers always tell me I should give some special credit for someone who takes responsibility for what they've done, that that's a factor that sort of suggests that they recognize the seriousness of it and I should consider that at the time of sentencing. And I do. I, of course, will do that.
>
> But really, no one gets penalized from me, this judge, for having a trial if that is what you want instead. *But what's … not going to work is failing to make a decision.*

(Emphasis added.)

¶30 In sum, the trial court did not participate in Price's plea negotiations; consequently, Price's pleas were not involuntary and he is not entitled to withdraw them. *See* ***Williams***, 265 Wis. 2d 229, ¶16. We affirm the convictions and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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