

**COURT OF APPEALS
DECISION
DATED AND FILED**

JUNE 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3827-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

**MICHAEL L. FUHRMAN AND
M.L. FUHRMAN CO., INC.,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Fond du Lac County:
HENRY B. BUSLEE, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

ANDERSON, J. This case is before us on a leave to appeal from the circuit court's order denying M.L. Fuhrman Co., Inc. and Michael L. Fuhrman's (hereinafter Fuhrman) motion to dismiss. Fuhrman argues that "[j]eopardy attached to both defendants ... when the trial court accepted a guilty plea from one defendant in exchange for dismissal of the charges against the other." The State concedes that the charge of theft against Michael "was

dismissed in exchange for the corporation's no contest plea to the amended information" which charged the corporation only with the transfer of encumbered property; yet, it maintains jeopardy did not attach with respect to Michael in his individual capacity. Because it is uncontested that the charges against Michael were dismissed in exchange for the corporation's no contest plea and because "a subsequent reprosecution of a charge dismissed as a result of a plea bargain is barred by elementary due process," *Nelson v. State*, 53 Wis.2d 769, 775, 193 N.W.2d 704, 708 (1972), we reverse the order.

In 1995, Michael in his individual capacity and Fuhrman Co. in its corporate capacity were charged with one count of party to the crime of theft in violation of § 943.20(1)(b) and (3)(c), STATS. Subsequently, the State reached a plea agreement with Fuhrman. Under the terms of the agreement, the State agreed to file an amended information that only named Fuhrman Co. and Fuhrman Co. would plead no contest to one count of transferring encumbered property in violation of § 943.25(2)(a), STATS. The effect of the agreement was dismissal of the charge against Michael. The court accepted the plea of Fuhrman Co. at a plea hearing on January 31, 1996. In addition, the court ordered a presentence investigation.

At the sentencing hearing, the circuit court commented on information contained in the presentence investigation report (PSI). It noted:

[T]here is no question ... nor is it axiomatic that the Court follows the statements made by victims in a sentencing procedure. But it is quite apparent to the Court that the District Attorney's Office was not aware of what had happened to these various victims at the time when they decided to change the complaint in filing of the Information against not Mr. Fuhrman personally, but only the corporation. It is apparent to the Court that the criminal activity by the defendant in here is far more reaching than

was represented to the Court on the day the Information was filed....

....

I want it to be well known ... [that] at the time of these proceedings I was faced with an Amended Complaint ... [naming] a corporation which was defunct, and a defendant who would suffer no consequences at all for what now appears to be substantial criminal activity in the operation of his company....

Based on the information it gleaned from the PSI, the circuit court sua sponte set aside the plea agreement, vacated the no contest plea of the corporation and referred the matter back to the district attorney's office for further proceedings.

Consequently, the State filed a motion to withdraw the amended information and to proceed on the original information which the circuit court granted.¹ Fuhrman then moved to dismiss the reinstated, original information. The court denied the motion. Fuhrman next filed a petition for leave to appeal with this court. We granted Fuhrman's motion.

Fuhrman renews its argument on appeal that jeopardy attached to both Michael and Fuhrman Co. when the circuit court accepted the corporation's guilty plea in exchange for dismissal of the charges against Michael and that *State v. Comstock*, 168 Wis.2d 915, 485 N.W.2d 354 (1992), bars reinstatement of charges which were dismissed pursuant to a valid plea agreement. The State maintains that double jeopardy only prohibits reinstatement of any charges which had been dismissed against the corporation as part of its plea agreement, but not against Michael (because he never pled to any charges).

We agree with Fuhrman. In *Comstock*, the supreme court directed:

¹ The original information charged Michael and M.L. Fuhrman Co., Inc. with the crime of theft in violation of § 943.20(1)(b) and (3)(c), STATS.

[E]ach circuit court [is] to refrain from *sua sponte* vacating a guilty or no contest plea after the circuit court has validly accepted the plea by assuring itself of the voluntariness of the plea and the factual basis for the charges unless the circuit court finds that there was fraud in procuring the plea or that a party intentionally withheld from the circuit court material information which would have induced the circuit court not to accept the plea.

Id. at 921-22, 485 N.W.2d at 356 (footnote omitted).

In this case, everybody honored the plea agreement except the circuit court which *sua sponte* vacated the plea agreement after it became aware of certain information from the PSI report. At sentencing, the court decided that the district attorney's office was unaware of what had happened to the various victims at the time it chose to file an amended information against the corporation and not Michael. Neither the State nor the circuit court asserts that this case involves fraud or the intentional withholding of material information. "The legislatively declared public policy of the state leads to the conclusion that a circuit court cannot vacate its dismissal ... on the basis of information derived from the presentence investigation conducted, as required by statute, after conviction."² *Id.* at 953, 485 N.W.2d at 369.

Nevertheless, the State maintains that *Comstock* would apply only if it tried to reinstate charges which had been dismissed against Fuhrman Co., but it does not prevent the State from reinstating the charges against Michael. The State contends that "[i]f the corporate defendant is dissatisfied with this result because

² As the supreme court recognized in *State v. Comstock*, 168 Wis.2d 915, 952-53, 485 N.W.2d 354, 369 (1992), the legislatively declared public policy provided in § 972.15, STATS., instructs a circuit court to not order—and therefore not consider—a presentence investigation report (PSI) before conviction because the PSI may rest on hearsay and contain information bearing no relation to the crime with which the defendant is charged. "Presentence investigations are, according to the legislature, relevant to sentencing, not to the determination of guilt or innocence." *Id.* at 953, 485 N.W.2d at 369.

one of the terms of the plea agreement has been voided—the dismissal of the theft charges against Mr. Fuhrman in his individual capacity—the corporate defendant is free to waive its double jeopardy challenge and withdraw the no contest plea to the amended information.” We disagree.

In *Comstock*, the supreme court observed, “Our court has stated that when the prosecutor on behalf of the sovereign state has contracted with an accused to dismiss charges and the court has dismissed the charges, a ‘subsequent reprosecution of a charge dismissed as a result of a plea bargain is barred by elementary due process.’” *Id.* at 950, 485 N.W.2d at 368 (quoting *Nelson*, 53 Wis.2d at 775, 193 N.W.2d at 708 (1972)). The “principles of fairness, finality and repose prohibit the prosecutor from reprosecuting charges that a court dismissed as a result of a plea agreement.” *Comstock*, 168 Wis.2d at 950, 485 N.W.2d at 368. Because the prosecutor is bound by a valid plea agreement, and due process protects the defendant from the prosecutor’s withdrawing from the agreement, considerations of double jeopardy and due process also preclude a circuit court from sua sponte relieving the prosecutor from a valid plea agreement. *See id.* at 950-51, 485 N.W.2d at 368.

The State does not contest the validity of the plea agreement nor does it deny that the charge of theft against Michael was dismissed in exchange for the corporation’s no contest plea to the amended information. The State agreed to dismiss the charge against Michael in exchange for a guilty plea and the payment of restitution by Fuhrman Co. The circuit court accepted the plea agreement and Fuhrman Co. made its restitution payments. We conclude that the State is bound by the terms of the plea agreement and that due process precludes the circuit court from sua sponte relieving the prosecutor from the valid plea agreement.

In order for the criminal justice system to operate properly, the district attorney's office must exercise its prosecutorial discretion in a sound manner and the circuit courts must exercise their powers in the public interest. *See id.* at 952, 485 N.W.2d at 369. Moreover, the circuit court is not a party to a plea agreement; it is not required to reduce the charges upon the prosecutor's motion nor must it accept the prosecutor's or defense's sentencing recommendations. *See id.* The prosecutor should obtain information relevant to the plea agreement before the plea hearing, including statements or testimony from the victim of the crime charged, so that the prosecutor and the circuit court can make a fully informed decision based on the information legally available to them. *See id.* However, once a plea agreement has been accepted by the circuit court, it may not sua sponte vacate the plea unless the court finds that there was fraud in procuring the plea or that a party intentionally withheld material information from the circuit court which would have induced the circuit court not to accept the plea. *See id.* at 953-54, 485 N.W.2d at 369-70.

For the above stated reasons, we conclude that jeopardy attached in this case upon the circuit court's acceptance of Fuhrman Co.'s no contest plea to the amended information. Accordingly, we reverse the circuit court's order vacating the no contest plea and reinstating the original information. We remand the matter to the circuit court for reinstatement of the amended information alleging one count of encumbering property by Fuhrman Co. in exchange for the dismissal of the theft charge against Michael individually, for reinstatement of the plea of no contest and for sentencing proceedings. *See id.* at 921, 485 N.W.2d at 356.

By the Court.—Order reversed and cause remanded.

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