STATE OF WISCONSIN
IN SUPREME COURT

Case Nos. 96-0600-CR & 96-1509-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VAN CAMP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION
OF THE COURT OF APPEALS

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

THE LOWER COURTS ERRED IN DENYING VAN CAMP'S MOTION TO WITHDRAW HIS NO CONTEST PLEA UNDER *STATE v. BANGERT*, 131 Wis.2d 246, 389 N.W.2d 12 (1986)

A. The Circuit Court's Factual Findings Do Not Support Its Legal Conclusions

The state disputes Van Camp's claims that the circuit court's factual findings are inconsistent with its ultimate legal conclusion that the plea was voluntary. It also asserts that the Court should infer from that ultimate conclusion that the court below made the factual

findings legally necessary to support it. State's Brief at 12-13, 23-27, 30-35. With one possible exception, the state is wrong.

1. Knowledge of maximum penalty

The state's objection that the circuit court made no "express factual finding[]" that Attorney Williams failed to inform Van Camp of the maximum penalty for false imprisonment, State's Brief at 24-25, may be correct. While that court expressly accepted as "true fact" the proffer that Williams never provided that information on the morning of April 19, 1995 (R41:62-65; App. 11-14), Williams' testimony could be construed as claiming he provided that information the evening before (*see* R41:55-56).

The state is wrong, however, in asserting that the Court should simply assume therefore that the circuit court bought in to Williams' claims. His claim that he told Van Camp the maximum penalty for false imprisonment because he was attempting to persuade Van Camp by contrasting that 2-year maximum with the higher penalty for kidnapping (R41:55), while superficially reasonable, is inconsistent with the "true fact" found by the court that he did not even raise that point the morning of April 19. While it is possible that Williams completely changed tactics overnight, a fact-finder easily could find such a transformation unlikely.

Simply inferring a finding that Williams told Van Camp the maximum sentence is especially inappropriate given the findings the circuit court did make. This Court has recognized that the test for adequacy of circuit court factfinding "'implies consideration and determination of the issuable facts which the party seeking to prevail adduced in support of his contentions.'" *Matter of T.R.M.*, 100 Wis.2d 681, 303 N.W.2d 581, 583 (1981) (citation omitted). The circuit court made clear, however, that it did not necessarily consider or determine *any* factual issue beyond those it discussed explicitly. That court expressly stated that its ultimate denial of the motion "[did] not mean that [Van Camp] necessarily understood every nuance of what this all meant . . .." (R41:80; App. 26).

That court, moreover, did not simply ignore this factual issue. Rather, it made specific factual findings that the maximum was stated in the original criminal complaint and the amended information, as well as a legal conclusion that it did not matter because Van Camp did not receive the maximum (R41:75; App. 21). Of course, these bases were wrong,[1] but the fact that the bases expressly relied upon

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[1] The complaint did not allege false imprisonment (R1; *see* R41:54), and there is no record that Van Camp ever was arraigned on or read the amended information that did charge that offense. Contrary to the state's suggestion, State's Brief at 30, it was the state's burden to prove his knowledge (continued...)

by the court were in error does not permit this Court reasonably to assume that the lower court also made other *implicit* factual findings on this contested issue which would have supported its legal conclusion. *See State v. Franklin*, 148 Wis.2d 1, 434 N.W.2d 609, 614 (1989) (unless sentencing court "expressly relies on parole eligibility," improper to assume that it did so, even when parole eligibility argued by prosecutor). Indeed, that court's reliance upon factors other than Williams' testimony suggests the contrary, that it did not credit that testimony. *See, e.g., Ritt v. Dental Care Associates, S.C.*, 199 Wis.2d 48, 543 N.W.2d 852, 865 (Ct. App. 1995) (refusing to assume circuit court made necessary factual finding when it rested its decision on a different basis and there were conflicting reasonable inferences to be drawn from the evidence).

In light of the circuit court's proviso that its denial of Van Camp's motion did not mean that he necessarily understood the full

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[1](...continued)
of the maximum penalty, not the defendant's to disprove it. *Bangert*, 389 N.W.2d at 26.

The circuit court's statement that the maximum penalty was not at issue here also is wrong. False imprisonment is a Class E felony carrying a maximum of 2 years incarceration. Wis. Stat. §§939.50(3)(e), 940.30. Given Van Camp's age and spotless record prior to this case, parole release at first eligibility after 6 months, Wis. Stat. §304.06(1)(b). was likely, leaving him with 18 months of parole supervision. The term imposed is the substantial equivalent of this maximum term. Indeed, but for the work release privileges, the actual term of 9 months of incarceration and 3 years of supervision, is *more* restrictive than the supposed "maximum."

effect of his plea, the Court also cannot ignore the fact that the circuit court's analysis was fatally tainted by an erroneous legal theory to the effect that withdrawal is inappropriate absent a defense showing of likely acquittal upon retrial.

Given all of these factors (application of an erroneous legal standard, reliance upon a clearly erroneous factual basis, and at best questionable evidence supporting the state's theory), the Court should not simply assume that the circuit court credited Williams' testimony. Rather, "[w]hen an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings." *Wurtz v. Fleischman*, 97 Wis.2d 100, 293 N.W.2d 155, 159 (1980) (citations omitted).

2. Knowledge of legal effect of read-in

Contrary to the state's suggestion, State's Brief at 25-27, the circuit court expressly held that Van Camp was *not* informed of the legal effect of the read-in but denied withdrawal on this ground for other reasons:

> Mr. Van Camp apparently was informed or wasn't informed of the effect of the read-in and, again, that penalty really had nothing to do or the potential penalty -- there was no enhancement, in short, of the penalty.

(R41:75; App. 21). Despite the court's initial misstatement, this assertion can only be read as a finding that the state failed to meet its burden. The court's statement that its ultimate denial of the motion to withdraw "does not mean that [Van Camp] necessarily understood every nuance of what this all meant or that what exactly a read-in could do or how that would reflect" (R41:80; App. 26), only supports rather than detracts from its finding that Van Camp was not informed. Why else would the court have felt the need to comment on Van Camp's lack of understanding?

B. Any Technical Defects In Van Camp's Motion Do Not Disentitle Him To Relief

The state claims that Van Camp should be denied relief because his motion failed expressly to state that he did not know the maximum penalty for false imprisonment or that he had an absolute right to testify and put on a defense at trial. State's Brief at 18-20. It apparently concedes, however, that the motion is sufficient regarding knowledge of the legal effect of the read-in. *Id.* at 20 & n.10.

The state conceded at the post-conviction hearing that the defendant had made out a *prima facie* case under *Bangert*, triggering its obligation to prove that the plea nonetheless was knowing,

voluntary and intelligent (R41:32-34).[2] Given the state's actions, the circuit court and the defendant were entitled to proceed on the understanding that the issue was not in dispute. *E.g.*, *State v. Hopkins*, 196 Wis.2d 36, 538 N.W.2d 543, 545-46 (Ct. App. 1995); *State v. Cleaves*, 181 Wis.2d 73, 510 N.W.2d 143, 146 (Ct. App. 1993).

Because the state failed to raise this objection in the circuit court when the defect easily could have been remedied, it has waived the point. *E.g.*, *State v. Brown*, 96 Wis.2d 258, 291 N.W.2d 538, 541 (1980) (state waived waiver argument by raising it for first time on appeal). Had the state timely identified the problem below rather than delaying its objections until now, Van Camp would have had an opportunity to dot these particular Is and cross these particular Ts at the circuit court level. Instead, he reasonably relied upon the state's concession that the only issue for resolution at the hearing was whether the state could bear its burden of proving by clear and convincing evidence that the plea was valid.

The Court also should deny the state's belated attempt to whipsaw the defendant in this manner because the state itself could

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[2] Indeed, the state asserted that, if trial counsel testified that he did not advise Van Camp of his rights, it would not even argue against the motion because "the plea must be allowed to be withdrawn" (R41:33-34).

have called Van Camp to testify in the circuit court concerning his knowledge and understanding of this information, *Bangert*, 389 N.W.2d at 26, but chose not to do so.

Under these circumstances, "[t]o relax the waiver rule in favor of the state makes no sense and does not serve either the efficient administration of judicial business or the interests of justice." *State v. Milashoski*, 159 Wis.2d 99, 464 N.W.2d 21, 25 (Ct. App. 1990), *aff'd on other grounds*, 163 Wis.2d 72, 471 N.W.2d 42 (1991). Should the Court decide to overlook the state's waiver of this claim, however, it should remand for an evidentiary hearing so Van Camp can correct this technical omission.

C. The Trial Court's Failure To Advise Van Camp Concerning The Legal Effect Of The Read-In Is A Valid Basis For Withdrawal

The state argues that a plea agreement may stand despite the defendant's total ignorance regarding a significant provision of that agreement. Specifically, it asserts that a defendant need not be informed, and need not know, of the legal effect of a read-in. State's Brief at 27-29. The state is wrong.

Contrary to the state's suggestion, a read-in is not exclusively beneficial to the defendant. Under Wisconsin's read-in procedure,

"the defendant does not plead to any charges and therefore is not sentenced on any of the read-in charges but such *admitted* uncharged offenses are considered in sentencing him on the charged offense." *Austin v. State*, 49 Wis.2d 727, 183 N.W.2d 56, 58-59 (1971) (emphasis added). Accordingly, "our read-in procedure dictates that when a defendant agrees to the read-in, he or she admits that the crimes occurred." *Cleaves*, 510 N.W.2d at 145. "When a defendant agrees to crimes being read in at the time of sentencing, he makes an admission that he committed those crimes." *State v. Szarkowitz*, 157 Wis.2d 740, 460 N.W.2d 819, 824 (Ct. App. 1990). A defendant need not personally admit the read-in offenses; so long as he or she knows the legal effect of the read-in, the court may assume that failure to object to the procedure constitutes an admission. *Cleaves*, 510 N.W.2d at 145-46; *see Szarkowitz, supra.*

The assumption necessarily fails, however, absent the prerequisite knowledge. Thus it is not surprising that both the Court of Appeals and this Court have strongly recommended that the trial court advise the defendant of the effect of the read-in. *Garski v. State*, 75 Wis.2d 62, 248 N.W.2d 425, 433 (1977); *Austin*, 183 N.W.2d at 60; *Cleaves*, 510 N.W.2d at 146 n.1; *see id.* at 146 (Nettesheim, J. concurring) (suggesting that *Bangert* colloquy

establish defendant's understanding of legal effect of read-in).[3]

Van Camp did not know that acceptance of the read-in would constitute an admission to the kidnapping and would not have accepted the plea agreement had he known (R31:1-2). In fact, he refused even to admit the conduct underlying the false imprisonment charge to which he pled no contest (*see* R15:5; App. 36). Yet, admission to the kidnapping was the direct consequence of the agreement, and indeed a precondition to it. *Cleaves*, *supra*. Because Van Camp was not informed of this fact, his entry into that agreement cannot be deemed knowing and voluntary.

D. Concern For The Complainant's Feelings And A Perception That The Defendant Would Have Been Convicted Anyway Are Not Appropriate Considerations on a Motion to Withdraw a Plea

1. Victim's feelings

The state concedes that the possible effect of withdrawal on the victim, to which the circuit court expressly referred at least twice in the course of denying Van Camp's motion (R41:10, 81), had no

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[3] The state's assertion that the requirement of such advice is based on public policy rather than due process, State's Brief at 27 n.11, is irrelevant. This Court held in *Bangert* that the trial court's provision of information to a pleading defendant is required not by the constitution but by statute or public policy. 389 N.W.2d at 18-21. The Court nonetheless held that the failure to provide such information may render the plea involuntary and subject to withdrawal. *Id.* at 25-27.

possible legitimate relevance to that decision. State's Brief at 14, 35, 38. It asserts, however, that the court referred to Guerts not in its analysis of the *Bangert*/voluntariness motion, but rather in deciding some separate "discretionary" motion. *Id.* at 38. The transcript itself demonstrates to the contrary (*see* R41:10, 69-81), as does the fact that Van Camp's motion was based squarely on the voluntariness of the plea rather than some amorphous form of "manifest injustice" (*see* R29).

2. Incorporation of outcome determinative/ harmless error test into *Bangert* analysis

Van Camp's opening brief addressed the circuit court's erroneous importation of an outcome-determinative/harmless error inquiry into the analysis for plea withdrawal established in *Bangert*. That argument sought to demonstrate (1) that the circuit court's harmless error analysis was directly contrary to precedent, *id.* at 22-25; *see, e.g., Bangert*, 389 N.W.2d at 19, 30 (defendant entitled to withdraw plea if not knowingly, voluntarily, and intelligently entered); *State v. Reppin*, 35 Wis.2d 377, 151 N.W.2d 9. 14 (1967), (2) that the application of an outcome-determinative/harmless error analysis to a plea subject to withdrawal under *Bangert* is invalid as the moral and legal equivalent of directing a plea of guilty, Van

Camp's Brief at 26-27, and (3) that an involuntary plea is the type of "structural defect[]" which defies harmless error analysis, *id.* at 26-27. Van Camp also addressed the fact that analysis under *Bangert* already incorporates an appropriate type of harmless error inquiry by granting the state an opportunity to prove that a plea is knowing and voluntary despite failure to comply with the procedural mandates of that decision and Wis. Stat. §971.08. Van Camp's Brief at 27-30.

That brief evidently was not as clear as counsel had hoped, however, as the state argues a totally different point. Rather than address the outcome-determinative analysis actually applied by the circuit court, the state seeks to argue that the strength of the state's case may sometimes be relevant as showing the defendant's motive for entering a plea. State's Brief at 38-41. To that limited extent, the state may be correct. The likelihood of conviction can indeed help explain *why* a defendant chose to plead guilty rather than go to trial.

It does not follow, however, that the strength of the state's case is at all relevant, let alone "powerful evidence," State's Brief at 40, that the plea was knowingly, voluntarily and intelligently entered. At best, it might be relevant in limited circumstances, as where a defendant claims involuntariness on the ground that counsel failed

properly to advise him regarding the likelihood of conviction and the benefits of entering a plea.

But such evidence can have no possible relevance in a *Bangert* motion such as this one, in which the controlling issue is whether "the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him." *Bangert*, 389 N.W.2d at 26. The strength of the state's case may make entry of a plea a good idea, but it did not make any more or less likely Van Camp's actual knowledge and understanding of the maximum penalty for false imprisonment, the legal effect of a read-in, or the legal rights given up by a plea of no contest.

As significant here, however, is that the circuit court at no time sought to apply the analysis now advocated for by the state. Rather than using the strength of the state's case as evidence of voluntariness, the court emphasized throughout the post-conviction motion hearing that it viewed a likelihood of acquittal as a prerequisite to relief. That court's statements can only be construed as requiring a defense showing of harm or prejudice *in addition to* a showing that the plea was not knowing, voluntary and intelligent:

> [I]t may not be necessary under the cases, but I

> believe before a withdrawal is a reasonable possibility, before withdrawal should be reasonably granted, rather there should be some indication that the ultimate outcome of the case will be affected. . . . There should be some underlying contention that if the case starts over, Mr. Van Camp would be exonerated or if he isn't exonerated, there would be a different outcome in the penalty.
>
> Mr. Van Camp's new attorney has carefully examined all the relevant cases, found all of the language which puts Mr. Williams' actions and my actions in question. But there has not been the slightest claim today that anything would change. . . .

(R41:78; App. 24). As fully demonstrated in Van Camp's opening brief, that view was and is wrong as a matter of law.

The state's brief thus addresses an issue raised by neither the defendant nor the facts of this case. What's more, its analysis of even that issue is wrong.

CONCLUSION

For these reasons, as well as for those set forth in his opening brief, Van Camp respectfully asks that the Court reverse the decisions below and remand with directions to grant the motion to withdraw his plea or, alternatively, for further proceedings and decision under the proper legal standard.

Dated at Milwaukee, Wisconsin, May 14, 1997.

Respectfully submitted,

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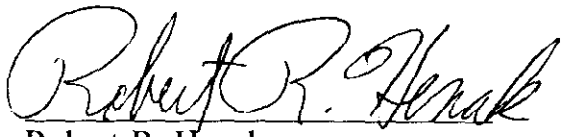
RULE 809.18(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of the includable portions of this brief is 2,997 words.



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