

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP2136-CR

Cir. Ct. No. 2005CT0638

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. FISCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Reversed.*

¶1 SNYDER, P.J.¹ David C. Fischer appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3. Fischer contends that his conviction resulted from the breach of a prior plea agreement where the State had promised not to file the OWI charge in question. We agree with Fischer and vacate the conviction. The judgment of the circuit court is reversed.

¶2 The essential background information is undisputed. On September 21, 2005, Fischer was issued a citation alleging a violation of the OWI statute, WIS. STAT. § 346.63(1)(a). Fischer received a second citation alleging a § 346.63(1)(am) violation of operating a motor vehicle with a detectable amount of restricted controlled substance in his blood.

¶3 On November 18, 2005, the State filed a criminal complaint charging Fischer with possession of drug paraphernalia with intent to use, contrary to WIS. STAT. § 961.573(1), at the time and place of the alleged OWI violation. On November 21, 2005, Fischer appeared pro se in court and entered into a plea agreement with the State concerning the drug paraphernalia charge. The plea agreement was presented by the State to the trial court as follows:

THE COURT: [Assistant District] Attorney Dietz is there a plea agreement in this case?

ATTORNEY DIETZ: There is, your Honor, for a plea to *the sole count* in this Criminal Complaint, the State would recommend a \$100 fine plus costs.

I believe that this was set for this date because at the time the citation was issued, the law enforcement agency believed that this would be an OWI offense; *however, the*

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

blood test returned with a legal blood alcohol content, therefore, this is the only count remaining. (Emphasis added.)

¶4 Fischer stated that he understood the plea agreement, the charge of possession of drug paraphernalia, the maximum penalties, and that he was waiving his constitutional rights including the right to be represented by an attorney. During the colloquy, the trial court told Fischer that an attorney might assist him to “negotiate a different plea agreement.” The trial court accepted the plea agreement and Fischer’s plea, imposed a fine of \$100 plus costs and assessments, and suspended Fischer’s driving privileges for six months.

¶5 On December 15, 2005, the State filed a criminal complaint alleging OWI and operating with a detectable amount of restricted controlled substances, both third offenses, violations on September 21, 2005.² Fischer moved to dismiss the subsequent OWI complaint based upon the State’s breach of its promise not to charge the OWI offense. The State contended that a promise not to file the OWI charge was not clear in the prior plea agreement and that if a breach did occur, Fischer’s remedy is to reopen the prior drug paraphernalia conviction.

¶6 In response to Fischer’s motion to dismiss, the trial court held that the plea agreement was somewhat ambiguous, that a breach of the plea agreement in the prior conviction would have to be remedied in that court,³ that Fischer

² The violation of WIS. STAT. § 346.63(1)(am), operating with a detectable amount of a restricted controlled substance, was dismissed and read in by the trial court at the request of the State. That disposition of that charge is not raised in this appeal and is not before this court.

³ The trial court concluded the motion hearing by declaring:

So my decision is that these [WIS. STAT. § 346.63(1)] charges should not be dismissed. And as I have indicated, if you want to go back to Judge Willis, it sounds like the state is willing to stipulate to reopen the plea.

proceeded without an attorney in the prior proceeding “at his own risk to a certain extent” and that the promise not to charge the OWI was not read into the record or put in writing. The trial court denied Fischer’s motion to dismiss the OWI charge, and Fischer then entered a plea of no contest resulting in his conviction on the OWI charge.

¶7 The appellate issue is whether the State’s subsequent filing of the OWI complaint deprived Fischer of the benefit for which he had bargained in his drug paraphernalia conviction.

¶8 Whether the State breached a plea agreement is a mixed question of fact and law. *State v. Naydihor*, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State’s alleged breach of that agreement are normally questions of fact and are reviewed under the clearly erroneous standard. *Id.* Whether the State’s conduct constitutes a material and substantial breach of the plea agreement is a question of law that we review de novo. *Id.* A breach is material and substantial when it “defeats the benefit for which the accused bargained.” *Id.*

¶9 Here, the trial court that approved the terms and conditions of the plea agreement in the drug paraphernalia case is not the same trial court that interpreted the plea agreement for purposes of the OWI charge. Therefore, the OWI trial court has no greater ability to address questions of fact as to the precise terms of the plea agreement or the historical facts surrounding the agreement than does this court. The drug paraphernalia court recognized the plea agreement as the basis for Fischer’s plea. Furthermore, the express terms of the agreement are on the record and undisputed. Both parties point to the exact same language as

evidence of the agreement. Accordingly, we analyze the issue presented by Fischer as a question of law.

¶10 A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). Due process concerns arise in the process of enforcing a plea agreement. *Id.* Once a defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled. *Id.* A material and substantial breach of a plea agreement amounts to a "manifest injustice." *Id.* at 272.

¶11 Plea agreements are an essential component of the administration of justice. *State v. Deilke*, 2004 WI 104, ¶11, 274 Wis. 2d 595, 682 N.W.2d 945. Plea agreements are analogous to a contract, and we draw upon contract principles in determining the rights of the parties to a plea agreement and whether there has been a material and substantial breach that warrants a remedy. *Id.*, ¶12.

¶12 In the recitation of the plea agreement the prosecutor advised the trial court that Fischer would plead to the "sole" charge remaining from the September 21, 2005 incident. The prosecutor stated that an OWI charge had been expected but, because the evidence would not support it, it would not be filed. Fischer then agreed to enter a plea to the "sole" charge of possessing drug paraphernalia in exchange for the State's recommending a fine of \$100. By the express terms of the agreement, Fischer's plea was to the "only count remaining" from the events of September 21.

¶13 The expected benefit of the plea agreement to Fischer was the avoidance of facing the OWI charge. The benefit to the State was the obtaining of

the drug paraphernalia conviction. We read the terms of this plea agreement concerning the State filing of an OWI charge as being unambiguous.⁴

¶14 The OWI charge and conviction resulted in Fischer receiving a forty-day jail sentence, a twenty-four month revocation of his operating privileges and a \$1395.50 fine including costs and fees. The breach of the plea agreement by the State was, therefore, material and substantial. The breach defeated the benefit for which Fischer had bargained in waiving his rights and entering his plea to the possession of drug paraphernalia charge and subjected Fischer to additional criminal sanctions. We conclude upon our reading of the possession of drug paraphernalia plea agreement that the State promised Fischer the OWI charge would not be filed if he entered a plea.

¶15 We next address the appropriate remedy for the State's breach of its promise not to file the OWI charge. The appropriate remedy for a material and substantial breach of a plea agreement depends on the totality of the circumstances. *State v. Robinson*, 2002 WI 9, ¶19, 249 Wis. 2d 553, 638 N.W.2d 564. "A court must examine all of the circumstances of a case to determine an appropriate remedy for that case, considering both the defendant's and State's interests." *Id.*

¶16 Here, the State asserts that if it breached the drug paraphernalia plea agreement the remedy is to allow Fischer to withdraw his plea to that charge, and not to dismiss the OWI and detectable amount of a restricted controlled substance

⁴ Whether an ambiguity exists in a plea agreement is a question of law. See *State v. Windom*, 169 Wis. 2d 341, 348-49, 485 N.W.2d 832 (Ct. App. 1992). Here, the terms of the agreement are clear from the record.

charges. The State does not suggest or cite to any other remedy. Fischer requests that we reverse the judgment and vacate the OWI conviction.

¶17 We must decline the State's invitation to correct its self-created plea agreement problem in advising the trial court and promising Fischer it would not file the OWI charge. First, the drug paraphernalia conviction is not before us and we lack jurisdiction to address that judgment of conviction. Second, the State suggests that we should visit the breach upon Fischer by allowing him to move to re-open and challenge the drug paraphernalia conviction.⁵ A trial court cannot inject itself into the plea bargaining process or into influencing the making of a plea, *State v. Williams*, 2000 WI 78, ¶26, 236 Wis. 2d 293, 613 N.W.2d 132, and neither can this court. Third, Fischer is entitled to meaningful relief from the State's breach of its plea agreement promise.

¶18 The remedy that restores Fischer's plea benefit is the State abstaining from prosecuting the OWI charge. We are satisfied that, under the circumstances presented here, the only appropriate legal remedy is one of specific performance, to reverse the judgment of the trial court and thereby vacate the OWI conviction.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁵ The State's offer to not object to Fischer's motion to withdraw his plea to the possession of drug paraphernalia conviction is a hollow gesture at best.

