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Clerk of Circuit Court
Calumet County
2022CM000213

STATE OF WISCONSIN	CIRCUIT COURT	CALUMET COUNTY
STATE OF WISCONSIN Plaintiff, vs. JOHN C. ANDREWS Defendant.	**STATE'S BRIEF IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL VINDICTIVENESS AND BASED ON PLEA AGREEMENT** Case No. 2022CM000213	

THE STATE OF WISCONSIN, by Nathan F. Haberman, District Attorney for Calumet County, hereby moves the Court for an Order Denying the defendant's motion to dismiss on prosecutorial vindictiveness and to dismiss based on a plea agreement.

I. Prosecutorial Vindictiveness

First, the defendant argues that this case should be dismissed based on prosecutorial vindictiveness. However, the Wisconsin Supreme Court has

> repeatedly acknowledged a prosecutor's broad discretion in determining whether to charge an accused, which offenses to charge, under which statute to charge, whether to charge a single count or multiple counts when the conduct may be viewed as one continuing offense, and whether to join all offenses in a single prosecution or to bring successive prosecutions. In sum, a prosecutor generally has discretion whether to bring one or several charges and whether to join all offenses in a single prosecution or to bring successive prosecutions. Although there are limits upon the State's prosecutorial discretion to avoid arbitrary, discriminatory or oppressive results, the court has explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature in the way he or she exercises prosecutorial discretion.

State v. Krueger, 224 Wis. 2d 59, 67-68, 588 N.W.2d 921 (1999).

Prosecutorial vindictiveness occurs if the state retaliates against a person for exercising a protected statutory or constitutional right. *State v. Johnson*, 2000 WI 12, ¶ 20, 232 Wis. 2d 679, 605 N.W.2d 846. The United State's Supreme Court created this concept out of judicial vindictiveness. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). It was extended to prosecutors in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098 (1974). In Blackledge, the defendant was convicted of a misdemeanor. *Id*. at 22. The defendant

appealed the conviction and ultimately received a new trial. *Id*. Before the new trial, the prosecutor obtained a new grand jury indictment replacing the misdemeanor charge with an upgraded felony version of the same offense. *Id*. at 23. The defendant was then convicted of the increased felony charge. *Id*. The Court found that it was improper to bring more the more serious charge in response to the defendant's appeal of a conviction. *Id*. at 28-29. There was a "realistic likelihood of vindictiveness in that case because the prosecutor had the means to discourage appeals by upping the ante against the defendant with a more serious charge. *Id*. at 27-28.

However, the application of prosecutorial vindictiveness has not been applied to a prosecutor's pretrial filing of increased charges. *See Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978); *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485 (1982). Vindictiveness applies when a punishment is imposed on a defendant when the defendant exercises his right to attack his original conviction. *Hayes*, 434 U.S. at 362. This, however, is "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense…." *Id*. In *Goodwin*, the defendant rejected an offer to settle several misdemeanor offenses, and requested a trial. *Goodwin*, 457 U.S. at 371. The prosecutor then increased the charges to include a felony and several misdemeanors. *Id*. The defendant's argument of vindictiveness was rejected even though the defendant was convicted of the felony because "[t]he prosecutor's initial charging decision "may not reflect the extent to which an individual is legitimately subject to prosecution," and before trial, the prosecutor must remain free to exercise his or her broad discretion to determine which charges properly reflect society's interests. *Id*. at 382.

Similarly, "no presumption of vindictiveness arises when additional charges are brought after a mistrial caused by a hung jury." *Johnson*, 2000 WI 12, ¶ 37. When "the prosecutor filed the additional charges during plea negotiations does not create a realistic likelihood of vindictiveness." *Id*. ¶ 43.

The defendant bears the burden to prove a presumption of vindictiveness. *Id*. ¶ 45. If the defendant proves this, "the prosecutor may rebut it with an explanation of the objective circumstances that led the prosecutor to bring the additional charges." *Id*.

Even when a presumption of vindictiveness does not apply, a defendant may establish that the prosecutor's decision to add charges was actually motivated by a desire to retaliate against the defendant for doing something the law permits. *Id*. ¶ 47. To establish actual vindictiveness, there must be objective evidence that a prosecutor acted to punish the defendant for exercising his legal rights. *Id*. A "prosecutor's belief that sufficient evidence exists to support a conviction of a new charge provides justification for the decision to file additional charges." *Id*. ¶ 50.

In the present case there is no presumption of vindictiveness because the original felony charges against the defendant were dismissed upon the defendant's motion. The context for which the present charges arise come from a pretrial motion to dismiss. *See Hayes*, 434 U.S at 362 and *Goodwin*, 457 U.S. at 382. In this case the prosecutor exercised discretion to bring felony charges initially. This misdemeanor prosecution began only when the felony was no longer a viable charge. There has not been an increase in charges. During the motion to dismiss in the felony case, this Court specifically found that probable cause existed for the misdemeanor charge of obstructing. It was the defendant who objected to amending the complaint in the felony, precipitating this misdemeanor prosecution. There is sufficient evidence to support the new charge, and these facts provide the justification that the new charges are an appropriate exercise of prosecutorial discretion.

Furthermore, the defendant's continued refusal to disclose information about the remains of Starkie Swenson, even when law enforcement pleaded for his compassion, resulted in continued ongoing suffering and uncertainty for the Swenson family. His obstructionist actions deprived the family closure and the opportunity to mourn the loss of a loved one. This obstructing is more serious than merely lying about one's name, or running from a scene of a

crime. This obstructing continued to ensure the remains of his homicide victim were not found by the victim's own family. This is sufficient grounds to justify this prosecution.

II. Plea Agreements

Next, the defense has filed a motion to dismiss based on a plea agreement. To be clear, the plea agreement that occurred in March 18, 1994, occurred during the original 1st degree intentional homicide trial. The plea agreement required the State to reduce the charge to homicide by negligent use of a motor vehicle, it required the defendant to waive any lapse of the statute of limitations, and enter an *Alford* plea.

At no point has the defense submitted any evidence to suggest that "immunity" was given to the defendant for future criminal behavior. Any agreement like this would certainly be void and contrary to public policy. *See State v. Conger*, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341.

On June 7, 2021, the defendant made the following statements regarding Starkie Swenson: "he has never seen the man," "he has never spoke to Starkie in person and never seen him in person," and finally that "he knows nothing about" the Starkie's disappearance. These are assertions made by the defendant to law enforcement officers, while they were acting in an official capacity as an investigator trying to locate the remains of Starkie Swenson. The State contends that these statements were false statements made with an intent to mislead the officers.

As outlined in the criminal complaint in the pending charge, W2 described the defendant being at her residence on August 13, 1983. The defendant heard something outside, and saw a person walking down W2's driveway. W2 believed it was Starkie. The defendant became extremely upset with the potential that W2 may be speaking with Starkie.

According to W1, Starkie had left his residence on August 13, 1983 in the evening on his bike heading to W2's residence.

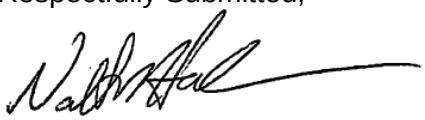
W3 stated on August 13, 1983, she observed the defendant leaving W2's residence. W3 then observed a disturbance at Shattuck Junior High School, directly next to W2s residence. W3 heard two males in an argument. One voice was the defendant's and the other voice was from a person talking about staying away from W2. W3 observed the next day blood on the defendant, and noticed some issues with the defendant's vehicle, consistent with running over a person.

These facts, among others, support a conclusion that the defendant did in fact see, speak to, and see in person Starkie Swenson on August 13, 1983, the last day he was seen alive. The defendant's intent to mislead is demonstrated by the context for which law enforcement arrived on June 7, 2021. Law enforcement was looking for guidance to locate Starkie's remains and provide closure to the family.

The authority cited by the defense in it's brief does not support the proposition that an agreement to settle a case, forgoes a future prosecution for lying. In short, the defendant's apparent authority does not grant the defendant a "license to lie" to law enforcement. Certainly an agreement to settle during the midst of a bodyless homicide trial, does not contemplate foreclosing a prosecution for obstructing an officer based on the defendant's statements made in June of 2021.

For those reasons, this Court should deny both of the defendant's motions.

Respectfully Submitted,



Nathan F. Haberman
District Attorney

Date Signed: 04/01/23
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