COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2029-CR **Cir. Ct. No. 2010CF162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MURRY WAYNE LOCKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Murry Locke appeals a judgment of conviction for two counts of possession of child pornography. Locke argues the State breached the plea agreement, and seeks resentencing before a different judge. We agree that

the State materially and substantially breached the agreement. Accordingly, we reverse and remand for resentencing before a different judge.

BACKGROUND

¶2 Pursuant to a plea agreement, the State promised its sentence recommendation would not exceed that in the presentence investigation report (PSI). However, the PSI writer declined to make a specific sentencing recommendation to the court because of internal agency policies that precluded doing so when the statute calls for a presumptive minimum sentence. Locke's convictions each carried three-year presumptive minimum confinement terms and twenty-five-year maximum terms of imprisonment.[1]

¶3 Immediately before the State made a sentencing recommendation, the prosecutor and the court each indicated the State was bound by its plea agreement to not make a recommendation beyond that set forth in the PSI. Nonetheless, the prosecutor then stated: "So the recommendation here is a non-recommendation as far as what I can say to lock Mr. Locke—lock Mr. Locke—up for 50 years, with 30 years of initial confinement and 50 [sic[2]] years of extended supervision." The following discussion ensued:

> [DEFENSE COUNSEL]: I'm going to object again to breach because I think he's doing a run-around now.
>
> [PROSECUTOR]: We are never going to finish this.

[1] *See* WIS. STAT. §§ 939.617(1)-(2); 939.50(3)(d); 948.12. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The most reasonable interpretation of the prosecutor's statement is that it was a recommendation for only a *twenty*-year term of extended supervision.

> THE COURT: [Prosecutor], your recommendation cannot go beyond the recommendation of the Presentence Investigation Report—
>
> [PROSECUTOR]: Right.
>
> THE COURT: —prepared by … the Department of Corrections.
>
> [PROSECUTOR]: Yes, sir.
>
> THE COURT: That report says … [t]he Department does not make a recommendation in presumptive-minimum cases. Because you said that you would go along with the—it would not exceed the recommendation of the Department of Corrections and they did not give the Court a recommendation, it appears you cannot give a recommendation.
>
> [PROSECUTOR]: Right that's what I'm saying. I'm not asking you to do anything more than use your discretion to sentence him … based on what she's told you, and I think he's a sick individual, but it's up to the Court to decide what to do with him, and that's all I have to say, sir.

The court proceeded to sentence Locke, and he now appeals.

DISCUSSION

¶4 Locke argues the State materially and substantially breached the plea agreement when it made a sentencing recommendation and then failed to retract the recommendation or acknowledge its breach. This presents a question of law. *See* ***State v. Williams***, 2002 WI 1, ¶¶2, 35, 249 Wis. 2d 492, 637 N.W.2d 733. A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244. Once a defendant has pled guilty, "due process requires that the defendant's expectations be fulfilled." ***Id.*** (citing ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997)); *see also* ***Santobello v. New York***, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or

agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

¶5 It is well-established that "[w]hen a prosecutor does not make the negotiated sentencing recommendation, that conduct constitutes a breach of the plea agreement." ***Smith***, 207 Wis. 2d at 272 (citing ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986)); *see also* ***Williams***, 249 Wis. 2d 492, ¶38; ***State v. Duckett***, 2010 WI App 44, ¶8, 324 Wis. 2d 244, 781 N.W.2d 522. However, an actionable breach cannot be merely technical; rather, it must be material and substantial.[3] ***Howard***, 246 Wis. 2d 475, ¶15. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Williams***, 249 Wis. 2d 492, ¶38; *see also* ***Smith***, 207 Wis. 2d at 272 ("Such a breach must deprive the defendant of a material and substantial benefit for which he or she bargained."). A prosecutor's sentencing recommendation is a material and substantial term of the plea agreement. ***Smith***, 207 Wis. 2d at 272-73. A material and substantial breach entitles a defendant to either vacation of the plea agreement or resentencing. ***Williams***, 249 Wis. 2d 492, ¶38.

¶6 We agree with Locke that the State materially and substantially breached the plea agreement. The prosecutor promised to recommend a sentence that was no longer than that recommended by the PSI. At sentencing, the prosecutor agreed with the court that, because the PSI made no recommendation, the State was barred from making a recommendation. Yet, the prosecutor then

[3] "'Material and substantial,' though it appears to have two parts, is actually a single concept … and that concept deals with materiality." ***State v. Deilke***, 2004 WI 104, ¶¶12 n.8, 13 n.9, 274 Wis. 2d 595, 682 N.W.2d 945.

inexplicably made a sentence recommendation—not just *a* recommendation, but a recommendation that Locke receive the maximum, consecutive sentence allowed by law. Surely, labeling the recommendation a "non-recommendation" does nothing to change the nature of the statement itself. If anything, it exhibits indifference to the sanctity of the plea agreement.

¶7 Even more disturbing, when defense counsel promptly objected to the clear breach, the prosecutor responded with a quip suggesting the defense was unduly prolonging the proceedings. When the court reminded the prosecutor a recommendation was impermissible, the prosecutor appeared to reaffirm his "non-recommendation": "Right that's what I'm saying." At the very least, the prosecutor never acknowledged his breach or retracted the recommendation. Instead, he merely suggested the court use its discretion to sentence Locke based on the PSI—from which the prosecutor had just previously recounted substantial negative information—stating Locke was "a sick individual." The prosecutor then abruptly terminated his comments.

¶8 The State argues the sentence recommendation did not constitute a breach because the statement "was ambiguous and not an explicit sentencing recommendation." That interpretation is unreasonable. The State next asserts the prosecutor promptly rectified any possible breach. That assertion is belied by the transcript, from which the State selectively quotes.

¶9 Finally, the State argues the prosecutor's "non-recommendation" was not a material and substantial breach because the "State agreed only to cap its sentencing recommendation, not to refrain from making a sentencing recommendation at all." It asserts, "The State's silence was not a benefit for which Locke bargained." We reject this interpretation of the agreement as

unreasonable. As the court and the State agreed at sentencing, because the PSI provided no sentence recommendation, neither could the prosecutor. Further, we agree with Locke:

> It is nonsensical to interpret a prosecutor's agreement "not to exceed the PSI," as one in which the State is free to ask for the maximum sentence. It cannot be reasonably argued that Locke entered his pleas with the expectation that his bargain allowed the State to argue for the maximum consecutive sentence.

Indeed, an agreement by the State to "cap its sentencing recommendation" at the maximum sentence is no bargain. Accordingly, Locke is entitled to resentencing before a different judge.[4]

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Neither party seeks vacation of the plea agreement.