COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1669-CR **Cir. Ct. No. 2012CF5495**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY H. DUBOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jerry H. Dubose appeals a judgment entered after he pled guilty to one count of second-degree reckless homicide by use of a dangerous weapon. He also appeals a postconviction order denying his claim that trial counsel was ineffective at sentencing. Dubose claims the prosecutor's

sentencing remarks breached the plea agreement, and his trial counsel was ineffective for failing to object. We affirm.

BACKGROUND

¶2 The State charged Dubose with first-degree intentional homicide by use of a dangerous weapon after he stabbed and killed Mark Chatman on November 1, 2012. *See* WIS. STAT. §§ 940.01(1)(a), 939.63(1) (2011-12).[1] The offense carries a maximum sentence of life plus five years in prison. *See* WIS. STAT. §§ 939.50(3)(a), 939.63(1)(b). Pursuant to a plea bargain, Dubose resolved the case by pleading guilty to a reduced charge of second-degree reckless homicide by use of a dangerous weapon, an offense carrying a maximum sentence of thirty years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 940.06(1), 939.50(3)(d), 939.63(1)(b). Under the terms of the plea bargain, the State would recommend "prison confinement up to the court" and was "free to argue any mitigating or aggravating facts of the case."

¶3 At sentencing, the parties did not dispute that Chatman struck Dubose's girlfriend, Sandra Arnold, Dubose struck Chatman in return, and Dubose then seized a knife and stabbed Chatman twelve times. In Dubose's sentencing remarks, Dubose emphasized the concern for Arnold that motivated his actions, the 9-1-1 call he made summoning police after the incident, and his remorse. Dubose also submitted a sentencing memorandum that discussed his troubled life and the factors limiting his life expectancy, including his age of fifty-three years, his compromised liver functioning, and his chronic alcohol abuse. Dubose urged

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the circuit court to adopt the sentencing recommendation in his memorandum, namely ten-to-twelve years of initial confinement and five years of extended supervision.

¶4 The State, in its sentencing remarks, described Dubose as dangerous and in pressing need of treatment for his dependence on drugs and alcohol. The State argued that "alcohol ... [is] what's causing him to get here and what hopefully will cause him to – the court to sentence him to prison in this matter." The State concluded its comments with the remarks that underlie the instant appeal:

> the only other thing I would have to say is that, in my opinion, Mr. Dubose had a significant plea agreement in this matter. The reason why is because of his age, his health problems, and because it's somewhat nebulous as to what happened at the scene. But there was a significant plea agreement here to the benefit of Mr. Dubose.

The circuit court ultimately sentenced Dubose to fifteen years of initial confinement and ten years of extended supervision.

¶5 Dubose filed a postconviction motion seeking resentencing on the ground that trial counsel was ineffective for failing to object to the State's sentencing remarks. According to Dubose, the references to a "significant plea agreement to his benefit" constituted an implicit request to impose "a sentence at the top end of the range available to the sentencing court." The circuit court rejected the claim without a hearing, and this appeal followed.

DISCUSSION

¶6 "'Whether the State's conduct constitutes a breach of a plea agreement and whether the breach is material and substantial are questions of

law.'" ***State v. Liukonen***, 2004 WI App 157, ¶9, 276 Wis. 2d 64, 686 N.W.2d 689 (citation and brackets omitted). We review such questions *de novo*. *See* ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. Dubose, however, did not claim during the sentencing hearing that the prosecutor's sentencing remarks breached the plea bargain, and he thereby forfeited the right to appellate review of the alleged breach during postconviction proceedings. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244.[2] Accordingly, he presents his claim within the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. In this circumstance, we follow the methodology set forth in ***Howard***: "[w]e first consider whether the State breached the plea agreement. If there was a material and substantial breach, the next issues are whether [trial] counsel provided ineffective assistance and which remedy is appropriate." ***Id.***, 246 Wis. 2d 475, ¶12.

¶7 The State breaches a plea bargain by failing to present the negotiated sentencing recommendation to the circuit court. *See* ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. The State's sentencing remarks may also constitute an implicit breach of a plea bargain by covertly or indirectly suggesting that the circuit court should impose a disposition other than the sentence recommended: "'[t]he State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the [circuit] court

[2] In ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244, we used the term "waiver" to describe the effect of the appellant's failure to raise a timely challenge to the State's sentencing remarks. We use the term "forfeiture" here to comport with the terminology adopted by the supreme court in ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted).

that a more severe sentence is warranted than that recommended.'" *See* ***id.***, ¶42 (citation omitted). At the same time, however, the State has an obligation to provide relevant information to the circuit court at sentencing. ***Id.***, ¶44. Indeed, the State may not agree to keep relevant information from the sentencing court. ***Id.***, ¶43.

¶8 Dubose concedes the State abided by its agreement to recommend prison without specifying a recommended length of confinement. He argues, however, that the prosecutor's remarks "undermined the State's agreement ... by implying that a sentence at or near the maximum available was appropriate because Dubose had received a dramatic benefit from being allowed to enter the plea to the amended charge of second-degree reckless homicide."

¶9 To support his claim, Dubose relies on ***Liukonen*** and ***Williams***. In both cases the question—ultimately resolved against the State—was whether the prosecutor's remarks implied that the defendant should receive a harsher sentence than the one the prosecutor promised to recommend. *See* ***Liukonen***, 276 Wis. 2d 64, ¶15; ***Williams***, 249 Wis. 2d 492, ¶51. We agree with the State that neither ***Liukonen*** nor ***Williams*** provides meaningful guidance in assessing the State's remarks in this case because the plea bargain here required the State to recommend "prison" but did not require the State to specify a recommended term of imprisonment; we thus cannot measure the State's remarks against a promise to recommend a specific sentence.

¶10 Rather, we are aided by the reasoning in ***State v. Duckett***, 2010 WI App 44, 324 Wis. 2d 244, 781 N.W.2d 522. There, as here, the State agreed to recommend "prison" without specifying a recommended length of confinement. *See* ***id.***, ¶2. There, as here, the State did not recommend a specific term at

sentencing, but the defendant nonetheless claimed the State breached the plea bargain. *See* ***id.***, ¶¶3-4. The ***Duckett*** defendant bottomed his claim on the State's recitation of the term of imprisonment recommended by the author of the presentence investigation report (PSI). *See* ***id.***, ¶11. The defendant contended that, by reciting the sentencing recommendation in the context of a "series of comments on the aggravated nature of the case," the State implicitly argued the recommendation in the PSI "was too low—in breach of the plea agreement's prohibition against recommending a particular sentence." *See* ***id.***, ¶4. We rejected this contention because the State did nothing more than "properly convey[] relevant information to the court without depriving [the defendant] of the benefit of the prison recommendation he bargained for." *See* ***id.***, ¶10.

¶11 Here, as in ***Duckett***, the State made remarks that squared with its right to recommend "prison." The State's references to a beneficial and significant plea agreement did not deprive Dubose of the benefit of a prison recommendation.

¶12 Further, in ***Duckett***, we noted that the circuit "court had the PSI report before it at the start of the sentencing hearing." *See* ***id.*** Thus, when the State recited the sentencing recommendation found in the PSI, the State merely described information the circuit court plainly already knew. Similarly, here, we cannot ignore that the description of the plea bargain as "significant" and beneficial to Dubose merely stated the obvious: the plea bargain shielded Dubose from the risk of receiving a mandatory life sentence. The circuit court could not help but recognize this benefit. The charging documents themselves placed the information before the circuit court. Dubose points out that the State also benefited from the plea bargain in this case, but the benefit to Dubose is not thereby rendered less obvious or less significant.

¶13 Moreover, in ***Duckett***, the State's sentencing remarks passed muster despite coupling a recitation of the PSI's sentencing recommendation with a description of aggravating sentencing factors. *See* ***id.***, ¶4. Here, by contrast, the State explained that Dubose received a significant plea agreement based on mitigating factors that the prosecutor listed on the record. We agree with the circuit court that an objective assessment of these remarks does not suggest they urged a maximum sentence, or indeed, any specific term of imprisonment.

¶14 Finally, our supreme court recommends prosecutors disclose the reasons for entering plea bargains that include charge concessions so the circuit court understands the propriety of the parties' agreement and the concessions extended. *See* ***State v. Comstock***, 168 Wis. 2d 915, 927 & n.11, 485 N.W.2d 354 (1992). The State's disclosure here was thus both proper and appropriate. *See* ***Williams***, 249 Wis. 2d 492, ¶43 (State may not agree to keep relevant information from sentencing court). We conclude the State's remarks did not breach the plea bargain.

¶15 Because the State's sentencing remarks did not breach the plea bargain, Dubose cannot show that his trial counsel was ineffective for failing to object to those remarks. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996) (counsel not ineffective for failing to pursue meritless motions). Further analysis is unnecessary. *See* ***Howard***, 246 Wis. 2d 475, ¶12.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).