COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1254-CR **Cir. Ct. No. 2012CF841**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN E. SCHABOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

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

¶1 HRUZ, J. Warren Schabow appeals a judgment of conviction, entered upon no-contest pleas to one count of armed burglary and two counts of theft, and an order denying his postconviction motion for resentencing or sentencing modification. The plea agreement in this case required the State to

"cap" its sentencing recommendation at a total sentence of two years' initial confinement and four years' extended supervision. Schabow contends the State breached this plea agreement generally by highlighting negative facts about Schabow after the victim requested a five-to-ten year "prison sentence," and specifically by stating the recommended two years' initial confinement was the "very minimum" period of initial confinement "that should be considered." We conclude that, evaluating the prosecutor's remarks in their totality, including the prosecutor's repeated affirmation of the State's sentencing recommendation, there was not a material and substantial breach of the plea agreement. Accordingly, we affirm.

BACKGROUND

¶2 On July 16, 2012, the State filed a criminal complaint against Schabow, alleging that he forcibly entered a residence and stole property, which included several firearms. Schabow was charged with armed burglary and two counts of theft, with all counts being charged as party to the crime.

¶3 The parties reached a plea agreement, under which Schabow agreed to plead no contest to the charges. In return, the State, as memorialized in an offer memorandum, agreed to "cap its recommendation at 2 years Initial Confinement and 4 years Extended Supervision." The State also informed Schabow it would request a presentence investigation report (PSI). Schabow complied with his portion of the agreement by entering no contest pleas to all counts.

¶4 At the sentencing hearing, the circuit court decided to first hear from the victim. The victim testified that the robbery severely impacted his family's sense of security. The victim stated he "would like to see something in the neighborhood of five to ten years of a prison sentence."

¶5 The prosecutor then made a sentencing argument on behalf of the State. After reciting the charges, the prosecutor immediately discussed the State's recommendation:

> The State's recommendation in this case I'll give right out of the gate. We're asking you to sentence the defendant to six years in the Wisconsin state prison system on the armed burglary to be made up of two years of initial confinement and four years of extended supervision. On the two theft of firearm charges we would recommend that you sentence the defendant concurrently to four years in the Wisconsin state prison [system] to be made up of one year initial confinement and three years of extended supervision.

Schabow does not allege this portion of the State's argument breached the plea agreement in any way.

¶6 However, Schabow broadly takes issue with the remainder of the prosecutor's sentencing remarks. Schabow's argument on appeal does not pertain to any specific language the prosecutor used—with one exception, which came at the conclusion of the prosecutor's sentencing argument—so we need not reproduce all of the prosecutor's lengthy comments verbatim.

¶7 The prosecutor first addressed Schabow's character. He noted Schabow's criminal record, which included recent convictions for "resisting-obstructing," possession of THC, and possession of drug paraphernalia. The prosecutor observed that Schabow was on probation at the time of the present offenses. Schabow was twenty years old. He lived with his father, who was addicted to drugs, until he was thirteen, and was then placed in a foster home. The prosecutor stated this "appears to have been a beneficial and good placement for him."

¶8 The prosecutor observed that Schabow graduated from high school and did not appear to have any juvenile offenses, but immediately after his graduation became heavily involved with drugs, including heroin and synthetic opiates. Although Schabow completed a drug program while on probation, he was actively using drugs at the time of the burglary and told the responding police officers that he had consumed twenty-five one-milligram Xanax tablets a few hours before the burglary. The prosecutor remarked "the most important feature, sadly enough, of the defendant's character at this point … is that he has a very serious drug problem." The prosecutor stated Schabow had no employment history to speak of, and he found it "difficult to imagine how [Shabow] could maintain employment of any level without thorough and intensive drug treatment." The prosecutor also indicated he did not believe Schabow "understood the gravity of the crimes, and I'm hoping maybe after the victim impact statement today he has a better idea."

¶9 The prosecutor next addressed the nature of the offenses. He stated the victim "really did my work for me in that regard," adding that it was a home burglary and that the victim was "no different than every other home burglary victim" in complaining about a loss of the sense of safety and security. The prosecutor noted that in addition to firearms, Schabow had stolen family heirlooms and a laptop computer with digital files relating to the victim's father's military records, the type of property that is "really heart breaking to lose." The prosecutor noted that the stolen firearms had been recovered, and that "[t]he defendant did provide information to the police that led to the recovery of those firearms, and I did give the defendant credit for that cooperation. And I think he helped recover some of the other property that was recovered as well."

¶10 Finally, the prosecutor addressed the need to protect the public. The prosecutor stated Schabow was, in his current drug-dependent state, "a danger to the public at least to the extent of committing home burglaries and thefts." Accordingly, the prosecutor indicated community supervision was not appropriate. He continued, "The hope that the State has is that he can change and that he will change, that he will be afforded intensive drug treatment in a prison setting and that the treatment will work." The prosecutor reiterated that, given the extent of the drug addiction and Schabow's criminal activity, "the State believes that there's a need for close rehabilitative control of the defendant for a lengthy period of time."

¶11 At the conclusion of his sentencing remarks, the prosecutor made the following statement:

> So, I think that the prison sentence of six years is appropriate. I think the initial confinement is the very minimum that should be considered, and I think a lengthy period of extended supervision. The four years that the State has recommended is wholly appropriate. That's all I've got to say.

Defense counsel agreed a period of confinement in the prison system was appropriate.

¶12 The circuit court ultimately sentenced Schabow to five years' incarceration on the armed burglary charge, consisting of two years' initial confinement and three years' extended supervision, and a total of six years' incarceration on the two theft counts, consisting of one year's initial confinement and two years' extended supervision on each count. Contrary to the State's recommendation, all sentences were ordered to be served consecutively to one another.

¶13 Schabow's counsel filed a no-merit report, but later informed this court he believed there was an arguably meritorious issue regarding whether the State breached the plea agreement at sentencing. On that basis, we rejected the no-merit report. Schabow then filed a postconviction motion seeking resentencing or sentence modification, contending that the State breached the plea agreement and that he received ineffective assistance of counsel based on his attorney's failure to object to the prosecutor's remarks at sentencing.

¶14 Schabow's defense counsel testified at a ***Machner*** hearing.[1] Counsel stated she did not object to the prosecutor's sentencing remarks because she did not believe his comments breached the plea agreement. Counsel acknowledged the prosecutor did "point out some negative characteristics of Mr. Schabow," but she noted he also pointed out some positive things. Counsel testified that during the sentencing hearing, Schabow was confused that the State appeared to be recommending much more time than agreed, but counsel explained to him that because the State sought concurrent sentences, the total recommended sentence complied with the plea agreement.

¶15 At the ***Machner*** hearing, the prosecutor explained that his use of the phrase "very minimum" at the conclusion of his sentencing remarks referred to ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. In ***Gallion***, our supreme court held that "[i]n each case, the sentence imposed shall 'call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Id.***, ¶44 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

N.W.2d 512 (1971)). The circuit court, referring to ***Gallion***, accepted the State's argument and denied Schabow's postconviction motion.

DISCUSSION

¶16 An accused has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. The State's agreement to recommend a particular sentence in exchange for a guilty plea may induce the defendant to give up the constitutional right to a jury trial; hence, once the defendant has entered the requisite plea, due process demands fulfillment of the bargain. ***Id.***

¶17 Not all breaches of a plea agreement entitle a defendant to relief. "An actionable breach must not be merely a technical breach; it must be a material and substantial breach." ***Id.***, ¶38. A material and substantial breach occurs when a defendant has been deprived of a "material and substantial benefit for which he or she bargained." ***State v. Howard***, 2001 WI App 137, ¶15, 246 Wis. 2d 475, 630 N.W.2d 244.

¶18 In this case, defense counsel did not object to the prosecutor's sentencing remarks. Therefore, Schabow is entitled to relief only if, in addition to showing a material and substantial breach of the plea agreement, he can show he received ineffective assistance of counsel. *See* ***id.***, ¶21. Despite acknowledging that he must ultimately demonstrate ineffective assistance of counsel, the substance of Schabow's brief focuses exclusively on whether there was a material and substantial breach of the plea agreement. Schabow's brief contains no argument regarding ineffective assistance of counsel. This alone provides a sufficient reason to affirm the circuit court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues

inadequately briefed."). Even overlooking Schabow's inadequate briefing, we conclude Schabow is not entitled to relief on the merits.

¶19 Both the historical facts regarding the terms of the plea agreement and the State's remarks during the sentencing hearing are undisputed. Accordingly, the only question is whether the State's conduct constitutes a material and substantial breach of the plea agreement. This is a question of law, which we review de novo. ***Williams***, 249 Wis. 2d 492, ¶5.

¶20 Schabow first asserts the prosecutor's remarks must be viewed in their proper context, immediately following the victim's request for a five-to-ten year sentence. It is true that we "examine the entire sentencing proceeding to evaluate the prosecutor's remarks." ***Id.***, ¶46. Schabow contends this case is similar to ***State v. Sprang***, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, in which we concluded the prosecutor breached the plea agreement by reciting the PSI's recommendation for a sentence harsher than that to which the state agreed. ***Id.***, ¶¶21-22. During the state's sentencing argument, the prosecutor observed that both the PSI and the sex offender assessment report disagreed with the agreed-upon probation recommendation, with the prosecutor adding that Sprang was "certainly high risk," and specifically noting information from the PSI author suggesting that a period of confinement was necessary to meet the defendant's treatment needs. ***Id.***, ¶¶7, 10. We concluded these comments impermissibly insinuated that the State was distancing itself from, and casting doubt on, its own sentence recommendation. ***Id.***, ¶24 (citing ***State v. Naydihor***, 2004 WI 43, ¶28, 270 Wis. 2d 585, 678 N.W.2d 220; ***Williams***, 249 Wis. 2d 492, ¶50).

¶21 Here, Schabow acknowledges that the prosecutor "avoided the ***Sprang*** prosecutor's error of mentioning and implicitly endorsing the victim's

sentencing recommendation." However, he asserts this is a "distinction without a difference." He contends the prosecutor was sending a message that "Schabow was bad with minimal redeeming qualities," implicitly suggesting, at best, that the prosecutor was "indifferent" regarding whether the court should impose a greater sentence than recommended and, at worst, that a sentence more in line with the victim's recommendation was appropriate.

¶22 The sentencing transcript belies Schabow's argument. As Schabow concedes, the prosecutor did not so much as mention the victim's sentencing recommendation. The prosecutor did refer to the victim's testimony twice, but only in the context of expressing that he hoped Schabow better understood the gravity of the offenses following the victim's testimony, and affirming that the victim accurately described the nature and effect of the offenses. Schabow relies on the sequencing of the testimony as the sole nexus between the victim's sentencing recommendation and the prosecutor's remarks, and we conclude this alone is insufficient to establish a breach of the plea agreement.

¶23 Still, Schabow is correct that "the State may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278. Schabow argues the prosecutor exacerbated the sequencing problem and indirectly supported the victim's sentencing recommendation by highlighting "many negative facts about Schabow's character and almost no positive aspects of it." He contends the prosecutor's argument, considered in its totality, violated the plea agreement by impliedly suggesting a sentence longer than that in the agreed-upon recommendation was warranted.

¶24 Schabow's argument largely tracks the one made by the defendant in ***Naydihor***. There, Naydihor argued the prosecutor breached the plea agreement because "the State did not say one thing positive about him." ***Naydihor***, 270 Wis. 2d 585, ¶15. Naydihor also faulted the prosecutor for highlighting his history of substance abuse, the victim's injuries, and calling him a danger to the community. ***Id.*** Naydihor claimed this conduct constituted an "end-run" around the plea agreement. ***Id.***

¶25 Our supreme court rejected Naydihor's argument, largely relying on ***Hanson***. In ***Hanson***, we acknowledged that the State walks a "fine line" at sentencing: "On the one hand, the State must obviously abide by its agreement to cap its sentencing recommendation. But on the other, the State is free to argue for an appropriate sentence within the limits of the cap." ***Hanson***, 232 Wis. 2d 291, ¶27; *see also* ***Williams***, 249 Wis. 2d 492, ¶44. In ***Naydihor***, our supreme court emphasized that "***Hanson*** stands for the proposition that the State may discuss negative facts about the defendant in order to justify a recommended sentence within the parameters of the plea agreement." ***Naydihor***, 270 Wis. 2d 585, ¶24.

¶26 Here, as in ***Naydihor***, "the prosecutor's comments supported the recommended sentence and were relevant to the pertinent sentencing factors the court was required to consider." ***Id.***, ¶30. The prosecutor, pursuant to the plea agreement, was recommending a substantial six-year sentence, consisting of two years' initial confinement and four years' extended supervision. His comments were a reasonable and permissible attempt to secure the recommended sentence. The prosecutor specifically tied each of his comments to a primary sentencing factor, namely Schabow's character, the nature of the crimes, and the need to protect the public. *See* ***id.***, ¶26. Schabow does not argue any of the topics the prosecutor mentioned were irrelevant to the sentencing inquiry. Although

Schabow no doubt wishes the prosecutor had kept quiet about his previous criminal history and other matters, any attempt to shield the sentencing court from relevant information is contrary to public policy. *See* ***Williams***, 249 Wis. 2d 492, ¶43; ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991).

¶27 The State is not "obligated to say something nice or positive about the defendant in order to avoid breaching a plea agreement." ***Naydihor***, 270 Wis. 2d 585, ¶30. However, we note the State in this case actually *did* emphasize positive aspects of Schabow's character, including that he graduated from high school, succeeded with a foster family after being removed from his father's home, did not have an apparent juvenile record, and, most notably, assisted with the recovery of the stolen property. Although Schabow portrays the prosecutor as cold and skeptical of Schabow's rehabilitative potential, the transcript reflects that the prosecutor actually focused on Schabow's need for drug treatment throughout the sentencing hearing, at one point stating that he hoped that Schabow "can change and that he will change" based on intensive drug treatment while incarcerated.

¶28 Schabow asserts that the totality of the prosecutor's sentencing comments reveal "less-than-enthusiastic support" for the agreed-upon sentencing recommendation. This argument applies an incorrect standard to our analysis of the prosecutor's sentencing remarks. There is no requirement that the State make a sentence recommendation forcefully or enthusiastically. ***State v. Poole***, 131 Wis. 2d 359, 362, 394 N.W.2d 909 (Ct. App. 1986). The "evil [is] not the lack of enthusiastic advocacy for the bargained sentence, but the state's use of qualified or negative language in making the sentence recommendation." ***Id.*** at 364.

¶29 Schabow's final argument is in this vein. He argues the prosecutor's comment that two years' "initial confinement is the very minimum that should be considered" subtly suggested that there were good reasons to deviate from the terms of the agreement. However, this argument focuses on a single isolated phrase, impermissibly stripping the prosecutor's comment of all context within his sentencing arguments as a whole. *See* ***Williams***, 249 Wis. 2d 492, ¶46. The prosecutor expressed the agreement in entirely unobjectionable terms at the inception of his remarks. Then, while concluding, he immediately preceded the "very minimum" comment by remarking that he thought "the prison sentence of six years is appropriate." Immediately after the allegedly offending comment, the prosecutor stated his recommendation of four years' extended supervision was "wholly appropriate."

¶30 Considering the prosecutor's "very minimum" comment in the overall context, we conclude it did not amount to a material and substantial breach of the plea agreement. Schabow was not deprived of a material and substantial benefit of the bargain, as the prosecutor clearly presented the State's recommendation and its overall endorsement of that recommendation. The prosecutor's "very minimum" comment was improvidently made, and it provided support for an argument that he impermissibly deviated from the plea agreement—i.e., that he failed to walk the "fine line" required by the applicable case law. *See* ***Hanson***, 232 Wis. 2d 291, ¶27. However, the totality of his remarks did not suggest, even implicitly, that he was distancing himself from the agreement, or in hindsight believed the recommendation was insufficient. *See* ***State v. Liukonen***, 2004 WI App 157, ¶13, 276 Wis. 2d 64, 686 N.W.2d 689; ***Sprang***, 274 Wis. 2d 784, ¶24.

By the Court.—Judgment and order affirmed.

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