

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2015

Diane M. Fremgen
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. 2014AP480-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF1086

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH L. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Joseph Evans appeals from a judgment convicting him of being party to the crime of armed robbery on his no contest plea and from an order denying his postconviction motion seeking resentencing because at sentencing, the State breached the plea agreement and the circuit court relied upon

inaccurate information. We conclude that the State did not breach the plea agreement and any inaccurate information relied upon by the circuit court at sentencing was harmless. We affirm.

¶2 The criminal complaint alleged that Evans, Wayne Bell, and others targeted a specific individual for the armed robbery. Evans remained in the vehicle as the get-away driver; Bell and others confronted the victim. During the robbery, the victim was beaten and shot by a third co-actor as the victim fled. In exchange for Evans's no contest plea to armed robbery as party to the crime, the State agreed, among other things, to take no position on the amount of extended supervision to be imposed. At sentencing, the State referred to Bell's twenty-two-year sentence, which included a ten-year term of extended supervision.

¶3 In its sentencing remarks, the circuit court deemed aggravating that Evans had "been to prison for essentially violent offenses and drug offenses. Substantial batteries and the like." Postconviction, Evans argued that the court misstated his prior custody history and relied upon this misstatement to impose a harsher sentence. The court deemed the inaccurate information harmless.

¶4 On appeal, Evans argues that the circuit court relied upon inaccurate information that he had been to prison for violent offenses and the error was not harmless. We agree with the circuit court that, on this record, the error was harmless.

¶5 A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether the circuit court relied upon inaccurate information at sentencing presents a question of law that we decide independently of the circuit court. *Id.* When the defendant meets his or her burden to show that the circuit

court relied upon inaccurate information at sentencing, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26. “The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error.” *State v. Travis*, 2013 WI 38, ¶73, 347 Wis. 2d 142, 832 N.W.2d 491. The focus is on the sentencing transcript, not on the postconviction motion hearing or speculation about what the circuit court would do at resentencing. *Id.*

¶6 In its sentencing remarks, the circuit court found the armed robbery aggravated, particularly because Evans had socialized with the victim in the past. The court noted Evans’s “reduced” role as the get-away driver. The court accurately recited Evans’s juvenile adjudications and adult convictions for criminal trespass to a dwelling; multiple simple, intermediate, and substantial batteries, some including use of a weapon; escape; disorderly conduct; obstruction; cocaine possession; and carrying a concealed weapon. The court found aggravating that Evans was in the community on extended supervision when he committed the armed robbery and that Evans has not changed his conduct despite numerous adjudications as a juvenile and convictions as an adult. The court noted that the shooter received a thirty-year sentence, and Bell received a twenty-two-year sentence.

¶7 The inaccurate information surfaced when the circuit court compared the criminal histories and custody experiences of Bell and Evans. The court described Bell’s prison term as arising from a status offense, failing to register as a sex offender. In contrast, Evans had “been to prison for essentially violent offenses and drug offenses. Substantial batteries and the like. This is an aggravating—aggravating situation.” The court’s description of Evans’s custody experience was not borne out by the presentence investigation report, which stated

that for battery, Evans served time in a juvenile facility and jail. The presentence investigation report did not state that Evans had been sentenced to prison for a violent offense, although it did report a prison sentence for cocaine possession. The court imposed a twenty-two-year consecutive sentence on Evans after finding that he required a significant period of incarceration to deter and punish him and to protect the public from future criminal conduct.

¶8 Postconviction, Evans argued that the circuit court had relied upon inaccurate information because he had not been sentenced to prison for a violent offense (battery) and his Ethan Allen School placement was not equivalent to a prison sentence. Evans argued the circuit court relied upon this inaccurate information to impose a harsher sentence.

¶9 The State countered that at sentencing, the circuit court accurately stated Evans's prior offenses, including the juvenile institution placement for battery. The State suggested that the circuit court merely misspoke when it stated that Evans had been imprisoned for battery.

¶10 The circuit court conceded that it relied upon inaccurate information when it stated that Evans had been incarcerated for battery or other violent offenses. However, the court determined that the inaccuracy was harmless because its mistaken recitation of Evans's custody experience did not cause it to impose either a harsher sentence or the same sentence received by Bell. The court found that it imposed an individualized sentence upon Evans after considering his character; culpability and history of prior, violent offenses (regardless of where Evans served his consequences); and the need to deter, punish, and protect the public. The court denied Evans's postconviction motion seeking resentencing on the grounds that the circuit court relied on inaccurate information.

¶11 We conclude that the circuit court's misstatement regarding Evans's prison experience was harmless on this record. The sentencing transcript does not show a causal connection between the misstatement and the length of Evans's sentence. The court made lengthy sentencing remarks and isolating this one, albeit erroneous, remark does not undermine what was a proper exercise of sentencing discretion. The error was harmless.

¶12 Evans next argues that the State breached the plea agreement. In the plea agreement, the State agreed to recommend no more than twelve years of initial confinement and take no position on the amount of extended supervision, eligibility for prison programming, or whether the sentence should be concurrent or consecutive. At the outset of his sentencing remarks, the prosecutor recommended twelve years and clearly stated that the State took no position on the other sentencing matters. The prosecutor further stated that he did not intend, by his remarks, to breach the plea agreement. The prosecutor's sentencing argument referred to Bell's sentence of twelve years of initial confinement and ten years of extended supervision. Later, the State did not correct the circuit court when the court suggested during its own sentencing remarks that the State was pointing the court in the direction of Bell's twelve-plus-ten sentence. Evans's trial counsel did not object to the State's remarks.

¶13 Postconviction, Evans argued that the State breached the plea agreement when the prosecutor did not counter the circuit court's remark about being pointed to Bell's sentence. Evans suggests that the prosecutor should have reminded the court that the State did not make a recommendation on extended

supervision.¹ By failing to do, the State effectively made an “end run” around the plea agreement. The State argued that there was no breach.

¶14 In rejecting Evan’s plea agreement breach claim, the circuit court concluded that the law only requires that the State adhere to the plea agreement, not that it reiterate the recommended sentence in response to subsequent remarks by the circuit court. In the circuit court’s view, the transcript showed that the State adhered to the plea agreement.

¶15 We will uphold the circuit court’s findings of fact regarding the terms of the plea agreement and the State’s conduct unless those findings are clearly erroneous. *State v. Bokenyi*, 2014 WI 61, ¶37, 355 Wis. 2d 28, 848 N.W.2d 759. Whether the State’s conduct constituted a material and substantial breach of the plea agreement presents a question of law we decide independently. *Id.*, ¶38.

¶16 For a plea agreement breach to warrant relief, the breach must be “material and substantial” such that it “defeats the benefit for which the [defendant] bargained.” *State v. Naydihor*, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220 (citation omitted). The State may not make an “end run” around the plea agreement to accomplish indirectly what it agreed not to do directly. *State v. Matson*, 2003 WI App 253, ¶17, 268 Wis. 2d 725, 674 N.W.2d 51. The breach inquiry focuses on the practical effect of the prosecutor’s remarks, not on

¹ At the postconviction motion hearing, Evans and the State stipulated that trial counsel did not perceive a breach of the plea agreement and had no strategic reason for failing to object. Because we hold that the State did not breach the plea agreement, we need not reach the ineffective assistance of trial counsel claim arising from counsel’s failure to object.

the prosecutor's intent at the time the remarks were made. *State v. Sprang*, 2004 WI App 121, ¶24, 274 Wis. 2d 784, 683 N.W.2d 522.

¶17 At sentencing, the prosecutor referred to the length of Bell's initial confinement but not to the length of his extended supervision. In its own sentencing remarks, the circuit court considered the entirety of Bell's sentence, which it was free to do in the exercise of sentencing discretion. *State v. Giebel*, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995). Under the facts of this case, the State was not required to counter the circuit court's sentencing remarks when they were not based on information provided by the State. The State did not breach the plea agreement.

By the Court.—Judgment and order affirmed.

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

