**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 10, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-3199-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANIEL J. VOIGT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Daniel J. Voigt appeals his judgment of conviction for solicitation of first-degree intentional homicide. He claims the State breached the plea agreement by recommending a six-year prison term and that the circuit court erroneously exercised its discretion by allowing his estranged wife to make a statement at sentencing. Voigt also attempts to challenge his sentence on a

companion bail jumping case. We conclude that the record does not establish a substantial and material breach of the plea agreement; that the trial court properly considered the statement by Voigt's wife under § 972.14, STATS.; and that the bail jumping sentence is not properly before us on appeal. Accordingly, we affirm.

## BACKGROUND

On February 27, 1998, Voigt entered a plea of no contest to solicitation to commit first-degree intentional homicide,[1] contrary to §§ 940.01(1) and 939.30(1), STATS., and a plea of guilty to bail jumping,[2] contrary to § 946.49(1)(b), STATS. In exchange for the pleas, the State dismissed an additional bail jumping charge[3] and agreed to cap its recommendation on the solicitation charge to six years and to recommend consecutive probation with an imposed and stayed sentence on the bail jumping charge. The circuit court accepted the pleas and ordered a presentence investigation report (PSI).

At the sentencing hearing on April 22, 1998, the court allowed Voigt's estranged wife, who was the victim of the dismissed bail jumping charge, to testify over Voigt's objection. After the testimony of several other victims, family members, and friends, the State recommended that Voigt be placed in the Wisconsin prison system for six years on the solicitation charge and then be placed on probation on the bail jumping charge. Voigt objected to the

[1] The solicitation charge was based on Voigt's offer to pay a man to hang his former business partner and make it look like a suicide.

[2] The bail jumping charge was based on Voigt's theft and use of his employer's credit card while he was out on bail for another pending charge.

[3] The dismissed bail jumping charge was based on Voigt's violation of a restraining order.

recommendation on the ground that asking for six years was different than asking the court to impose no more than six years. The court acknowledged the plea agreement, and sentenced Voigt to six years in prison to be followed by ten years of probation.

## STANDARD OF REVIEW

The appellant must show by clear and convincing evidence that there was a substantial and material breach in the plea agreement in order to establish his entitlement to resentencing. ***State v. Jorgenson***, 137 Wis.2d 163, 168, 404 N.W.2d 66, 68 (Ct. App. 1987). A circuit court's determination as to whether a breach of the plea agreement occurred is a question of fact which we will not set aside unless it is clearly erroneous. ***Id.*** at 169, 404 N.W.2d at 68. Assuming that there has been a breach, the determination of whether that breach was substantial and material lies within the circuit court's discretion. ***State v. Bangert***, 131 Wis.2d 246, 288-89, 389 N.W.2d 12, 32 (1986). The circuit court also has discretion to allow statements by victims and others prior to sentencing. *See* § 972.14(3)(a), STATS. We will sustain discretionary acts by the circuit court so long as the court "examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Modica v. Verhulst***, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995).

## ANALYSIS

### *Plea Agreement*

When asked about the plea agreement at the plea hearing, the State informed the court, "On the solicitation case the State will be capping at six

years." The defense then emphasized that it was reserving the right to argue for a lesser sentence, and the court noted:

> Okay, and it's my understanding that it's in the form of a cap. In other words, they cannot argue for any more serious penalties than that after the PSI is in. They're free to argue for a lesser sentence but they're capping it, and you're free to argue as well and that's understood.

Defense counsel thanked the court and the court proceeded to other topics.

At the sentencing hearing, Voigt objected to the State's recommendation of six years in prison as a violation of the plea agreement, which he maintained called for a recommendation of no more than six years. While we agree with the appellant that there is a subtle distinction between recommending that an offender be sentenced to six years in prison and recommending that he be sentenced to no more than six years in prison, the record does not establish that the plea agreement was for the latter recommendation.

The problem with Voigt's argument is that it assumes that the State had agreed to recommend a six-year cap on his sentence, rather than to a six-year cap on its recommendation. We do not read the plea agreement that way. The transcript of the plea hearing shows that the State agreed not to recommend more than six years, and it did not. Because the record supports the circuit court's implicit finding that no breach occurred, we need not consider whether the distinction Voigt raises would be substantial and material.

*Wife's Statement*

Voigt also contends that the trial court erroneously exercised its discretion by allowing his wife to testify about a wide variety of matters, including

conduct other than that for which he was being sentenced. Section 972.14(3)(a), STATS., provides:

> Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

Voigt claims that his wife was not a victim and that her testimony was the product of bitter divorce proceedings and irrelevant to his sentencing. The record shows, however, that the circuit court allowed Voigt's wife to testify as "any other person," and that it considered her testimony relevant to the question of Voigt's character. We agree, and further note that the impact of Voigt's solicitation crime on his family was also relevant to the severity of the offense and the need to protect the public. The circuit court was well aware that Voigt and his wife were in the middle of divorce proceedings, and was able to take that into account when deciding what weight to give her statement. No erroneous exercise of discretion occurred in allowing her to testify.

*Length of Probation*

Finally, Voigt argues that his ten-year probation on the bail jumping charge was illegal because it was in excess of the statutory maximum for the crime. *See* § 973.09(2)(b), STATS. While this claim may have merit, it is not properly before this court because Voigt has not yet raised the issue in a motion to the trial court under § 974.02(2), STATS., and is therefore barred from raising it here.

*By the Court.*—Judgment affirmed.

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