COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2355-CR **Cir. Ct. No. 2010CF836**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES G. PITTMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. James Pittmon appeals a judgment of conviction and an order denying his motion for resentencing. Pittmon 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 Pittmon was charged with two counts of repeated sexual assault of a child and one count of sexual assault of a child under age sixteen. A plea agreement was reached in which the State agreed to dismiss and read in two of the counts in exchange for a guilty or no-contest plea to one count of repeated sexual assault of a child. *See* WIS. STAT. § 948.025(1)(e).[1] That Class C felony carried a maximum penalty of forty years' imprisonment, including a maximum term of fifteen years' extended supervision. *See* WIS. STAT. §§ 973.01(2)(b)3., (2)(d)2.

¶3 At the plea hearing, the prosecutor explained the parties' agreement: "At the time of sentencing the State's going to recommend 20 years in the Wisconsin State prison system bifurcated with ten years of initial confinement followed by ten years of extended supervision; and the defense would be free to argue." The court also received a case consolidation document at that hearing, which set forth the same agreement.[2] The plea questionnaire and waiver of rights form similarly provided: "the State will … recommend 20 years (10 in/10 out); defense free to argue." Further, during the plea colloquy, the court observed, "I have heard what the State's going to recommend."

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

[2] This case involved charges consolidated from another county.

¶4 At the sentencing hearing five and one-half months later, a different prosecutor appeared on behalf of the State. The sentencing judge had presided at the plea hearing. The prosecutor commenced his remarks as follows, "I am asking the Court to impose a prison sentence that includes ten years of initial confinement." He concluded his argument by stating, "So I am asking you to impose a ten-year—a sentence that includes a ten-year initial confinement portion. The length of extended supervision and the conditions of that portion of the sentence I would leave to the Court."

¶5 Pittmon's counsel did not object, nor did she recount the terms of the plea agreement when offering her own sentencing recommendation. Prior to announcing the sentence, the court observed:

> Nobody argues the fact that prison is the appropriate sentence. They simply argue the time. We certainly have a range in the recommendations. We have a six to eight-year initial confinement recommendation by Ms. Watkins [the alternative presentence author] with five to six years of extended supervision. *We have a ten-year recommendation with ten years of extended supervision by the State.* The presentence report prepared by the Department of Corrections recommends an initial incarceration period of 13 to 15 years followed by seven to eight years of extended supervision.

(Emphasis added.) The court then imposed a twenty-five-year sentence, consisting of fifteen years' initial confinement and ten years' extended supervision.

¶6 Pittmon moved for resentencing based on the State's failure to recommend ten years' extended supervision. At a hearing on the motion, Pittmon's prior attorney testified she believed the failure to object "was an oversight on [her] part and [she] did not realize that they had asked for something other than the plea agreement." The prosecutor at the motion hearing, who was

also the sentencing prosecutor, stated that although he had been involved in the plea negotiations, it appeared there was a "miscommunication … in [his] own notes" in the case file.

¶7 The State argued the sentencing was not "defective because of what amounts really to a relatively inadvertent breach." Alternatively, the State argued Pittmon failed to satisfy the prejudice prong of ineffectiveness of counsel, because the court "sentenced him to exactly the amount of extended supervision that was in the negotiation …." The circuit court determined there was not a substantial and material breach, explaining:

> First of all, I took the plea in this case. I knew what the plea agreement was, ten in and ten out. …
>
> My inference from what [the prosecutor] said at the time of sentencing was[,] at the time of sentencing[,] and still is today[,] that [he] was actually suggesting he was not [wedded] necessarily to asking for ten years of extended. If the Court felt that something less than that was appropriate, then the Court should make that decision. He was not arguing for more than ten years. He was actually in my inference saying to the Court that if something less in the Court's estimation was appropriate that the Court might go ahead and do that. So I do not find his remarks were a substantial and material breach of this plea agreement.
>
> Having found that, there is no ineffective assistance of counsel certainly. Lastly, there's absolutely no prejudice whatsoever to Mr. Pittmon in this case because this Court ordered ten years of extended supervision. Motion is denied.

Pittmon now appeals.

DISCUSSION

¶8 Pittmon argues the State materially and substantially breached the plea agreement when it failed to recommend ten years' extended supervision.

This presents a question of law. *See* ***State v. Williams***, 2002 WI 1, ¶2, 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.").

¶9 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 entitles a defendant to either vacation of the plea agreement or resentencing. ***Williams***, 249 Wis. 2d 492, ¶38. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.***; *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

[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.

bargained."). A prosecutor's sentencing recommendation is a material and substantial term of the plea agreement. ***Smith***, 207 Wis. 2d at 272.

¶10 Further, we have explained:

> When examining a defendant's allegation that the State breached a plea agreement, such as by making a different recommendation at sentencing, it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation. *See* ***United States v. Clark***, 55 F.3d 9, 13 (1st Cir. 1995) (A prosecutorial failure to fulfill a promise is not rendered harmless because of judicial refusal to follow the recommendation or judicial awareness of the impropriety.). Thus, the focus of the trial court's analysis for postconviction motions, and for this court on appeal, is whether the State breached the agreement and, if so, whether the breach was material and substantial, rather than whether the trial court was influenced by the breach.

Howard, 246 Wis. 2d 475, ¶14; *see also* ***State v. Sprang***, 2004 WI App 121, ¶24 n.6, 274 Wis. 2d 784, 683 N.W.2d 522 ("[O]ur inquiry [does not] turn on whether the sentencing court was influenced by the State's breach.").

¶11 Similarly, "[t]hat the prosecutor did not intend to breach the agreement or that a breach was inadvertent 'does not lessen its impact.'" ***Williams***, 249 Wis. 2d 492, ¶38 (quoting ***Santobello***, 404 U.S. at 262); *see also* ***Sprang***, 274 Wis. 2d 784, ¶24 ("Our inquiry does not turn on whether the prosecutor intended to breach the agreement[.]"); ***Howard***, 246 Wis. 2d 475, ¶20 (even if inadvertent, "the defendant is still entitled to a remedy for the breach").

¶12 The State contends its "obvious error and misstatement" was "no breach" of the plea agreement. It argues "the court effectively recognized, corrected, and cured the State's misstatement," and, therefore, the "momentary

misstatement could have had no effect."[4] However, the State does not cite, much less discuss, a single legal authority or proposition of law in support of its position.[5] Moreover, the State essentially ignores Pittmon's argument and the cases he relies on. We could reverse for these reasons alone. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (arguments not supported by legal authority will not be considered); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). However, as is apparent from the contrast with the legal propositions we set forth above, the State's position fails on the merits.

¶13 Pittmon did not—and, of course, could not—bargain for a particular sentence. Rather, he obtained a promise that the State would recommend a particular sentence to the circuit court at the time of sentencing. The promised recommendation of ten years' extended supervision was substantially less than the maximum term of supervision that could be imposed. When the State neglected to recommend a term of supervision, it deprived Pittmon of a material and substantial benefit for which he negotiated. *See* ***Smith***, 207 Wis. 2d at 272-73. Consequently, the State materially and substantially breached its agreement. *See* ***id.*** It is irrelevant whether the State's breach was inadvertent. *See* ***Howard***, 246 Wis. 2d 475, ¶20.

[4] We note that the State's misstatement was not "momentary." The State never acknowledged or corrected its error.

[5] While the State cites no authority in support of its position—it fails to even mention the applicable standard, that a breach must be material and substantial—it does cite two of the cases referenced in Pittmon's brief. Without discussing those cases or providing pinpoint citations, the State merely asserts they are distinguishable.

¶14 It is also irrelevant that the circuit court effectively ignored the State's actual sentencing recommendation and subsequently mentioned the promised, but undelivered, recommendation. *See* ***id.***, ¶14 ("[I]t is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation."); ***Sprang***, 274 Wis. 2d 784, ¶24 n.6. The court was not a party to the agreement; consequently, it could not independently cure a party's breach.[6] *See* ***State v. Deilke***, 2004 WI 104, ¶12, 274 Wis. 2d 595, 682 N.W.2d 945 (contract principles apply to the plea breach inquiry). "'[J]udicial adhesive cannot mend the prosecutor's broken promise.'" ***Poole***, 131 Wis. 2d at 363 (quoting ***Snowden v. State***, 365 A.2d 321, 325 (Md. 1976) (citing ***Santobello***)). Simply stated, the case law is clear that influence, or lack thereof, on the sentencing judge is disregarded for purposes of the breach analysis.[7]

[6] Depending on the circumstances, the State may be able to cure its breach by reaffirming the terms of the plea agreement. For instance, in ***State v. Knox***, 213 Wis. 2d 318, 319, 570 N.W.2d 599 (Ct. App. 1997), the prosecutor misstated the sentencing recommendation. Knox's counsel promptly interjected, and the prosecutor convincingly rectified the error, rendering the breach not actionable. ***Id.*** at 322-23. However, in ***State v. Williams***, 2002 WI 1, ¶51 & n.47, 249 Wis. 2d 492, 637 N.W.2d 733, where the prosecutor accurately stated the terms of the plea agreement, undercut the sentence recommendation by adopting the view of the presentence investigator, drew an objection, and then affirmed the plea agreement, the breach was not cured.

[7] The Supreme Court's decision in ***Santobello*** is a case in point. As here, different prosecutors appeared at the plea and sentencing hearings. *See* ***Santobello***, 404 U.S. at 258-59. However, unlike here, in ***Santobello*** a new judge presided at the sentencing hearing. *See* ***id.*** Consequently, the judge was unaware of the plea agreement's actual terms. Nonetheless, the Court held:

(continued)

¶15 While we realize the court knew full well what the recommendation was *supposed* to be, that is also the case in every instance where the State breaches the plea agreement by actually making the promised sentence recommendation, but then doing an "end run" around the agreement by undercutting its recommendation. *See, e.g.*, ***Williams***, 249 Wis. 2d 492, ¶¶39-51. The question here, as there, is whether the defendant received the benefit of the bargain—a particular sentencing recommendation from the State. *See* ***Smith***, 207 Wis. 2d at 272-73 ("the State's recommendation deprived Smith of the benefit for which he negotiated"); ***Duckett***, 324 Wis. 2d 244, ¶¶8, 14 ("the question is whether the prosecutor's comments deprived Duckett of the benefit he bargained for—a prison term recommendation").

¶16 Finally, we note that because Pittmon's attorney did not object to the State's breach, this case falls under the ineffective assistance of counsel rubric. *See* ***Howard***, 246 Wis. 2d 475, ¶12. The State does not acknowledge this issue, much less argue that counsel's performance was either not deficient or nonprejudicial. It therefore concedes that, if there was a breach, Pittmon's attorney was ineffective. *See* ***Charolais Breeding***, 90 Wis. 2d at 109.

> We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case [to grant the defendant a remedy]. … We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.

Id. at 262.

¶17 We nonetheless observe that Pittmon satisfies both the deficient performance and prejudice prongs. Defense counsel's failure to object to a material and substantial breach of the plea agreement constitutes deficient performance unless counsel both (1) did so for a strategic reason and (2) consulted with the defendant. *See* ***Sprang***, 274 Wis. 2d 784, ¶¶2, 27-29; ***Smith***, 207 Wis. 2d at 274-75. Here, however, counsel simply overlooked the breach. Further, Pittmon need not affirmatively demonstrate prejudice. Rather, ***Smith*** "established a per se rule of prejudice in all instances where the prosecutor committed a material and substantial breach of the plea agreement." ***State v. Franklin***, 2001 WI 104, ¶21, 245 Wis. 2d 582, 629 N.W.2d 289 (citing ***Smith***, 207 Wis. 2d at 281-82). "Such a breach of the State's agreement on sentencing is a "manifest injustice" and always results in prejudice to the defendant." ***Smith***, 207 Wis. 2d at 281-82 (citing ***State v. Bangert***, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986)).

¶18 Accordingly, we remand for Pittmon's requested remedy, resentencing before a different judge.

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

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