COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3638-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CONFUCIUS GOODEN,

DEFENDANT-APPELLANT,

DAMON CLARK,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. KREMERS, Judges.[1] *Reversed and cause remanded with directions.*

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[1] The Hon. Jeffrey A. Wagner presided over the guilty plea hearing and entered the judgment of conviction; the Hon. Jeffrey A. Kremers entered the order denying the motion for postconviction relief.

Before Fine, Schudson and Curley, JJ.

SCHUDSON, J. Confucius Gooden appeals from the judgment entered after he pled guilty to attempted armed robbery, party to a crime, contrary to §§ 943.32(1)(b), 939.32(3), and 939.05, STATS. He also appeals from an order denying his motion for postconviction relief. Gooden argues that the trial court erred in denying his motion for sentence modification. He contends that the prosecutor breached the plea agreement and, therefore, that he is entitled to resentencing. We agree and, accordingly, we reverse and remand for resentencing.

On May 17, 1996, Gooden and his co-defendant, Damon Clark, attempted to rob Moline Jewelry in the City of West Allis. The robbery was foiled, however, when the owner, Scott Moline, pulled out a gun and started firing at them. Gooden and Clark fled the store. Both men were charged with one count of attempted armed robbery, party to a crime.

Gooden and Clark entered into plea agreements, pursuant to which each would plead guilty and the State would recommend five-year sentences.[2] At Gooden's sentencing, the prosecutor stated, in part:

> The State is recommending that the Defendant be sentenced to the Wisconsin State Prison System, for a period of five years.
>
> Um, in this case the victim … is the owner of the jewelry store. And I indicated up front, and I told counsel … that Mr. Moline and myself [sic] have never agreed on the proper disposition, and he will state to the Court his position regarding this matter. Just so everybody is aware

[2] Clark also appealed offering essentially the same argument Gooden now presents. A different panel of this court also reversed and remanded for resentencing in Clark's case. *See* ***State v. Clark***, No. 96-3625-CR, unpublished slip op. (Wis. Ct. App. Dec. 9, 1997).

> of that. And – but I do believe that given the lack of substantial prior record, and the facts of this case, that five years is an appropriate, ah, sentence[.]
>
> In this case there's [sic] many, many aggravating factors. First of all, as the Court can see, Mr. Moline is confined to a wheelchair…. But due to the fact that he's in a wheelchair, um, this Defendant and, ah, Damon Clark decided that he was an easy mark. And they have admitted to that, and that is an extremely aggravating factor to me.
>
> ….
>
> Now, I've never – especially in the case of armed robbery and robbery, I've never agreed with the law. It doesn't make any sense that an attempt somehow diminishes what the crime is. It doesn't really diminish it, because all of the harm that could have been done was done.
>
> ….
>
> The real harm in a robbery is not the property taken, the real harm is … the fact that the victim is threatened and frightened, and has nightmares after that, and that's what happened to Mr. Moline, as well as many other victims…. I'm going to let him speak now, because I am not very eloquent when it comes to this, because I'm not the one who looked at the gun and faced … possible death at the arms of this Defendant.

Gooden argues that the prosecutor's comments, suggesting that the harm caused by an attempted armed robbery is equal to the harm caused by a completed armed robbery, compromised the State's five-year recommendation. Gooden also argues that by emphasizing the aggravating facts of the crime and the validity of the victim's perspective, the prosecutor implicitly adopted the victim's statement recommending ten years' incarceration.

Whether a prosecutor violated the terms of a plea agreement presents an issue of law which we review *de novo*. *See* ***State v. Poole***, 131 Wis.2d 359, 361, 394 N.W.2d 909, 910 (Ct. App. 1986). "A comment which implies reservations about the recommendation 'taint[s] the sentencing process' and

breaches the agreement." ***Id.*** at 364, 394 N.W.2d at 911 (quoted source omitted; alteration in ***Poole***). We conclude that the prosecutor's statements constituted a less than neutral recitation of the recommendation, and therefore, a material breach of the plea agreement. *See* ***id.*** at 362-64, 394 N.W.2d at 910-11.

Although the prosecutor, as agreed, recommended a five-year sentence, he undermined that recommendation by emphasizing the "extremely aggravating" nature of this specific attempted armed robbery, and by expressing disagreement with the potential maximum sentence of twenty years. Although the prosecutor's opinion about the minimal difference between attempted armed robbery and armed robbery was tenable, it effectively conveyed his view that Gooden should have been facing a maximum of forty years, not twenty.

Rather transparently, these remarks rendered the prosecutor's five-year recommendation implausible. Considered in their entirety, his statements could only have been understood by the trial court to mean, "five years, but not really." Thus, they amounted to "[a] comment which implies reservations about the recommendation," which "'taint[s] the sentencing process' and breaches the agreement." ***Id.*** at 364, 394 N.W.2d at 911 (quoted source omitted; second alteration in ***Poole***).[3] We therefore reverse and remand for resentencing in accordance with the plea agreement.

[3] We reiterate, however, that the prosecutor did not breach the agreement by facilitating the victim's opportunity to address the court. No plea agreement could ever properly foreclose a trial court from gaining the information it needs to determine a fair sentence. Hearing directly from the victim often is essential to justice in sentencing. *See* § 950.04(2m), STATS., providing that victims and witnesses of crimes have the right "[t]o have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim of a felony and have the information considered by the court." *See also* ***State v. Voss***, 205 Wis.2d 586, 596, 556 N.W.2d 433, 436 (Ct. App. 1996) ("[E]ven apart from what the prosecutor does or does not present at sentencing, victims have independent constitutional access to the court at the dispositional stage.").

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

Not recommended for publication in the official reports.

No. 96-3638-CR(D)

FINE, J. *(dissenting)*. The prosecutor's statement to the trial court upon which the majority relies to reverse the judgment of conviction and the order denying Confucius Gooden's motion for postconviction relief gave the trial court the following information:

> 1. That the victim disagreed with the plea bargain. Majority op. at 2.
>
> 2. That the prosecutor believed that five years was an appropriate sentence because of Gooden's "lack of substantial prior record." ***Id.*** at 2–3.
>
> 3. That the victim was confined to a wheelchair, and that this was an "aggravating factor." ***Id.*** at 3.
>
> 4. That the prosecutor did not believe that attempted robbery was less serious than robbery. ***Ibid.***

The first three items presented to the trial court information that, under our law, the trial court needed to know, and, indeed, was information that the prosecutor was required to give: "Agreements by … prosecutors[] not to reveal relevant and pertinent information to the trial judge charged with the duty of imposing an appropriate sentence upon one convicted of a criminal offense, are clearly against public policy and cannot be respected by the courts." ***State v. McQuay***, 154 Wis.2d 116, 125, 452 N.W.2d 377, 381 (1990); *see* ***State v. Comstock***, 168 Wis.2d 915, 954, 485 N.W.2d 354, 370 (1992) (Trial court has "right and duty to be apprised of all relevant information before … sentencing and [this] allows the circuit court to make informed decisions protecting the public interest."). Accordingly, telling the trial court that the victim disagreed with the plea bargain, that the prosecutor was recommending a five-year sentence because Gooden did not have a "substantial prior record," and that the victim was confined to a wheelchair and that this, in distinction to the mitigating circumstance of Gooden's criminal history, was an aggravating factor, could not be a breach of the plea

bargain because the prosecutor did not—and could not—agree not to give this information to the trial court. ***McQuay***, 154 Wis.2d at 125–126, 452 N.W.2d at 381. *See also* ***id.***, 154 Wis.2d at 133–134, 452 N.W.2d at 385 (should not read into plea bargain elements that are not present).

Item number four is also information pertinent to the trial court's sentencing decision; it helps to explain the totality of the circumstances underlying the prosecutor's recommendation. Unless the majority is prepared to accept the proposition that plea bargaining is a wholly irrational way of disposing of cases, and that a prosecutor's recommendation is founded upon expediency *only*—without even a minimal assessment of society's interest in the enforcement of its criminal law, the prosecutor's statement bore on why, given Gooden's apparent "lack of substantial prior record," he was recommending a five-year term of incarceration rather than some other period or probation. A trial court is not bound by any plea-bargained recommendation. ***Id.***, 154 Wis.2d at 128, 452 N.W.2d at 381, 382. Thus, the trial court had an obligation to assess the prosecutor's recommendation in light of all the circumstances, including the prosecutor's reasons for making the recommendation. *See* ***Comstock***, 168 Wis.2d at 954, 485 N.W.2d at 370 (Trial court has "right and duty to be apprised of all relevant information before … sentencing and [this] allows the circuit court to make informed decisions protecting the public interest."). Indeed, the supreme court recommends that trial judges "ask sufficient questions, including the prosecutor's reasons for entering the plea agreement, to satisfy itself of the wisdom of accepting the plea." ***Id.***, 168 Wis.2d at 927, 485 N.W.2d at 358. The same advice applies to the prosecutor's plea-bargained sentence recommendation. Certainly, if the court has the right to ask, which it does, the prosecutor has the right to say. Here, the prosecutor's statement helped flesh out the rationale

underlying both the plea bargain and his sentence recommendation and was information relevant to the trial court's assessment of that recommendation.

Gooden received the recommendation for which he bargained. The prosecutor did not breach the plea bargain.[4] Accordingly, I would affirm.

[4] The majority uses the term "plea agreement" rather than the term "plea bargain," which formerly was the term that described the bartering of justice that is so endemic in our system. Indeed, even ***State v. Poole***, 131 Wis.2d 359, 394 N.W.2d 909 (Ct. App. 1986), upon which the majority relies, occasionally uses the accurate phrase "plea bargain" to describe the process, *see, e.g.,* ***id.***, 131 Wis.2d at 364, 394 N.W.2d at 911, as have the supreme court and other districts of this court, *see, e.g.,* ***State v. Thiel***, 188 Wis.2d 695, 697, 524 N.W.2d 641, 642 (1994); ***State v. Lentowski***, 212 Wis.2d 849, 852, 569 N.W.2d 758, 760–761 (Ct. App. 1997) (District II); ***State v. Elliott***, 203 Wis.2d 95, 99, 101, 551 N.W.2d 850, 851 (Ct. App. 1996) (District III); ***State v. Hubbard***, 206 Wis.2d 650, 655 n.4, 558 N.W.2d 126, 129 n.4 (Ct. App. 1997) (District IV). I see the shift in terminology as a subtle attempt to make the practice more seemly than the "direct sale of justice," as it was once accurately described. *See* ***Wight v. Rindskopf***, 43 Wis. 344, 354 (1877). The French philosopher Georges Bernanos once remarked that there "are no more corrupting lies than problems poorly stated." To call plea bargaining by any other name gives it a façade of acceptability to which I cannot agree.