

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 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. 2014AP1392-CR

Cir. Ct. No. 2011CF1298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY E. MILLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Johnny E. Miller, Jr., appeals his convictions for possession of heroin with intent to deliver and possession of a firearm by a convicted felon. Miller seeks resentencing on the ground that the State materially

breached the plea agreement when it recommended at sentencing that Miller be eligible for the Earned Release Program (ERP) only after he had served a specified period of prison time. Miller argues that the State's recommendation for a limitation on ERP impermissibly advocated a harsher sentence than negotiated. We disagree and affirm Miller's conviction.

Facts

¶2 Miller was charged with six offenses. In exchange for Miller pleading guilty to possession of heroin with intent to deliver and possession of a firearm by a convicted felon, the State agreed to dismiss the remaining charges as well as a penalty enhancer and to recommend six years' initial confinement and two years' extended supervision for the drug charge and three years' initial confinement and three years' extended supervision for the weapons charge. In accordance with the agreement, Miller entered guilty pleas to the drug and weapons charges and the State recommended the bifurcated sentences that had been agreed to.

¶3 At Miller's sentencing hearing, the circuit court found Miller eligible for ERP, upon which the following exchange occurred:

[PROSECUTOR]: Your Honor, I would ask that the Court find that he is eligible for the Earned Release Program after serving a specific period within the Wisconsin State Prison System so that he is not immediately eligible and immediately subject to release.

[DEFENSE COUNSEL]: Well, that wasn't discussed as far as the plea bargain. I understand the Court may have its discretion but I would object to that.

[THE COURT]: I'm going to receive the State's suggestion, find that Mr. Miller is not eligible for earned release until he's served the sentence on Count 1. It's the weapons charge that would be second to that, but the drug

charge in this is so serious, I agree with the State's request, and I'll issue the judgment of conviction accordingly.

Miller appeals.

Discussion

¶4 Miller argues that the State's recommendation to defer his ERP eligibility is a material breach of the parties' plea agreement entitling him to resentencing. Whether the State's conduct materially breached the terms of the plea agreement is a question of law that we review de novo. *State v. Bowers*, 2005 WI App 72, ¶5, 280 Wis. 2d 534, 696 N.W.2d 255.

¶5 A material and substantial breach violates the terms of a plea agreement if it “defeats the benefit for which the [defendant] bargained.” *State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. A prosecutor must convey the plea agreement to the court in neutral terms. *See id.*, ¶42. A prosecutor is prohibited from using indirect or covert means to recommend a more severe sentence than what was agreed to in plea negotiations. *See id.* Miller has the burden to establish by clear and convincing evidence that a material and substantial breach occurred. *See State v. Deilke*, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945.

¶6 Miller argues that he reasonably expected “unconditional” ERP eligibility. Miller asserts that the State's ERP recommendation materially breached the parties' plea agreement as deferment of ERP eligibility resulted in a harsher sentence than negotiated. The failure in Miller's premise is that Miller and the State did not have any agreement as to ERP eligibility.

¶7 The State fulfilled its agreement by neutrally recommending bifurcated sentences of six years' initial confinement and two years' extended supervision for the drug charge and three years' initial confinement and three years' extended supervision for the weapons charge. Advocating for less than unconditional eligibility for ERP does not breach the agreement reached on the State's sentencing recommendations. The State is only obligated "to those promises it actually made." *Bowers*, 280 Wis. 2d 534, ¶16. Without an indication that the parties agreed the State would either remain silent or affirmatively recommend immediate ERP eligibility, the State's recommendation to defer Miller's ERP eligibility was not a breach of the parties' agreement. *See id.*, ¶¶16, 20. The plea agreement contemplated by the parties was fulfilled.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

