COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0148-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER A. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

EICH, J. Roger Schultz appeals from a judgment convicting him of attempted first-degree intentional homicide and from an order denying his motion for postconviction relief. He claims he is entitled to be resentenced because the prosecutor violated the sentence-recommendation terms of a plea agreement. We agree with the trial court that there was no material breach of the plea agreement,

and that even if there was a breach, it does not warrant resentencing. We therefore affirm the judgment and order.

In exchange for Schultz's guilty plea to a charge of attempted first-degree murder, the prosecutor agreed to drop another felony charge and to refrain from arguing for any specific prison term at sentencing.[1] The attempted murder charge was based on a complaint and information alleging that Schultz had bludgeoned his ex-girlfriend with a hatchet, at least six times, and left her for dead. At sentencing, the prosecutor pointed out to the court that Schultz had already received "consideration" from the district attorney's office when it dropped the second charge (that, after bludgeoning the victim, Schultz had run her over with his car). "So," said the prosecutor, "[Schultz] has already gotten ... a great deal of discretion and doesn't deserve any more." A short time later, after discussing the victim's extensive and severe injuries, the prosecutor stated:

> How this woman survived I don't know. I think it is basically God's will and her desire to live that this woman survived and we are not here asking for a life sentence rather than 40 years.

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[1] The plea agreement, as summarized by Schultz's counsel at the plea hearing, was as follows:

> Mr. Schultz will be entering a plea of guilty to count one of the information. Our agreement is that count two will be dismissed. Our further agreement is that the state will agree not to bring any further charges against Mr. Schultz for any conduct involved in the May 8, 1997, incident or the March 18, 1997, incident. The state also agrees that it will not charge Mr. Schultz for any other alleged previous criminal conduct of which the state is currently aware. *At the time of sentencing the state will be free to make a statement to the court regarding sentencing, although it will not make a specific recommendation with regard to what an appropriate sentence would be. They will not make a recommendation for a specific length of incarceration. Mr. Schultz will be free to argue for any lawful sentence* (emphasis added).

At that point, defense counsel objected that the prosecutor had violated the plea agreement by "recommend[ing] the maximum sentence to the court." The court responded by stating that, in its view, "[t]he context of his statement is [that] we're here by the grace of God that it's not a homicide where I would be imposing life as opposed to a maximum of 40 years being the maximum that's available to the court." The prosecutor then stated: "If I misstated, judge, I will correct it.... [T]he intent of the statement is that we're lucky we're not here on a murder charge rather than an attempted murder charge," whereupon the court directed that the proceedings continue. At the conclusion of the hearing, the court sentenced Schultz to forty years in prison.

Schultz moved to vacate the sentence, claiming that the prosecutor's remark had breached the plea agreement. The court denied the motion, concluding in a detailed and thoughtful decision from the bench, that, taking the prosecutor's statements in context, there was no substantial and material breach of the agreement, and that even if there was a breach, it was "technical" and did not deprive Schultz of any "substantial and material benefit for which he bargained." Schultz renews his arguments on appeal.[2]

"[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 of consideration, such promise must be fulfilled." ***Santobello v. New York***, 404 U.S.

[2] Schultz also contends that the prosecutor's other remark—that he had already received "consideration" from the district attorney—was an argument that he (Schultz) was not "deserving of any further judicial discretion," and thus indirectly breached the plea agreement. Schultz, however, failed to object to this alleged breach at the time the remark was uttered, and has therefore waived his right to challenge it on appeal. *See* ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989) ("the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant").

257, 262 (1971). To ensure that a criminal defendant is not treated unfairly, "when a defendant pleads guilty to a crime pursuant to a plea agreement and the prosecutor fails to perform his [or her] part of the bargain, the defendant is entitled to relief." ***State v. Beckes***, 100 Wis.2d 1, 4, 300 N.W.2d 871, 872-73 (Ct. App. 1980). Thus, a plea agreement may be vacated where a material and substantial breach of the agreement has been established by clear and convincing evidence. ***State v. Bangert***, 131 Wis.2d 246, 289, 389 N.W.2d 12, 32 (1986).

> The rule that a breach be material before the agreement may be vacated ... is specifically designed to foreclose a party from relying on technical but nonprejudicial deviations from an agreement as a basis for a claimed breach.... A breach must not merely be technical, but rather must deprive the party of a substantial and material benefit for which [the defendant] bargained.

Id. at 290, 389 N.W.2d at 33. However, "[e]ven an oblique variance will entitle the defendant to a remedy if it 'taints' the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for." ***State v. Knox***, 213 Wis.2d 318, 321, 570 N.W.2d 599, 600 (Ct. App. 1997). Finally, where, as here, the facts are undisputed, whether the prosecutor's conduct violated the terms of the plea agreement is a question of law which we review de novo. ***State v. Ferguson***, 166 Wis.2d 317, 320-21, 479 N.W.2d 241, 243 (Ct. App. 1991).

Citing ***State v Poole***, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986), Schultz argues that the prosecutor materially and substantially breached the plea agreement because he "did not unqualifiedly make the sentence recommendation bargained for." In ***Poole***, the defendant agreed to plead guilty to a burglary charge in exchange for the prosecutor's agreement to recommend only a fine at sentencing. At sentencing, the prosecutor recommended a fine, but went

on to note that he had agreed to do so "before we knew of the other instances. But that is our agreement." The "other instance" the prosecutor referred to was a separate case in which the defendant's probation had been revoked. The court imposed a prison sentence and Poole appealed, arguing that the prosecutor "qualified" the recommendation by recommending something less than he bargained for, and thus breached the agreement. We agreed, concluding that, while a prosecutor is not required to make a sentence recommendation forcefully or enthusiastically, a comment which uses "qualified or negative language" or "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). Because the prosecution had "undercut" the sentencing recommendation by rendering less than a neutral recitation of the terms of the plea agreement, we reversed and remanded for resentencing. ***Id.*** at 364-65, 394 N.W.2d at 911-12.

We agree with the State that the prosecutor's remark in this case did not constitute an attempt to qualify or undercut the substance of the plea agreement, but was simply a misstatement—as the sentencing judge immediately recognized—which was promptly corrected. This is a very different situation than the one presented in ***Poole***. We think it is much more akin to ***Knox***, where we held that an "inadvertent and insubstantial" misstatement of the plea agreement, which was promptly rectified, did not constitute a breach. ***Id.***, 213 Wis.2d at 320, 570 N.W.2d at 599. The misstatement in ***Knox*** was the prosecutor's request for a consecutive, rather than a concurrent, sentence. Immediately realizing the error, the prosecutor advised the court of the mistake regarding the agreement and made a new record, recommending the concurrent sentence bargained for. The court rejected the recommendation and imposed consecutive prison terms. On appeal,

the State conceded that the misstated recommendation was material, but denied that it was substantial. We agreed, recognizing that the perceived breach was "not intended to affect the substance of the agreement by sending a veiled message to the sentencing court that greater punishment than provided for in the plea agreement was warranted." ***Id.*** at 322, 570 N.W.2d at 600-01. "Rather," we said,

> the deviation from the original terms drew a prompt objection and was shown to be the result of a mistake that was quickly acknowledged and rectified. Indeed, the prosecutor's earnest manner in advocating the corrected proposed disposition, commented upon by the trial court, further circumstantially belies an implication of improper motive. For these reasons, the momentary and inadvertent misstatement of the parties' agreement did not constitute an actionable breach.

Id. at 322-23, 570 N.W.2d at 601.

We reach the same conclusion here. We see no indication that the court was influenced by the prosecutor's inadvertent remark, or that that remark in any way tainted the sentencing. We have referred to the court's discussion of the context of the prosecutor's remark and its conclusion that there had been no substantial breach of the plea agreement. Beyond that, the record satisfies us that the court's sentence was based on proper and appropriate considerations. It entered upon a lengthy discussion and analysis of the litany of sentencing factors discussed in ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732-33 (Ct. App. 1992), and struck the balance at a sentence of forty years, which, under the circumstances of this case, was well within the bounds of its sentencing discretion.

By the Court.—Judgment and order affirmed.

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