

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2001

Cornelia G. Clark
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.

**Nos. 01-0331-CR
01-1405-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SARAH E. JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Sarah Johnson appeals from a judgment convicting her of first-degree intentional homicide, party to a crime, and an order denying her postconviction relief. The trial court sentenced her to life in prison with a parole eligibility date twenty-eight years from the date of conviction. She argues that the

trial court erroneously determined that she breached her plea agreement and, as a result, erroneously released the State from its obligations under the agreement. Because the record supports the trial court's determination, we affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

¶2 In the early morning hours of May 21, 1999, Roland Krueger was murdered at his farmhouse in Polk County. Death was caused by two gunshot wounds, one to the neck and one to the head. Initially, his wife, Mary Krueger, was charged with intentional homicide.

¶3 Investigation revealed that certain items of property had been removed from the farmhouse, including firearms, jewelry and television sets. On the morning of the murder, Mary was located at a medical center where she had a previously scheduled appointment. Mary told investigators that she last saw her husband when he dropped her off at the medical center.

¶4 Johnson was a friend of the Kruegers and lived in an apartment with her boyfriend, Charles Blanford. When interviewed the first time on May 22, 1999, Johnson denied knowing who would have killed Roland. At the end of June, Blanford's former mother-in-law overheard Johnson saying that she was leaving for Kentucky with Blanford to "get rid of something hot." Upon learning this information, officers obtained a search warrant and searched her truck. Four guns were found, one of which was later determined to be the murder weapon.

¶5 Blanford told officers that Johnson had asked him to help her move and pawn some property. They pawned some television sets in St. Paul, Minnesota, and planned to dispose of the guns in Kentucky.

¶6 On July 1, after talking to Blanford, officers again interviewed Johnson. This time, she told them that she had felt that something bad was going to happen to her friend Roland, so she went to the farmhouse and discovered his body. She claimed to have left without taking anything.

¶7 On July 8, Johnson entered into an “Agreement in Exchange for Cooperation and Truthful Testimony.” The agreement recited that Johnson would enter a guilty plea to the charge of disposing evidence, contrary to WIS. STAT. § 946.47(1)(b),¹ and the State would recommend no more than one year in the county jail. Johnson was to cooperate in the investigation and provide truthful testimony in the homicide prosecution against Mary. The sheriff’s department was to have unlimited access to Johnson, with notice to her trial counsel. The meetings were to be taped.

¶8 When first interviewed on July 8, Johnson advised officers that Mary came to her apartment in the early morning of May 21 and told her that she just shot her husband. She asked Johnson to go out to the farm to make it look like Roland had been shot during a burglary. Johnson stated that she went to the farm, saw Roland’s body and, at Mary’s request, removed property to make the scene look like a burglary. Johnson said that she did not leave fingerprints because she used her shirttail when she touched anything. She stated that she was not wearing gloves.

¶9 Johnson told officers that Mary told her she would be paid in exchange for her help. Johnson said that she removed guns, two television sets, a

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

drill and a video camera, loaded them into her van and stored them in a shed belonging to a friend, Michael Timo. Initially, Johnson stated that she was alone at the shed, but later explained that Timo was there and knew that she had stored the guns in his shed.² At this point in time, Johnson maintained that she did not know how Mary got to the hospital.

¶10 When questioned again, Johnson changed her story. According to Ann Wade, investigator for the Polk County Sheriff's Department:

[Johnson] told me that Rollie had come to her apartment the night before on May 20th and had solicited her to come to the farm after he had taken Mary to the hospital on the morning of the 21st and that Rollie had paid her \$50 to come to the farm to have sex with him.

Johnson told Wade that upon completion of the sex act, Mary stepped out of a bedroom and shot Roland. Wade testified that it was an established fact that Mary had checked into the hospital at 6:30 the morning of May 21. Johnson stated that she had no idea how Mary got to the hospital.

¶11 Officers received information that there may be a plastic bag hidden in an outhouse in a remote area of Polk County called "the barrens," containing items from the Krueger house, such as Roland's watch, jewelry, wallet and an expended shell casing. Upon further questioning, Johnson acknowledged that she had visited the area with Blanford to pick up a lawn mower from a storage building. She denied dropping off any property there.

¶12 The officers executed a search warrant for the outhouse in "the barrens" and retrieved the plastic bag containing the items sought, as well as a pair

² Later, Timo testified that Johnson had contacted him the night before the murder about storing items in his shed.

of rubber gloves. When confronted with this information, Johnson advised that she had gone to the Krueger residence and had worn rubber gloves while performing oral sex on Roland.³ She maintained that in late June, she and Blanford went out to the Krueger farm, and Mary had given her the plastic bag containing Roland's property and asked Johnson to dispose of it, which she did in the outhouse.

¶13 Upon further questioning, Johnson revealed that she had lied earlier because she was afraid of Mary and was fearful Mary would harm Johnson's children. Also, she said she did not want anyone to know that she was a prostitute. She claimed that she went to the Krueger farm at 5:30 a.m. because she had other customer appointments later that morning. When asked to provide their names to corroborate her statements, however, she refused.

¶14 After graphically describing the sexual act, Johnson stated Roland was zipping his pants when Mary came out the bedroom, and told Johnson to get out of the way. Johnson stated that she dove out of the way, and Mary fired a rifle, shooting Roland in the neck or head area. Mary then walked over to Roland, placed the barrel up to Roland's head and shot him a second time in the back of the head as he was lying face down on the floor. Mary then enlisted Johnson's assistance to make the scene look like a burglary. Johnson complied, and took the items, including the murder weapon, out to her van. Johnson told investigator Wade that Mary took a plastic bag with Roland's wallet and wristwatch in her van. Johnson stated that she drove out of the driveway, leaving Mary at the residence.

³ Later testing revealed Johnson's DNA on the rubber gloves found in the outhouse.

¶15 On July 12, in a videotaped interview, Johnson told officers that the reason she was at the Krueger farm the morning of the murder was because Mary came to her apartment the day before and asked her to come out and perform oral sex on her husband so that Mary could take photographs to use in a divorce proceeding. Mary allegedly offered Johnson \$10,000 if she came out to perform the sex act. Johnson stated that instead of taking a photograph, Mary fired the rifle.

¶16 On July 14, the preliminary hearing was held in the homicide prosecution against Mary. Johnson spoke to officers before the hearing, this time stating for the first time that she gave Mary a ride to her medical appointment, dropping her off three blocks away. Johnson also said that she had had a premonition that something bad was going to happen to Roland, and that Mary had wanted him dead for years.

¶17 After Johnson testified at the preliminary hearing, Mary was bound over for trial. Between July 14 and October 20, Johnson had no contact with the investigators. On October 20, the officers notified Johnson's counsel that they wanted to speak with Johnson for the purpose of trial preparation. Defense counsel believed it was not necessary for him to attend the meeting. During this interview, Johnson indicated for the first time that the victim used a condom during the sex act, which conflicted with her previous statement that she had swallowed the ejaculate. When this inconsistency was pointed out, Johnson claimed to have bit the tip of the condom off and swallowed the ejaculate. Although she claimed to have left the condom at the murder scene, the investigator's search, which included trash receptacles, did not discover it.

¶18 On October 22, investigator Wade went to the jail to meet with Johnson to ask her for one additional item of information, which was if Johnson knew whether the victim had been circumcised. Wade did not notify Johnson's defense counsel. Wade stated that when she walked into the booking room to interview Johnson, she did not have an opportunity to ask that question because, "[a]s soon as Johnson saw me, she appeared to be agitated. She told me that she was not testifying." Wade asked Johnson if she wanted to contact her attorney, but Johnson said that she did not. Wade added:

She said that she was tired of being a victim of Mary Krueger's, that she was tired of the fact that [Blanford] was out free and that she was in custody. And I reminded her that she was at the scene of the homicide and that [Blanford] was not. She said, well, [Blanford] knows more than I am telling you, but I am no stooly (sic) is what she said.

When ultimately asked the question about circumcision, Johnson answered that she did not remember.

¶19 Based upon Johnson's refusal to testify, as well as the changing versions of her accounts of the crime, the State decided to terminate its agreement with Johnson. The State charged Johnson with first-degree intentional homicide party to a crime. Johnson brought a motion to dismiss the charge for prosecutorial misconduct. The State, on the other hand, brought a motion to void the plea agreement based on Johnson's breach. The trial court denied Johnson's motion and granted the State's. After a three-day jury trial, Johnson was convicted as charged. Her postconviction motions were denied and Johnson appealed.

DISCUSSION

¶20 Johnson argues that she did not materially violate the plea agreement and that the trial court erroneously released the State from its obligation under the agreement. She claims that any perceived inconsistencies in her testimony were minor and that she offered plausible explanations for them. We conclude that the record fails to support her claim.

¶21 “To allow a defendant to claim the benefit of an agreement where he, himself, is in default, offends fundamental concepts of honesty, fair play and justice.” *State v. Rivest*, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982). When the State contends that it should be released from its obligations under a plea bargain because of the defendant’s alleged breach of the agreement, an evidentiary hearing is required to determine whether the defendant actually breached the agreement and, if so, whether the breach is sufficiently material to warrant releasing the State from its promises. *Id.* at 411. “It is clear that the defendant’s failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement.” *Id.* at 413 (citation omitted). By analogy to contract law, a plea agreement may be vacated when a material and substantial breach of the plea agreement has been proven. *Id.* at 414.

¶22 While analogies to contract laws are important, such analogies are not solely determinative as fundamental due process rights are implicated. *Id.* at 413. To satisfy constitutional due process requirements, the State bears the burden to show that a defendant materially and substantially breached the terms of the agreement. *See id.* at 414.

¶23 It is evident that the trial court believed investigator Wade’s testimony that just a few days before trial, when she walked into the room to talk

to Johnson, the first words uttered were Johnson's, refusing to testify. Also, Wade testified that Johnson stated that Blanford knew a lot "more than *I am telling you.*" (Emphasis added.) The plea agreement required Johnson to disclose all information in her possession regarding the murder. If she knew that Blandford had information, the agreement required her to disclose this fact to the investigators.

¶24 The court's determination that Wade accurately recounted Johnson's statements is not overturned on appeal. The trial court is the arbiter of the weight and credibility of the testimony, and its credibility assessment will not be overturned unless it is inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Because Johnson's plea agreement called for her to cooperate in the investigation and to testify at Mary Krueger's trial, her refusal to testify and disclose all information in her possession constituted a material and substantial breach.

¶25 In addition, the trial court was entitled to find that the numerous variations in Johnson's statements to officers were evasive and misleading. For example, after the July 8 agreement, Johnson denied disposing of critical items of evidence in the outhouse at "the barrens." Later, she conceded that she did so. Also, on July 8, Johnson stated that Roland had come to her apartment the night before the murder to solicit sex. On July 12, she changed her story to say that Mary had come out to her apartment the night before to enlist her aid in a scheme to assist her divorce. Also, for the first time on July 14, Johnson advised that she was the one who gave Mary a ride the morning of the murder. These were not minor variations.

¶26 Evasive and misleading answers to investigators' questions violate a plea agreement that calls for truthfulness and cooperation. *See id.* at 416-17. Neither the prosecutor nor defense counsel can knowingly present false testimony. *Id.* at 417. We conclude that the record supports the trial court's finding that Johnson materially and substantially breached the plea agreement.

¶27 Johnson argues that the State had breached the agreement because investigator Wade came to interview her October 22, without notifying defense counsel. We are unpersuaded. Wade testified that when she previously asked counsel to participate in an interview for trial preparation, he declined, advising that it was unnecessary. As a result, Wade's decision to ask this question, based on the inference that defense counsel was not intending to participate for the single question she sought to ask on October 22, is not a material and substantial breach. In any event, we agree with the trial court that Johnson's evasive and misleading answers to questions pre-dated the October 22 meeting and, therefore, Johnson had already materially and substantially breached the agreement.

¶28 Next, Johnson argues that the State was fully satisfied with her cooperation until the October 22 meeting. This argument misses the point. In order to satisfy due process, the issue whether Johnson breached the agreement must be determined by the court, not unilaterally by the State. “[T]he question whether defendant did in fact fail to perform the condition precedent is an issue not to be finally determined by the government, but only on the basis of adequate evidence by the Court” *Id.* at 412. In an ongoing investigation, whether the State was satisfied at any given point does not determine the ultimate issue whether Johnson breached the agreement.

¶29 We conclude that the record supports the trial court's finding that Johnson's evasive and misleading answers to questions put forth by the State in its investigation of Roland's murder and her refusal to testify breached her plea agreement. Based on Johnson's breach, the trial court properly released the State from the agreement.⁴

By the Court.—Judgment and order affirmed.

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

⁴ Because we resolve the appeal on its merits, we do not reach the State's waiver argument.

