COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1631-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD V. KURSZEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. This case is before us on remand from the supreme court. In our initial opinion, ***State v. Kurszewski***, No. 95-1631-CR, unpublished slip op. (Wis. Ct. App. May 2, 1996), we held that Ronald Kurszewski, who was claiming that his trial counsel was ineffective for failing to object to the

prosecutor's alleged breach of the sentence-recommendation provisions of a plea agreement, had failed to establish prejudice from his attorney's actions (or inaction).[1]

In so ruling, we relied on our earlier published decision in ***State v. Smith***, 198 Wis.2d 820, 543 N.W.2d 836 (Ct. App. 1995), where we held that the defendant had suffered no prejudice from his attorney's failure to object to a higher sentence recommendation than that agreed to by the prosecutor. We considered the facts of ***Smith*** to be on all fours with those in Kurszewski's case because in each instance the trial court advised the defendant that it was not bound by the sentence recommendations and did not refer to them during sentencing, relying instead on "independent factors." Therefore, we followed ***Smith*** and affirmed the trial court's denial of Kurszewski's claim of ineffective assistance of counsel. ***Kurszewski***, slip op. at 5-6.

After granting Kurszewski's petition to review, the supreme court reversed ***Smith***, holding that a prosecutor's breach of the sentence-recommendation provisions of a plea agreement "*always* results in prejudice to the defendant," ***State v. Smith***, 207 Wis.2d 259, 282, 558 N.W.2d 379, 389 (1997) (emphasis added), and it remanded ***Kurszewski*** to us for reconsideration in light of ***Smith***. Thus, we must now address a question that was unnecessary to our prior decision in this case: whether Kurszewski had a plea agreement with the

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[1] To establish a denial of the right to counsel guaranteed by the Sixth Amendment, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his or her case. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may, as we did in ***State v. Kurszewski***, No. 95-1631-CR, unpublished slip op. (Wis. Ct. App. May 2, 1996), decide the appeal on lack-of-prejudice grounds without considering the "ineffectiveness" claim. *See* ***Strickland,*** 466 U.S. at 697.

prosecutor. We conclude that he did, and because there is no question that the prosecutor breached that agreement by recommending a sentence that was much higher than agreed to, ***Smith*** compels reversal and resentencing.[2]

Because a plea bargain is analogous to a contract, we look to contract-law principles to determine a defendant's rights thereunder. ***State v. Windom***, 169 Wis.2d 341, 348, 485 N.W.2d 832, 835 (Ct. App. 1992); ***State v. Jorgensen***, 137 Wis.2d 163, 167, 404 N.W.2d 66, 68 (Ct. App. 1987).[3] And while we have found no cases specifically stating the scope of appellate review of the formation of a plea agreement, the breach of such a bargain has been held to be a question of law which we review *de novo*. ***State v. Wills***, 187 Wis.2d 529, 535, 523 N.W.2d 569, 572 (Ct. App. 1994), *aff'd*, 193 Wis.2d 273, 533 N.W.2d 165 (1995). We see no reason why a different standard should govern consideration of whether an agreement was entered into in the first place. The trial court's underlying findings of fact are, of course, accepted on appeal unless they are clearly erroneous. Section 805.17(2), STATS.

Kurszewski was charged with aggravated battery, subject to a penalty enhancer, and burglary. His attorney discussed the possibility of a plea with the prosecutor. And when counsel told Kurszewski that he had reached an agreement with the prosecutor at an April 7, 1993, pretrial conference, which

[2] The dissenting judge in ***Kurszewski*** concluded that there had been a breach of a valid plea agreement, and we have borrowed much from that analysis in the preparation of this opinion. As we indicated, the ***Kurszewski*** majority—concluding under ***Smith*** that, whether counsel's performance was defective or not, no prejudice could be shown—saw no need to consider the validity of the agreement. ***Kurszewski***, slip op. at 5-6.

[3] As we discuss in greater detail below, we noted in ***State v. Toliver***, 187 Wis.2d 346, 355, 523 N.W.2d 113, 116 (Ct. App. 1994), that "[t]he analogy to contract law … is not entirely dispositive [of such issues] because a plea agreement also implicates a defendant's due process rights."

called for dismissal of the penalty enhancer and a joint sentencing recommendation of probation with ninety days' county-jail time (together with a drug and alcohol assessment and restitution), Kurszewski decided to plead guilty. Prior to entry of the plea, Kurszewski and his attorney signed a document entitled "Plea Advisement and Waiver of Rights," which states in part as follows:

> I have entered in[to] a plea agreement. My understanding of the plea agreement is: in exchange for my plea of other than not guilty to burglary and aggravated battery, the penalty enhancer language will be dropped, probation for two years, an AODA assessment, restitution of approx. $173.13, 3 months in jail and a pre-sentence investigation.[4]

Kurszewski's attorney filed the Plea Advisement form with the trial court at the plea hearing, stating: "We did arrive at a plea agreement…. [My client] will … plead guilty … at this time, and the plea agreement is outlined in our [P]lea [A]dvisement, and that is before the Court, and there would be a pre-sentence investigation." The prosecutor, who had been either given or shown a copy of the Plea Advisement, neither objected to the document nor countered defense counsel's statement in any way. After undertaking a ***Bangert***-type[5] colloquy with Kurszewski, the court accepted his guilty plea and ordered a presentence investigation (PSI).

The PSI report, which was filed with the court prior to the sentencing hearing, recommended that, because of the seriousness of the offenses, Kurszewski receive a prison sentence. The report was silent as to the existence of any plea agreement.

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[4] These terms are the same as those contained in a letter written to Kurszewski by his attorney on April 21, 1993, outlining the "plea agreement with the District Attorney" entered into at the April 7 pretrial conference.

[5] *See* ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

At sentencing, the prosecutor argued not for probation and ninety-days' county-jail time, but for a five-year aggregate prison term: "I believe that the State prison system is appropriate, and I would request that the Court impose a sentence of two years … for the burglary, and … further impose three years consecutive to that for the aggravated battery." Kurszewski's attorney did not object to the recommendation but simply argued against it, requesting at one point that Kurszewski be sentenced according to what was "recommended initially by the District Attorney." The trial court imposed the five-year sentence the prosecutor recommended without mentioning the existence of any plea agreement.

In a postconviction motion, Kurszewski argued that his trial counsel was ineffective for failing to raise and object to the prosecutor's breach of the plea agreement. At the hearing on his motion, Kurszewski's trial counsel testified that the terms set forth in the Plea Advisement form were those he negotiated with the prosecutor and that the prosecutor never indicated a desire to withdraw from the agreement, either prior to the plea or after.

The prosecutor acknowledged that she and defense counsel had engaged in "quite extensive" plea negotiations,[6] but she could not recall them in detail:

> I really don't have any recollection as to whether or not I was going to be bound by the original recommendation of two years. I know that by the time … of the sentencing …

[6] She stated that the negotiations were "very long and … sort of complicated kind of procedural process in developing … a plea agreement that was acceptable."

> in, I believe, January of '94 … Mr. Kurszewski had again been charged with another serious felony.[7]

The prosecutor also acknowledged in her testimony that defense counsel "may have" shown her the Plea Advisement form at the time the plea was entered; but she stated that, in her recollection, she would have withdrawn the plea agreement "given the other charges that had been issued."[8] She could not recall, however, whether she had "committed" herself to recommending a specific sentence at the time of the plea hearing. Reviewing her notes made over the course of the plea negotiations, she said that there was a "consistent notation … that a PSI would be ordered … I do recall there being that meeting of minds. The other aspects of it, I don't recall." When specifically asked about the agreement on cross-examination, she agreed that "at some point" she believed there had been a "meeting of the minds," and that she and defense counsel had reached an agreement:

> Q. … [I]sn't it true that [at the pretrial conference] on 4/7/93 you … reached an agreement with [defense counsel] regarding [the defendant]?
>
> A. … The record may reflect that. I don't recall….
>
> Q. Viewing … exhibit [No. 6], does that help you refresh your recollection … as to whether or not you ever had a plea agreement with [defense counsel] in regards to [the defendant]?

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[7] The reference to "other charges" is, we assume, to a felony charge apparently filed against Kurszewski sometime in late November 1993—between the trial court's acceptance of his plea and the sentencing hearing. The brief citations to the record provided by the parties on the subject indicate only that a criminal complaint was issued relating to "some crimes or a crime" Kurszewski was alleged to have committed two or three years earlier "against a juvenile female," and describe the charge as "a third degree sexual assault."

[8] As we just noted, *see supra* note 7, the charges were not filed until late November 1993, nearly five months after the hearing at which the court entered and accepted Kurszewski's plea.

> A. I think I stated that I did have a plea agreement with him.
>
> Q. *And is the plea agreement you had with him correctly outlined on Plaintiff's Exhibit No. 6*?
>
> A. … *[I]t would appear to be*.

(Emphasis added.) The exhibit referred to is a note from the prosecutor's file dated April 7, 1993, which states as follows:

> Kurszewski. Plea to Burglary Ag Battery dismiss … enhancement. *joint* Recommend—2 years—90 days AODA costs PSI Plea date 6/2/93—9:30.

(Emphasis in original.)

The trial court denied Kurszewski's motion on the basis of several factual "findings." The court began by finding that, at the time the Plea Advisement form was filled out (several weeks prior to the plea hearing), Kurszewski's attorney and the prosecutor had an "understanding" that the State would be recommending probation, county-jail time, a PSI, restitution, and drug and alcohol counseling. The court stated, however, that it "can't find from the record that [the prosecutor] also had that understanding at the time of the plea …. [T]here's a question as to whether [she] still understood at that time that that was going to be the recommendation."[9]

Summing up, the court noted that a "lack of communication" between the prosecution and the defense characterized the entire plea process. The court concluded:

[9] The court also said that while it was clear that defense counsel gave the prosecutor a copy of the Plea Advisement form at the hearing, on the basis of the prosecutor's statement that "she has no recollection [of reading it at the time]," the court concluded that the record "does not support a finding that the district attorney read … or even looked at it …."

> But I think that … what happened is that there was initially an agreement to make a specific recommendation. When the two things occurred; namely, the sentencing of the co-defendant and the new charges being brought against … Mr. Kurszewski, that there was no longer, in the District Attorney's mind an agreement. And … I can't make a specific finding here from this record that the district attorney in her mind had an agreement as to sentencing recommendation at the time of the … plea because it[]s … just not in the record.

From those facts, the trial court concluded that no plea agreement existed and that, as a result, counsel could not be considered ineffective for failing to object to the prosecutor's recommendation on that basis.

We agree that communication between defense counsel and the prosecutor was flawed. But the prosecutor's testimony is clear that, at some time prior to the entry of Kurszewski's guilty plea, she had agreed to recommend probation plus jail time and the other items in exchange for the plea. Her own notes and her testimony at the postconviction hearing confirm the existence of just such an agreement, and the trial court found that it existed at some point prior to the plea. It is equally clear that prior to entry of the plea the prosecutor never communicated to defense counsel that the State was withdrawing from that agreement. Indeed, as we indicated, she was present at the plea hearing when defense counsel filed the Plea Advisement form, indicating that it stated the terms of the plea agreement reached with the State, and provided a copy to the prosecutor—who made no objection or other comment to the court concerning the document.

Whatever discretion a prosecutor may have to withdraw from a plea agreement *prior to* entry of the plea, the United States Supreme Court has recognized that once the plea is entered, the defendant has a constitutional right to enforcement of the bargain. ***Mabry v. Johnson,*** 467 U.S. 504, 507-08 (1984).

We adopted that position in ***Wills***, 187 Wis.2d at 536-37, 523 N.W.2d at 572, noting that an analysis of a plea agreement under standard contract law leads to the same result. We went on to say that, having obtained the plea on the basis of the agreement, the prosecutor was required to fulfill her part of the bargain: "[I]f the prosecutor could not support the agreement, she should not have committed the state to it." ***Id***. at 538, 523 N.W.2d at 572. In ***State v. Poole***, 131 Wis.2d 359, 361, 394 N.W.2d 909, 910 (Ct. App. 1986), we quoted Justice Douglas's concurrence in ***Santobello v. New York***, 404 U.S. 257, 262, 264 (1971):

> "[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt…. [Thus,] when 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."

(Citations omitted.)

Thus, a plea agreement remains executory and absent prejudice to the defendant, subject to withdrawal by either side prior to the plea. ***Mabry***, 467 U.S. at 507; ***State v. Becker***, 100 Wis.2d 1, 8, 300 N.W.2d 871, 874 (Ct. App. 1980). But where, as here, no such withdrawal is communicated to the defendant prior to entry of the plea, and he or she enters the agreed-to plea, the bargain is sealed—no matter how ill-conceived hindsight may show the bargain to have been. The lesson of the cases is that even if—as the trial court found to be the fact in this case—the prosecutor, at the time of the plea, no longer believes an earlier agreement to be in effect, where the defendant enters the plea without being advised of the State's withdrawal from the agreement, it must be kept.

The trial court's conclusion, which we quoted above, was that while the parties "initially" reached an agreement to jointly recommend probation plus jail time, that agreement was "no longer in the [prosecutor]'s mind" after the State had charged Kurszewski with another offense and the court had rejected his co-defendant's plea agreement. The State makes a similar argument: the prosecutor's "withdrawal" from the agreement was justified by these "intervening events." The problem is, of course, that these "events" did not occur until long after Kurszewski's guilty plea had been entered and accepted by the court, and the law is clear that the "state may not refuse to adhere to the terms of a plea bargain because it later discovers information which may have caused it to enter a different bargain …." ***Poole***, 131 Wis.2d at 364 n.2, 394 N.W.2d at 911 (quotations and quoted source omitted).[10] As we have said, once a negotiated plea is entered, the defendant has a constitutional right to enforcement of the plea bargain. ***Wills***, 187 Wis.2d at 536-37, 523 N.W.2d at 572. And to be relieved from the terms of a plea agreement after the plea is entered, the prosecutor must obtain a judicial determination that the defendant has materially and substantially

[10] The State argues that to the extent ***State v. Poole***, 131 Wis.2d 359, 394 N.W.2d 909 (Ct. App. 1986), prohibits a prosecutor from making the agreed-upon sentence recommendation, it has been overruled "sub silentio" by our decision in ***State v. Windom***, 169 Wis.2d 341, 485 N.W.2d 832 (Ct. App. 1992). We disagree. In ***Windom***, we relied on ***State v. Pascall***, 358 N.E.2d 1368, 1369 (Ohio Ct. App. 1972), for the proposition that a subsequent conviction excuses the prosecutor from recommending probation. But the issue in ***Windom*** was not whether changed circumstances justify a prosecutor's failure to make the agreed-upon recommendation; it was whether, after the state honored its promise to not make a sentence recommendation, it was bound by that plea agreement when the defendant was resentenced for later violating his probation. We held that defendant's commission of a new crime and the resulting probation revocation constituted a "new factor" warranting the prosecutor's change in position at the *resentencing*. ***Windom***, 169 Wis.2d at 350-51, 394 N.W.2d at 836. Unlike the defendant in ***Windom***, Kurszewski did not "reap[] the benefit of the State's promise," pursuant to the plea agreement. The case is inapposite.

Even so, the supreme court has stated quite plainly that the court of appeals lacks the power to overrule, modify, or withdraw language from a published opinion. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997).

breached the conditions of the agreement and that it was sufficiently material to release the State from its obligations under the agreement. ***State v. Rivest***, 106 Wis.2d 406, 414, 316 N.W.2d 395, 399 (1982). The State has made no case for any such relief.[11]

Because there is no question that the State breached its plea agreement with Kurszewski, ***Smith*** requires that we reverse the trial court's denial of his postconviction motion and remand to the court for "a new sentencing hearing conducted in accordance with the terms of the plea agreement." ***Smith,*** 207 Wis.2d at 283, 558 N.W.2d at 390. Further proceedings shall be consistent with this opinion.

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

Not recommended for publication in the official reports.

[11] The State attempts to distinguish ***State v. Rivest***, 106 Wis.2d 406, 316 N.W.2d 395 (1982), on the grounds that in that case, the State's attempt to vacate the plea agreement arose after the defendant commenced serving his sentence. The holding in ***Rivest*** was not so limited, however. Additionally, Wisconsin law is clear that once the defendant enters a plea, an evidentiary hearing is necessary to determine whether a breach of the agreement occurred and whether such breach entitles the other party to relief. *See* ***Toliver***, 187 Wis.2d at 358, 523 N.W.2d at 117; ***Bangert***, 131 Wis.2d at 288-89, 389 N.W.2d at 32; ***State v. Paske***, 121 Wis.2d 471, 473-74, 360 N.W.2d 695, 697 (Ct. App. 1984).