COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1651-CR **Cir. Ct. No. 2010CF711**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. TUEFFEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Christopher A. Tueffel appeals from a judgment of conviction for operating a motor vehicle while intoxicated as a fifth or sixth

offense in violation of WIS. STAT. § 346.63(1)(a) (2011-12)[1] and an order denying his postconviction motion for resentencing. He argues that the prosecution substantially and materially breached the plea agreement when it made an erroneous statement to the court regarding the sentencing recommendation, even though the prosecutor immediately corrected the mistake and stated the correct recommendation. Tueffel further argues that the prosecutor's failure to affirmatively advocate for the recommended sentence, her initial argument in support of the erroneous recommendation, and the language used by the prosecutor to explain the erroneous recommendation cast veiled doubts on the State's commitment to the plea agreement. We hold that the breach was not substantial and material because it was a simple mistake that was immediately corrected. We affirm the judgment and order.

¶2 Tueffel was charged with one count of operating a motor vehicle while intoxicated as a fifth or sixth offense, one count of refusing to take a test for intoxication, and one count of operating with a prohibited blood alcohol content as a fifth or sixth offense. He negotiated a plea agreement under which the State would dismiss and read in the second and third charges and would recommend twelve months of initial confinement and twenty-four months of extended supervision for the first. The court accepted Tueffel's plea and the case proceeded to sentencing. At the sentencing hearing, the prosecutor, an intern, misstated the sentencing recommendation as "three years in prison and three years extended supervision." The court and defense counsel immediately corrected the prosecutor. Upon being corrected, she stated that "[the negotiated

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

recommendation] is fine if that is in the agreement. I must have been reading old notes in the file.... The State believes a year is appropriate then.... The State will withdraw their argument." Sentencing was adjourned for the parties to confer and resumed a week later. At the second hearing, the prosecution offered no further comment on the plea recommendation. The court sentenced Tueffel to three years' confinement and three years' extended supervision, the maximum allowed by law.

¶3 In order to obtain relief for breach of a plea agreement, the defendant must show that a breach occurred and that it was material and substantial. ***State v. Williams***, 2002 WI 1, ¶2, 249 Wis. 2d 492, 637 N.W.2d 733. Whether a breach occurred and whether it was material and substantial are matters of law that this court reviews de novo. ***Id.***, ¶5. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.***, ¶38. Both parties in this case agree that a breach occurred when the prosecutor misstated the sentencing recommendation; this dispute arises over whether the breach was material and substantial.

¶4 Our precedent regarding plea agreement breaches reflects the concern that the prosecutor, after inducing a plea from the defendant in exchange for a recommendation, might then attempt to covertly argue for a more severe sentence. *See* ***id.***, ¶42. In ***Williams***, the defendant agreed to plead guilty to failure to pay child support in exchange for a recommendation of three years of probation and sixty days in jail. ***Id.***, ¶24. During sentencing, the prosecutor made statements such as "I can best describe my impression of this defendant as manipulative and unwilling to take responsibility," and "[i]t just is very frustrating to think that someone could completely walk away and be so uncaring about a child." ***Id.***, ¶26 (emphasis omitted). She concluded by stating, "[the presentence

investigator] reiterated to [another prosecutor] that it was her belief that the defendant needs to go to prison." ***Id.*** (emphasis omitted). The prosecutor qualified her remarks by stating that she was sticking to the plea agreement and "I am in no means suggesting that I am asking the Court to adopt [the presentence investigator's] recommendation." ***Id.***, ¶29. The ***Williams*** court held that, while there is a duty to convey both positive and negative information to the court, the prosecutor may not "personalize the information, adopt the same negative impressions as [the author of the presentence report] and then remind the court that the [author] had recommended a harsher sentence." ***Id.***, ¶48 (citation omitted; alteration in original). Because the prosecutor did those things, the court held that the breach in ***Williams*** was material and substantial. ***Id.***, ¶59. However, the prosecutor's actions in ***Williams*** presented the court with a "close question." ***Id.***, ¶52.

¶5 At the opposite end of the spectrum are breaches "shown to be the result of a mistake that was quickly acknowledged and rectified." *See* ***State v. Knox***, 213 Wis. 2d 318, 322-23, 570 N.W.2d 599 (Ct. App. 1997). In ***Knox***, the prosecutor mistakenly asked for consecutive, rather than concurrent, sentences. ***Id.*** at 319. The prosecutor's mistake was immediately recognized by defense counsel and was corrected after a brief recess. ***Id.*** at 320-21. The court held that this momentary and inadvertent mistake did not constitute a material and substantial breach of the agreement. ***Id.*** at 323. Similarly, in ***State v. Bowers***, 2005 WI App 72, ¶3, 280 Wis. 2d 534, 696 N.W.2d 255, the prosecutor misstated the length of the agreed-upon recommendation, and the error was promptly corrected. ***Id.*** This court held that such a breach was insubstantial and immaterial. ***Id.***, ¶21.

¶6 Tueffel's attempt to distinguish his case from ***Knox*** and ***Bowers*** is not persuasive. The prosecutor's misstatement was immediately corrected by both the court and defense counsel. The prosecutor then clarified the agreed-upon recommendation and matter-of-factly stated, "The State believes a year is appropriate then." Her statement that "I must have been reading old notes in the file" evidences an honest mistake, not an attempt to circumvent the plea agreement. We do not see any attempt by the prosecutor in this case to covertly suggest to the court that a more serious sentence was appropriate. Additionally, it is especially unlikely that a law student intern would attempt to intentionally torpedo an agreed-upon sentencing recommendation.

¶7 Tueffel also argues that the argument made by the prosecutor was in support of the erroneous recommendation, not the correct one. However, the prosecutor's brief remarks on the defendant's prior history were factual in nature and did not include any personal opinions about the defendant's character, or any veiled references to the appropriateness of a more severe penalty, as occurred in ***Williams***. Indeed, the prosecutor has a duty to convey both positive and negative facts to the court at sentencing so that the court can make an informed decision, regardless of the specific sentencing recommendation. ***Williams***, 249 Wis. 2d 492, ¶¶43-44.

¶8 Finally, Tueffel directs us to several cases from other jurisdictions that purportedly state that the prosecutor has the implicit obligation to advocate in favor of the recommended sentence. These cases are not persuasive because they uniformly involve a ***Williams***-like attempt to covertly subvert the recommended sentence and imply that it was not severe enough. *See, e.g.*, ***State v. Wills***, 102 P.3d 380, 382-83 (Idaho Ct. App. 2004) (prosecutor's emphasis that agreed-upon sentence range was the minimum the court should impose "impliedly disavowed

the recommended sentences"); ***State v. Foster***, 180 P.3d 1074, 1078 (Kan. Ct. App. 2008) (prosecutor recommended probation but provided information that suggested the court would not be able to find the defendant eligible for probation); ***United States v. Brown***, 500 F.2d 375, 377 (4th Cir. 1974) (prosecutor admitted he "ha[d] some problems" with the recommendation).

¶9 In conclusion, the breach of the plea agreement was not substantial or material. The prosecutor's misstatement was not "intended to affect the substance of the agreement by sending a veiled message to the sentencing court." ***Knox***, 213 Wis. 2d at 322. Rather, the State's breach of the plea agreement was a simple mistake that was immediately acknowledged by both parties and the court and was immediately rectified by the prosecutor.

By the Court.—Judgment and order affirmed.

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