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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT IV**

July 8, 2022

To:

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Electronic Notice

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Clerk of Circuit Court  
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1206-CR	State of Wisconsin v. Kendrick D. Sellers (L.C. # 2017CF2320)
2021AP1207-CR	State of Wisconsin v. Kendrick D. Sellers (L.C. # 2018CF1321)

Before Kloppenburg, Fitzpatrick, and Nashold, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Kendrick Sellers appeals his judgments of conviction, as well as circuit court orders denying postconviction relief. Sellers argues on appeal that he is entitled to relief because the State breached the plea agreement. Based upon our review of the briefs and record, we conclude at conference that these consolidated appeals are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Sellers pled guilty to two counts of second-degree sexual assault contrary to WIS. STAT. § 940.225(2)(a). The terms of the negotiated plea agreement included a joint sentencing recommendation for ten years of initial confinement, with the parties free to argue as to the length and terms of extended supervision. At the sentencing hearing, the prosecutor recommended ten years of initial confinement and ten years of extended supervision on each count, to run concurrently. The circuit court ultimately sentenced Sellers to eighteen years of initial confinement and ten years of extended supervision on each count, to run concurrently. Sellers then filed a motion for postconviction relief in which he argued that the prosecutor breached the plea agreement by distancing herself from the joint sentencing recommendation through remarks made at the sentencing hearing. The circuit court denied the motion, and Sellers appealed.

Sellers presents two issues on appeal. First, he argues that the prosecutor's remarks following questioning by the circuit court at sentencing constituted a breach of the plea agreement. Second, Sellers argues that he did not waive his right to challenge the State's compliance with the plea agreement and that, even if he did, he is entitled to relief due to ineffective assistance of counsel. We need not address or decide the second issue because, with respect to the first issue, we conclude that the prosecutor's remarks at sentencing cannot reasonably be construed as a breach of the plea agreement. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

A defendant has a constitutional right to enforce a negotiated plea agreement. *State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. *Id.*, ¶38. To be actionable, however, a breach must not be merely technical but, rather, must deprive the

defendant of a substantial and material benefit for which he or she bargained. *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). In reviewing plea-breach claims, we review the circuit court's factual findings under the clearly erroneous standard, but we review de novo whether the State's conduct is a substantial and material breach of the plea agreement. *Williams*, 249 Wis. 2d 492, ¶20.

In the appellant's brief, Sellers quotes the following exchange between the court and the prosecutor, Tracy McMiller. The exchange occurred at the sentencing hearing on June 19, 2019, after McMiller had concluded her argument, but before defense counsel's argument.

THE COURT: Okay. Before I go to the defense argument: Ms. McMiller, your argument ends with a "10-year in and 10-year out" sentence. I know you were in this courtroom yesterday where I was asked to sentence someone who had no criminal record, who had sexually assaulted one victim -- albeit, it was a six-year-old child -- who made some threats but certainly didn't try to get anyone to -- to kill the victim. The -- I could go on and on and on. There are probably a hundred different ways to distinguish those cases; and in that case, I was asked to impose a sentence of 40 years in the Wisconsin State Prison System: 25 years of initial confinement and 15 years of extended supervision.

Just give me one second. I am just trying to wrap my mind around those very different asks by the DA's Office because [your] argument doesn't sound like a 10-year sentence of initial confinement; right? So I -- I don't know what to do with -- with those. I don't know how to juxtapose them.

MS. McMILLER: Judge, I can note that this was the negotiated plea between the two parties after meeting on multiple occasions, and this was something that was negotiated a long time ago. We had actually waited for sentencing for a long time in order to get all of the information to the presentence investigation writer and to -- I believe that they may have asked for an extension of the time to get that report done. And then once that report was completed, that was also months before we were able to get in here and do a sentencing.

During the time that we negotiated this joint recommendation, it was taking into account the fact that the defendant was taking responsibility for his actions, which I know

is different from what you had yesterday -- where it went through a trial, where a child had to testify in front of a jury, where somebody did not take responsibility for their actions at all. In this case, we did have a plea to two counts of second-degree sex assault and taking responsibility, and I have to take that into account when making a recommendation and negotiating a case.

I was not the prosecutor in the other case. I was present in the courtroom, but I -- that is a completely separate case, completely separate prosecutor, a different kind of victim, a different kind of disposition, and I think the recommendation that we're putting forth here is appropriate. It's a joint recommendation, and I -- I think that you should take that into account.

Sellers argues that, in the exchange quoted above, the prosecutor provided “less than enthusiastic” support for the joint sentencing recommendation and, in doing so, violated the plea agreement. Sellers argues that, by commenting that the agreement was reached “a long time ago” and as a result of “meeting on multiple occasions,” the prosecutor was “[d]istancing herself from the negotiated plea.” Sellers further argues that, by referencing the long time it had taken for the presentence investigation report (PSI) to be prepared and for the court to set a sentencing date, the prosecutor diverted the court’s attention from the plea agreement.

We do not read the prosecutor’s remarks as a way to distance herself from the plea agreement or to divert the court’s attention from the agreement. “We must examine the entire sentencing proceeding to evaluate the prosecutor’s remarks.” *Id.*, ¶46. When examined as a whole, the transcript of the sentencing hearing shows that the prosecutor recommended to the court the agreed-upon sentencing recommendation of ten years of initial confinement. The record is devoid of any evidence that the prosecutor made statements to repudiate or second-guess the plea agreement. To the contrary, the prosecutor’s remarks regarding the time and effort involved in negotiating the agreement suggest that the prosecutor was highlighting

Sellers's willingness to take responsibility for his actions by entering a plea early on in the proceedings.

Sellers asserts in the appellant's brief that the prosecutor qualified her sentencing recommendation "by noting that it was done '*when* (emphasis added) the defendant was taking responsibility for his actions.'" We admonish Sellers's counsel that this assertion is not an accurate representation of what the prosecutor said, as reflected in the sentencing transcript. As the State points out in the respondent's brief, what the prosecutor actually said was that "[d]uring the time that we negotiated this joint recommendation, it was taking into account the fact that the defendant was taking responsibility for his actions, which I know is different from what you had yesterday ... where somebody did not take responsibility for their actions at all." When considered accurately and within the context of the entire hearing, the prosecutor's statement acknowledges that Sellers took responsibility for his actions early on, and was still taking responsibility for those actions, in contrast to the defendant from the previous day's sentencing hearing referenced by the circuit court.

Sellers acknowledges that, in the State's opening argument at sentencing, the prosecutor "supported the plea agreement." Sellers goes on to assert that, in responding to the court's questioning later in the hearing, the prosecutor "did not reaffirm her recommendation but merely asked the court to take it 'into account.'" Again, the transcript of the sentencing hearing shows

this assertion by Sellers' counsel not to be accurate.<sup>2</sup> The transcript shows that the prosecutor ended her remarks as follows: "I think the recommendation that we're putting forth here is appropriate. It's a joint recommendation, and I -- I think you should take that into account."

We are satisfied that the transcript of the sentencing hearing shows that the prosecutor followed through on the State's agreement to recommend ten years of initial confinement. Nothing in the prosecutor's remarks at sentencing supports a reasonable conclusion that the State breached the plea agreement.

Therefore,

IT IS ORDERED that the judgments and orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>2</sup> The misrepresentations made by Sellers' counsel do not affect the outcome of this case, as the prosecutor's actual statements are readily accessible to the court in the form of the sentencing transcript in the appellate record. However, we caution counsel against making future misstatements or misrepresentations to the court. *See generally* SCR 20:3.3(a)(1) (2022) (regarding candor toward the tribunal).