COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP1931-CR
2015AP1932-CR
2015AP1933-CR

Cir. Ct. Nos. 2013CF532
2013CF1263
2014CF96

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. TAYLOR,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. David Taylor appeals judgments convicting him of eleven felonies and an order denying his postconviction motion for resentencing.

Taylor argues that the prosecutor's sentencing recommendation breached the parties' plea agreement and that his trial counsel was ineffective for failing to object to the breach. We conclude the prosecutor's recommendation did not breach the plea agreement and, therefore, we affirm.

BACKGROUND

¶2 The State and Taylor reached a global plea agreement to resolve numerous counts in three separate criminal complaints. During Taylor's plea hearing, the prosecutor described the parties' plea agreement as follows:

> I can tell you that in file 13CF532, the Defendant is going to plead to the felony intimidation DVO [Domestic Violence Offense]. The repeater is being dismissed. In 13CF1263, he's pleading to eight counts of Possession of Child Pornography and dismiss and read in the other counts in that file. We are requesting 15 to 20 years of initial confinement …. Also, in 14CF96, the Defendant is pleading to the sexual assault charge involving victim A.B.B. And then the charge that involves the taking of the picture, which I believe is the last count. All the other counts are going to be dismissed and read in. We're requesting a 5 to 10 year consecutive sentence. I should point out, Your Honor, that the State's recommendation for total incarceration[1] is *not to exceed 20 years*.[2]

[1] Incarceration is not defined in the Wisconsin Statutes. *Cf.* ***State v. Finley***, 2016 WI 63, ¶96 Attach. A, 370 Wis. 2d 402, 882 N.W.2d 761 (attaching definitions of important statutory terms related to sentencing, such as "imprisonment," "confinement in prison," and "extended supervision," but failing to provide statutory definition for "incarceration"). However, the record makes clear—and the State essentially concedes—that the prosecutor's usage of incarceration at both the plea and sentencing hearings meant "initial confinement." Therefore, the prosecutor's subsequent usage of "incarceration" at those hearings should be construed as referring to "initial confinement."

(Emphasis added.)

¶3 At Taylor's sentencing hearing, the prosecutor made the following sentence recommendation to the court:

> The State at this point when we talk about case 13CF532, we're asking for a time served sentence in that. That is the domestic violence case. The Defendant has sat a very long time in the Brown County jail. And he's facing so much time with all of the files. And in 14CF96 and 13CF1263, the State is requesting *at least twenty years* of incarceration. We would leave the extended supervision or supervision of some sort up to the Court as to what you believe is appropriate.
>
> ….
>
> … Something has to be done to protect the community. And that is why *the State is asking for twenty years* of incarceration ….
>
> So, it's with all of those [reasons] that the State requests that you sentence this Defendant to a lengthy period of time in the Wisconsin correctional facility.

(Emphasis added.) Taylor's counsel did not object to the prosecutor's sentence recommendation.

¶4 After sentencing, Taylor's postconviction counsel filed a motion seeking resentencing before a different judge or, in the alternative, for the circuit court to conduct a ***Machner***[3] hearing. The circuit court denied Taylor's motion,

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[2] The State's recitation of the parties' plea agreement is somewhat perplexing given the State's individual sentence recommendations for initial confinement, if served consecutively, could be longer than the State's total sentence recommendation for initial confinement. However, what is important is the parties' agreement required the State to recommend no more than a total of twenty years of initial confinement at the sentencing hearing.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

concluding that a ***Machner*** hearing was unnecessary because the prosecutor's sentence recommendation was not a "material and substantial" breach of the parties' plea agreement, but rather "an inadvertent or insubstantial misstatement of the plea agreement, which was promptly rectified." Taylor now appeals.

DISCUSSION

¶5 Taylor's trial counsel failed to object to the State's alleged breach of the parties' plea agreement at the sentencing hearing. Therefore, Taylor forfeited his right to directly challenge the purported breach. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Nonetheless, Taylor is still permitted to—and does—challenge his trial counsel's failure to object to the State's alleged breach of the plea agreement on the grounds of ineffective assistance of counsel. *See* ***State v. Sprang***, 2004 WI App 121, ¶¶12-13, 25, 274 Wis. 2d 784, 683 N.W.2d 522 (addressing defendant's ineffective assistance of counsel claim after determining that defendant forfeited the right to directly challenge State's alleged breach of plea agreement).

¶6 Before we address Taylor's claim of ineffective assistance of counsel, we must first ascertain whether there was, in fact, a material and substantial breach of the parties' plea agreement. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. "If we conclude that there was not a breach of the plea agreement, then defense counsel's failure to object would not constitute deficient performance." ***Sprang***, 274 Wis. 2d 784, ¶13 (citation omitted).

¶7 "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***Howard***, 246 Wis. 2d 475, ¶13. However, a

defendant is not automatically entitled to relief when the State breaches a plea agreement. *See* ***id.***, ¶15. "An actionable breach must not be merely a technical breach; it must be a material and substantial breach." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733 (footnote omitted). "A breach is material and substantial when it 'defeats the benefit for which the accused bargained.'" ***Naydihor***, 270 Wis. 2d 585, ¶11 (quoting ***Williams***, 249 Wis. 2d 492, ¶38). Further, in determining whether the State breached its plea agreement with Taylor, "it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's [sentence] recommendation." ***State v. Bowers***, 2005 WI App 72, ¶8, 280 Wis. 2d 534, 696 N.W.2d 255.

¶8 The plea agreement here was clear: the State would not recommend more than a total of twenty years of initial confinement. The prosecutor emphasized at the plea hearing, "I should point out, Your Honor, that the State's recommendation for total [initial confinement] is not to exceed 20 years." However, at the sentencing hearing, the prosecutor stated that it was recommending Taylor be sentenced to "at least twenty years of [initial confinement]." Both the historical facts regarding the terms of the plea agreement and the State's remarks during the sentencing hearing are undisputed. Accordingly, the only question is whether the State's conduct constitutes a material and substantial breach of the plea agreement. This is a question of law, which we review de novo. ***Williams***, 249 Wis. 2d 492, ¶5.

¶9 Our decision in ***State v. Schabow***, No. 2014AP1254-CR, unpublished slip op. (WI App July 7, 2015),[4] is instructive on the question before us. In ***Schabow***, the plea agreement required the State to "cap" its sentencing recommendation at a total sentence of two years' initial confinement and four years' extended supervision. ***Id.***, ¶3. Schabow argued that the prosecutor breached the plea agreement because later in the sentencing hearing—after the prosecutor made lengthy negative comments about Schabow's background and character—the prosecutor stated the recommended two years' initial confinement was the "very minimum" period of initial confinement "that should be considered." ***Id.***, ¶11. However, immediately preceding the "very minimum" comment, the prosecutor remarked, "the prison sentence of six years is appropriate." ***Id.*** Immediately after the "very minimum" comment, the prosecutor stated his recommendation of four years' extended supervision was "wholly appropriate." ***Id.*** We held that:

> Considering the prosecutor's "very minimum" comment in the overall context, we conclude it did not amount to a material and substantial breach of the plea agreement. Schabow was not deprived of a material and substantial benefit of the bargain, as the prosecutor clearly presented the State's recommendation and its overall endorsement of that recommendation. The prosecutor's "very minimum" comment was improvidently made. … However, the totality of his remarks did not suggest, even implicitly, that he was distancing himself from the agreement, or in hindsight believed the recommendation was insufficient.

Id., ¶30 (citations omitted).

[4] *See* WIS. STAT. RULE 809.23(3)(b) (unpublished, authored decisions issued on or after July 1, 2009, may be cited for persuasive value).

¶10 Similarly here, considering the prosecutor's "at least twenty years" comment in the overall context, we conclude that it was a mere technical breach of the plea agreement, not a material and substantial breach. After initially informing the circuit court at the plea hearing that, under the parties' agreement, the State's recommendation for initial confinement was capped at twenty years, the prosecutor then recommended the court order no less than that sentence at the sentencing hearing. In doing so, the prosecutor came dangerously close to communicating to the court the State was distancing itself from the parties' agreement—*i.e.*, the State believed twenty years was insufficient and the court should consider ordering a longer period of initial confinement. However, the prosecutor then corrected her recommendation with the statement "the State is asking for twenty years of [initial confinement]." That recommendation is substantially the same as the State's agreement to recommend a period of initial confinement "not to exceed 20 years." Taylor was not deprived of a material and substantial benefit of the bargain because the prosecutor clearly presented the correct sentence recommendation and its overall endorsement of that recommendation. As in ***Schabow***, the prosecutor's singular reference to "at least twenty years" was improvidently made. However, the totality of her remarks did not suggest, even implicitly, that she was distancing herself from the agreement or, in hindsight, believed the recommendation was insufficient.

¶11 We pause to note that, while we determine there was not a material and substantial breach of the agreement here, the prosecutor here and in ***Schabow*** came close to doing so. The context in which their comments were made saved them from appearing to be distancing themselves from the plea agreement. The "State may not accomplish through indirect means what it promised not to do

directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278. In ***Hanson***, we acknowledged that the State walks a "fine line" at sentencing: "On the one hand, the State must obviously abide by its agreement to cap its sentencing recommendation. But on the other, the State is free to argue for an appropriate sentence within the limits of the cap." ***Id.***, ¶27. However, improvident language used by a prosecutor may, in a context different than this case, lead to a material and substantial breach of the agreement.

¶12 In conclusion, we hold that the State substantially corrected its improvidently made statement of "at least twenty years of [initial confinement]" and therefore did not materially and substantially breach the parties' plea agreement. Because we conclude there was no breach of the plea agreement, Taylor's counsel's failure to object to the State's comments at the sentencing hearing did not fall below an objective standard of reasonableness considering all the circumstances. *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. We therefore affirm the judgments of conviction and order denying postconviction relief.

By the Court.— Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).