

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2005

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.

Appeal No. 2004AP2545-CR

Cir. Ct. No. 2002CF621

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIONYSUS J. THOMAS,

DEFENDANT-APPELLANT.

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

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Dionysus J. Thomas appeals from a judgment convicting him of possession of cocaine with intent to deliver contrary to WIS. STAT. § 961.41(1m)(cm)4. (2001-02) and from an order denying his motion for resentencing. On appeal, Thomas argues that the State breached the plea

agreement and he should therefore be resentenced. The circuit court rejected this argument, as do we. We affirm.

¶2 At the plea hearing, the prosecutor described the relationship between the State's sentence recommendation and Thomas' statement:

In the meantime Mr. Thomas has expressed a willingness to make a statement and [the] making of that statement as well as the completeness, his thoroughness and his willingness to testify to back it up if needed are going to determine exactly what the State's sentencing recommendation is.

We have a draft written agreement in place as far as what those terms would be, but we are going to wait to file that until after he gives that statement. The punch line really is that should everything go the way we expect it to go, the State's recommendation would be for a prison sentence consisting of eight years' initial incarceration, five years' extended supervision. The defense will be free to argue. It all depends on getting the statement before the sentencing.

¶3 At sentencing, the extent of Thomas' cooperation vis-à-vis his statement became an issue. The State presented the testimony of Officer Frey, a drug unit member, about the central role Thomas played in the drug operation in Oshkosh. The officer characterized as "a charade" the statement Thomas gave as part of the plea agreement. According to Frey, Thomas blamed individuals inferior to him in the drug operation who had already cooperated in the investigation. Thomas was not truthful in his statement and did not provide information about anyone senior to him in the drug operation. Thomas' statement also was contrary to what investigators had learned about the drug operation.

¶4 In his sentencing remarks, the prosecutor referred to Thomas' character and expressed his agreement with Frey's assessment of Thomas' statement. The prosecutor continued:

The deal that we arranged with Mr. Thomas is that if he agreed to give us a debriefing statement we would request less time than we otherwise might have. And that less time is the specific 13 years, eight and five. The condition was that information he provides to be useful, truthful, credible, and be willing to testify to back it up. I don't think he's come through on that agreement. I think I probably would be justified in pulling the plug on this whole situation and saying, you know, let's just start over, let's go to trial. I think I could. But in the interest of justice and getting this matter behind us I'm not going to.

¶5 The prosecutor then suggested that Thomas' statement indicated a continuing loyalty to the main members of the drug conspiracy, and that the circuit court could view this as a strong indication of Thomas' character. Notwithstanding his concerns about the quality of Thomas' statement, the prosecutor recommended the thirteen-year sentence set out in the plea agreement. Defense counsel did not object to the prosecutor's sentencing remarks.

¶6 In his sentencing remarks, defense counsel advised that Thomas disputed some of Frey's remarks, but "Mr. Thomas is of course willing to go through and point out everything that's incorrect to assist them in whatever they need to do" and "to answer whatever questions they may have and provide whatever information that they require." In exercising his right of allocution, Thomas stated that he gave information to officers and was willing to work with them further.

¶7 In sentencing Thomas, the circuit court noted Thomas' intent to cooperate with drug unit investigators and the prosecutor's view that even though Thomas did not provide the statement intended by the plea agreement, the State would recommend the sentence agreed upon. The court imposed the sentence recommended by the State pursuant to the plea agreement.

¶8 Postconviction, Thomas sought resentencing because the prosecutor impermissibly distanced the State from its sentence recommendation and breached the plea agreement. He further claimed that his trial counsel was ineffective for failing to object to those remarks.

¶9 At the postconviction motion hearing, trial counsel testified that he did not believe that the prosecutor breached the plea agreement when he opined that Thomas' statement was not what was expected under the plea agreement. Counsel further explained that he did not object to the prosecutor's comments because he did not want to disturb the plea agreement, which was beneficial to Thomas.

¶10 The circuit court ruled that the prosecutor did not breach the plea agreement. Thomas appeals.

¶11 We address whether the prosecutor materially and substantially breached the plea agreement. *State v. Sprang*, 2004 WI App 121, ¶13, 274 Wis. 2d 784, 683 N.W.2d 522.

[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement....

A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing.

Whether the State breached a plea agreement is a mixed question of fact and law. The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State's alleged breach of that agreement are questions of fact. On appeal, the circuit court's determinations as to these facts are reviewed under the clearly erroneous standard. Whether the State's

conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo. A breach is material and substantial when it “defeats the benefit for which the accused bargained.”

Id., ¶14 (citations omitted). It is well-settled that the “State may not accomplish by 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. Williams*, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733 (citations omitted).

¶12 We reject Thomas’ contention that the prosecutor impermissibly qualified or undermined the State’s sentence recommendation. The terms of Thomas’ plea agreement are not in dispute: the State agreed to recommend a thirteen-year sentence in exchange for a thorough and complete statement from Thomas about the drug operation.

¶13 It is also undisputed that Thomas’ statement was neither thorough nor complete, and that Thomas offered at sentencing to further cooperate with the State by providing more information. Because Thomas did not provide the statement anticipated under the plea agreement, the State had the option to seek relief from the plea agreement rather than give Thomas the benefit of his bargain. Nevertheless, the State recommended the sentence bargained for, and the circuit court imposed it. The State’s remarks did not divert the circuit court’s attention from the recommendation in the plea agreement or constitute an “end run” around the plea agreement. *See id.*¹

¹ Because the State did not breach the plea agreement, we need not address whether trial counsel was ineffective for failing to object to the prosecutor’s remarks.

¶14 The prosecutor's remarks at sentencing may also be understood as part of the prosecutor's overall argument about Thomas' character, a factor to be considered at sentencing. *See State v. Gallion*, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The plea agreement did not require the prosecutor to refrain from discussing Thomas' character. The prosecutor discussed the level of Thomas' involvement in the drug trade in the area and suggested that Thomas' statement revealed that he had an undying loyalty to members of the drug operation. The prosecutor also suggested that Thomas' statement was intended to pay back those who had already given information to investigators rather than to assist investigators in their investigation.

¶15 Finally, the State was not obligated to keep Thomas' initial failure to meaningfully cooperate from the circuit court in order to fulfill its obligations under the plea agreement. *See State v. Naydihor*, 2004 WI 43, ¶¶21, 23, 270 Wis. 2d 585, 678 N.W.2d 220 (the prosecutor has a duty to insure that the circuit court has complete and accurate information concerning the defendant to enable the court in imposing an appropriate sentence).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

