COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2726-CR **Cir. Ct. No. 2003CF2809**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODERICK LASHAWN BOGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and MEL FLANAGAN, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Roderick Lashawn Bogan appeals from a judgment entered after Bogan pled guilty to possession with intent to deliver a controlled substance (cocaine), more than one gram, less than five grams, and

resisting/obstructing an officer, as a habitual criminal, contrary to WIS. STAT. §§ 961.16(2)(b)(1), 961.41(1m)(cm)(1r), and 939.62(1)(a) (2003-04).[1] He also appeals from an order denying his postconviction motion. Bogan claims the prosecutor breached the plea agreement by referring to the presentence investigation report's (PSI) harsher recommendation, and that he received ineffective assistance of counsel. Because the prosecutor did not breach the plea agreement, and Bogan has failed to demonstrate that he received ineffective assistance of counsel, we affirm.

BACKGROUND

¶2 On May 11, 2003, Milwaukee police stopped a vehicle containing three people, all of whom exited the vehicle as the officers approached. Bogan

> fled on foot northbound in the 3100 block of N. 34th St. area as Officer Kline told him to stop. The defendant did not stop and fled eastbound at 3400 W. Auer Street. The defendant was eventually taken into custody at 3213 N. 33rd St. in the rear alley. At this point, the defendant refused to put his hands behind his back and was moving around his arms, making it difficult for officers to cuff him.

¶3 The officers searched Bogan and found thirty-one corner cuts of crack cocaine. Bogan told a detective that he intended to sell the crack for $200, that he had received the drugs from his cousin, and that he wanted to use the money from selling the drugs to enter a contest.

¶4 Bogan was charged with the crimes noted above. He entered into a plea agreement with the State. At the guilty plea hearing on November 17, 2003,

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the State advised the court that the plea agreement consisted of Bogan pleading guilty to the two charges in exchange for the State's agreement to recommend forty-eight months in prison, with half the time in initial confinement and half as extended supervision.

¶5 Bogan indicated he was pleading guilty because he was guilty, but that he disagreed with some of the contents of the criminal complaint. His counsel explained that the complaint stated there were three individuals in the vehicle, but actually there were four. Counsel also advised the court that Bogan believed the officers had him mixed up with another individual as far as the fleeing was concerned. Bogan did admit that there was a sufficient basis for an obstructing charge against him because he fled from the police and did not stop when they ordered him to stop. The trial court accepted the plea and ordered a PSI.

¶6 The PSI recommended that Bogan be sentenced to an initial confinement term of five to seven years, followed by extended supervision of five to eight years. The trial court sentenced Bogan to a ten-year sentence on the drug count, with four years of initial confinement and six years of extended supervision, and a nine-month concurrent sentence on the obstruction count.

¶7 Bogan moved for postconviction relief alleging that the State had breached the plea agreement and that his counsel provided ineffective assistance. His motion was denied. He now appeals.

DISCUSSION

A. Breach of Plea Agreement.

¶8 Bogan argues that the comments the prosecutor made during the sentencing hearing constituted a breach of the plea agreement. He contends that the prosecutor endorsed and adopted the PSI writer's negative impressions of the defendant, thereby indirectly suggesting that the PSI writer's harsher sentencing recommendation was more appropriate than the sentence agreed to in the plea agreement. We reject Bogan's contention.

¶9 In reviewing a breach of plea agreement case, our standard of review is mixed. We review the historical facts under the clearly erroneous standard. ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. Whether the State's conduct constitutes a substantial and material breach, however, is reviewed independently. ***Id.***

¶10 Bogan had the right to the enforcement of his negotiated plea agreement. *See* ***id.***, ¶37. The prosecutor, therefore, must render a neutral recitation of the terms of the plea agreement and not "'undercut the essence of the plea agreement.'" ***State v. Naydihor***, 2004 WI 43, ¶17, 270 Wis. 2d 585, 678 N.W.2d 220 (citing ***Williams***, 249 Wis. 2d 492, ¶46). In reviewing a claim that the State covertly breached a plea agreement, we must review the prosecutor's remarks in the context of the sentencing as a whole. ***Williams***, 249 Wis. 2d 492, ¶46.

¶11 Bogan's complaint is with respect to the comments the prosecutor made regarding the PSI. The PSI in this case was filed on December 17, 2003. As noted, the PSI recommended a harsher sentence than that agreed to in the

negotiated plea. Bogan filed a response to the PSI, which provided, in pertinent part:

> 2. Offender Interview – in the 3rd line the agent states that Mr. Bogan stated the criminal complaint was "accurate". Mr. Bogan does not recall making a statement that would indicate that the "facts" in the complaint, particularly about the matter of his fleeing the scene, are true and correct, vis a vis the statements the agent has attributed to him in the balance of that … paragraph. Mr. Bogan knows that with the bullet he has resting on his spine, he would be risking paralysis if he were [sic] resist arrest as described in the complaint.

¶12 The State was provided a copy of Bogan's response to the PSI on the morning of the day of sentencing, January 5, 2004. The prosecutor commented with respect to Bogan's response to the PSI:

> I am concerned though about his correction, specifically, paragraph number two of his response to the presentence report. I was not the assisting [sic] DA in court when the plea was entered so I do not have any independent knowledge about what the factual basis was as to Count 2 of the information, the obstructing an officer, as a habitual criminal.
>
> But, basically, paragraph two of his response sounds like a denial, so either that's a change of story or a change of heart or just a flat out denial from the start about Count 2, but I'm troubled by that.

¶13 The prosecutor continued addressing the court with respect to Bogan's character:

> I do agree with the PSI writer's impression that the defendant seems to be sluffing [sic] off blame to other individuals and not taking full responsibility for his actions. I think that causes some concern when you evaluate whether or not the defendant is likely to repeat in the future.

¶14 The prosecutor also addressed the seriousness of the offense:

> Given the sheer amount though, of the cocaine, thirty-one corner cuts, is quite a bit plus the weight of almost four grams is quite a bit.
>
> ….
>
> But what can't be ignored is the fact the police officers did find a gun in this car. That can't really be attributed to one person or another, and I don't think anyone was charged for possession of that gun simply because they couldn't tell beyond a reasonable doubt who possessed it, but there was a gun in the car. And when the police officers hear shots and respond to the location and find a gun in this car and the defendant is coming out of that car, also has to cause some concern.

¶15 The prosecutor also advised the court that: "The state does not feel though that the amount of time recommended by the PSI is necessarily needed in this case." The transcript also reflects that the prosecutor opened his remarks by informing the court that: "[T]he state is recommending two years of initial confinement and two years of extended supervision globally to the counts." The prosecutor closed his comments to the court with: "So based on all that information, the state feels two years is appropriate as an initial confinement."

¶16 Bogan suggests that the prosecutor's comments regarding the PSI, the seriousness of the offense, the amount of the drugs and the concern about Bogan's response to the PSI, all evidenced an attempt to covertly undermine the negotiated sentence recommendation. We cannot agree.

¶17 The negotiated plea agreement did not prohibit the prosecutor from discussing the severity of the crime or the character of the defendant. Nor should it. A rule preventing the State from commenting on the severity of the offense or the character of the offender would interfere with the trial court's proper exercise of sentencing discretion set forth in ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). "'A plea agreement which does not allow the sentencing

court to be appraised of relevant information is void [as] against public policy.'" ***State v. Liukonen***, 2004 WI App 157, ¶10, 276 Wis. 2d 64, 686 N.W.2d 689 (citation omitted; alteration in original). The prosecutor here was obligated to provide the sentencing court with the pertinent information to support the sentencing recommendation agreed to—a four-year term.

¶18 We cannot conclude from our review that the prosecutor here, was trying to convey to the trial court that it should impose a more severe sentence than that recommended by the State. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991) ("The state may not accomplish 'through indirect means what it promised not to do directly,' i.e., convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended.") (citation omitted).

¶19 Bogan also suggests that the prosecutor's statement, that he agrees with the PSI writer's impression that Bogan seems to be "sluffing off blame," demonstrates that the prosecutor was suggesting that the PSI's lengthier sentence should be imposed. We cannot agree. The agreement with the "sluffing off blame" comment cannot be construed as an attempt to suggest that the court adopt the PSI's sentencing recommendation. The prosecutor did not specifically identify the sentence recommended by the PSI, but referred to it only as a longer sentence than that being recommended by the State. While the prosecutor's comments could be interpreted to lend indirect or attenuated support to the PSI writer's recommendation, in the context of the State's repeated endorsements of the terms of the plea agreement, the comments to which Bogan objects cannot be construed to undermine the sentencing recommendation proffered by the State.

¶20 Bogan also relies on the prosecutor's statement that the PSI's harsher sentencing recommendation is not "necessarily" needed, demonstrates that the State was encouraging the court to impose a sentence greater than what was being recommended by the prosecutor. We do not agree. Reading the prosecutor's statement in context demonstrates that the statement was not intended to endorse a harsher sentence, but to advise the court that the harsher sentence was not required.

¶21 Bogan next argues that the prosecutor's expressed concerns about his response to the PSI are similar to those expressed in ***State v. Sprang***, 2004 WI App 121, ¶6 n.4, 274 Wis. 2d 784, 683 N.W.2d 522, wherein this court concluded that the prosecutor breached the plea agreement. We reject Bogan's contention. The comments made in the instant case are distinguishable from what happened in ***Sprang***. ***Id.***

¶22 First, the prosecutor's concerns in the instant case were reasonable given the circumstances. The sentencing prosecutor was different than the plea-hearing prosecutor, who had heard Bogan's explanation for the misstatements in the complaint and the basis for the obstruction charge. Moreover, Bogan's response was not provided to the State until the day of the sentencing hearing. That was not the case in ***Sprang***.

¶23 Second, the court knew that Bogan's "correction" to the PSI was essentially consistent with the correction expressed at the plea hearing. Thus, the prosecutor's objection did not adversely influence the court. The court was not confused by Bogan's version of events. Again, the circumstances in ***Sprang*** were very different than those presented here. Accordingly, we are not convinced that

the prosecutor's comments here regarding Bogan's correction to the PSI, constituted a material or substantial breach of the plea agreement.

¶24 Third, we agree with the State's analysis of the pertinent case law in concluding that the facts in this case are more akin to ***State v. Stenseth***, 2003 WI App 198, 266 Wis. 2d 959, 669 N.W.2d 776, than to ***Williams*** or ***Sprang***. Both ***Williams*** and ***Sprang*** involved plea agreements where the prosecutors agreed to recommend probation, but then argued factors which supported the PSI's suggestion that incarceration was required. ***Williams***, 249 Wis. 2d 492, ¶26; ***Sprang***, 274 Wis. 2d 784, ¶¶7-10.

¶25 In contrast, ***Stenseth*** was a case where the State agreed to recommend a sentence that would include prison time, and the PSI recommended a longer term of imprisonment. ***Id.***, 266 Wis. 2d 959, ¶¶3, 4. We determined in ***Stenseth*** that the prosecutor did not breach the plea agreement by arguing that prison time, as opposed to probation, was necessary.

¶26 The facts in this case are most similar to ***Stenseth***. The prosecutor agreed to recommend two years of confinement, followed by two years of extended supervision. The PSI recommended a longer sentence and the defendant argued that probation was the appropriate sentence. Under these circumstances, the prosecutor is obligated to provide factors to the court to support the prison term recommendation made by the State. Referring to some factors discussed by the PSI writer does not mean that the prosecutor is attempting to covertly increase the State's sentencing recommendation.

¶27 Our review demonstrates that the prosecutor did not adopt the PSI as his recommendation, that he did not cross the line or undermine the plea agreement, and that his comments at sentencing do not rise to the level of a

material or substantial breach. The prosecutor advised the court twice as to the agreed-upon sentencing recommendation and provided pertinent information to support the four-year sentence.

B. Ineffective Assistance.

¶28 Bogan contends that his trial counsel provided ineffective assistance of counsel by failing to object to the breach of the plea agreement. We are not persuaded.

¶29 In order to establish ineffective assistance of trial counsel, Bogan must prove both that the counsel's performance was deficient and that such deficient performance prejudiced the case. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We have decided that the prosecutor did not breach the plea agreement. Accordingly, it logically follows that if there was no breach, there was no reason for Bogan's counsel to object to the prosecutor's conduct, and this inaction cannot constitute deficient performance. Therefore, Bogan has failed to establish that he received ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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