

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 20, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 00-1829-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID G.K.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

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

¶1 PER CURIAM. David G.K. appeals from a judgment of conviction for sexual assault of a child and incest, and from an order denying postconviction relief. The issue on appeal is whether the prosecutor breached the plea agreement.

We conclude that the prosecutor did not breach the plea agreement by facilitating the testimony of the victim and her mother, and we affirm.

¶2 David was charged in a criminal complaint with two counts of sexual contact with a child who has not attained the age of thirteen, contrary to WIS. STAT. § 948.02(1) (1997-98).<sup>1</sup> After a preliminary examination information, the State filed an information that charged David with two counts of first-degree sexual assault of a child and two counts of incest. Pursuant to a plea agreement, David pled no contest to one count of sexual assault of a child and one count of incest. The State dismissed the other counts. The State and the defense agreed to jointly recommend eight years in prison on the incest count and twenty years' probation on the sexual assault count to run consecutively. Additionally, each party would be free to argue the conditions of probation.

¶3 The agent who prepared the presentence investigation report (PSI) agreed with the prosecutor's plea recommendation, although he stated that it could take at least six to seven years to provide sex offender treatment for David in the prison system. The agent interviewed the victim's mother, K.M. She thought David needed long term help and she did not believe that eight years in prison was sufficient. The victim, T.K., had submitted a victim impact statement several months before sentencing that stated that "[David] needs counseling and he needs to go to jail forever." The victim impact statement was included in the PSI.

¶4 At the sentencing hearing, both the victim and the victim's mother testified. The prosecutor asked the following questions of the victim's mother:

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Q. Now, in regard to the abuse of [T.K.] involved in this particular case, have you considered the—how the case should be resolved and a recommendation that you'd like to—maybe to the Court?

A. I would like to see him get as much help as possible that he could get—so he doesn't do this to another child. It's happened so many times over and it's got to stop. He needs long term help.

Q. When you say “long-term help,” what do you mean?

A. As much counseling, intense counseling or whatever that possibly could be out there for him. And he needs to finally admit he has done something wrong and be punished for it. I feel personally that 8 years is not enough.

The victim testified and was asked, “And what would you like to tell the judge today about your dad?” T.K. replied, “I just hope that my dad doesn't get out of jail too soon or prison cause I don't want him to do what he did to me to other kids.”

¶5 The prosecutor began her sentencing argument by stating that the defense and the State had an agreement, a joint recommendation of a period of incarceration followed by an extended period of probation. She stated that the agreement was placed on the record at the plea hearing. She then related the State's proposed conditions for probation. She proceeded to provide her rationale for the joint recommendation of prison followed by probation supervision. Finally, she concluded by again requesting that the court adopt the plea agreement. She made no references to the victims' statements except to say that she had not expected the child victim to make a statement.

¶6 The trial court sentenced David to twelve years in prison on the incest count and followed the joint agreement for twenty years' probation on the sexual assault count. The court based its sentence on four factors, including information in the PSI that it took a minimum of six to seven years from entry into

prison until completion of sex offender treatment. The report also stated that the process could be longer for those resistant to treatment. The court noted David's historic resistance to treatment chronicled in the PSI report. Finally, the court based the sentence on the aggravated nature of the crime, the need to protect the public, and David's failure to take responsibility for his actions.

¶7 In a postconviction motion, David argued that the State had breached the plea agreement and that his trial counsel was ineffective for failing to object to the State's breach. The trial court denied the motion and this appeal followed.<sup>2</sup>

¶8 Whether the State breached the plea agreement is a question of law that this court decides without deference to the trial court. *State v. Knox*, 213 Wis. 2d 318, 321, 570 N.W.2d 599 (1997). There is a due process right to enforcement of a negotiated plea agreement upon which a defendant has relied. *Id.*

¶9 David contends that the State knowingly elicited testimony from T.K. and K.M. that ran counter to the plea agreement, thereby "tainting" the sentencing hearing.<sup>3</sup> David asserts that the State knew that T.K. had provided a victim impact statement stating that "[David] needs to be in jail forever."

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<sup>2</sup> The parties agree that the threshold issue is whether the plea agreement was breached and this court need not consider an ineffective assistance of counsel claim unless we conclude that a breach occurred.

<sup>3</sup> We note at the outset that ch. 950 of the Wisconsin Statutes concerns the rights of victims and witnesses of crime. WISCONSIN STAT. § 950.04(1v)(m) provides that victims have the right to provide statements concerning sentencing and subsec. (p) states that the person preparing the PSI should make a reasonable attempt to contact the victim concerning the impact on the victim. Further, WIS. STAT. § 950.02(4) specifies that if the victim of a crime is a child, the child's parent is also a victim. *The legislature has declared its intent that victims' rights should be "honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."* WIS. STAT. § 950.01 (emphasis added).

Moreover, he argues that the State knew from the PSI that K.M. felt eight years was not a sufficient sentence because of his long-term needs.

¶10 The issue of a plea agreement breach was raised in *Sharp v. State*, 908 S.W.2d 752 (Mo. App. E.D. 1995). In *Sharp*, the defendant and the State had entered into a plea agreement whereby the State would remain silent regarding the issue of punishment and make no sentencing recommendation. *Id.* at 754. The defendant was charged with involuntary manslaughter and three counts of second-degree assault in a drunk driving accident. *Id.* Ms. Darling, a victim and mother of the other three victims, testified at the sentencing hearing. *Id.* The State asked her how the accident had affected her and what she expected of the court. She delivered an emotional statement regarding her daughters' injuries and the death of her third daughter. She asked the court to sentence the defendant to the maximum punishment allowed. *Id.*

¶11 The defendant brought a motion to withdraw his guilty plea, contending that the State violated the plea agreement by calling a witness whose statement included a recommendation for the maximum sentence. *Id.* The defendant contended that this action breached the plea agreement.

¶12 The *Sharp* court rejected the defendant's argument, finding no allegation or evidence that the State made any agreement that would preclude the testimony of the victim or a request for a specific sentence by the victim. The court concluded that there was an agreement that the State would remain silent but no such agreement for the victim. The court stated:

Nor, contrary to Defendant's contentions, does the fact that the state called the victim to the stand and asked the open-ended question that preceded the victim's recommendation thereby transform her into a witness for the state.... Although called to the stand and invited to give her

statement by the prosecutor, nothing in her testimony purported to present the views of the prosecutor, the state, or anyone other than herself or her family.

*Id.* at 755.

¶13 Here, David produced no evidence that there was an agreement that the victims would not testify or would not make a sentencing recommendation. T.K. and the victim's mother, K.M., testified at the sentencing hearing, as is their right under WIS. STAT. § 950.04(1v)(m). The State's questioning of the victims did not turn them into witnesses for the State. They spoke on their own behalf, not on behalf of the State. Nothing in their testimony purported to present the views of the prosecutor, the State, or anyone but themselves and their family. The State did nothing more than facilitate their appearances before the court.

¶14 Moreover, K.M.'s reply that eight years in prison was not long enough came as the answer to a neutral question asked by the prosecutor. That question was: "When you say 'long-term help,' what do you mean?" K.M.'s answer to the question of what she wanted to tell the judge was fairly innocuous. It certainly did not suggest any specific sentence.

¶15 Similarly, in *State v. Clement*, 153 Wis. 2d 287, 298, 450 N.W.2d 789 (Ct. App. 1989), the defendant moved to withdraw his guilty plea, claiming that the prosecutor breached the plea agreement requiring the prosecutor to refrain from requesting a specific sentence. During the sentencing hearing, the victim and her fiance requested that Clement be sentenced to the maximum penalty. *Id.* at 300. Clement asserted, among other allegations, that the State sponsored the testimony of the victim and her fiance. *Id.*

¶16 The *Clement* court concluded that the State agreed not to recommend a particular number of years and the record demonstrated the

prosecutor's full compliance with the agreement. *Id.* at 301. "There [was] no evidence that the prosecutor advised or encouraged the victim and her fiance to recommend the maximum sentence." *Id.* at 302.

¶17 As with Clement, we reject David's contention that the prosecutor did not fully comply with the plea agreement. David has provided no evidence that the prosecutor advised or encouraged the victim and her mother to recommend a sentence beyond that contained in the plea agreement. The prosecutor stated that she did not even know T.K. would testify. She did nothing more than comply with the victims' rights to be heard pursuant to ch. 950 of the Wisconsin Statutes. *See supra* note 3.

¶18 This case is distinguishable from *State v. Williams*, 2001 WI App 7, 241 Wis. 2d 1, 624 N.W.2d 164.<sup>4</sup> In *Williams*, the defendant pled to one count of failure to pay child support in return for a plea agreement to recommend probation with jail time. *Id.* at ¶2. We held that the State had breached the plea agreement when the prosecutor told the court that after reading the PSI report, she gained a negative impression of Williams. Her sentencing argument was replete with references to her feelings about Williams and the case. We noted that a prosecutor has a duty to present information to the court relevant to sentencing but that the prosecutor may not make this information a "personal recommendation." *Id.* at ¶9. Further, we held that the plea agreement was violated by the prosecutor's adoption of the same negative impressions held by the PSI and thereafter informing the court that the PSI recommended incarceration. *Id.* at ¶12.

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<sup>4</sup> A petition for review of *Williams* has been granted by the Wisconsin Supreme Court and is currently pending. *State v. Williams*, 2001 WI 43, 242 Wis. 2d 543, \_\_\_ N.W.2d \_\_\_ (Wis. Apr. 5, 2001) (No. 00-0535-CR).

¶19 The prosecutor in this case began and ended her argument by requesting the court to adopt the joint recommendation. She supported that request with her rationale for proposing the joint recommendation. She delivered her argument in a neutral fashion, at all times supporting the plea agreement.<sup>5</sup> Finally, she made no references to the victims' statements in her sentencing argument except to say that she did not expect T.K. to testify.

¶20 We hold that there was no prosecutorial breach of the plea agreement. Therefore, we affirm the judgment of conviction and the postconviction order.

*By the Court.*—Judgment and order affirmed.

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

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<sup>5</sup> See *State v. Poole*, 131 Wis. 2d 359, 364, 389 N.W.2d 40 (Ct. App. 1986).



