COURT OF APPEALS DECISION DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP1167 **Cir. Ct. No. 2004CF5874**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARON DAVID THORNTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Jaron David Thornton appeals from a judgment of conviction for attempted armed robbery as a party to the crime, and from a postconviction order summarily denying his motion for resentencing. We conclude that Thornton's breach of the plea bargain was material and substantial,

thereby relieving the State of its obligation to honor its previously negotiated sentencing recommendation. Therefore, we affirm.

¶2 The complaint charged Thornton, Stephen Marice Harwell, and Earnest D. Burks with conspiring to commit an armed robbery. During the attempted armed robbery, Jeffery D. Smith panicked, shot and allegedly killed Lynn M. Worley.[1] Harwell pled guilty to attempted armed robbery with the threat of force; Burks was tried and acquitted by a jury.

¶3 Incident to a plea bargain before Burks's trial, Thornton pled guilty to the reduced charge of attempted armed robbery as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003), 939.32 (amended Feb. 1, 2003) and 939.05 (2003-04).[2] The State agreed, in addition to reducing the charges against Thornton, to recommend a nine-year sentence, bifurcated in four- and five-year respective periods of initial confinement and extended supervision, provided Thornton

> cooperate fully and truthfully in … interviews [with personnel from law enforcement or the District Attorney's Office and] he must testify truthfully if subpoenaed, and must refrain from any further criminal activity.
>
> If Mr. Thornton fails to cooperate fully in the prosecution of his co-actors, fails to testify truthfully, or if he re-involves himself in criminal activity the State will consider that a material and substantial breach of the plea agreement and will at its discretion be released from its obligation regarding any recommendations to the court at the time of sentencing.

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[1] Smith was tried by a jury for first-degree reckless homicide while armed, and for being a felon in possession of a firearm; he was acquitted.

[2] Convicting Thornton of the attempted rather than the completed offense reduced his maximum exposure in half. *See* WIS. STAT. § 939.32(1g)(b) (amended Feb. 1, 2003).

¶4 Prior to the issuance of charges, Thornton had been interviewed by police three times. In his first statement, he denied any knowledge of the robbery incident.

¶5 In his second statement, approximately seventeen hours later, Thornton told police of Burks's significant role in planning the robbery. According to Thornton, his girlfriend Tierra Woodfaulk had a roommate named Angie who was "always having all these white men coming over." Thornton, Burks and Harwell were at Tierra's house when Angie received a telephone call from "a white man" that Burks told Thornton would be a good target for a robbery. Thornton, Burks and Harwell then saw a white man (Worley) sitting in a car in front of Tierra's and Angie's house. Tierra came outside with a telephone that Burks asked to use. Burks telephoned someone but walked away so that Thornton could not hear what he was saying, or determine to whom he was talking. As Burks returned, he said, "Just know, it's a wrap. My niggas coming." When Thornton and Harwell asked Burks what he was talking about, he said, "[f]or the white dude. Don't worry about it. It's a wrap." Thornton understood Burks to mean that he "had called someone to rob the white man." When questioned about why this statement was so different from his first statement denying any involvement in the robbery, Thornton said that "he was afraid of going to jail and he was worried about getting killed for being a snitch."

¶6 Two days later, Thornton gave a third statement to police. Thornton told police that either Burks or Harwell had the idea to rob the man in the car in front of Tierra's and Angie's house because he "must have a lot of money." In this statement, Thornton said that "they all agreed to call 'Fred' to come over to do the robbery." Thornton told police that Burks used Tierra's telephone to call "Fred" (who was Smith's younger brother) and said, "there's this white dude

sitting right here at the corner in front of Tierra's house." Burks then said "Fred and them are on their way."

¶7 Thornton and Harwell had already pled guilty to the charges; however, Burks proceeded to trial. Burks's trial occurred prior to sentencing for either Thornton or Harwell. As contemplated by the plea bargain, the State intended to call Thornton as a witness at Burks's trial. Shortly before Burks's trial, Thornton's counsel notified the prosecutor that Thornton intended to testify that, although Burks gave Harwell Fred's telephone number, it was Harwell, not Burks as Thornton had told police, who had telephoned Fred to rob the victim, shifting much of the culpability from Burks to Harwell, who had already pled guilty. Thornton's trial counsel admits that had he not forewarned the prosecutor of Thornton's intention to deviate from his statements to police, his trial testimony would have been a surprise. Trial counsel forewarned the prosecutor in the event it would affect her decision to call Thornton as a witness at Burks's trial.

¶8 At Burks's trial, the prosecutor called Thornton as a witness. Thornton testified that it was Harwell's idea to rob the victim. Thornton testified that, although Burks gave Harwell Fred's telephone number, it was Harwell, not Burks, who actually talked to Fred about robbing the victim. When questioned about the inconsistencies between his statements to police and his trial testimony, Thornton claimed that "I was trying to cover [for] Mr. Harwell."

¶9 At sentencing, the prosecutor told the trial court that, in addition to repudiating his statements to police incriminating Burks in the conspiracy, police had intercepted a letter Thornton had written to Harwell, trying to persuade him that they should attempt to deflect culpability from Burks, whose guilt, unlike their own, had not yet been determined. The trial court ruled that Thornton had

breached the plea bargain by testifying inconsistently with his previous statements to police, and that that breach was material, as Thornton

> was basically recanting the statement.
>
> The State, [the trial court] think[s], had no choice because they needed corroboration and … they believed in their opening statement – [they] indicated there would be – co-actors [that] would testify and [they] were basically sandbagged. [The trial court] think[s] this defendant, based upon the interception of the letter, gives the Court enough evidence here and based upon the statements in the Presentence Report, based upon the written reports here [to] indicate to this Court that there was almost like a plan that after the statements were given that, God, we've got to do something to get Earnest [Burks] out of this or each other out of this and we'll change our testimony.
>
> We'll recant …

The trial court determined that the State met its burden by clear and convincing evidence that Thornton breached the plea bargain, and that his breach was material, reasoning that "the State relied upon [Thornton's] statements and needed [Thornton's] statements to convict [Burks]." The trial court then relieved the State from its previously negotiated recommendation of a nine-year sentence bifurcated into four- and five-year periods of initial confinement and extended supervision.

¶10 The State then recommended "substantial" periods of initial confinement and extended supervision. The trial court imposed a thirteen-and-one-half-year sentence bifurcated into six- and seven-and-one-half-year respective periods of initial confinement and extended supervision. Thornton appeals, contending that he did not breach the plea bargain, and if he had, that breach was not material and substantial; therefore, the State should not have been relieved of its obligation to honor its negotiated recommendation.

¶11

> 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, an accused may be entitled to resentencing. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the [non-breaching party] bargained.[3] "End runs" around a plea agreement are prohibited.

State v. Matson, 2003 WI App 253, ¶17, 268 Wis. 2d 725, 674 N.W.2d 51 (citation omitted).

> ¶12 The terms of a plea agreement and the historical facts of the [party]'s conduct that allegedly constitute a breach of a plea agreement are questions of fact. We review the [trial] court's findings of fact under the clearly erroneous standard of review. However, whether the [party]'s conduct constitutes a breach of the plea agreement and whether the breach is material and substantial are questions of law. We determine questions of law independently of the [trial] court. The determination of law whether a breach occurred and whether the breach was substantial and material requires a careful examination of the facts.

Id., ¶15 (citation omitted).

¶13 The plea bargain expressly provided that in exchange for the State's sentencing recommendation, Thornton would "cooperate fully and truthfully … and … testify truthfully if subpoenaed, and must refrain from any further criminal activity." Thornton's trial testimony differed from his statements implicating Burks to police; at trial, Thornton minimized Burks's role in the conspiracy at the expense of Harwell, who had already pled guilty. Also, Thornton's trial counsel forewarned the prosecutor that Thornton intended to testify somewhat differently than the substance of his prior statements to police. Moreover, the intercepted letter that Thornton wrote to Harwell outlined Thornton's plan to shift culpability

[3] "'[M]aterial and substantial' is a single concept." ***State v. Deilke***, 2004 WI 104, ¶13 n.9, 274 Wis. 2d 595, 682 N.W.2d 945 (citations omitted).

away from Burks and explained why it was important for Thornton to "recant" his prior statements to police.[4]

¶14 The trial court's factual findings of the terms of the plea bargain, Thornton's trial testimony, his statements to police, and the substance of the letter written to Harwell are not clearly erroneous. We independently conclude that Thornton's trial testimony, shifting culpability from Burks to Harwell, was inconsistent with his prior statements to police. We need not infer that this deflection of culpability from Burks to Harwell was designed to minimize Burks's yet undetermined guilt at the expense of Harwell, who had already pled guilty; Thornton admitted as much at Burks's trial and in his albeit intercepted letter to Harwell. Additionally, Thornton's counsel forewarned the prosecutor that if called to testify, Thornton's testimony would deviate from his statements to police, affording the prosecutor the option to not call Thornton as a witness at Burks's trial.

¶15 We further conclude that Thornton's breach of the plea bargain was material and substantial, as it deprived the State of its benefit from the plea bargain, which was to strengthen its pending prosecution of Burks by reinforcing its reliance on truthful trial testimony by Thornton implicating Burks at Burks's trial, as Thornton had in his previous statements to police. Instead, it plea-bargained the charges against Thornton and Harwell to strengthen its prosecution against Burks, who instead was acquitted after Thornton minimized Burks's role at the expense of the already convicted Harwell. Consequently, we independently conclude that Thornton's breach of the plea bargain was material and substantial,

[4] "[R]ecant" was the trial court's characterization of Thornton's trial testimony.

as further substantiated by his intercepted letter, outlining his intention to "change [his] testimony" expressly designed "to get Earnest [Burks] out of this."[5]

¶16 "[A] prosecutor is relieved from the terms of a plea agreement where it is judicially determined that the defendant has materially breached the conditions of the agreement." ***State v. Rivest***, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982). Additionally, the parties' plea bargain expressly provided that remedy in the event of a material breach by Thornton.[6]

¶17 Sentencing Thornton without requiring the State to adhere to its negotiated recommendation that was more lenient in exchange for Thornton's contemplated testimony that was consistent with his prior statements that would fully implicate Burks was appropriate and expressly contemplated as the remedy for Thornton's material and substantial breach. He is not entitled to resentencing to require the State to abide by the terms of a plea bargain that he breached.

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[5] These quotations are the trial court's characterizations; they are not quotations directly from Thornton.

[6] The parties' plea bargain provided in pertinent part:

> If Mr. Thornton fails to cooperate fully in the prosecution of his co-actors, fails to testify truthfully, or if he re-involves himself in criminal activity the State will consider that a material and substantial breach of the plea agreement and will at its discretion be released from its obligation regarding any recommendations to the court at the time of sentencing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).