

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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**Appeal No. 02-3061-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-111

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN PATRICK KALISZEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 LUNDSTEN, J. Shawn Patrick Kaliszewski appeals a judgment finding him guilty as a party to the crime of five counts of burglary, with a

repeater enhancement on three counts.¹ He also appeals an order denying his motion for postconviction relief. Kaliszewski claims that he should be allowed to withdraw his no contest pleas because the prosecutor breached the plea agreement, his pleas were involuntary, and he was denied the right to effective assistance of counsel in connection with his pleas. Kaliszewski also claims that the circuit court erred by imposing ten years of extended supervision, unaccompanied by a period of initial confinement, on Count 3. We conclude that the prosecutor did not breach the plea agreement, that Kaliszewski's pleas were voluntary, and that Kaliszewski was not denied the effective assistance of counsel. The State concedes that the sentence entered on Count 3 is improper, and that concession is appropriate. Accordingly, we affirm in part, but reverse the judgment with respect to Count 3. We remand with directions that the circuit court resentence Kaliszewski on Count 3. We also direct that the circuit court address and resolve Kaliszewski's request for sentence credit.

Background

¶2 On April 6, 2001, Theresa Schwertel came home to find a strange white car parked in her garage. She called 911 and then watched from a distance as two men left her house, got in the white car, and drove off. She told police what the car looked like, its license plate number, and its direction of travel. The driver of the white car was Kaliszewski.

¹ Three of these counts of burglary are from St. Croix County. Kaliszewski was also charged with two counts of burglary in Pierce County. Pierce County consented to allow Kaliszewski to enter his pleas to the Pierce County charges in St. Croix County. At the sentencing hearing in St. Croix County, Kaliszewski pled no contest to the two additional counts of burglary from Pierce County and was found guilty of those two counts. Kaliszewski does not raise any challenges here in connection with the Pierce County counts.

¶3 Shortly thereafter, a St. Croix County deputy spotted a car matching the description given by Schwertel and a roadblock was set up in an effort to intercept the car. Kaliszewski drove around the roadblock, and a chase ensued. A deputy eventually forced Kaliszewski's car off the road. A baggie containing 5.5 grams of marijuana was recovered from Kaliszewski at the scene. Kaliszewski's accomplice was a man named Edward Loeffler.

¶4 Kaliszewski was charged with burglary with intent to steal as a party to a crime, fleeing a police officer, first-degree reckless endangerment, and possession of marijuana, all with repeater enhancement.

¶5 At the April 18, 2001, preliminary hearing, Investigator Daniel Breymeier testified that when he questioned Loeffler about the Schwertel burglary, Loeffler admitted that he and Kaliszewski had committed the burglary. Searches of the white car, a residence in Wisconsin, and two locations in Minnesota identified by Loeffler revealed property taken during five other burglaries. St. Croix County subsequently charged Kaliszewski with four additional counts of burglary as a party to a crime, with repeater enhancement.

¶6 Kaliszewski agreed to plead no contest to three of the burglary counts and agreed that two burglary counts could be dismissed and read in for sentencing purposes. The State agreed to move to dismiss the remaining charges. The prosecutor also agreed to cap his total sentence recommendation at ten years of initial confinement and ten years of extended supervision. One of the terms of the agreement was that the State would "make the best efforts" it could to help Kaliszewski serve part or all of his Wisconsin time in a Minnesota prison. Pursuant to this agreement, on April 30, 2001, Kaliszewski entered no contest pleas.

¶7 Kaliszewski was sentenced to a bifurcated sentence of forty years on the three St. Croix County counts: twenty years of initial confinement and twenty years of extended supervision, broken down as follows:

- Fifteen years on Count 1, with an initial confinement of ten years and extended supervision of five years;
- Fifteen years on Count 2, with an initial confinement of ten years and extended supervision of five years, consecutive to Count 1;
- Ten years on Count 3, with no initial confinement and extended supervision of ten years, consecutive to Counts 1 and 2.

¶8 The sentence imposed was twice the prosecutor's recommendation, and Kaliszewski filed a postconviction motion asking the court to resentence him to the shorter sentence recommended by the prosecutor or, in the alternative, to allow him to withdraw his pleas. In support of his plea withdrawal request, Kaliszewski asserted that the prosecutor did not comply with the terms of the plea agreement, that Kaliszewski's no contest pleas were induced by misleading information, and that he did not receive effective assistance of counsel. An evidentiary hearing was held on the motion. We granted an extension of time to decide the motion, but the extended deadline passed with no decision and the motion was deemed denied pursuant to WIS. STAT. RULE 809.30(2)(i) (2001-02).²

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Discussion

Whether the Prosecutor Breached the Plea Agreement

¶9 The “[t]erms of a plea agreement and the historical facts surrounding the conduct that allegedly constitutes a breach are findings of fact that we will not disturb unless they are clearly erroneous. Whether the conduct actually constitutes a breach, however, is a question of law that we review independently.” *State v. Stenseth*, 2003 WI App 198, ¶8, 266 Wis. 2d 959, 669 N.W.2d 776 (citations omitted), *review denied*, 2003 WI 140, 266 Wis. 2d 65, 671 N.W.2d 851 (Wis. Oct. 21, 2003) (No. 02-3330-CR). If a plea agreement is breached in a “material and substantial” manner, the defendant is entitled to relief. *Id.*, ¶10.

¶10 Kaliszewski correctly asserts that there is no factual dispute regarding the terms of the plea agreement. Kaliszewski and the State agree that the prosecutor did not promise that Kaliszewski *would* serve his Wisconsin sentence in Minnesota, but that the prosecutor promised to do the “best” he could to see that Kaliszewski serve part or all of his Wisconsin sentence in Minnesota. Kaliszewski does not assert that the prosecutor was obligated to make futile efforts, and Kaliszewski does not contend that the prosecutor agreed to do anything in particular. Accordingly, we discern no dispute regarding the terms of the plea agreement.³

³ We interpret Kaliszewski’s brief in this manner even though at one point Kaliszewski asserts that the prosecutor said “Minnesota we can do,” when referring to Kaliszewski’s desire to serve his Wisconsin sentence in Minnesota. Kaliszewski’s supporting record cite for this alleged statement is to his own postconviction testimony. We may not resolve the factual question whether the prosecutor used these words. See *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals is precluded from making any factual determinations where the evidence is in dispute). In any event, resolution of this factual issue is unnecessary. At this point in Kaliszewski’s brief, he is *not* saying that this was the plea agreement promise.

(continued)

¶11 We turn to the question of performance. Kaliszewski argues that the prosecutor's failure to take action, by itself, demonstrates a breach of the plea agreement. That is, Kaliszewski asserts that the prosecutor was required by his promise to take some action, and the prosecutor's failure to do so constituted a breach per se. We disagree.

¶12 In this case, the "best" effort possible may have been no action at all, if there was nothing the prosecutor could have done to make it more likely that Kaliszewski would serve his Wisconsin time in Minnesota. No one suggests, at least not in a coherent manner, that, at the time the prosecutor's promise was made, either party realized that there was nothing the prosecutor could do. To the contrary, the record reflects that Kaliszewski had pending criminal matters in Minnesota, and that both sides believed there was a possibility of Kaliszewski serving some of his Wisconsin sentence in Minnesota. Thus, in the context of this plea agreement, no effort might have been the "best" possible effort, if there was nothing the prosecutor could have done.

¶13 We turn to Kaliszewski's argument that there was something meaningful the prosecutor could have done, but that he failed to do it. The full extent of Kaliszewski's argument regarding what the prosecutor could have done is the following:

This could have been a telephone call or letter to the Department of Corrections asking the department to use the Interstate Corrections Compact, *see* Wis. Stat. §§ 302.25, 302.26.

Rather, Kaliszewski is arguing that his testimony about the prosecutor's alleged statement supports his argument that the "do the best" promise was intended to and did serve to induce Kaliszewski to enter his pleas. We assume for purposes of this decision that the prosecutor's promise to make his best efforts was part of the reason Kaliszewski decided to enter his pleas.

¶14 The State responds that it is true the prosecutor could have asked (and for that matter still could ask) the Department of Corrections to transfer Kaliszewski to Minnesota under the interstate compact. However, the State contends that the record demonstrates that such a request would be a futile act because an affidavit in the record from a person at the department asserts that such a request would not cause the department to transfer Kaliszewski. The affidavit the State refers to states: “[T]he only time the [Department of Corrections] uses the interstate Compact is for security reasons. There are presently five Wisconsin inmates in Minnesota. Every one of them is there for security reasons.”

¶15 Kaliszewski makes no attempt to refute the proposition that it would have been futile for the prosecutor to request that the interstate compact be used. Rather, Kaliszewski only repeats that the prosecutor should have made that request.

¶16 Further, the State summarizes: “It is clear from the record that the district attorney was unable to do anything positive to arrange ... transfer of custody because Minnesota decided not to charge Kaliszewski with committing any additional crimes, and, therefore, had no interest in having him returned to Minnesota.” Kaliszewski responds that a new charge in Minnesota was only one means of having Kaliszewski serve his Wisconsin time in Minnesota. The other, according to Kaliszewski, was “a 57-month stayed sentence.” Kaliszewski, however, then fails to explain what the prosecutor could have done with respect to the stayed Minnesota sentence to make it more likely that Kaliszewski would serve his Wisconsin sentence in Minnesota. It appears this stayed sentence is similar to the uncharged Minnesota crimes. Minnesota authorities might have

pursued the matter, but decided not to and, therefore, the stayed sentence provided no basis for Kaliszewski serving his Wisconsin sentence in Minnesota.⁴

¶17 Kaliszewski relies on *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975), for the proposition that, by promising to make his best efforts, the prosecutor was required to do something. However, the part of the *Geisser* decision Kaliszewski relies on did not involve a dispute over whether the government should have taken an action, regardless of the futility of such action. Unlike here, the government in *Geisser* did not argue futility, and the *Geisser* court apparently assumed that there might have been some benefit to the defendant if the government had only tried to approach a different government agency. *Id.* at 869.

¶18 Accordingly, because Kaliszewski has not shown that the prosecutor failed to do something he could have done to make it more likely that Kaliszewski would serve part or all of his Wisconsin sentence in Minnesota, he has failed to demonstrate that the prosecutor breached the plea agreement.

Voluntary and Knowing Plea

¶19 Kaliszewski argues that he is entitled to plea withdrawal because his plea was not knowingly and voluntarily entered. Kaliszewski does not contend that the circuit court failed to comply with the requirements of WIS. STAT. § 971.08 or *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986),

⁴ If anyone broke a promise to Kaliszewski, it may have been the Minnesota authorities who apparently led Kaliszewski and his attorney to believe that Kaliszewski would be charged with new Minnesota crimes and that he would be revoked and his stayed Minnesota sentence would be imposed.

and its progeny. Rather, he argues that he received misleading information from the circuit court.⁵ Under these circumstances, Kaliszewski has the burden of showing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *See State v. Lange*, 2003 WI App 2, ¶15, 259 Wis. 2d 774, 656 N.W.2d 480. “A plea which is not knowingly, voluntarily and intelligently entered is a manifest injustice.” *Id.*

¶20 Kaliszewski argues that the circuit court misled him because, although the court cautioned Kaliszewski that there were no guarantees he would be transferred to Minnesota, the court expressed the misleading opinion that the transfer could work out because Kaliszewski was from Minnesota. Kaliszewski’s discussion, however, contains no factual development of the context in which the circuit court made its remarks. In particular, Kaliszewski does not address the implications of the fact that, at the time of his plea, he had pending criminal matters in Minnesota which made it appear to all that there was a real possibility he could serve Wisconsin time concurrently with Minnesota time in a Minnesota prison. At the time of the plea hearing, there existed the possibility that Kaliszewski would be charged with and convicted of crimes in Minnesota and also that he would be revoked with respect to a prior Minnesota conviction that carried an imposed and stayed fifty-seven-month sentence.

¶21 At the plea hearing, the following exchange occurred:

⁵ Kaliszewski also complains that he received misleading information from the prosecutor, but Kaliszewski’s supporting argument only asserts: “The prosecutor stated he would make his best efforts to see that [Kaliszewski] served a portion of his sentence in Minnesota.” This adds nothing to Kaliszewski’s assertion that the prosecutor failed to comply with what the prosecutor said he would do prior to Kaliszewski’s plea.

[prosecutor]: Our agreement, in exchange for this plea, is that we will make the best efforts we can that he would serve portions of this or part of it in Minnesota. Now, that may not be possible. We're going to try to do what we can on that. But that's our negotiation at this point. And it is his request, I believe, is that he be allowed to serve this time in Minnesota, is that correct, Counsel?

[Kaliszewski's attorney]: That is correct, Your Honor.

[prosecutor]: And I've indicated that I would work towards that, but that may not happen. I can't control everything here. I want to make sure—my primary concern is that he serves ten years, first. Whether he serves it in Minnesota or Wisconsin, I don't care; but I want to make sure that he is incarcerated during that time. And I want to make sure that, if he is released in Minnesota, that he's not moved around or released early or whatever they do over there.

Immediately following these comments by the prosecutor, Kaliszewski's counsel led the circuit court to believe that there was a substantial chance that Kaliszewski could serve part of his Wisconsin sentence in Minnesota. Counsel informed the court:

My client has 57 months sitting in Minnesota to at least setting it up so that he can go back to Minnesota, get the verification on that, making that the primary jurisdiction, that's why we're not looking at sentencing today. I've been working with the parole officer from Washington County [Minnesota], and it looks like that is possible working with the Lino Lakes facility such that there would be transport back here for any hearing dates necessary. Also, working to make sure, once that the primary jurisdiction is not lost—my client does understand that, if Minnesota doesn't have the entire amount of time, he would be coming to the State of Wisconsin and would serve his time.

Shortly thereafter, the circuit court cautioned Kaliszewski that he should not depend on serving his Wisconsin time in Minnesota:

THE COURT: ...

Now, the other thing we should discuss is that, I understand the theory about you wanting to do time in Minnesota, okay? But I don't think anybody can promise you that.

[Kaliszewski]: Okay. But it is my understanding that it is worked out with Minnesota.

THE COURT: That may be. But I just have to explain to you that the best laid plans sometimes go astray.

[Kaliszewski]: Right.

THE COURT: Okay? And you heard what the district attorney's going to recommend. You heard what the district attorney's going to recommend; for example, that you would do ten years, at least, in prison, according to the recommendation. Now, it's actually 20 years prison but do a definite ten years.

[Kaliszewski]: Yes.

THE COURT: Now, I don't know how that compares to what you're going to get in Minnesota, for example. And so even if you were to do some time over there, maybe you'd end up coming back to finish time over here.

[Kaliszewski]: That's my understanding. I'd be able to, first, go and serve my time in Minnesota.

THE COURT: That's fine with this Court, too. I was hoping that you didn't have some impression that you'd just do your time over in Minnesota.

[Kaliszewski]: No, no. I understand that. My understanding is that the 57 months that I have hanging in Minnesota that, eventually, I would be released from bond here, released back to the Department of Corrections in Minnesota, get my time over there, serve my sentence over in Minnesota. Then if something has not been worked out between the State of Minnesota and Wisconsin where I would do an interstate compact to finish my time back in Minnesota, that I would then be coming back over here to Wisconsin to start serving my time. And at that time, if they're still housing—if Wisconsin is still using facilities in Minnesota to house some of their inmates, that would be looked at for me, if I ended up having to come back over

here in Wisconsin to serve the rest of my prison sentence. That is my understanding of the plea agreement, Your Honor.

THE COURT: To be sure, that may be the negotiation. In reality, I don't know what's going to happen, okay? The plan sounds fine to me, too, all right? But you shouldn't be misled and shouldn't believe that absolutely 100 percent it's going to happen that way because I've seen way too many things go wrong between these two states to guarantee it for you. So if that's part of your negotiation, then you should not be pleading today. If you think that's absolutely going to happen 100 percent, you should not be pleading today because I don't know if it's going to happen. And, believe me, I don't have any control over what the Department of Corrections does or says.

[Kaliszewski]: No, I understand.

THE COURT: And nobody in the room does either. And they don't have any control over what Minnesota does or says. And nobody over there, including the governor, doesn't have any control of what Minnesota does.

[Kaliszewski]: In regard to that, I have spoken to my attorney at length to that and we have spoken with my parole agent in Minnesota, as well as people within Washington County, people within the Department of Corrections, all of whom said, no problem, we'll take him. Just let us know and we'll see it gets worked out.

THE COURT: My best advice to you is, get it in writing, and make sure you have an original signature, okay? Do you understand what I'm saying?

[Kaliszewski]: Yes, Your Honor.

THE COURT: Given all that, are you still interested in proceeding today?

[Kaliszewski]: One moment.

THE COURT: Yeah.

(WHEREUPON, there was an interruption in the proceedings.)

THE COURT: Do you want to proceed today?

[Kaliszewski]: Yes, Your Honor.

¶22 The most reasonable interpretation of the plea hearing transcript is that the trial judge, who has just listened to Kaliszewski's counsel talk about the possibility that Kaliszewski could serve at least some of his Wisconsin sentence in Minnesota (because of the entirely reasonable assumption that Minnesota would either pursue new charges, pursue revocation, or both), was warning Kaliszewski that Kaliszewski should not enter his plea if he was counting on that happening. Far from adding to the problem alleged by Kaliszewski, the circuit court was cautioning Kaliszewski. We conclude that Kaliszewski has not shown that his pleas were not knowingly and voluntarily entered.

Ineffective Assistance Prior to Entry of the Pleas

¶23 Kaliszewski seems to argue that he is entitled to plea withdrawal based on a manifest injustice because his trial counsel performed ineffectively when advising Kaliszewski on the benefits of the plea agreement. However, we are uncertain what trial counsel allegedly did wrong. Kaliszewski states in his brief:

Defense counsel performed deficiently in advising [Kaliszewski] when defense counsel did not understand one of the conditions of the plea agreement. Defense counsel testified that he had no idea what the state was obligated to do when it said it would make the "best efforts" to see that Kaliszewski served his sentence in Minnesota.

Kaliszewski's argument is unpersuasive because he does not specify what his counsel said to him that was misleading. For example, Kaliszewski has not alleged that his counsel told him that the prosecutor's promise had any particular value. Thus, Kaliszewski has failed to demonstrate that his counsel gave him bad advice that played a role in Kaliszewski's decision to plead no contest.

¶24 Kaliszewski separately argues that his trial counsel “had a duty to research the applicable law and require specific action from the state.” But Kaliszewski does not elaborate. He does not, for example, go on to tell us what specific information his attorney’s research would have revealed that his attorney did not know.⁶

¶25 We turn our attention to prejudice. Kaliszewski asserts that he demonstrated prejudice because he gave the following testimony at the postconviction hearing:

[Defense counsel] came to me with the original plea of just the ten and ten with the reckless endangerment included. The problems I have is (1) I don’t want to plead to the reckless endangerment; and (2) I felt at that time the ten years was a long time to serve for burglary. And so what I had asked him to do was go back to the district attorney and ask for seven years and then I would take the plea. And if he could not get the seven years, then I was asking for boot camp or to be returned to Minnesota to serve my time as a stipulation that I would want in the deal before I would accept it.

Based solely on this testimony, Kaliszewski argues there was a reasonable probability that, but for his counsel’s deficient performance, he would not have pled no contest. The problem here is that Kaliszewski’s conclusory assertion is just that, a conclusory assertion. In *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), the court held that a similar conclusory assertion was not sufficient to entitle the defendant to an evidentiary hearing. *Id.* at 312, 315-16. The defendant in *Bentley* alleged he would have pled differently if only his

⁶ To the extent he may be arguing that his trial counsel was ineffective because trial counsel did not negotiate a better plea agreement, Kaliszewski has similarly failed to provide a developed argument. Our own review of the record suggests no basis for concluding that Kaliszewski could have obtained a better plea bargain.

counsel had correctly informed him about his minimum parole eligibility date. *Id.* at 315-17. Bentley did not, however, offer to explain why a twenty-three-month difference in parole eligibility dates would have affected his decision to plead guilty. The conclusory assertion did not provide a basis that would allow the court to meaningfully assess Bentley's claim that he was prejudiced by the misinformation. *Id.* at 316. The same is true here.

¶26 Prior to the plea agreement, in St. Croix County Kaliszewski was facing the possibility of five counts of burglary, one count of fleeing an officer, one count of first-degree reckless endangerment, and one count of possession of THC, all enhanced as a repeater. His potential maximum sentence was 153 years and six months. By entering his pleas, Kaliszewski limited his total exposure to seventy-five years and, more importantly, got a recommendation from the prosecutor of ten total years of initial incarceration. There is no indication that Kaliszewski had a viable defense to any of these charges or any reason to insist on going to trial. He was essentially caught in the act regarding one burglary. His accomplice and physical evidence tied him to several more burglaries. Moreover, Kaliszewski had no apparent defense against the charge of eluding a police officer, endangering safety, or possession of marijuana.

¶27 So far as this record discloses, Kaliszewski's plea agreement was simply a mutually beneficial agreement in which Kaliszewski limited his exposure to prison time with the additional hope that the trial court would adopt the sentence recommended by the prosecutor. The prosecutor had a strong case but, from the prosecutor's perspective, the agreement avoided the time, expense, and risk associated with any full-blown trial on multiple charges. Kaliszewski provides no reason why he would have rejected the plea agreement and insisted on going to trial if the agreement had not included the prosecutor's promise regarding

Minnesota. We conclude that Kaliszewski received effective assistance prior to the entry of his pleas.

Ineffective Assistance After Entry of the Pleas

¶28 Kaliszewski argues that his trial counsel provided ineffective assistance after Kaliszewski's plea hearing and before sentencing when counsel failed to discuss with Kaliszewski the option of moving to withdraw his pleas. Kaliszewski asserts that his counsel instead deficiently "moved to compel specific performance" regarding the prosecutor's promise to make his best efforts to see that Kaliszewski serve part of his Wisconsin sentence in Minnesota. Kaliszewski seems to argue that requesting plea withdrawal was an attractive alternative to seeking specific performance at this point in time because, prior to sentencing, defendants are permitted to withdraw their pleas for any "fair and just reason," a lower burden than the manifest injustice standard applied after sentencing. This is the full extent of Kaliszewski's argument.

¶29 This argument is not developed. Kaliszewski has not set forth any reason to believe that the circuit court would have granted plea withdrawal. This argument, like others, is based on layers of assumptions, most notably that, prior to the plea hearing, Kaliszewski's counsel and the prosecutor conveyed to Kaliszewski misleading information and that the Minnesota issue was of such great importance to Kaliszewski that he would have passed up the agreement (with its reduced number of charges and ten-year initial confinement recommendation) and insisted on going to trial on charges against which he had no apparent defense. We decline to address the matter further.

Improper Sentence on the Third Burglary Count

¶30 On Count 3, burglary, the circuit court imposed ten years of extended supervision with no initial term of incarceration. Kaliszewski contends this sentence was illegal because a court may not impose only extended supervision. A court must either impose a bifurcated sentence, comprised of initial confinement and extended supervision, or probation. Kaliszewski requests that this court remand for resentencing on Count 3 and a determination of sentence credit because the court did not decide Kaliszewski's motion for sentence credit. The State agrees that a remand for resentencing on Count 3 is necessary and that it would be appropriate for the court to address sentence credit on remand. We accept the State's concession.

¶31 The judgment is vacated only with respect to Count 3. The matter is remanded for resentencing on Count 3. On remand, the circuit court should also address and resolve Kaliszewski's request for sentence credit.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

No. 02-3061-CR(C)

¶32 DYKMAN, J. (*concurring*). I cannot agree with the majority that the prosecutor did not breach his agreement to make the best effort he could to help Kaliszewski serve his prison time in Minnesota. It is undisputed that the prosecutor did nothing at all. This hardly qualifies as “best efforts.” But *State v. Stenseth*, 2003 WI App 198, ¶10, 266 Wis. 2d 959, 669 N.W.2d 776, *review denied*, 2003 WI 140, 266 Wis. 2d 65, 671 N.W.2d 851 (Wis. Oct. 21, 2003) (No. 02-3330-CR), requires that a plea breach be material and substantial before a defendant is entitled to relief. While the prosecutor undoubtedly breached his agreement, it is not disputed that whatever the prosecutor might have done would have been futile. The breach, therefore, could hardly have been either material or substantial, and certainly not both.

