

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 23, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to *See* § 808.10 RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 95-0318
95-0319
95-0320**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**In the Interest of
Avery T., Jr., A Juvenile
Under the Age of 18 Years:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

AVERY T., JR.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Racine County:
NANCY E. WHEELER, Judge. *Reversed and cause remanded with directions.*

ANDERSON, P.J. Avery T., Jr. appeals from an order of the circuit court finding that Avery materially breached a plea agreement with the State when his attorney argued against an imposed and stayed order to

corrections. We reverse the juvenile court because we conclude that Avery did not breach the plea agreement.

On October 28, 1994, Avery appeared at a detention hearing on one count of operating a motor vehicle without the owner's consent, one count of obstructing an officer and one count of possession of cocaine. Because of the juvenile's prior history, the court commissioner placed Avery on secure contract custody instead of ordering him to be held in secure detention.

In a separate case, a plea hearing was conducted on November 23, 1994, for one count of obstructing an officer. At the hearing, the State, Avery and his attorney drafted and signed a juvenile plea agreement, and all cases were set for a fact-finding and dispositional hearing. The parties discussed the plea agreement as follows:

MR. GEAR: ... The agreement in this case which would deal with all the files would be that he plead to possession of cocaine, plead to the two obstructing charges in both of the files and then the OVWOC would be dismissed. In addition, *the state would also be seeking a stay to corrections.* The state has indicated six to twelve months, twelve months of supervision, the mandatory suspension of driver's license, no contact with the co-defendant, no drugs, no driving and then follow any additional recommendations of [sic] Human Services Department.

THE COURT: Is that your understanding, Mr. Miller?

MR. MILLER: Yes, it is and *I'll be arguing against any kind of correctional order at this time.* [Emphasis added.]

The juvenile court accepted Avery's admissions to one count of possession of cocaine, and two counts of obstructing an officer, and dismissed one count of operating a motor vehicle without the owner's consent. At disposition, the State argued for a one-year order to corrections, to be imposed and stayed, and one year of supervision. Avery's attorney argued for the one-year supervisory order and against any imposed and stayed order to corrections. The State objected to the argument claiming it was a breach of the plea agreement. Without conducting an evidentiary hearing, the court found that a breach had occurred, withdrew Avery's guilty pleas and reinstated all charges, setting the cases for another pretrial.

At the pretrial, the court commissioner set the question of whether a breach of the plea agreement had occurred for a motion hearing before the juvenile court and found good cause for continuance beyond statutory time limits. At the motion hearing, the court reaffirmed its earlier ruling and set the reinstated charges for trial. Avery's attorney then moved this court for leave to file an appeal. We granted Avery's request to review the trial court's order.

The Supreme Court of Wisconsin has recently distinguished two different standards of review for analyzing a breach of a plea agreement. *State v. Wills*, ___ Wis.2d ___, 533 N.W.2d 165 (1995). The court held that if the breach is a result of a dispute over facts, then the court must apply a clearly erroneous standard to the trial court's finding. *Id.* The court cited *State v. Jorgensen*, 137 Wis.2d 163, 404 N.W.2d 66 (Ct. App. 1987), as an example of the

appellate court correctly applying the clearly erroneous standard to determine whether the circuit court abused its discretion. In *Jorgensen*, we were faced with the question of what a plea agreement contemplated when one of its terms required the prosecutor to remain “silent” at sentencing; in finding that there had not been a material breach of the plea agreement, we wrote that the issue presented was a question of fact.

However, when the facts of a case are undisputed, the question of whether the prosecution or defense materially violated the spirit of the plea agreement is reviewed under a de novo standard. *Wills*, ___ Wis.2d at ___, 533 N.W.2d at 166 (citing *State v. Ferguson*, 166 Wis.2d 317, 320-21, 479 N.W.2d 241, 243 (Ct. App. 1991)). Because there is no dispute over the meaning of the terms in the signed plea agreement and there is no dispute over what Avery's attorney was arguing for at disposition, we will review the decision of the juvenile court de novo.

As in most cases involving an assertion that there has been a material breach of a plea agreement, there was a request that the complaining party be relieved of the terms of the agreement and the juvenile's admissions be withdrawn. The procedure in these cases requires the complaining party to do more than simply contend that there has been a material and significant breach of the agreement. The complaining party is obliged to establish the material and substantial breach of the plea agreement by clear and convincing evidence. See *Jorgensen*, 137 Wis.2d at 168, 404 N.W.2d at 68. The procedure does not

change just because the State is the complaining party. *See State v. Rivest*, 106 Wis.2d 406, 411, 316 N.W.2d 395, 398 (1982). In order for the State to meet its burden, it is required to present clear and convincing evidence at a hearing that there was a breach of the agreement and that the breach was sufficiently material to warrant releasing the party from its obligations under the agreement. *See State v. Bangert*, 131 Wis.2d 246, 289, 389 N.W.2d 12, 32 (1986).

An evidentiary hearing was never held and we could remand this case to the juvenile court for such a hearing where the State would have the burden to prove a breach and to prove that the breach was a material deviation from the terms of the plea agreement. However, the parties do not controvert any of the facts in this case and we are comfortable applying the law to the undisputed facts in the record.

The undisputed facts establish that Avery's counsel was not foreclosed from arguing against the State's proposal for an imposed and stayed order to corrections. At the November 23, 1994, plea hearing, the attorney for the State recited the elements of the plea agreement including that "the state would also be seeking a stay to corrections." The State's relation of the agreement parallels the written Juvenile Plea Agreement where the State committed itself to a stayed corrections disposition recommendation and there is no reference to Avery being bound to this term. Avery's counsel acknowledged that the terms of the agreement were understood and that he would "be arguing against any kind of correctional order at this time." The

State did not object to Avery's postscript to the terms and, coupled with its earlier statement and the written plea agreement that the State would seek a correctional order, establishes the uncontroverted fact that Avery had not promised not to argue against an imposed and stayed correctional order. Therefore, we conclude that Avery did not breach the plea agreement when his counsel argued against the State's recommendation for an imposed and stayed order to corrections.

Avery argues that if we conclude that he did not breach the plea agreement, he is entitled to a reversal of the juvenile court nonfinal order vacating the plea agreement and setting the cases for a contested fact-finding hearing. He asserts that because the juvenile court erred in finding "good cause" for suspending the time limits of ch. 48, STATS., we must remand these cases to the juvenile court with directions that the cases be dismissed. We disagree with Avery's conclusion that the facts and circumstances of these cases do not support a finding of "good cause." We are satisfied that the State's contention that Avery breached the plea agreement is a "hearing on other matters" and the time consumed by such hearings is excluded from computing the time periods under ch. 48. Section 48.315(1)(a), STATS. Further, because we conclude that the State's assertion that the plea agreement was breached by Avery was not made to delay proceedings and unduly prejudice Avery, the juvenile court's conclusion that there was good cause for a continuance under § 48.315(2) was not clearly erroneous.

In conclusion, we reverse the nonfinal order of the juvenile court that Avery breached the plea agreement. We remand these cases to the juvenile court with directions to conduct another dispositional hearing where both the State and Avery will be bound by the terms of the original plea agreement, including the opportunity for Avery to argue in opposition to an imposed and stayed corrections order.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.