COURT OF APPEALS
DECISION
DATED AND RELEASED

November 07, 1995

NOTICE

No. 95-1526-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS C. GROHMANN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed and cause remanded with directions.*

SULLIVAN, J. Thomas C. Grohmann appeals from a judgment of conviction, on a no contest plea, for misdemeanor battery, contrary to § 940.19, STATS. He also appeals from an order denying his motion for postconviction relief. He presents one issue for this court's review—whether the State's recommendation at sentencing of "straight time" breached the State's promise as part its plea agreement with him to take no position opposing work release, thereby violating his due process rights. The trial court concluded that the State's recommendation was a "technical breach" of the plea agreement, and therefore did not mandate Grohmann's resentencing before a different judge.

This court disagrees because the State's recommendation violated the terms of the plea agreement. Accordingly, this court must reverse the order and judgment of conviction and remand the matter to the trial court for resentencing before a different judge.[1]

In November 1993, Grohmann was charged with one count of misdemeanor battery of his girlfriend. After plea negotiations with the State, he entered a no contest plea to the battery charge. At sentencing, the following exchange took place:

> THE COURT: I will hear from everyone who wishes to make a statement. Mr. [Prosecutor], is the State taking any position as to whether this time should be straight time or time with Huber privileges?
>
> [PROSECUTOR]: Judge, I think incarceration is appropriate.
>
> THE COURT: With or without Huber privileges?
>
> [PROSECUTOR]: I can't recall whether that was an aspect of our plea negotiations. My position is that the time should be straight time, and I don't recall an agreement that we'd commit to recommending other than that.
>
> [GROHMANN'S COUNSEL]: I beg to differ with that, Judge. At least my understanding was, there would be a potential for Huber.
>
> THE COURT: Was that put on the record?
>
> [PROSECUTOR]: I'm not sure. The negotiations were put on the record.
>
> THE COURT: I'm sure the negotiations were put on the record, I always ask for it. Was that what I was told?

[1] This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

[PROSECUTOR]: I cannot recall.

[COUNSEL]: I can't recall. On misdemeanor cases, Judge, in speaking with the district attorneys, I can honestly say if it wasn't verbally stated, I thought that was our understanding. As far as going into court, Judge, and knowing it was straight time, I would have objected to it for a misdemeanor. I am naturally assuming Huber would be a consideration.

[PROSECUTOR]: I will not take a position one way or the other. I will not affirmatively recommend Huber privileges, but I will stand silent on the issue and rely on the court's judgment in the matter.

The trial court then sentenced Grohmann to the maximum penalty of nine months incarceration. He received Huber privileges to attend Batterer's Anonymous meetings, doctor's appointments, and child visitations.

After the judgment was entered, Grohmann filed a motion for postconviction relief, seeking, *inter alia*, resentencing based on the State's alleged breach of its plea agreement with Grohmann. Further, he sought work release privileges. He argued that pursuant to the plea agreement, the State was to remain silent on the issue of work release, and that the State's original request for incarceration, that is, "straight time," violated this agreement. The trial court held evidentiary hearings where Grohmann's appellate counsel questioned the prosecutor about the plea negotiations:

Q.Now, could you state the substance of what [trial counsel] proposed to you as a potential plea agreement?

A.It's my recollection-- I have not reviewed the files. It is my recollection that there were two charges for two separate incidents that had been joined for trial, and he proposed that the State dismiss one of those incidents, one of those

charges, in exchange for a plea to the other. I don't recall whether it would be a dismissal and read-in or an outright dismissal of the charge that was to be dismissed. It was essentially dismissing one charge in exchange for a plea to the other.

Q.Did [trial counsel] propose anything as far as sentencing was concerned?

A.We discussed sentencing. I told him I would recommend nine months, which was the maximum for the particular charge that Mr. Grohmann was pleading guilty to. I cannot tell you the verbatim discussions that occurred, but I made it clear to him that was the arrangement I would be recommending, nine months in the House of Correction.

Q.Were there any discussion [sic] of whether Huber privileges would be requested by the State or whether [trial counsel] wished the State to recommend Huber privileges?

A.There was some discussion of Huber. [Trial counsel] intended to recommend Huber to the court. I did not think in this case Huber was appropriate; however, the agreement we reached was that I would not oppose Huber, nor would I affirmatively recommend Huber as being appropriate to the court. Essentially, I would recommend the nine months in the House of Correction and not take a position either way with respect to Huber.

Grohmann's trial counsel testified that it was his understanding and recollection of the plea negotiations that the State would recommend nine months incarceration with Huber privileges or work release.[2] Before reaching

[2] Both parties during the hearings interchangeably use Huber privileges and work release to

its decision on Grohmann's motion, the trial court made the following findings of fact. First, the trial court found that the record of the agreement between Grohmann and the State was silent on "whether there was going to be an affirmative position [taken by the State] with respect to straight time or Huber." Second, from the testimony taken at the postconviction hearing, the trial court found that there was nothing that led the trial court "to believe that there was an affirmative representation that the State would recommend either Huber, or that the State would be recommending straight time [and that it was] just an issue that did not arise." Third, the trial court found that once the prosecutor "was informed of what the negotiations were, he withdrew his request for straight time and decided to stand silent with respect to the issue."

The trial court then concluded that the real question raised was whether the "very short period" from when the prosecutor "`request[ed] nine months straight time,' to the time that he withdrew that request" was a breach. The trial court determined that it could not be "characterized as anything other than a technical breach." Accordingly, the trial court denied Grohmann's motion requesting resentencing before another judge.

In determining whether the State violated the terms of a plea agreement, this court's standard of review will depend on the circumstances of each case. *See* ***State v. Wills,*** 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). Accordingly:

> If there are disputed questions of fact on appeal, that is, if the question of whether the prosecutor violated the terms of the plea agreement turns on a question of fact, then the court must give deference to the factual findings of the circuit court unless clearly erroneous. If there are no disputed questions of fact on appeal, ... the question is one of law to be reviewed *de novo* without deference to the lower court.

Id.

(..continued)
mean work release.

The facts are uncontroverted. The trial court found that the agreement was silent on whether the State would affirmatively recommend Huber privileges, but the court also found that the agreement did provide that the State would remain silent on the issue of Grohmann's request for Huber privileges. This is consistent with the prosecutor's testimony at the postconviction hearing, where he stated that "the agreement we reached was that I would not oppose Huber, nor would I affirmatively recommend Huber as being appropriate to the court. Essentially, I would recommend the nine months in the House of Correction and not take a position either way with respect to Huber." Further, as the record from sentencing shows and as the trial court found, the prosecutor briefly recommended "straight time," but then switched and said that he would remain silent on work release. It is also uncontroverted that Grohmann agreed to plead no contest at least in part on his belief he would receive work release privileges. These findings of fact are not clearly erroneous. ***Id***.

Our question then becomes whether the "technical breach," as found and characterized by the trial court, and Grohmann's subsequent sentencing, was a violation of his due process rights. *See* ***Santobello v. New York,*** 404 U.S. 257, 262 (1971) (When "a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such a promise must be fulfilled."). This is a question of law this court must review *de novo*.

"`[W]hen a defendant pleads guilty to a crime pursuant to a plea agreement and the prosecutor fails to perform his [or her] part of the bargain, the defendant is entitled to relief.'" ***State v. Poole,*** 131 Wis.2d 359, 361, 394 N.W.2d 909, 910 (Ct. App. 1986) (citation omitted).[3] Did the prosecutor's brief recommendation for "straight time" and then his recantation of this recommendation violate Grohmann's due process rights? This court is forced to conclude that it did. The "technical breach" is still a material breach of the agreement which calls into question the constitutional fairness of Grohmann's plea and sentence. *See* ***State v. Wills,*** 187 Wis.2d 528, 537, 523 N.W.2d 569, 572 (Ct. App. 1994) ("[O]nce the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be

[3] For purposes of this appeal, it is irrelevant that Grohmann pleaded no contest rather than guilty.

fulfilled." (citation omitted)), *aff'd by equally divided court*, 193 Wis.2d 273, 533 N.W.2d 165 (1995).

It is clear from the record that the prosecutor did not intend to breach the State's plea agreement with Grohmann, and that once he was made aware of the actual agreement, he attempted to mitigate his previous recommendation. Unfortunately, it is not possible to put the *djinni* back into the bottle once it is released. Thus, whether the trial court could have disregarded the State's original recommendation for "straight time," and instead focused on the State's feigned silence, is irrelevant. ***Poole,*** 131 Wis.2d at 364, 394 N.W.2d at 911. The State breached the agreement and Grohmann is entitled to relief. The appropriate relief for this violation of Grohmann's due process rights is resentencing. *See* ***id.*** at 365, 394 N.W.2d at 911; ***Santobello,*** 404 U.S. at 263.

Accordingly, this court reverses the order and the judgment and remands the matter to the trial court for resentencing before a different judge in a manner consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded with directions.

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