

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and 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.

**No. 95-1620-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JEFFREY H. ANDRUS,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Judgment affirmed; order reversed and cause remanded.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Jeffrey Andrus appeals from a judgment convicting him on two felony counts and one misdemeanor count, and from an order denying postconviction relief. Pursuant to a plea bargain, Andrus pled no contest to the charges and was sentenced to prison. He challenged the sentence on a postconviction motion by alleging that the prosecutor breached the plea agreement by remarks she made at the sentencing hearing. Because

counsel waived the issue by not objecting to those remarks, *see State v. Smith*, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989), Andrus also alleged ineffective assistance of counsel. The trial court concluded that the prosecutor did not breach the agreement and therefore did not address counsel's alleged ineffectiveness. Because we conclude that the prosecutor did breach the agreement, we reverse the postconviction order and remand for a decision on the ineffectiveness issue.

The State charged Andrus with five felony counts of first-degree sexual assault of a child and two misdemeanor counts of exposing his sex organ to a minor. Pursuant to a plea bargain, Andrus pled no contest on two of the sexual assault counts and one exposure count. In exchange, the State dropped the remaining charges and agreed to recommend no more than five years' total imprisonment, concurrent to a sentence on other crimes.

At sentencing, the prosecutor's remarks included extensive comments about Andrus's bad character, the damage done to the victim (his daughter) and to his wife, his substance abuse problems, his lack of demonstrated remorse or concern for the victim, and his criminal and anti-social acts in the past, some proved and some only alleged. The prosecutor read at length some letters Andrus sent to his wife after his arrest expressing violent and threatening feelings about her and his daughter. After noting that the sexual assault counts carried twenty year maximum terms and that the only crime ranked as more serious is murder, the prosecutor stated:

So I think it's clear that these offenses call for the harsh penalties that they do, because of the impact that this had [on Andrus's family]. In terms of protecting the public from Mr. Andrus and Mr. Andrus hurting anyone anymore, I think there's a definite need for that and, in particular, there's a definite need for protection specifically of [Andrus's family]. There's a fear on their part that if and when Mr. Andrus is released that he will seek them out and cause them harm ....

The prosecutor concluded her remarks by stating:

I think that based on comments made in [Andrus's letters], that there's definitely a need for protection of the public and, more specifically, protection of this family from this defendant. Based on all of this, the State is bound by the recommendation it made in this matter.

Counsel for Andrus did not object to any of the prosecutor's remarks.

The court sentenced Andrus to a five-year prison term on one felony charge and a six-month consecutive prison term on the misdemeanor, both consecutive to a sentence on other crimes. The court withheld sentence and ordered five years' probation on the remaining felony count. This appeal ensued after the trial court denied the motion for resentencing.

If a plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). *Santobello* proscribes not only explicit repudiations of plea agreements, but also "end-runs around them." *State v. Ferguson*, 166 Wis.2d 317, 322, 479 N.W.2d 241, 243 (Ct. App. 1991). The State must not convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended. *Id.* Comments which imply reservations about the recommendation taint the process and also breach the agreement. *State v. Poole*, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986). Where, as here, the facts are undisputed, whether the State violated the plea agreement is a question of law we review without deference to the trial court. See *State v. Wills*, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995).

The prosecutor's remarks at sentencing violated the plea agreement. We recognize that a plea bargain cannot prevent the prosecutor from noting pertinent, detrimental factors relating to the defendant's character and conduct, *Ferguson*, 166 Wis.2d at 324, 479 N.W.2d at 244, but the prosecutor must make a good faith effort to avoid casting doubt on the recommended sentence. *State v. Wills*, 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (Ct. App. 1994), *aff'd*, 193 Wis.2d 273, 533 N.W.2d 165 (1995). Here, the prosecutor only offered two statements to explain the recommended sentence. She stated that

she was "bound" by the plea agreement and that she thought it an appropriate sentence "at the time" of the plea agreement. Both statements strongly imply that by the time of sentencing the prosecutor believed otherwise. Additionally, her other comments undeniably re-enforced that implication, especially her discussion of the maximum sentences and the seriousness of the offenses, followed soon after by her argument that "there is a definite need for" a harsh penalty because of the violent threat Andrus posed to his family. Having agreed to the bargain, the prosecutor was obligated to use her best efforts to support it. *Id.* That she did not do.

Our conclusion that the State breached the plea agreement does not resolve the case. As noted, Andrus waived that breach when counsel failed to object at sentencing. We therefore remand to the trial court for a determination on Andrus's claim of ineffective assistance of counsel. If counsel is deemed ineffective, Andrus is entitled to resentencing by a different judge. *Santobello*, 404 U.S. at 263; *Poole*, 131 Wis.2d at 365, 394 N.W.2d at 911-12.

*By the Court.*—Judgment affirmed; order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.