OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 28, 2020

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Br. 35
901 N. 9th St., Rm. 632
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jorge R. Fragoso
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4116

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Abigail Potts
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2019AP11-CR State of Wisconsin v. Timothy A. Harmon (L.C. # 2014CF310)

Before Brash, P.J., Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy A. Harmon appeals from a judgment, entered upon his no-contest plea, convicting him on one count of second-degree reckless injury. Harmon also appeals from an order denying his postconviction motion for resentencing. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] The judgment and order are summarily affirmed.

On October 18, 2013, Milwaukee Police responded to a shooting outside a residence. They located the victim, R.A., who was transported to the hospital and treated for a "through and through" gunshot wound to his left forearm and gunshot wounds to his lower back and stomach. When R.A. was interviewed after surgery, he reported that Harmon, his brother-in-law, pointed a semi-automatic handgun at his face and shot him as he ran away. Harmon gave a statement in which he admitted he met with R.A. on that date but stated that it was R.A. who had the gun.

Based on R.A.'s allegations, Harmon was charged with one count of possession of a firearm by a felon and one count of first-degree reckless injury with use of a dangerous weapon. His extended supervision in another case was revoked, and he was ordered to serve the five remaining years of his sentence in prison. Harmon eventually agreed to resolve this case through a plea agreement. In exchange for a no-contest plea, the State would reduce the reckless injury charge to second-degree, move to dismiss the possession offense, and recommend a prison sentence of an unspecified length to run concurrent with his revocation sentence.

At the sentencing hearing, the State explained that R.A. was not present, but had authorized the State to share his feelings with the circuit court. When the court inquired whether R.A. agreed with the charge amendment, the State answered that R.A. "did express surprise at the maximum sentence for this charge. He feels that the maximum sentence should be more for the crime that occurred." The court then asked the State why R.A. had not appeared at the plea

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

hearing. The State answered that it had reviewed the plea negotiations with R.A. and that they had discussed "the length of the sentence and the concurrent aspects of it[.]" The State also commented that R.A. "is entitled to his own opinion, and … my take on it was he was objecting to the concurrent matters, but I explained it to him and … I think he understood it." The court then asked to "spend a few moments with counsel in chambers."

When back in the courtroom, the circuit court explained that it was "a little concerned about how much of a discussion occurred between the victim and the State and what the victim's understanding was as these negotiations unfolded." The court further made a record that R.A. "was invited to participate in this sentencing hearing and to make a statement to the court but declined to do so. I did want to satisfy myself that that was not out of frustration or disgust or something else."

The State then continued its sentencing comments, describing its conversation with R.A. "and the statements the he authorized me to relay to the court." Specifically, the State told the circuit court that R.A.:

> did express shock at what he considered to be a light maximum sentence under this charge for which the Defendant was convicted. And that would be the 12-and-a-half year … maximum sentence….
>
> He was also upset because this occurred in front of his three-year-old daughter, and she, to this day, still gets upset when he is out of the room….
>
> He is himself in daily pain because of his gunshot wounds that he is still healing from. This pain and … the medical treatment that he had to undergo interrupted his school pursuits …. He also requests restitution for his numerous medical bills ….
>
> ….

> The victim also mentioned that he has trouble sleeping because of what happened in this incident. He wants to seek the maximum sentence penalty under this charge, and he also disagreed with the State's recommendation … that this sentence be concurrent. He wants the sentence to be consecutive with any sentence that is currently being served by the Defendant.
>
> The victim expressed concern about what will happen when the Defendant gets out of prison.

Harmon did not object to any of these statements.

The circuit court also asked the State to explain "the thinking behind the reduction" in the charges. The State responded that R.A. "would have been basically the only fact witness and identifying witness, and there's a risk in this day and age that the jury requires more than just one person, the victim, pointing a finger at another." It noted that R.A. "had been on again off again cooperative," though he was most recently cooperative, and the State "just did not know if his testimony would carry the day in terms of you never know in front of the jury." The State also noted that it had taken Harmon's revocation sentence into account.

Defense counsel began her sentencing comments, and the circuit court interjected to ask its clerk to call R.A. on the telephone so the court could ask him some questions. R.A. then appeared by phone. The court's questions initially focused on R.A.'s opinions regarding the charge reduction and whether the sentence should be concurrent or consecutive. The court explained a hypothetical concurrent sentence and asked R.A. how he felt about the State's negotiation of the case. R.A. said that he agreed with the decision to reduce the charge instead of going to trial. The court then gave a hypothetical example of a four-and-a-half year consecutive sentence and asked R.A. what he thought a fair sentence would be. R.A. responded, "[S]omething like that with consecutive would be fair." The court then asked R.A. to state in his own words why he thought a consecutive sentence would be fairer than a concurrent one; after

R.A. answered, the court followed up by saying, "Okay. So just so I understand what you're saying. You think that a concurrent sentence actually gives him time off and that it's too short?" R.A. answered affirmatively. Neither party had follow-up questions for R.A., so defense counsel finished her sentencing remarks, followed by Harmon's allocution.

The circuit court then announced its sentencing decision, considering appropriate factors and objectives. It concluded by stating, in relevant part:

> I've considered the record that was made today. You know, the State made an agreement. The victim objects to the concurrent part, which I understand completely when you look at all the facts of this case, and I think the benefit here was in a greatly reduced charge. I don't think it should go any further than that. That's more than enough all things considered.
>
> The court's going to impose … seven-and-a-half [years of initial confinement] and five [years of extended supervision], but I'm going to make that a consecutive, not concurrent. I disagree with concurrent very strongly in this case.

Harmon subsequently filed a postconviction motion seeking resentencing on two grounds: first, that the State had breached the plea agreement by advocating for R.A.'s position on sentencing, and second, that the circuit court had considered inaccurate information during sentencing, specifically, R.A.'s "false assertion" that his young daughter was by his side during the incident. Following briefing, the circuit court denied the motion. Harmon appeals.

"[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. "A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement." ***Id.***, ¶38. However, "[n]ot all conduct that deviates from the precise terms of a plea agreement constitutes a breach that warrants a remedy." ***State v. Bokenyi***, 2014 WI 61, ¶40, 355 Wis. 2d 28, 848 N.W.2d 759 (citing ***State v. Deilke***, 2004 WI

104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945) (brackets in ***Bokenyi***). In order to vacate the plea agreement, any breach thereof "must be material and substantial." ***Bokenyi***, 355 Wis. 2d 28, ¶40 (citations omitted). "A breach is material and substantial when it 'defeats the benefit for which the accused bargained.'" ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220 (citing ***Williams***, 249 Wis. 2d 492, ¶38).

The State "need not enthusiastically recommend a plea agreement" but also "may not render less than a neutral recitation of the terms of the plea agreement." ***Williams***, 249 Wis. 2d 492, ¶42 (citation omitted). "'End runs' around a plea agreement are prohibited"; the State may not accomplish indirectly what it promised not to do directly. *See* ***id.*** (citations omitted). But the State also may not agree to withhold relevant information from the sentencing court. *See* ***Bokenyi***, 355 Wis. 2d 28, ¶44. "Commentary on and consideration of the victim's recommendations by counsel and the court may be warranted." ***Id.***, ¶58. "The law does not preclude acknowledgment or commentary regarding the victim's wishes," nor does it prohibit the State from relaying the victim's thoughts to the court. *See* ***id.***, ¶63. The State must, however, refrain from insinuating that it is distancing itself from its recommendation. *See* ***Naydihor***, 270 Wis. 2d 585, ¶28.

"Whether the State breached the plea agreement is a mixed question of fact and law." ***Id.***, ¶11. The terms of the agreement and historical facts surrounding the alleged breach are questions of fact, which we review under the clearly erroneous standard. *See* ***id.*** "Whether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law" that we review *de novo*. *See* ***id.***. Here, the parties do not dispute the terms of the plea agreement, so our discussion centers on whether the State's conduct constitutes an actionable breach. *See* ***State v. Sprang***, 2004 WI App 121, ¶15, 274 Wis. 2d 784, 683 N.W.2d 522.

In denying Harmon's postconviction motion, the circuit court explained:

> [T]he State did not breach the plea agreement—the prosecutor recommended the exact sentence the defendant bargained for—"a plea to [the amended] charge[,] prison, the amount is up to the discretion of the Court, and that that sentence be concurrent to any other sentence the defendant is now serving." The court rejects the argument that the State breached the plea agreement when it conveyed the victim's disagreement with the sentencing recommendation. The victim had a right to provide a statement concerning sentencing. The court perceives nothing in the prosecution's statements about its conversation with the victim which suggested that it was adopting the victim's position as to sentencing or that the defendant deserved a harsher sentence than what it was recommending. Furthermore, the victim appeared by telephone later in the proceedings and personally communicated his wishes to the court, and by doing so, he corroborated what the State had represented during its sentencing argument. The court finds nothing improper about the State's conduct and perceives no breach of the plea agreement. Consequently, the court denies the motion for resentencing on this basis.

On review, "[w]e must examine the entire sentencing proceeding to evaluate the [State's] remarks." ***Williams***, 249 Wis. 2d 492, ¶46. Our inquiry focuses on the "practical effect of the prosecutor's statements[.]" *See* ***Sprang***, 274 Wis. 2d 784, ¶24. When we review the entire sentencing proceeding in this case, it is clear that the only effect of the State's comments was to inform the circuit court of R.A.'s position on the plea and sentencing, not to distance the State from its own recommendation. Indeed, we observe that much of the focus on R.A.'s sentencing opinion was driven by the court itself, not the State, and we perceive the State to have been responding so as to fulfill its obligation of candor to the court and its questions. We therefore

agree with the circuit court that the State did not breach the plea agreement, so resentencing was not warranted on that ground.[2]

Harmon also claimed that he had been sentenced based on inaccurate information; specifically, he disputes a contention made by both R.A. and the State that R.A.'s three-year-old daughter was outside the residence and present for the shooting. Harmon contends that this assertion is "inaccurate according to the witness statements of three individuals, all of whom were aligned with the victim or neutral bystanders."

"[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy at sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [circuit] court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citing ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

Here, the circuit court first stated that it did not believe Harmon had met his burden to show any inaccurate information—"competing statements in the police reports submitted with

[2] Harmon had relatedly alleged that trial counsel was ineffective for failing to object to the State's comments, because a failure to make a contemporaneous objection to an alleged breach of the plea agreement forfeits the issue. *See* ***State v. Sprang***, 2004 WI App 121, ¶12, 274 Wis. 2d 784, 683 N.W.2d 522. A failure to object to a material and substantial breach of the plea agreement automatically prejudices the defense, *see* ***id.***, ¶25, but because there was no breach of the plea agreement, trial counsel was not deficient for failing to object, *see* ***id.***, ¶13.

the … motion do not prove by clear and convicting evidence" that the daughter was not there, and the court "still could have found the victim's version of the events to be more credible."[3] However, the court also assumed for motion purposes that the information had been inaccurate; it nevertheless concluded that resentencing was unwarranted, explaining that "the exact position of the child during the shooting was not particularly significant to the court's sentencing decision, and the court did not materially rely upon this factor during its rendition of sentence." Accordingly, we agree that there is no basis for resentencing on this ground.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] We note that while two of three witnesses stated the child had come inside just before the shooting, the third witness had observed Harmon and R.A. just before the shooting and merely "did not report seeing a child was present."