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DISTRICT II

March 30, 2022

To:

Hon. Paul Bugenhagen, Jr.
Circuit Court Judge
Electronic Notice

Hon. Michael P. Maxwell
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Sarah Barwise Joseph
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John W. Kellis
Electronic Notice

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

2021AP408-CR	State of Wisconsin v. Michael S. Booth (L.C. #2017CF927)
2021AP409-CR	State of Wisconsin v. Michael S. Booth (L.C. #2017CF1283)
2021AP410-CR	State of Wisconsin v. Michael S. Booth (L.C. #2017CF1284)
2021AP411-CR	State of Wisconsin v. Michael S. Booth (L.C. #2017CF1285)

Before Gundrum, P.J., Neubauer and Kornblum, 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).

In these consolidated cases, Michael S. Booth appeals from judgments of conviction for identity theft and from an order denying his postconviction motions. He contends the circuit court erred in denying his postconviction motions seeking an "evidentiary hearing and an order vacating his sentences and granting him a resentencing hearing" on the basis that the State breached the terms of the plea agreement. 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(2019-20).[1] Because we conclude there was no breach, we affirm.

Whether the State violated the terms of a plea agreement is a question of law we review de novo. ***State v. Jackson***, 2004 WI App 132, ¶9, 274 Wis. 2d 692, 685 N.W.2d 839. To gain relief, a defendant bears the burden of showing by clear and convincing evidence that a breach occurred and that it is material and substantial. ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945.

Booth pled no contest to four counts of identity theft (intentional misappropriation of a document of an individual); numerous other charges were dismissed and read in. The following relevant exchanges took place at the plea hearing:

> [PROSECUTOR]: …Your Honor, … the State would be requesting a PSI [presentence investigation] and making a prison recommendation with the length *to be determined after reviewing the PSI*.
>
> ….
>
> THE COURT: … So the State's offer on this matter then is a plea to the first count in each one of these four files and the State's recommendation is going to be what?
>
> [PROSECUTOR]: Prison. In terms of *the amount*, the State indicated *we reserve the right to determine the amount upon review of a presentence investigation* which we are also recommending.
>
> THE COURT: *Is that your understanding, Mr. Kay*?

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

> MR. KAY: *Yes*. I put that on each of our plea questionnaires and an attachment I called page three of three. My client … understand[s] that the State will be requesting a PSI and depending on whatever that rec[ommendation] is, we are free to argue for prison or no prison or a withheld sentence. We understand that is what the State is recommending, *basically* follow the PSI recommendation.

(Emphasis added.)

The PSI ultimately recommended that the court sentence Booth to consecutive terms of "one to two years Initial Confinement and two years Extended Supervision" on each count, which terms would also be consecutive to a sentence in a separate case out of Milwaukee County. At the sentencing hearing, the prosecutor stated, "I do believe that a prison sentence on these Waukesha cases consecutive is the only appropriate sentence in this case," adding, "I think that the presentence recommendation here is appropriate. I think that two years on each felony of initial confinement consecutive to the Milwaukee case is appropriate. I think that the extend[ed] supervision that [the PSI] recommend[s] is also appropriate."

Based upon the exchanges at the plea hearing, Booth contends the State "agreed to recommend a prison sentence with the *same length* as the recommendation contained in the PSI." (Emphasis added.) He is mistaken. The State clearly stated it would determine the amount of prison it would recommend "after reviewing the PSI." While Booth argues that the State somehow implicitly agreed to his apparent understanding that the State would "*basically* follow the PSI recommendation," the State never moved off of its twice-stated indication that it would make its determination as to what amount of prison it would recommend after it had an opportunity to review the PSI. (Emphasis added.) As it turned out, though not bound to make a prison recommendation consistent with or even close to that recommended in the PSI, the State's specific recommendation at the sentencing hearing of "two years on each felony of initial

confinement consecutive to the Milwaukee case" and "the extended supervision that [the PSI] recommend[s]" in fact was "basically" what the PSI recommended.

Booth also contends that the State breached the plea agreement because it presented its sentencing arguments in such a way that it undercut its own recommendation and was signaling to the court that it should sentence Booth more harshly than even the two years of initial confinement that it did recommend. On this, Booth points to sentencing comments by the prosecutor that

> [t]he State did make the pretrial offer in this case[.] [O]riginally charged[,] this defendant faced over 60 years of exposure on these offenses. Frankly, I don't think that does justice to the amount of victimization that the citizens as well as the banks and credit card companies in these cases have endured because these people now forever have to worry about where that information was leaked and who has it … and whether their identities are going to be protected going forward.

Shortly thereafter, the State made its specific recommendation of two years' initial confinement on each felony consecutive to Booth's Milwaukee County sentence.

As we have stated: "[T]he State should be held only to those promises it actually made to the defendant" and "will not be bound to those it did not make." ***State v. Bowers***, 2005 WI App 72, ¶16, 280 Wis. 2d 534, 696 N.W.2d 255 (citation omitted). At the plea hearing, the State never "actually made" a promise to Booth to be bound to any particular recommendation made in the PSI. It only made a promise that it would determine what its prison recommendation would be "after reviewing the PSI." Thus, absent any specific promise made by the State to Booth as to the length of prison it would recommend, even if the State's "I don't think [sixty years] does justice to the amount of victimization" comment was an attempt to encourage the

court to sentence Booth to more than the two years of initial confinement the State explicitly recommended, there still would be no breach of the plea agreement.

IT IS ORDERED that the judgments and order of the circuit court 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