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**DISTRICT IV**

November 10, 2022

To:

Hon. Paul S. Curran  
Circuit Court Judge  
Electronic Notice

John Blimling  
Electronic Notice

Lori Lowe  
Clerk of Circuit Court  
Juneau County Justice Center  
Electronic Notice

Kathleen A. Lindgren  
Electronic Notice

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

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2021AP1502-CR

State of Wisconsin v. Richard A. Girouard (L.C. # 2018CF192)

Before Blanchard, P.J., Graham, and Nashold, 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).**

Richard Girouard appeals a judgment of conviction for two counts of child sexual assault. He argues that the State breached the parties' plea agreement. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).<sup>1</sup> We affirm.

During Girouard's plea hearing, the prosecutor summarized the plea agreement and stated that, as part of the agreement, the presentence investigation report (PSI) would not include a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

sentencing recommendation. The prosecutor explained: “The parties are in agreement that as far as the PSI goes, we’re just asking that [the department of corrections] just do the factual PSI. It does not need to have a recommendation for sentence.”<sup>2</sup> The circuit court ordered a PSI with no sentencing recommendation, consistent with the parties’ plea agreement.

A PSI was completed by the department of corrections. The section of the PSI titled “Sentencing Recommendation” provided as follows: “Regarding this case, a sentencing recommendation was not ordered. Therefore, the Department of Corrections will not be providing a sentencing recommendation at this time.” Another section of the PSI titled “Other Statement(s)” contained a quoted statement from an individual identified as Girouard’s former employer, who concluded his statement by saying that he “would recommend the maximum sentence available.”

Girouard moved to strike the PSI and requested sentencing before a different judge. The circuit court denied the motion. The court concluded that the inclusion of Girouard’s former employer’s statement in the PSI was not a sentencing recommendation.

On appeal, Girouard contends that the inclusion of his former employer’s statement in the PSI was a material and substantial breach of the parties’ plea agreement that entitles him to resentencing before a different judge. We disagree that there was a breach of the plea agreement.

“[W]hether the State’s conduct constitutes a breach of the plea agreement and whether the breach is material and substantial are questions of law.” *State v. Howland*, 2003 WI App

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<sup>2</sup> Girouard’s plea questionnaire and waiver of rights form similarly specified that the parties had agreed to a “PSI w/ no recommendation.”

104, ¶24, 264 Wis. 2d 279, 663 N.W.2d 340. “We determine questions of law independently of the circuit court.” *Id.*

Girouard argues that under the unambiguous terms of the parties’ plea agreement the PSI was not to include any sentencing recommendation, and that “the use of a PSI with a ‘maximum sentence’ recommendation from an individual interviewed by the PSI writer” over his objection was a material and substantial breach of the agreement. Girouard relies on case law that provides that the State may not make “[e]nd runs” around a plea agreement through the use of a proxy or by other indirect means. See *State v. Matson*, 2003 WI App 253, ¶¶17, 25, 268 Wis. 2d 725, 674 N.W.2d 51; *Howland*, 264 Wis. 2d 279, ¶26. Under this case law, “the State’s conduct need not be based on bad motive or intent to violate a plea agreement.” *Howland*, 264 Wis. 2d 279, ¶31.

We are not persuaded by Girouard’s arguments, and we disagree with Girouard that there was an “end run” around the plea agreement here. We conclude instead that there was no material and substantial breach of the plea agreement, whether direct or indirect.

The parties’ plea agreement, reasonably interpreted, contemplated that the PSI author would not make a sentencing recommendation. The inclusion of Girouard’s former employer’s statement in which the former employer “recommend[ed] the maximum sentence” was not a sentencing recommendation within the meaning of the parties’ agreement. Nothing in the PSI indicated that the PSI author was adopting or otherwise advocating for Girouard’s former employer’s opinion that Girouard should receive the maximum sentence. The PSI expressly stated that “the Department of Corrections will not be providing a sentencing recommendation at this time.”

We agree with the circuit court that the inclusion of Girouard’s former employer’s statement in the PSI is not reasonably viewed as a sentencing recommendation. Rather, as the circuit court aptly stated, it was “a report about what one person who was interviewed as part of the PSI investigation said.” Further, the former employer was not a State agent, and Girouard gives us no reason to think that the former employer was influenced by any State agent to give the quoted personal opinion about what the sentence should be. The circumstances here are readily distinguishable from those in which we have concluded that the State breached a plea agreement because an agent of the State made a statement or engaged in conduct that was inconsistent with the agreement. See *Matson*, 268 Wis. 2d 725, ¶¶3, 13, 22-23, 25 (concluding that the State breached the plea agreement when its chief investigating officer sent a letter to the court recommending a sentence that exceeded the sentencing recommendation to which the State had agreed); *Howland*, 264 Wis. 2d 279, ¶¶2, 29, 32, 37, 39 (concluding that the State breached the plea agreement when prosecutors engaged in improper contacts with department of corrections employees about the PSI sentencing recommendation after the State had agreed to not make a recommendation).

Therefore,

IT IS ORDERED that the circuit court’s judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*