STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

I. THE COURT SHOULD OVERRULE *SPRANG*.

A. This is an appropriate case in which to determine *Sprang's* validity.

In its petition for review, the State argued that the reason this court should grant review

was to determine whether the court of appeals' decision in *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, was correctly decided. In his response brief on the merits, Bokenyi asks the court not to decide that issue. He says that "this case is the wrong vehicle for considering the state's challenge to *Sprang*" because *Sprang*'s holding "does not apply here, where counsel had no strategic reason for not objecting." Bokenyi's brief at 28 (capitalization omitted).

Bokenyi accuses the State of "spin[ning] a silly scenario" where defense counsel "does not recognize the prosecutor's breach but is still required to consult with the defendant about objecting to a breach the attorney doesn't recognize." *Id.* at 30. He says that the answer to the question the State posed in its brief – "when counsel does not object because he or she does not believe there is any legal basis for an objection, what is there to consult about with the defendant?" – is "[n]othing." *Id.* "*Sprang* does not require counsel to consult with the client when counsel does not recognize the breach," he writes *Id*. Rather, *Sprang*'s holding "is triggered only when counsel recognized the breach but had valid strategic reasons for not objecting. That is not this case." *Id.*

That argument flatly contradicts the argument Bokenyi make in the court of appeals. In his court of appeals brief, Bokenyi acknowledged that his trial counsel testified at the *Machner*[1] hearing that he did not object to the prosecutor's remarks because he did not think he

[1]*State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

had any legal basis to object and that that was the reason that counsel did not discuss the matter with Bokenyi. *See* Bokenyi's court of appeals brief at 20. That failure to consult, Bokenyi argued, violated *Sprang*: "If this court concludes that the prosecutor's comments did constitute a breach of the plea agreement, it should also conclude that counsel was deficient for failing to object or, at a minimum, for failing to consult with Mr. Bokenyi about whether he wanted to object. *See Sprang*, 274 Wis. 2d 784, ¶27." *Id.* The court of appeals agreed with Bokenyi that *Sprang* does apply in this case. *See State v. William F. Bokenyi*, no. 2012AP2257-CR, unpublished slip op. ¶32 (Ct. App. June 18, 2013); Pet-Ap. 114-15 (citation omitted).

After successfully arguing in the court of appeals that his lawyer performed deficiently under *Sprang*, Bokenyi should not be heard to argue that this court should not consider *Sprang*'s continuing vitality because *Sprang*'s holding does not apply here. *See Paul Davis Restoration of S.E. Wisconsin, Inc. v. Paul Davis Restoration of Northeastern Wisconsin, Inc.*, 2013 WI 49, ¶43, 347 Wis. 2d 614, 831 N.W.2d 413 (judicial estoppel precludes a party from maintaining a position in litigation contrary to an earlier position taken by that party if the latter position is clearly inconsistent with the earlier position, the facts relevant to the party's position are the same at both points in litigation, and the party to be judicially estopped convinced the first court to adopt its position).

More importantly, Bokenyi's argument rests on an artificial distinction between an attorney's decision not to object because the attorney has determined that the prosecutor's

argument did not "cross the line" and a decision to forego an objection after determining that a valid objection could be made. Both of those decisions are based on the attorney's exercise of professional judgment. Whether an attorney reasonably exercised his or her professional judgment – not whether a particular decision may be labeled "strategic" – is the crux of the determination whether counsel performed deficiently. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984).

B. *Sprang* was wrongly decided.

In his defense of *Sprang*, Bokenyi offers a lukewarm endorsement of the court of appeals' contract-based rationale. He acknowledges that a plea agreement may not be modified without a defendant's knowledge and consent. *See* Bokenyi's brief at 34. However, he also argues that when the State's sentencing argument undercuts the agreed recommendation, "the original agreement has 'morphed into one' in which the state is arguing for a sentence other than what the plea agreement demanded." *Id.* (quoting *Sprang*, 274 Wis. 2d 784, ¶27). Bokenyi does not explain the difference between the modification of a plea agreement, which he acknowledges did not occur here, and the "morphing" of an agreement, which he says did occur.

Bokenyi's primary defense of *Sprang* rests on his contention that "*Sprang*'s duty of consultation is consistent with well-established constitutional principles governing guilty pleas and the enforcement of plea agreements." *Id.* at 30. He contends that because a defendant must

personally decide whether to enter into a plea agreement and because a defendant has a due process right to have a plea bargain fulfilled, "the defendant must decide whether to give up his or her right to hold the state to the terms of the agreement by objecting and demanding specific performance" when the prosecutor has breached the agreement. *See* Bokenyi's brief at 31-32.

Bokenyi does not cite, and the State's research has not disclosed, any case from any other jurisdiction that imposes a duty on defense counsel to consult with the defendant about forgoing an objection to the prosecution's sentencing argument.

The closest analogy the State has found involves defense counsel's duty to consult with the defendant about forgoing an appeal. Although there is no federal constitutional right to an appeal in criminal cases, *see Abney v. U. S.*, 431 U.S. 651, 656 (1977), state law may provide the right to appeal a criminal conviction. California, like Wisconsin, constitutionally guarantees that right. *See People v. Rosalez*, 20 Cal. Rptr. 80, 81 (Cal. Ct. App. 1962); *State v. Perry*, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987).

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a California defendant argued that he received ineffective assistance of counsel based on counsel's failure to file a notice of appeal without his consent. *See id*. at 473. The first question the Court addressed was whether the constitution imposes a *per se* duty upon defense counsel to consult with the defendant about a possible appeal. *See id*. at 478-79. The answer, the Court held, is "no," even though a California statute imposes that duty.

> Because the decision to appeal rests with the defendant, we agree with Justice SOUTER that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d ed. 1993). In fact, California imposes on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal. See Cal. Penal Code Ann. § 1240.1(a) (West Supp. 2000). Nonetheless, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are only guides," and imposing "specific guidelines" on counsel is "not appropriate." *Strickland,* 466 U.S., at 688. And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. See *ibid.* We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense. See *id.,* at 689 (rejecting mechanistic rules governing what counsel must do).

Id. at 479 (citation omitted).

The usual rule governing ineffective assistance claims – "that counsel make objectively reasonable choices," *id.* – suffices to protect at defendant's constitutional rights in a plea agreement case. "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts."

McMann v. Richardson, 397 U.S. 759, 770 (1970). The court should reject *Sprang*'s creation of a new, additional duty to consult with the defendant about whether to object to the State's sentencing argument.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S SENTENCING ARGUMENT.

Because Bokenyi's trial counsel did not object to the State's sentencing argument, Bokenyi is not necessarily entitled to a new sentencing hearing even if the court determines that the prosecutor's sentencing argument breached the plea agreement. If the court determines that the State did breach the plea agreement, it then must determine whether Bokenyi's counsel provided ineffective assistance. *See State v. Howard*, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244.

Bokenyi attempts to minimize the significance of the ineffective assistance analysis that governs his claim. He appears to argue that if a reviewing court determines that the State's sentencing argument breached the plea agreement, it necessarily should conclude that the lawyer who determined that the remarks did not breach the agreement performed deficiently. "Reasonably prudent counsel," he argues, "should be capable of identifying when the prosecutor's comments undercut the recommendation that the state promised to make. . . ." Bokenyi's brief at 26.

Bokenyi emphasizes the fact that the law is well-established that the State breaches the plea agreement when its sentencing remarks undermine the bargained-for sentencing recommendation by insinuating that the defendant deserves a harsher sentence. *See* Bokenyi's brief at 20-21. He points out, correctly, that counsel is expected to know and apply governing law. *See id.* at 21 (citing *State v. Thiel*, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305). Thus, he argues, "[i]t is not too much to ask that defense counsel listen carefully to the prosecutor's argument to determine if it undercuts the bargained for recommendation and to make an objection if it does, unless the client chooses to proceed with the sentencing." *Id.* at 24. And, he further argues, that is not a difficult task because "counsel's performance only becomes an issue if the defendant establishes that the state's argument constitutes a material and substantial breach of the plea agreement." *Id.* at 25.

But while the law is well-settled, applying the law in a particular case is not always cut-and-dried. As this court has noted, the "fine line" that the State must walk when balancing its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement "is fine indeed." *State v. Williams*, 2002 WI 1, ¶44, 249 Wis. 2d 492, 637 N.W.2d 733.

One of the asserted breaches in this case demonstrates especially well how close those assessments can be. Bokenyi argues that the prosecutor breached the plea agreement when he described a jail incident report in which Bokenyi said that he was looking forward to getting out of jail "so he could 'shoot up some cops'" as "most frightening" (60:14; Pet-Ap. 128). It was not the

information that the prosecutor conveyed that constituted the breach, Bokenyi says, but the prosecutor's characterization of that information as "most frightening." *See* Bokenyi's brief at 15.

Yet the courts have held in some cases that the prosecutor's harsh and disparaging language about the defendant did not breach the plea agreement. In its opening brief, the State noted that in *State v. Ferguson*, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991), a case in which the prosecutor agreed to recommend probation with an imposed and stayed sentence, the court of appeals held that there was no plea breach even though the prosecutor characterized the offenses as "the most perverted of all perverted sex acts" and stated, "this is the sickest case that I have seen or read about. If I refer to this defendant as 'sleaze,' I think that would be giving him a compliment." *Ferguson*, 166 Wis. 2d at 319-20, 325.[2]

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[2]Bokenyi attempts to distinguish his case from *Ferguson* because the plea agreement there called for the State to recommend "imposed and stayed 20-year sentences – the maximum – for each conviction," while the prosecutor here "was bound to recommend far less than the maximum. . . ." Bokenyi's brief at 17. The flaw in that argument is that because the plea agreement in *Ferguson* required that the State ask that the maximum sentences be imposed and stayed, with a year of jail time as a condition of probation, *see Ferguson*, 166 Wis. 2d at 319, the effective disposition that the State agreed to recommend in *Ferguson* – probation – was far less than the four years of confinement and four years of extended supervision the State agreed to recommend here (25:13; 61:3). *See Ferguson*, 166 Wis. 2d at 325 ("The prosecutor in this case faced the unenviable task of convincing the sentencing court that Ferguson's actions were such that he deserved the maximum allowable sentence, but should only be required to actually serve one year of county jail time.").

More recently, in *State v. Wood*, 2013 WI App 88, 349 Wis. 2d 397, 406, 835 N.W.2d 257, a case in which the State agreed to recommend probation, the prosecutor twice remarked at sentencing that there were "a number of alarming things" that he learned about the defendant when he read the presentence investigation report. *Id.*, ¶4. He also told the sentencing court that he had concerns about other information in the PSI. *Id.* The court of appeals held that "[w]hile the prosecutor in this case did express 'alarm[]' and 'concern[]' regarding information he 'learned' in reading the PSI," those remarks, taken in the context of the entire sentencing argument, did not convey a covert argument that the court should sentence the defendant to a more severe sentence than what the State agreed to recommend. *See id.*, ¶¶11-13.

In contrast, this court held in *Williams* that the State breached the plea agreement when it discussed negative information in the PSI. That was so, the court held, because "[t]he State adopted the information acquired from the presentence investigation report after the plea agreement had been reached as its own opinion of the defendant," which "created the impression that the prosecutor was arguing against the negotiated terms of the plea agreement." *Williams*, 249 Wis. 2d 492, ¶48.

The purpose of these examples is not to argue that the prosecutor's remarks in this case were on the *Ferguson/Wood* side of the line rather than on the *Williams* side. Rather, it is to demonstrate that factually similar cases may yield differing conclusions about whether the State breached the plea agreement. For that reason, defense counsel's determination whether

a prosecutor's argument has crossed the line between permissible and impermissible argument involves an exercise of professional judgment to which a reviewing court must be "'highly deferential.'" *State v. Balliette*, 2011 WI 79, ¶78, 336 Wis. 2d 358, 805 N.W.2d 334 (quoting *Strickland,* 466 U.S. at 689).

Contrary to Bokenyi's suggestion, *see* Bokenyi's brief at 23, the State does not contend that a lawyer's failure to recognize "egregious" breaches falls within the reasonable exercise of professional judgment. If the breach was truly egregious, it would be difficult to argue that a lawyer's failure to recognize it fell within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

The State does not dispute that a reasonable argument may be made that the State's sentencing remarks in this case crossed the fine line at which a sentencing argument "covertly convey[s] to the trial court that a more severe sentence is warranted than that recommended." *Williams*, 249 Wis. 2d 492, ¶42. But the State does disagree with Bokenyi's argument (and the court of appeals' conclusion[3]) that the State's breaches were so egregious that any reasonable lawyer would have objected – that the failure to object "amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (quoting *Strickland,* 466 U.S. at 690).

In this regard, it is significant that the circuit court concluded that none of the challenged remarks breached the plea agreement

[3]*Bokenyi*, slip op. at ¶31; Pet-Ap. 114.

and that it would not have sustained an objection had one been made (65:46-54; Pet-Ap. 132-40). The State recognizes that whether the sentencing argument breached the plea agreement is a question of law that is reviewed de novo. *Williams,* 249 Wis. 2d 492, ¶20. But, to reiterate, whether Bokenyi is entitled to a new sentencing hearing depends not on whether the prosecutor's remarks breached the plea agreement but whether defense counsel was ineffective for failing to object to those remarks. The fact that the experienced trial court judge[4] who presided at both the sentencing and postconviction hearings concluded that none of the remarks at issue breached the plea agreement is a compelling indication that Bokenyi's lawyer's determination that the remarks were not objectionable was not outside the bounds of how a competent lawyer would act.

"It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Harrington*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 689). Bokenyi bears the burden of demonstrating that his lawyer's failure to object constituted deficient performance. *See Strickland*, 466 U.S. at 687-88. To do that, he must overcome the strong presumption that defense counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. He has not carried that burden.

[4]Judge GaleWyrick was first elected in 2002. *See State of Wisconsin Blue Book* 895 (2003-04).

CONCLUSION

For the reasons stated above and in the State's opening brief, the court should reverse the decision of the court of appeals.

Dated this 10th day of February, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,946 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February, 2014.

_____
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