STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP002557 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Polk County Circuit Court, the Honorable Molly E. GaleWyrick, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The Prosecutor Breached the Plea Agreement by Suggesting That a Harsher Sentence than the Bargained for Recommendation Was Appropriate, and Trial Counsel Was Ineffective by Failing to Object.

A. The state concedes that under controlling case law Mr. Bokenyi has established ineffective assistance of counsel if the court determines that the prosecutor's comments breached the plea agreement.

Much of the state's first five-and-a-half pages of argument contain assertions that both William Bokenyi and this court can disregard. In those pages, the state asserts that ***State v. Sprang***, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, and its progeny were wrongly decided. *See also* ***State v. Liukonen***, 2004 WI App 157, ¶¶20-22, 276 Wis. 2d 64, 686 N.W.2d 689; ***State v. Miller***, 2005 WI App 114, ¶8, 283 Wis. 2d 465, 701 N.W.2d 47. But the state also acknowledges, as it must, that this court is bound by those decisions. (State's brief, p. 5). ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The state concedes that "[u]nder *Sprang*, if this court determines that the prosecutor's sentencing argument breached the plea agreement, Bokenyi's lawyer performed deficiently." (State's brief, p. 5). This is so because the record is clear that trial counsel did not consult with Mr. Bokenyi about whether he wanted to object to the prosecutor's breach of the plea agreement. (*Id*. at 5-6). Further, the state does not dispute that prejudice is presumed when the defendant establishes deficient performance related

to a breach of the plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 281-82, 558 N.W.2d 379 (1997). Consequently, the state concedes that Bokenyi has established his claim of ineffective assistance of counsel if this court concludes that the prosecutor's sentencing argument constitutes a breach of the plea agreement.

Before moving on to what the parties agree is the "dispositive issue" of whether there was a breach, a few words are required to address the state's claim that Mr. Bokenyi did not develop an argument that counsel's failure to object to the prosecutor's comments constituted deficient performance. Rather, the state concedes only that the failure to consult with Bokenyi was deficient under controlling case law.

Although the question whether a prosecutor's comments constitute an end run around the bargained for recommendation typically involves a "fine line," ***Liukonen***, 276 Wis. 2d 64, ¶10, Mr. Bokenyi is entitled to relief only if he has established a material and substantial breach of the plea agreement. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. Thus, if he convinces this court that the prosecutor's comments constitute a material and substantial breach of the plea agreement, trial counsel performed deficiently by failing to object because the record is clear that counsel had no strategic reason for not objecting.

Trial counsel testified at the postconviction hearing that he did not object because he did not think there was a breach and, therefore, did not think there was a legal basis to object. (65:15). If Bokenyi has established a material and substantial breach, trial counsel was wrong and he performed deficiently by failing to object. After all, a long line of case law makes clear that the prosecutor may not make comments

that undercut the bargained for recommendation or insinuate that a more severe sentence is warranted. *See*, *e.g.*, ***Williams***, 249 Wis. 2d 492, ¶51; ***Liukonen***, 276 Wis. 2d 64, ¶15; ***Sprang***, 274 Wis. 2d 784, ¶24. Counsel is expected to know the relevant law. *See* ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305.

If this court agrees that the prosecutor's comments constitute a breach of the plea agreement, it should also conclude that counsel's failure to object was deficient because counsel had no strategic reason for failing to object to the material and substantial breach. However, the court may resolve the ineffective claim pursuant to the state's concession that under controlling case law counsel's failure to consult with Bokenyi about his right to object was, in itself, deficient and, therefore, ineffective assistance has been established.

B. Three times the prosecutor made comments suggesting that the four-year term of confinement that he was bound to recommend was insufficient, comments that amount to a material and substantial breach of the plea agreement.

The state begins its defense of the prosecutor's comments by describing the offense, the ensuing charges and the terms of the plea agreement. None of that is objectionable. But then the state goes on to summarize the prosecutor's thought process and intentions heading into sentencing and at sentencing, quoting from the prosecutor's comments at the postconviction hearing. (State's brief, pp. 9-10). The prosecutor's thoughts or intentions were not relevant at the postconviction hearing, as defense counsel pointed out (65:45), and they are not relevant here. It simply

doesn't matter whether the prosecutor had no intention or design to breach the agreement. It doesn't matter if the prosecutor believes his comments supported the bargained for recommendation. "That the prosecutor did not intend to breach the agreement or that a breach was inadvertent 'does not lessen its impact.'" ***Williams***, 249 Wis. 2d 492, ¶52, *quoting* ***Santobello v. New York***, 404 U.S. 257, 262.

In its brief, the state says it provides that information "not to excuse an unintended breach" but to somehow show that the prosecutor's comments actually supported the bargained for recommendation of four years' confinement. (State's brief, p. 10). The state's reliance on the prosecutor's after-the-fact explanation is misplaced. This court's determination of whether the prosecutor's comments breached the plea agreement must be based upon what the prosecutor said at sentencing in the context of the entire sentencing proceeding. ***Williams***, 249 Wis. 2d 492, ¶46. What the prosecutor said at sentencing is memorialized in the sentencing transcript, and the interpretation of the written transcript of the prosecutor's comments is a question of law determined independently by this court. ***Id***. at ¶35. What the sentencing transcript shows is that not once, not twice but three times the prosecutor made comments suggesting that a confinement term of more than four years was necessary to address the seriousness of the offense and to protect the public. The state's attempt to excuse those comments is unconvincing.

1. The maximum penalties don't do justice to the seriousness of the crimes.

The state merely adopts the circuit court's reasoning in its defense of the prosecutor's argument that the penalties do not do justice to the seriousness of the offenses. Its defense

suffers from the same flaws as the circuit court's, as argued in Mr. Bokenyi's brief-in-chief. (Brief, pp. 11-12). First, the state ignores the fact that the prosecutor recited the maximum penalties for each of the three crimes immediately before referring to "the felony classifications" and stating, "I don't think they really do them justice in terms of how serious this was." (60:8). Second, the state ignores that the felony classifications are a system for specifying the maximum penalties. Both in the prosecutor's comments and as a matter of law, the felony classifications are the maximum penalties for Bokenyi's crimes. A statement that the felony classifications do not do justice to the offenses is the same as a statement that the maximum penalties do not do justice to the offenses.

The notion that the penalty classification is somehow different than the penalty, particularly where the prosecutor had just recited the maximum penalties, is without merit and should be rejected. Certainly, if the maximum penalties – totaling 26 years – did not do justice to the seriousness of the offenses, the bargained for recommendation of eight years (four years' confinement followed by four years' extended supervision) was wholly inadequate. Here, as in ***Liukonen***, the prosecutor breached by agreement by "implicitly arguing that the court should impose a sentence exceeding the recommended sentence." ***Liukonen***, 276 Wis. 2d 64, ¶13.

2. The victims should be able to live without fear of Bokenyi getting out of custody until his 11-year-old son is grown and out of school.

Equally unconvincing is the state's attempt to dismiss the prosecutor's endorsement of the victim's sentencing request as a "passing reference". (State's brief, p. 16). The

prosecutor had already read Sherri Bokenyi's letter at the start of the sentencing hearing, fully protecting the victim's right to have input at sentencing. The breach occurred when the prosecutor in his sentencing argument endorsed and adopted as his own Sherri's request that she and her son be allowed to live without fear of Bokenyi getting out of prison and harming them while the child is still growing up and in school.

The prosecutor did not merely make a passing reference to Sherri's request. After discussing Bokenyi's mental health history (60:11-13), the prosecutor noted the dual and competing needs, "there's the need to protect the public or the public's interest in rehabilitation of the defendant …." (*Id*. at 13). The prosecutor argued that protection of the public trumped rehabilitation. " … I think this overwhelmingly comes down to the protection of the public interest. The protection of the public, being Sherry [sic] Bokenyi and their son." (*Id*.). In the next two sentences, the prosecutor expressly endorsed Sherri's sentencing request.

> They have a right, as she says in her letter, to live fearlessly while their son is growing up and in school. She has a right to live not in fear that Mr. Bokenyi, when he gets out, is going to come looking for her and to finish what he's attempted at least one other time before.

(*Id*.).

The only reasonable interpretation of the prosecutor's argument is that, in order to protect Sherri and their son, Mr. Bokenyi should be locked up at least until their son is an adult. The prosecutor had already reminded the court that the boy was 11. (*Id*. at 9). A confinement term of at least seven years was needed to provide the protection the victim *and* prosecutor believed was necessary.

Contrary to the state's claim, the prosecutor's comments here are more troublesome than in ***Williams***. There, the prosecutor breached the agreement by appearing to adopt as her own view unfavorable information about the defendant's character that was taken from the presentence report and the defendant's ex-wife. ***Williams***, 249 Wis. 2d 492, ¶¶26 & 45. Here, the prosecutor appeared to adopt as his own not information about the defendant's character but the victim's actual sentencing request. And the prosecutor did so even though the victim's request called for more time in custody than the prosecutor was bound to recommend under the plea agreement.

3. "[M]ost frightening" is Mr. Bokenyi's threat to shoot up some cops when he's released.

The state likens the prosecutor's editorializing about the jail incident to the strong language used by the prosecutor in ***State v. Ferguson***, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991). But the language at issue in ***Ferguson*** is unlike the comment here for two reasons.

First, the prosecutor's admittedly strong language in ***Ferguson*** pertained to the offenses for which the defendant was being sentenced, specifically, two counts of first-degree sexual assault of a child. ***Id***. at 319-20. Here, the prosecutor also used rather strong language when describing Bokenyi's offenses (60:6-7), which Bokenyi conceded was fair game. (Brief-in-chief, p. 10). At issue here are the prosecutor's comments not about the offenses but about statements Bokenyi made to a jailer months after the offenses were committed. As Bokenyi acknowledged, the state was free to bring those statements to the court's attention, but it had to do so in a way that honored the plea agreement.

Williams, 249 Wis. 2d 492, ¶44; ***State v. Duckett***, 2010 WI App 44, ¶9, 324 Wis. 2d 244, 781 N.W.2d 522. The prosecutor did not honor the agreement but, rather, undercut it, by labeling Bokenyi's statements "most frightening" and offering no explanation why, in light of the threats that he found so frightening, the prosecutor nevertheless believed the recommendation was appropriate.

Second, in ***Ferguson***, the court of appeals concluded that the prosecutor's strong language supported the state's recommendation of imposed and stayed 20-year sentences, the maximum, for each conviction. ***Ferguson***, 166 Wis. 2d at 324. Here, the prosecutor was bound to recommend far less than the maximum, eight years' imprisonment versus a total maximum of 26 years. The prosecutor's description of the jail incident suggested that far more than four years' confinement was appropriate.

The prosecutor characterized as "the most frightening for me" Bokenyi's threat to shoot up some cops when he's released, along with anyone else who gets in his way. By signaling that he viewed Bokenyi's statements as a serious threat, the prosecutor was casting doubt on the four-year confinement term he was obligated to recommend given the PSI's recommendation. This is particularly so because that comment came on the heels of two other arguments suggesting that a longer confinement term was needed.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Bokenyi respectfully requests that the court reverse the judgment of conviction and order denying postconviction relief, and remand for resentencing before a different judge.

Dated this 25th day of March, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,171 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 25th day of March, 2013.

Signed:

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