STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP1248-CR
Case No. 2014AP1249-CR
Case No. 2014AP1250-CR
Case No. 2014AP1251-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES CITED

ADDITIONAL AUTHORITY

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP1248-CR
Case No. 2014AP1249-CR
Case No. 2014AP1250-CR
Case No. 2014AP1251-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Patrick Tourville, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

As he did in his postconviction motion, Tourville argues on appeal that the State breached the plea agreement when it recommended at the sentencing hearing that the court impose consecutive sentences and that his counsel was ineffective for failing to object to the alleged breach. He also argues that there was an inadequate factual basis for his guilty plea to the theft charge in case no. 2012CF27. Because the circuit court correctly rejected those claims, this court should affirm the judgments of conviction and the order denying postconviction relief.

I. TOURVILLE'S COUNSEL WAS NOT INEFFECTIVE BECAUSE THE STATE DID NOT BREACH THE PLEA AGREEMENT.

Tourville argues that the State breached the plea agreement because "the State agreed to cap its sentence recommendation at the 'high end' of what the PSI recommended," the PSI "did not recommend consecutive sentences," "[b]ut at sentencing, the State added a recommend[ation] that the sentences be served consecutively."

Tourville's brief at 9. "This went above the 'high end' of what the PSI recommended," he contends, "and was a breach of the plea agreement." *Id*. Tourville claims that his lawyer was ineffective for failing to object to that alleged breach. *Id*.

Tourville's claim depends on a factual assertion: that "the State agreed to cap its sentence recommendation at the 'high end' of what the PSI recommended." *Id*. As the circuit court noted in its order denying Tourville's postconviction motion, the State argued below that there was no such agreement on sentencing and, in the alternative, that even if there were such an agreement, the State's recommendation did not violate it (2014AP1248-CR:83:2; A-Ap. B2). The circuit court did not decide whether there was such an agreement (2014AP1248-CR:83:2-4; A-Ap. B2-B4), ruling instead that "presuming the State was bound by the high end of the PSI," the State's sentencing recommendation did not violate the agreement (2014AP1248-CR:83:3; A-Ap. B3).

The State agrees with the circuit court that, assuming the parties agreed that the State's sentencing recommendation would be capped at the high end of the PSI's recommendation, the prosecutor's consecutive sentence recommendation did not violate that agreement. However, should this court disagree with that conclusion, the State requests that this case be remanded to allow the circuit court to make a factual finding with respect to the terms of the plea agreement. A remand would be necessary to resolve that issue because the terms of a plea agreement are a question of fact, *see State v. Bokenyi*, 2014 WI 61, ¶37, 355 Wis. 2d 28, 848 N.W.2d 759, and an appellate court is precluded from making findings of fact where the facts are in dispute, *see Wurtz v.*

Fleischman, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).[1]

For the reasons discussed below, the prosecutor's sentencing recommendation did not constitute a material and substantial breach of the alleged plea agreement. As a result, the court need not address Tourville's argument that his trial counsel was ineffective, *see Bokenyi*, 355 Wis. 2d 28, ¶5, or should conclude that Tourville's counsel was not ineffective for failing to make a meritless objection, *see State v. Naydihor*, 2004 WI 43, ¶31, 270 Wis. 2d 585, 678 N.W.2d 220.

A. Applicable legal standards.

An 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. When an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights require fulfillment of the bargain. *Id*.

An actionable breach must not be merely a technical breach; it must be a material and substantial breach. *Id*., ¶38. A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for which the accused bargained. *Id*. When the breach is material and substantial, a plea agreement may

[1]Tourville bears the burden of establishing the terms of the plea agreement. *See State v. Wesley*, 2009 WI App 118, ¶16, 321 Wis. 2d 151, 772 N.W.2d 232. He agrees that "[t]he court did not make findings as to whether the terms of the plea agreement included a cap on the State's recommendation. . . ." Tourville's brief at 11 n.5.

be vacated or an accused may be entitled to resentencing. *Id.*

The terms of a plea agreement and the historical facts of the State's conduct that allegedly constitute a breach of a plea agreement are questions of fact. *See Bokenyi*, 355 Wis. 2d 28, ¶37. An appellate court reviews the circuit court's findings of fact under the clearly erroneous standard of review. *Id.* Whether the State's conduct constitutes a material and substantial breach of a plea agreement is a question of law that an appellate court reviews de novo. *Id.*, ¶38.

B. The prosecutor did not breach the plea agreement when he asked the court to impose consecutive sentences.

Tourville argues that because the plea agreement required the State to cap its sentencing recommendation at the high end of the sentence recommended by the PSI, and because the PSI did not recommend that the sentences run consecutively, the plea agreement limited the State to a concurrent sentencing recommendation. The circuit court rejected that argument. It held that the PSI was silent on the issue of concurrent or consecutive sentences and that Tourville had provided no authority to support his argument that if a PSI is silent, it is presumed to be a recommendation for concurrent sentences (2014AP1248-CR:83:3; A-Ap. B3). Rather, the court held, under *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, because "the parties[] plea negotiation did not consider the issue of concurrent or consecutive sentences," the prosecutor did not violate the plea agreement

when he recommended consecutive sentences (2014AP1248-CR:83:3-4; A-Ap. B3-B4).

The State agrees that *Bowers* is the reported decision that provides the best guidance in this case. In *Bowers*, the defendant pled guilty to one count and the other counts were dismissed. *Bowers*, 280 Wis. 2d 534, ¶2. The plea agreement described the sentence that the State would recommend, but "there was no mention either in court or on the plea questionnaire as to whether the recommended sentence would run concurrent or consecutive to any other sentence." *Id.*

At the sentencing hearing, the State recommended that the sentence run consecutive to a sentence that Bowers had begun serving in another case. *Id.*, ¶3. Bowers argued "that because the plea agreement was silent on the question of whether his sentence should run concurrently or consecutively, the State breached the plea agreement by recommending a consecutive sentence." *Id.*, ¶14.

The court of appeals disagreed. It "recognize[d] that the issue of concurrent and consecutive sentences is 'extremely important' to a guilty plea." *Id.*, ¶16 (citing *State v. Howard,* 2001 WI App 137, ¶18, 246 Wis. 2d 475, 630 N.W.2d 244). "However," the court held, "in the absence of any indication that the parties expected the State to either remain silent or recommend concurrent sentences, we are reluctant to engraft these conditions into a fully integrated plea agreement." *Id.* "The interpretation of plea agreements is rooted in contract law," the court noted, "and basic contract law dictates that we recognize the parties' limitation of their assent." *Id.* "Contract law demands that each party should receive the

benefit of its bargain; no party is obligated to provide more than is specified in the agreement itself." *Id*.

The court summarized its conclusion as follows:

> Here, the agreement was silent regarding the issue of concurrent and consecutive sentences; thus, the record does not reflect that Bowers bargained for the State's promise to refrain from asking for consecutive sentences. Therefore, when the State recommended consecutive sentences, it did not violate the plea agreement.

Id., ¶18. The court further held that because the State did not breach the agreement, Bowers' counsel did not perform deficiently by failing to object to the State's recommendation. *Id*., ¶20.

Bowers' rationale applies in this case. The PSI recommended sentences of sixteen to eighteen months of initial confinement followed by six months of extended supervision in case no. 2011CF293; four to six years of initial confinement and three to four years of extended supervision in case no. 2011CF376; sixteen to eighteen months of initial confinement and six months of extended supervision in case no. 2012CF27; and one to two years of initial confinement and two years of extended supervision in case no. 2013CF107 (2014AP1251-CR:16:17). The PSI was silent, as the circuit court found and Tourville acknowledges, with regard to whether those recommended sentences should be imposed concurrently or consecutively (2014AP1251-CR:16:17-18). Accordingly, the maximum sentence that could be imposed consistent with the PSI's recommendation was to impose the high end of the individual sentences consecutively.

Had the plea agreement called for the State to recommend sentences of those lengths but been silent as to whether the State's recommendation would be for concurrent or consecutive sentences, *Bowers* would squarely control and the State would be free to recommend that the court impose consecutive sentences. In this case, the State effectively agreed to incorporate the PSI's sentencing recommendation when it agreed to cap its sentencing recommendation at the high end of the sentence recommended by the PSI. Because both the plea agreement and the PSI's recommendations were silent on whether the sentences should be concurrent or consecutive, *Bowers*' reasoning applies here, and the State was free to argue for consecutive sentences.

Tourville attempts to distinguish his case from *Bowers* by arguing that "[u]nlike *Bowers*, Tourville's plea agreement was not silent as to recommending consecutive or concurrent sentences – it required the State to limit its recommendation to the recommendation of the PSI." Tourville's brief at 12 n.6. "Since the PSI did not ask the Court to impose consecutive sentences," he argues, "the State's recommendation of consecutive sentences exceeded the PSI's recommendation." *Id*.

There are two flaws in that argument. The first is Tourville's claim that his plea agreement "was not silent as to recommending consecutive or concurrent sentences." He is wrong. Tourville does not point to anything in the plea agreement that addresses whether the State would recommend consecutive or concurrent sentences. The plea agreement was silent on this point.

The second flaw in Tourville's argument is his contention that because the PSI was silent with regard to whether the sentences it was recommending should be concurrent or consecutive, "the PSI should be presumed to recommend concurrent sentences." *Id*. But, as the circuit court pointed out (2014AP1248-CR:83:3; A-Ap. B3), the cases that Tourville cites address the situation in which the court's pronouncement of sentence is silent with respect to whether a sentence should be served concurrently or consecutively. *See State v. Oglesby*, 2006 WI App 95, ¶¶21-22, 292 Wis. 2d 716, 715 N.W.2d 727; *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991).

Tourville acknowledges that distinction, but argues that "these cases are relevant because they illustrate the principle that unless it is clear that a court intends sentences to be consecutive, they must be presumed to be concurrent." Tourville's brief at 13. That is indeed what those cases say, but they are not relevant here because the court's intent is not at issue here. Tourville's claim involves the interpretation of a plea agreement, and he provides no reason why cases governing the court's pronouncement of sentence should apply here – he simply says that there is no reason that they should not. *See* Tourville's brief at 13-14. However, *Bowers* is the case that addresses plea agreements that are silent with respect to concurrent or consecutive sentencing recommendations, and it is a much closer fit to the issue presented by this case.

Had the PSI recommended concurrent sentences, the State's recommendation of consecutive sentences would have violated its agreement to cap its sentencing recommendation

at the high end of the PSI's recommendation. But because the PSI was silent on that point, the high end of the PSI's recommendation included the possibility that the sentences would be imposed consecutively. Accordingly, the State did not breach the plea agreement when it recommended that the court impose consecutive sentences.

II. THERE WAS A FACTUAL BASIS FOR TOURVILLE'S GUILTY PLEA IN CASE NUMBER 2012CF27.

Tourville next argues that there was an insufficient factual basis for his guilty plea to the charge of theft as a party to a crime in case number 2012CF27. He does not challenge the circuit court's use, with defense counsel's agreement, of the allegations in the amended complaint to establish a factual basis (2014AP1251-CR:26:12). *See State v. Thomas*, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836 ("a factual basis is established when counsel stipulate on the record to facts in the criminal complaint"). Rather, he argues that the facts alleged in the complaint fail to provide a factual basis for the offense.

The amended criminal complaint alleged that Joshua Scanlon, Eric Wood, and a third man, identified only as Richie, committed a residential burglary in which they stole a number of items, including a safe (2014AP1250-CR:2:2; A-Ap. F2). After the burglary, the three men drove to Tourville's residence, told him about the burglary, and asked for his help in opening the safe (*id.*). Tourville and the others then went to Tourville's campsite at a resort, where Wood used a torch to

cut off the bottom of the safe while the other men poured water on the safe to keep the guns inside it from burning (*id*.).

The men then took the safe a mile or two down the road and tried to sink it in a swamp (*id*.). Scanlon, Wood, and Richie divided up the stolen firearms and other property and paid Tourville in cash for his assistance (*id*.).

For the reasons discussed below, those allegations provided a factual basis for Tourville's guilty plea to theft as a party to a crime. Accordingly, this court should reject Tourville's claim that he is entitled to withdraw his plea to that charge.[2]

A. Applicable legal standards.

A postconviction motion for the withdrawal of a guilty plea is only granted when necessary to correct a manifest injustice. *State v. Johnson*, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). One type of manifest injustice is the failure to establish a sufficient factual basis that the defendant committed the offense to which he pleads. *Id.*

The circuit court's decision regarding the withdrawal of a guilty plea is discretionary and will not be upset on review unless there has been an erroneous exercise of discretion. *Id.* Failure by the circuit court judge to ascertain that "the

[2]In his postconviction motion, Tourville argued that there was no factual basis for his plea because the complaint charged him under Wis. Stat. § 943.20(1)(e), which makes it a crime to fail to return property that has been rented or leased (2014AP1250-CR:57:5-7). He has abandoned that claim on appeal. *See* Tourville's brief at 19 n.10.

defendant in fact committed the crime charged" is an erroneous exercise of discretion. *Id.* (quoted source omitted). The defendant has the burden of showing by clear and convincing evidence that withdrawal of his plea is necessary to correct a manifest injustice. *Id*.

B. There was a sufficient factual basis for Tourville's plea.

Tourville correctly observes that the offense of theft requires proof of both the "taking" and "carrying away" of property belonging to someone else. *See* Tourville's brief at 21; Wis JI-Criminal 1441 (2009). He argues that because he knew nothing about the burglary or the theft of the safe until after they occurred, none of his actions can be construed as being a party to the crime of theft, whether by directly committing the crime, aiding and abetting it, or as a party to a conspiracy. *See* Tourville's brief at 20-21.

During the plea colloquy, defense counsel told Tourville that the basis for the theft charge was that he aided and abetted the theft (2014AP1251-CR:26:10). The State agrees that the proper basis for Tourville's liability as a party to a crime was as an aider and abettor.

Tourville appears to be arguing that for him to be liable as an aider and abettor, he must have aided and abetted both the taking of the safe and its carrying away. *See* Tourville's brief at 18-24. If so, that argument is based on a misunderstanding of aider-and-abettor liability.

"One need not perform an act which would constitute an essential element of the crime in

order to aid and abet that crime." *State v. Marshall*, 92 Wis. 2d 101, 122, 284 N.W.2d 592 (1979). "It is only necessary that he undertake some conduct (either verbal or overt), which as a matter of objective fact aids another person in the execution of a crime, and that he consciously desire or intend that his conduct will in fact yield such assistance." *Id.*

It was not necessary, therefore, for Tourville to have aided in the taking of the gun safe. All that was necessary was that he undertake some conduct that aided the other men in the execution of the theft and that he intended to so aid them. Tourville did that when he agreed to go with them and the stolen safe to his campsite, helped them open the safe to access the stolen contents, which the other men took with them, and then participated in taking the safe to a swamp where they attempted to concealed it.

Tourville also argues that he did not aid in the carrying away of the safe because "any 'carrying away' that Tourville participated in began from his house, not the victim's residence." Tourville's brief at 21. That is significant, he contends, because *Berry v. State*, 90 Wis. 2d 316, 330, 280 N.W.2d 204 (1979), holds that "carrying away" requires "a movement away from the area where the product was intended to be." *See* Tourville's brief at 21.

But it was not necessary for Tourville to have committed the initial act of carrying away. *See Marshall*, 92 Wis. 2d at 122. It was only necessary that he commit some act that aided the others in the theft. As discussed above, he did just that when he helped them continue carrying away the gun safe to his campsite, helped them open the

safe, which allowed them to then access and carry away the guns that were inside the safe, and then participated in taking the stolen safe to the swamp for disposal.

The amended criminal complaint alleged facts that demonstrated that Tourville aided and abetted in the theft of the safe and its contents. Because the complaint provided an adequate factual basis for Tourville's plea to theft as a party to a crime, Tourville is not entitled to withdraw his plea to that charge.

CONCLUSION

For the reasons stated above, the court should affirm the judgments of conviction and the order denying postconviction relief.

Dated this 18th day of September, 2014.

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,186 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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 18th day of September, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General