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STATE OF WISCONSIN

IN SUPREME COURT

Appeal Nos. 2014AP001248-CR
2014AP001249-CR
2014AP001250-CR
2014AP001251-CR

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STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PATRICK K. TOURVILLE,
Defendant-Appellant-Petitioner.

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ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON MAY 1, 2014, AND A JUDGMENT OF CONVICTION ENTERED ON JULY 9, 2013, BY THE CIRCUIT COURT FOR POLK COUNTY, HON. MOLLY E. GALEWYRICK, PRESIDING

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**Wisconsin Statutes**

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## ISSUES PRESENTED

1. In exchange for Tourville's plea of guilty or no-contest to four criminal charges, the State agreed to cap its sentence recommendation at the "high end" of whatever sentence the presentence investigation (PSI) would recommend. The PSI recommended a range of initial confinement and extended supervision time, but it did not make a

recommendation as to whether the sentences should be served consecutively or concurrently.

a. Did the State breach the plea agreement when it recommended consecutive sentences?

b. If so, was the trial attorney ineffective in failing to object to the recommendation?

Both the trial court and court of appeals ruled the State's recommendation was not a breach of the plea agreement.

2. Was there a sufficient factual basis to allow the court to accept Tourville's guilty plea to the charge in Polk County Case Number 2012CF27?

Both the trial court and court of appeals ruled that there was a sufficient factual basis.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

## STATEMENT OF THE CASE

Between 2011 and 2013, the State charged Patrick Tourville with various crimes in four separate Polk County cases.

- 2011CF293: Theft, resisting/obstructing an officer, operating vehicle without owner's consent.
- 2011CF376: Burglary while armed, felony theft (2 counts), misdemeanor theft, bail jumping, and felon in possession of a firearm.

- 2012CF27: Theft and felon in possession of a firearm.
- 2013CF107: Bail jumping (5 counts) and possession of drug paraphernalia.

All charges from these four cases were subsequently incorporated into a single plea agreement. On April 18, 2013, in accordance with the agreement, Tourville pled guilty or no-contest to four counts, one count corresponding to each of the above case numbers.[1] (Doc. 26:5 in 2014AP1251). In exchange, the State agreed to dismiss and read in the remaining counts. (Doc. 26:5 in 2014AP1251). The court, Hon. Molly GaleWyrick, accepted the terms of the plea agreement (Doc. 26:20 in 2014AP1251).

On July 8, 2013, the same court sentenced Tourville to consecutive prison sentences totaling 26 years (14.5 years initial confinement plus 11.5 years extended supervision). (Doc. 53a:83-84 in 2014AP1248 (attached as Appendix C)).

On December 26, 2013, Tourville filed a postconviction motion raising the same two issues contained in this appeal. (Doc. 69 in 2014AP1248). The court conducted a postconviction hearing on March 18, 2014. (Doc. 91 in 2014AP1248). Following briefing, the court issued a written decision on May 13, 2014, denying relief on both issues. (Doc.

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[1] Polk Co. Case No. 11 CF 293 corresponds to Appeal No. 2014AP1248.
Polk Co. Case No. 11 CF 376 corresponds to Appeal No. 2014AP1249.
Polk Co. Case No. 12 CF 27 corresponds to Appeal No. 2014AP1250.
Polk Co. Case No. 13 CF 107 corresponds to Appeal No. 2014AP1251.

The full transcription of the plea hearing, sentencing hearing, postconviction hearing, and various other documents are found in different Appeals numbers. Therefore, in this brief, citations to the record will cite to the appeals case number where the full transcription is located. In some instances, the same full document can be found in all four appeals numbers, but citations will only be made to one case for the sake of simplicity.

62 in 2014AP1249 (attached as Appendix B)). According to the court, the State did not violate the plea agreement because the "plea negotiation did not consider the issue of concurrent or consecutive sentences. (Doc. 62:4 in 2014AP1249). The court further held that there was a factual basis as to the theft charge because Tourville "was providing a location to conceal the safe." (Doc. 62 :4 in 2014AP1249).

The four cases were subsequently consolidated for appeal to the court of appeals. On March 31, 2015, the court of appeals issued an unpublished per curium decision affirming the rulings of the trial court. *State v. Tourville*, Nos. 2014AP248, 2014AP249, 2014AP250, 2014AP251, unpublished slip op. (WI App Mar. 31, 2015) (attached as Appendix A).

## STATEMENT OF FACTS

Although the facts relevant to the two issues in this case are temporally intertwined, they are conceptually distinct and are described separately below.

*Facts related to Issue No. 1—the plea breach issue*

At the April 18, 2013 plea hearing, District Attorney Daniel Steffen recited the terms of the plea agreement, stating that Tourville would plead guilty or no-contest to one count in each of the case numbers, with dismissal of the other counts. (Doc. 26:5 in 2014AP1251). Neither DA Steffen nor Tourville's attorney, George Miller, mentioned what sentencing recommendations would be made by the parties under the plea agreement.

However, Judge GaleWyrick stated that she had received the "plea questionnaire waiver of rights forms" for each of the cases (Doc. 26:14 in 2014AP1251). Attached to

each of these forms was an Addendum that had been signed by Tourville. The Addendum for three of the cases (11CF293, 11CF376, and 12CF27) stated:

> The joint sentencing recommendation is to order a presentence investigation; the state will cap its recommendation at the high end of what the PSI orders.

(Doc. 32:4 in 2014AP1248; Doc. 32:4 in 2014AP1249; Doc. 31:4 in 2014AP1250). No Addendum was attached to the plea questionnaire for Case 13CF107 (Doc. 13 in 2014AP1251).

Subsequently, a Presentence Investigation Report (PSI) was filed with the court. (Doc. 44 in 2014AP1251). The table below sets forth the PSI's recommendations for each sentence. The prosecutor then made recommendations that were generally on the high end of the PSI's recommendations, as also shown in the table.

| Polk County Case Number | PSI sentence recommendation[2] | State's sentence recommendation[3] |
|---|---|---|
| 2011CF293 | 16-18 months IC<br>6 months ES | 1.5 years IC<br>6 months ES |
| 2011CF376 | 4-6 years IC<br>3-4 years ES | 6 years IC<br>4 years ES |
| 2012CF27 | 16-18 months IC<br>6 months ES | 1.5 years IC<br>6 months ES |
| 2013CF107 | 1-2 years IC<br>2 years ES | 2 years IC<br>2 years ES |

The PSI was silent as to whether these sentences should run consecutively or concurrently to each other. Nevertheless, at sentencing, the prosecutor recommended that the court impose consecutive sentences on all four cases, stating:

[2] PSI's recommendations are in Doc. 44:17 in 2014AP1251.

[3] State's recommendations are in Doc. 53a:36-37 in 2014CF1248.

> And while the PSI doesn't talk about current [sic] or context [sic]. I'm requesting that these be consecutive. These are crimes take place [sic] over the course of 2 plus years from the oldest to the newest. They are all separate situations showing a history of crimes, a series of events. So I think that they should be served consecutive to each other.

(Doc. 53a:37 in 2014AP1248).

In his postconviction motion, Tourville argued that the State breached the plea agreement by recommending consecutive sentences, which went beyond the recommendation in the PSI. (Doc. 57:1-3 in 2014AP1250). He further argued that Atty. Miller was ineffective in failing to object to the alleged breach.

At the postconviction hearing, Atty. Miller testified that his understanding of the plea agreement was consistent with what was described in the Plea Questionnaire and Addendum (Doc. 91:12 in 2014AP1248). He testified that at the time of the plea, neither he nor Tourville knew what the PSI would recommend, but knew that whatever the PSI recommended for a sentence, the State could not recommend a longer sentence (Doc. 91:12 in 2014AP1248). Atty. Miller testified that he "did not have a strategic reason for not objecting" to the State's recommendation of consecutive sentences because it "slipped my mind to object." (Doc. 91:17 in 2014AP1248).

In a written decision, Judge GaleWyrick held that the State did not breach the plea agreement by recommending consecutive sentences. (Doc. 67:2-4 in 2014AP1250). The court held that the plea negotiation "did not consider the issue of concurrent or consecutive sentences," and that therefore, the State's recommendation of consecutive sentences was within the "high end" of what the PSI recommended. (Doc. 67:4 in

2014AP1250). Accordingly, the court did not find that Tourville's attorney was ineffective in failing to object to the State's recommendation. (Doc. 67:4 in 2014AP1250).

The court of appeals agreed with the trial court's decision, holding that "Tourville's plea agreement did not place any obligation on the State to 'recommend concurrent sentences.'" *Tourville*, unpublished slip op., ¶4.

*Facts related to Issue No. 2—the factual basis issue*

In Polk County case number 2012CF27, the State accused Tourville of theft. (Doc. 2 in 2014AP1250). According to the amended criminal complaint, several men–but not Tourville–broke into the home of K.B. and stole a safe containing firearms and other tools. (Doc. 2:2 in 2014AP1250). The men then took the safe to Tourville, told him about the burglary and asked for his help in opening the safe. Tourville then went along with them to a campground where they opened and disposed of the safe.

Although Tourville had not entered K.B.'s house, or participated in the planning or execution of the burglary/theft, the charging section of the Complaint alleged that Tourville "took and carried away" movable property as a party to a crime. (Doc. 2:1 in 2014AP1250).[4]

[4] The Complaint erroneously stated that Tourville's actions were contrary to Wis. Stat. § 943.20(1)(e) & (3)(d). (Doc 2:1 in 2014AP1250). As was later acknowledged by the State (Doc. 91:40 in 2014AP1248), the complaint cited the wrong subsection of the statute because § 943.20(1)(e) makes it a crime to fail to return property that had been *rented* or *leased*—something that had not been alleged at any point. In any event, the language of the charging section alleged that Tourville "did take and carry away movable property of another." (Doc. 2:1 in 2014AP1250).

At the plea hearing, the court addressed whether there was a factual basis for the theft charge. Tourville told the court that he did not give the burglars anything, and that he did not hide anything. (Doc. 26:10 in 2014AP1251). The court then told Tourville that he was being charged because he "gave surroundings" to the other defendants. (Doc. 26:11 in 2014AP1251). At that point, the court said, "And everybody agrees that that meets the elements of the crime?" (Doc. 26:11 in 2014AP1251). The prosecutor agreed, but neither Tourville nor his attorney said anything on the record before the court accepted the plea.

In his postconviction motion, Tourville argued that there was no factual basis that Tourville had taken and carried away movable property of another as charged in the Amended Criminal Complaint. He therefore argued that he was entitled to withdraw his plea. (Doc. 57:5-6 in 2014AP1250).

In her written decision, Judge GaleWyrick held that there was a factual basis for Tourville's plea. The court ruled that the reference to § 943.20(1)(e) was a "scrivener's error." (Doc. 67:4 in 2014AP1250). The court further held that Tourville's participation in disposing of the safe amounted to a violation of subsection (1)(a) of the theft statute. The court stated that Tourville understood what he was pleading to, and therefore there was no manifest injustice. (Doc. 67:6-7 in 2014AP1250).

In a *per curium* decision, the court of appeals agreed with the trial court that there was a sufficient factual basis for Tourville's plea, stating that Tourville did not need to be present during the crime. *Tourville*, unpublished slip op. ¶7.

## STANDARD OF REVIEW

Whether the State breached a plea agreement is a mixed question of fact and law. *State v. Sprang*, 2004 WI App. 121, ¶14, 173 Wis. 2d 784, 683 N.W.2d 522. The terms of a plea agreement and historical facts surrounding the State's alleged breach of the agreement are questions of fact, reviewable under a clearly erroneous standard. *Id.* However, the meaning of words in a document that is not dependent on a court's appraisal of the credibility of a witness is a question of law to be determined independently by the reviewing court. *State v. Williams*, 2002 WI 1, ¶35, 249 Wis. 2d 492, 637 N.W.2d 733. The Court applies a *de novo* standard to determine whether, as a matter of law, the State's conduct breached the terms of a plea deal. *State v. Smith*, 207 Wis. 2d 258, 266, 558 N.W.2d 379 (1997).

Whether counsel's actions constitute ineffective assistance is also a mixed question of law and fact, and the Court will not reverse findings of fact unless they are clearly erroneous. *Id.* In this case there are no disputed facts concerning the contents of either the plea agreement, the PSI or defense counsel's actions. Thus, the first issue should be reviewed *de novo*.

Where the trial court has determined that there was a sufficient factual basis for acceptance of a plea, the appellate court will not upset that determination unless it is clearly erroneous. *State v. Mendez*, 157 Wis. 2d 289, 295, 459 N.W.2d 578 (Ct. App. 1990). The defendant has the burden of showing by clear and convincing evidence that the withdrawal of the plea is necessary to correct a manifest injustice. *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

## ARGUMENT

### I. The State breached the plea agreement by recommending consecutive sentences, and Tourville's attorney was ineffective in failing to object to the breach.

When the State and defendant agree to a plea deal, both parties are obligated to abide by its terms. In this case the State agreed to cap its sentence recommendation at the "high end" of what the PSI recommended. The PSI did not recommend consecutive sentences. But at sentencing, the prosecutor added something that was not included in the PSI: a recommendation that the sentences be served consecutively. This went above the "high end" of what the PSI recommended and was a breach of the plea agreement. Tourville's trial attorney was ineffective for not objecting to this breach of the agreement, and Tourville is entitled to a re-sentencing by a different judge.

#### A. The State breached the plea agreement by recommending a harsher sentence than the PSI recommendation.

Due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971)*; see also Smith*, 207 Wis. 2d at 271. Terms of a plea deal must be followed. *State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733 (a prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement).

In Tourville's case, the terms of the plea agreement were set forth in the "Written Addendum to Plea

Questionnaire/Waiver of Rights Form" that was submitted to the court at the time of the plea.[5] The Plea Questionnaires were signed by both Atty. Miller and Tourville. Tourville also separately signed the Addendums. According to those terms:

> The joint sentencing recommendation is to order a presentence investigation; the state will cap its recommendation at the high end of what the PSI orders.

(Doc. 44:4 in 2014AP1248; Doc. 32:4 in 2014AP1249; Doc. 31:4 in 2014AP1250 (attached as Appendix D)). These terms were not stated orally at the time of the plea, and there was some discussion at the postconviction hearing as to whether the terms were actually part of the final plea agreement.[6] The court

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[5] The Addendums of each case differed depending on the charged offense. However, the above language was the same in the Addendums of cases 11CF376, 11 CF293, and 12CF27. As to 13CF107, there was no Addendum setting forth the terms of the plea deal.

[6] At the postconviction hearing, DA Steffen stated that the final plea agreement did not include a cap on the sentencing recommendation. (Doc. 91:62 in 2014AP1248). However, DA Steffen did not offer any sworn testimony supporting that allegation. At the postconviction hearing, two letters were introduced into evidence. The first was a December 19, 2012 letter from DA Steffen to Atty. Miller stating that in exchange for a plea to charges in the first three cases, the "state would agree to be capped at the high end range of the PSI." (Doc. 91:19 in 2014AP1248). The second letter, again from DA Steffen to Atty. Miller, dated March 26, 2012, came after Tourville was charged with additional counts in 13CF107. That letter stated that "if your client wants to enter a plea to Count 1 of the Information we would use the same PSI and argue sentencing." DA Steffen argued that since the second letter did not mention a "cap," there was none. (Doc. 91:61-62 in 2014AP1248). However, Atty. Miller testified that in his opinion, the "March 26th letter read in conjunction with your December 19th, 2012 letter indicates that you're still capping at the high end of the PSI." (Doc. 91:23 in 2014AP1248).

The circuit court did not make findings as to whether the terms of the plea agreement included a cap on the State's recommendation, but

acknowledged receiving the "individual plea sheets," that is, the Plea Questionnaire forms. (Doc. 26:6 in 2014AP1251).

The PSI recommended a range of initial confinement and extended supervision for each charge; it made no recommendation for consecutive sentences. (Doc. 14b:17 in 2014AP1251). Instead, it simply gave a range regarding each case:

> Case No. 11CF 293: 16-18 months IC, 6 months ES
> Case No. 11CF376: 4-6 years IC, 3-4 years ES
> Case No. 12CF27: 16-18 months IC, 6 months ES
> Case No. 13CF107: 1-2 years IC, 2 years ES

The PSI's recommendation contrasts starkly with the prosecutor's recommendation at sentencing, when, after making individual sentence recommendations as to each of the four cases, he told the court that "I'm requesting that these be consecutive." (Doc. 53a:37 in 2014AP1248 (attached as Appendix E)). By recommending consecutive sentences, the State breached the plea agreement.

In denying postconviction relief, Judge GaleWyrick acknowledged that the difference between concurrent and consecutive sentences is "material and substantial." (Doc. 67:3

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instead simply held that the State's recommendation fell within the PSI's sentencing recommendation, and therefore was not a breach.

In its brief to the court of appeals, the State suggested that if the court concludes that the prosecutor breached the plea agreement, a remand would be necessary so that the circuit court could make a factual finding with respect to the terms of the plea agreement. (State's brief to Court of Appeals at 3-4). Tourville asserts that he has met his burden by offering unrebutted evidence regarding the terms of the plea agreement at the postconviction hearing. The State chose to not present any contradictory evidence at that time. A remand is not necessary under such circumstances.

at 2014AP1250). This is an important distinction because a defendant is not entitled to relief when the breach is merely technical rather than a "substantial and material breach." *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986); *see also State v. Howard*, 2001 WI App 137, ¶¶18-19, 246 Wis. 2d 475, 630 N.W.2d 244 (whether sentences are to be concurrent or consecutive is "extremely important," and if the State agrees to recommend concurrent sentences, it cannot then recommend a consecutive sentence without committing a material and substantial breach).

However, the circuit court found that the State did not breach the plea agreement because it concluded that Tourville "got exactly what he bargained for, a recommendation at the high end of what the PSI orders." (Doc. 67:3 at 2014AP1250). Similarly, the court of appeals found that the State "did not violate the terms of the plea agreement." *Tourville*, unpublished slip op., ¶4.

Both courts are wrong. The State's recommendation that the sentences be served consecutively was not within the "high end" of the PSI. The PSI said nothing about the sentences being consecutive and there is no reason to assume that the "high end" includes this feature that effectively makes the sentence recommendation much more severe than the PSI's. The State's recommendation for consecutive sentences does not fit within the structure of the PSI's recommendation—it extends it to heights not articulated in the PSI. If the PSI writer had wanted to recommend consecutive sentences, she could have easily done so. By adding its own terms to the PSI recommendations, the State drastically changed the actual recommendation.

Both the circuit court and the court of appeals concluded that Tourville's case is governed by *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 366. Such reliance is

misplaced. While *Bowers* addressed a similar issue, it does not control here. In *Bowers*, the plea agreement required the State to recommend a sentence of two years' initial confinement plus three years extended supervision. *Id.* ¶2. There was nothing in the agreement regarding whether the State's recommendation could be made consecutively to a previously existing sentence. *Id.* However, at sentencing, the State recommended that the new sentence be imposed consecutively to the existing sentence. *Id.* On appeal, Bowers argued that since the plea agreement was silent on the question of whether the sentence should be run concurrently or consecutively, the State breached the plea agreement by recommending a consecutive sentence. *Id.* ¶14.

The court of appeals denied Bowers' claim. It stated,

> We recognize that the issue of concurrent and consecutive sentences is "extremely important" to a guilty plea. *See Howard*, 246 Wis. 2d 475, ¶ 18, 630 N.W.2d 244. However, 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.* ¶16.

Although the situation in *Bowers* shares similarities with Tourville's case, there are important differences. In contrast to *Bowers*, where the defendant struck a plea deal regarding a single charge, in Tourville's plea deal, the State's sentence recommendation was in regard to four separate charges. When considering a deal that encompasses a single charge—as in *Bowers*—it is understandable why the parties might not specify whether the recommendation would be for a concurrent or consecutive sentence (even though there was a previously existing underlying sentence).

More importantly, the language of Tourville's plea agreement is significantly different from Bowers'. The plea agreement in Bowers' case simply stated: "State to recommend 2 yrs. initial confinement; 3 yrs extended supervision." *Id.* ¶2. However, in Tourville's agreement, the State agreed to "*cap* its recommendation at the high end of what the PSI orders." (Doc. 44:4 in 2014AP1248) (emphasis added.) In doing so, the State agreed to have the PSI's recommendation set the parameters of what the prosecutor could recommend. That means that in agreeing to be *capped* by the PSI's sentence recommendation, the State agreed to let the PSI set the upper limits of the recommendation. The PSI did not recommend consecutive sentences, and therefore the State went beyond the "upper limits" of the PSI's recommendation. Hence, the State breached the agreement.

In *Bowers*, the court held that "[i]n 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.* ¶16. However in Tourville's agreement, there was no "absence of any indication" as to what the State would recommend in terms of a concurrent or consecutive sentence; there was a clear indication that the State would be limited by the recommendation of the PSI.

Even if this court concludes that *Bowers* can be stretched to address the situation presented in Tourville's case, it should decide that *Bowers* was wrongly decided, and overrule that case. A major flaw in the holding in *Bowers* is that it fails to adequately account for the prominent role played by a prosecutor's sentence recommendation regarding concurrent or consecutive sentences. There is a huge difference between a prosecutor's recommendation for multiple sentences that run concurrently and that run consecutively. If a defendant bargains for a plea agreement

that does not specifically address whether the prosecutor's recommendation will be that the sentences should be consecutive to one another, then courts should not find that the agreement contemplated both arrangements.

Judge Brown's dissenting opinion in *Bowers* framed the issue well:

> But a major tenet of contract law is that the mutuality of assent underlies an enforceable contract. In plea bargaining terms, there must be a promissory exchange and the promise of certain benefits, including the exact penal promises, in return for a defendant's promise to enter a guilty or no contest plea. If we allow the State to bargain for a recommendation of a specific sentence and then let the State unilaterally recommend a consecutive sentence over and above the sentence recommendation mutually assented to, we are permitting the State to change the rules of the game.
>
> It is my opinion that Bowers was entitled to a clear understanding of exactly how the State's promise would affect him. If it were up to me, the State would not be able to recommend consecutive terms unless bargained for. While I would see nothing wrong with the State alerting the trial court that it should address whether the sentence is to be served consecutively or concurrently with another sentence, I see everything wrong with allowing the State to *recommend* consecutive terms without having bargained for it.

*Id.* ¶¶26-27 (Brown, J, concurring in part, dissenting in part). The dissent also cited to *State v. Deilke*, 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945, where this Court found that "provisions that were not explicitly stated in plea agreements have been held to be material and substantial breaches."

Judge Brown is correct. The sentencing recommendations of prosecutors are vitally important to courts

in selecting sentences for defendants. As important as the length of the sentence is the matter of whether the sentence should be imposed concurrently or consecutively to other sentences. *See Howard*, 2001 WI App. 137, ¶¶18-19.

If a plea agreement makes no mention of whether a sentence recommendation is to be concurrent or consecutive to other sentences, then this Court should overrule *Bowers* and declare that the State has breached the plea agreement by recommending consecutive sentences.

Finally, to the extent there is ambiguity as to whether the State breached the plea agreement, this Court should favor Tourville's interpretation. Caselaw from related areas of law is instructive. For example, when a sentencing court does not clearly indicate that a new sentence is to be consecutive to an existing sentence, the sentences are deemed to run concurrently. *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991)*; see also State v. Ogelsby*, 2006 WI App 95, 292 Wis. 2d 716, 715 N.W.2d 727. Moreover, penal laws are to be construed strictly to safeguard a defendant's rights. *State v. Austin*, 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978); *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (it is a fundamental principle of American law that the rule of lenity requires "penal laws ... to be construed strictly"); *State v. Kittilstad*, 231 Wis. 2d 245, 266-67, 603 N.W.2d 732 (1999).

In this case, the court of appeals held that the sentencing and lenity cases do "not apply in this case because the ambiguity arises out of the parties' plea agreement and the PSI." *Tourville*. unpublished slip op., ¶4. Tourville acknowledges the different context for these cases, but contends that they are nevertheless relevant to the Court's analysis.

### B. Tourville's trial attorney was ineffective by failing to object to the State's breach of the plea agreement.

Tourville's attorney, George Miller, did not object when the State recommended consecutive sentences. By failing to object, Tourville's right to directly challenge the State's breach may have been waived. *See Howard,* 2001 WI App. 137, ¶12 ("when Howard failed to object to the State's alleged breach of the plea agreement at the sentencing hearing, he waived his right to directly challenge the alleged breach of the plea").

Therefore, Tourville claimed in his postconviction motion that his attorney was ineffective in failing to object to the State's recommendation. This claim has gone largely unaddressed by the circuit court and the court of appeals, since those courts concluded that that there was no breach of the plea agreement.[7]

However, if this Court agrees with Tourville that the State breached the plea agreement, then it should also conclude that counsel's failure to object to the breach violated Tourville's right to effective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, counsel's failure to object to the breach was deficient performance. At the postconviction motion hearing, Atty. Miller testified that he had no strategic reason for not objecting, but that it was an oversight which "slipped [his] mind." (Doc. 69:17 at 2014AP1249). The State has not

[7] In its decision, the circuit court stated that Tourville's trial attorney was not ineffective. (Doc. 67:4 in 2014AP1250). The court of appeals offered no analysis of the ineffective assistance of counsel claim in its decision.

offered a possible strategic decision for counsel's failure to object.

Tourville was prejudiced because he did not receive the recommendation for which he bargained. In *Smith*, 207 Wis. 2d at 281, this Court held that:

> The breach of a material and substantial term of a plea agreement by the prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable. Our conclusion precludes any need to consider what the sentencing judge would have done if the defense counsel had objected to the breach by the district attorney. Rather, our conclusion is premised on the rule of *Santobello*, that when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled.

Therefore, for the purposes of determining ineffective assistance of counsel, the defendant is automatically prejudiced when the State violates a substantial and material term of the plea agreement. *Id.* at 282.

The prejudice analysis is the same in this case as *Smith*. By recommending consecutive sentences, the State exceeded the PSI's recommendation, which violated a material and substantial term of the plea agreement. A breach is considered to be material and substantial when it "defeats the benefit for which the accused bargained." *Williams*, 2002 WI 1, ¶38. As a result of this breach, Tourville was denied due process because he did not get the benefit of the deal that he made in exchange for pleading guilty to the charges.

It does not matter whether the sentencing court was influenced by the State's comments. *See Howard*, 2001 WI App 137, ¶14 ("When examining a defendant's allegation that the State breached a plea agreement, such as by making a

different recommendation at sentencing, it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation.")

Accordingly, Tourville is entitled to resentencing under the terms of the plea agreement.[8] At the resentencing, the State can recommend sentences at the high end of the sentencing range suggested in the PSI, but cannot include a recommendation that the sentences should be consecutive. The resentencing hearing must be before a different court that did not hear the prohibited recommendation of the State. *See Smith*, 207 Wis. 2d at 282. At the resentencing, the State must be bound to its original plea agreement to recommend a sentence no longer than the recommendation in the PSI.

## II. There was insufficient factual basis for the court to accept Tourville's guilty plea in case number 2012 CF 278.

One of the four cases charged against Tourville alleged that he was guilty of felony theft under Wis. Stat. § 943.20: that on August 27, 2010, he did "take and carry away" property of another. The property included a safe containing guns from a home owned by K.B. (Doc. 2:2 in 2014AP1250)

The problem is that at no point did Tourville "take or carry away" anything from K.B.'s home. Nor did he assist anyone in taking or carrying away anything from K.B.'s home. Indeed, there are no facts alleging otherwise. Instead, other men—without Tourville's knowledge or assistance—took K.B.'s property and brought it to Tourville who then assisted

[8] The remedy for a violation of a plea agreement is either a new sentencing hearing conducted by a different judge in accordance with the terms of the plea agreement or the withdrawal of the guilty plea. *Smith*, 207 Wis. 2d at 282. Here, Tourville does not request the more drastic remedy of a plea withdrawal.

the men in opening and disposing of the safe. Since Tourville had nothing to do with the taking or carrying away of property from K.B.'s residence, there is no factual basis supporting his plea to that charge. Consequently, Tourville should be allowed to withdraw his plea in that case.

### A. Legal Standards

Before accepting a guilty (or no-contest) plea, courts are required to establish a factual basis for the plea. *State v. Lackershire*, 2007 WI 74, ¶ 34, 301 Wis. 2d 418, 734 N.W.2d 23. This requires a court to find enough facts to satisfy itself "that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). A factual basis inquiry protects the defendant from voluntarily entering a plea in which there is no factual basis for guilt. *Lackershire*, 2007 WI 74, ¶35; *White v. State*, 85 Wis. 2d 485, 271 N.W.2d 97 (1978).

A post-sentencing motion for withdrawal of a guilty plea should only be granted when necessary to correct a manifest injustice. *State v. Johnson*, 200 Wis. 2d 704, 708, 548 N.W.2d 91 (Ct. App. 1996) *aff'd,* 207 Wis. 2d 239, 558 N.W.2d 375 (1997). A defendant shows the requisite "manifest injustice" when the court fails to ensure a sufficient factual basis for a defendant's plea. *Smith*, 202 Wis. 2d at 25.

Where the trial court has determined that there was a sufficient factual basis for accepting a plea, the reviewing court will not upset that determination unless it is "clearly erroneous." *Mendez*, 157 Wis. 2d at 295. The defendant has the burden of showing, by clear and convincing evidence, that the withdrawal of the plea is necessary to correct a manifest injustice. *Spears*, 147 Wis. 2d at 434.

### B. Application

The Criminal Complaint in 2012CF27 was filed on January 23, 2012. (Doc. 1:1 in 2014AP1250 (attached as Appendix F)). Count One of the Complaint charged that on or about August 27, 2010, as a party-to-a-crime, Tourville committed a Felony Theft, as a Repeater, contrary to §§ 943.20(1)(e) & (3)(d), 939.05, and 939.62(1)(b). The reference to § 943.20(1)(e) was clearly in error, since (1)(e) makes it a crime to fail to return rental or leased property—facts that were never alleged or alluded to in any manner throughout the case.[9]

Two days later, the State filed an Amended Criminal Complaint. (Doc. 2:1 in 2014AP1250 (attached as Appendix G)). The charging section added something that was not in the original complaint, namely, the allegation that under the Felony Theft charge, Tourville "did take and carry away movable property of another." Although the Amended Complaint continued to erroneously cite to § 943.20(1)(e), it is clear that the State meant to charge under the portion of the theft statute listed in (1)(a) which states:

> **943.20 Theft. (1)** ACTS. Whoever does any of the following may be penalized as provided in sub. (3):
>
> (a) Intentionally *takes and carries away*, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of such property.

(Emphasis added).

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[9] Since the reference to §943.20(1)(e) was apparently a scrivener's error, and the complaint later refers to subsection (1)(a), Tourville does not maintain that he should be allowed to withdraw his plea on the basis that there are no facts alleging that he failed to return rental or leased property under subsection (1)(e).

The Amended Complaint did *not* include all of the various forms of theft listed in subsection (1)(a). Instead, it chose only the part of the statute that makes it a crime to "take and carry away" property.

Here, there are no facts alleged which, if proved, constitute the crime of theft—taking and carrying away property of another. According to the Amended Complaint, three men—not including Tourville—broke into the home of K.B. and stole a safe. (Doc. 2:2 in 2014AP1250). The men then drove to Tourville's residence and told him about the burglary and asked for his help in opening the safe. Tourville then joined them and they went to a campsite. While there, one of the men used a torch to cut off the bottom of the safe and the rest poured water on the safe to keep the guns from burning. They all took the guns out of the safe, and then disposed of the safe in a swamp. The men then dropped off Tourville who was later paid in cash for his assistance. (Doc. 2:2 in 2014AP1250).

Thus, while it is clear that others took and carried away the property of K.B., there are no facts supporting the allegation in the complaint that Tourville did so.

Nor did the court establish independent facts at the plea hearing that satisfy the requirement for a factual basis. At the plea hearing, the court addressed the factual basis requirement, but no facts were presented that Tourville took or carried away K.B.'s property. Instead, the only facts alleged at the hearing were that Tourville helped open the safe and provided a means to hide the property. (Doc. 26:9-11 in 2014AP1251 (attached as Appendix H)).

In its decision denying the postconviction motion, the court made no finding that Tourville took and carried away the

property, but found it sufficient that he "provided a location to conceal the safe." The court stated:

> What Defendant Tourville admitted to was providing a location to conceal the safe while attempts were made to gain access to it. Eventually, he participated in disposal of the safe which was an attempt to conceal it. While not pretty and certainly not textbook, the colloquy supports the conclusion that in 12 CF 27, Mr. Tourville was pleading to a violation of §943.20(1)(a) and there was a factual basis for the plea. Mr. Tourville hasn't provided testimony or even an affidavit that claims he didn't understand what he was pleading to in 12 CF 27. In fact the record indicates he was clearer on the facts than the Court was and spoke up when I tried to put words in his mouth. There was no manifest injustice.

(Doc. 67:6-7 in 2014AP1250). Of course, the problem with the court's holding is that Tourville was not charged with concealing the property, or transferring the property. The circuit court failed to explain how Tourville's conduct satisfied the "take and carry away" element of the crime charged.

The different modes of committing theft under §943.20(1)(a) cannot be simply substituted for each other, as the court attempted to do. In *Jackson v. State*, 92 Wis. 2d 1, 10-11, 284 N.W.2d 685 (Ct. App. 1979), the court stated that:

> Section 943.20(1)(a), Stats., is similar to the statute involved in *Gipson*. It contains five distinct alternative elements of the offense. Without proof of one of these alternative elements, there is no crime of theft. The State must plead one of these alternative elements of the offense in the complaint or information. Without one of these alternative elements in the complaint or information, no crime is charged; therefore, the complaint or information is jurisdictionally defective and void. *Champlain v. State*, 53 Wis. 2d 751, 754, 193 N.W.2d 868, 871 (1972). The State may not, however, charge the defendant in the

> disjunctive by alleging that he took and carried away Or used Or transferred, etc. Where the complaint charges in the disjunctive and the terms are not synonymous, the complaint is defective.

Although the complaint listed one of the elements—take and carry away—it was not an element that fit the facts of the case.

Besides the fact that Tourville's conduct does not satisfy the statutory requirement that he took or carried away property, Tourville's conviction runs counter to this Court's decision in *Berry v. State,* 90 Wis. 2d 316, 280 N.W.2d 204 (1979). In *Berry*, the Court held that to prove the "carrying away" element of theft, the State must prove that there was movement "away from the area where the product was intended to be…." *See also Johnson*, 200 Wis. 2d 704 (holding that there was insufficient factual basis for defendant's guilty plea to stealing a car because there was no carrying away: he could not start the car and therefore never moved it from where it was parked). Tourville was not the person who moved the property away from K.B.'s home—that was done by the other three men, without Tourville's presence, knowledge or assistance. Here, any "carrying away" that Tourville participated in began from his house, not the victim's residence. Under *Berry*, Tourville's participation in moving the safe from his house to the campground does not satisfy the "carrying away" element of § 943.20(1)(a).

The fact that Tourville was charged under the party-to-a-crime statute does not salvage the case. There is nothing in the Amended Complaint indicating that Tourville helped the others plan the burglary or theft, or that he was even aware of it until after the fact, when the other men brought the safe to him. Therefore, the party-to-a-crime statute, Wis. Stat. § 939.05, does not operate to make Tourville liable in a vicarious manner. That statute states:

> **939.05 Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

Since Tourville knew nothing about the burglary or theft until *after* the fact, none of Tourville's actions can be construed under any of the above alternatives.

The court of appeals concluded that a factual basis existed under the "taking and carrying away" provision, stating that "to be guilty of aiding and abetting in a crime, it is only necessary for the defendant to have been a willing participant." *Tourville,* unpublished slip op., ¶4. But this raises the question: a willing participant of what? If the answer to that question is "taking and carrying away," then it is clear that there is no factual basis that Tourville did that.

The court of appeals cited to three cases in support of its decision that a factual basis exists: *State v. Marshall,* 92 Wis. 2d 101, 283 N.W.2d 592 (1979), *State v. Grady,* 93 Wis. 2d 1, 286 N.W.2d 607 (Ct. App. 1979), and *Hawpetoss v. State,* 52 Wis. 2d 71, 187 N.W.2d 823 (1971). However, a review of these cases reveals that all are readily distinguishable.

In *Marshall*, the defendant was accused of locating the victim of a homicide and then relaying that information to other men who then shot and killed the victim. *Marshall*, 92 Wis. 2d at 108. Since the crime would not have been possible without Marshall providing the victim's location, he was an essential part of the overall scheme. Further, the court concluded that the jury could reasonably have inferred that Marshall intended to aid in the execution of the crime. *Id.* at 122. Since the crime would not have been possible without Marshall providing the victim's location, he was an essential part of the overall scheme. Further, the court concluded that the jury could have reasonably inferred that Marshall intended to aid in the execution of the crime. *Id*.

That is a very different situation than occurred in Tourville's case, where the taking and carrying away the property of another had already been completed before Tourville was even aware of theft. Therefore, unlike *Marshall*, Tourville did not aid in crime's commission, nor was he an essential part of its accomplishment.

In *Grady*, the defendant and a friend approached a group of students asking to purchase "some weed." *Grady*, 93 Wis. 2d at 5. During their conversation, the friend took a radio from one of the students and walked away with it. *Id.* The students followed the men to attempt to recover the radio, and when they caught up to them, Grady pointed a handgun at them, allowing Grady and his friend to leave with the radio. *Id.* On appeal, Grady argued that the evidence did not support his conviction of armed robbery party-to-a-crime. He maintained that he had no involvement in the taking of the radio, and that the robbery was complete when his friend started walking away from the owner of the radio. *Id.*

The decision in *Grady* did not articulate whether Grady's conviction could rest solely on the fact that Grady

transported the radio. Instead, the court found it significant that Grady knew of the robbery at the time the radio was taken from the students. The court stated:

> The record clearly indicates he was present during the entire incident and facilitated the commission of the crime. The jury could reasonably believe that defendant knew of the robbery, and intentionally assisted his companion in completing the crime.

*Id.* at 7.

The distinction between *Grady* and Tourville is clear: Grady was present when the radio was stolen, knew about it, and helped transport the radio directly away from the victim. Tourville was not present when the safe was stolen, knew nothing about it, and did not take it or carry it away from the owner. At best, he received stolen property and then moved it to another location.

Finally, *Hawpetoss* is distinguishable. In that case, Hawpetoss and a companion, Darlene LeRoy, spent time with the victim, Selvent. *Hawpetoss*, 52 Wis. 2d at 73. The two got Selvent drunk, allowing them to steal his watch and other items. *Id.* Hawpetoss was convicted of larceny. On appeal, he argued that he did not aid and abet or conspire with LeRoy in the theft of the watch. Hawpetoss pointed out that it was LeRoy who had taken the watch from Selvent, and that he was not even aware of the thefts at the time. However, the Supreme Court found that there was evidence that Hawpetoss was "fully aware" of the fact that LeRoy had removed the watch from Selvent. *Id.* at 79. In addition, the Court found that there was a reasonable inference that Hawpetoss and LeRoy conspired with each other to drug Selvent and then take his possessions. *Id.* at 81.

*Hawpetoss* differs from Tourville's situation because Hawpetoss was present at the time of the initial theft, and there was evidence that he either aided in the theft, or conspired with the principle. That is not the situation in Tourville's case, where Tourville had no knowledge of the theft until it after the fact.

Since there was no factual basis to the allegation that Tourville took and carried away the property of another, he has established the existence of a manifest injustice. See *Smith*, 202 Wis. 2d at 25. Accordingly, he should be allowed to withdraw his plea to the count in Polk County Case No. 2012CF27.

## CONCLUSION

For the above reasons, Tourville is entitled to a resentencing with a different judge under the terms of his original plea agreement. In addition, Tourville is entitled to withdrawal of his guilty plea in case number 2012CF27.

Respectfully submitted this 1st day of October, 2015.

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## CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,778 words.

John A. Pray

## ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

John A. Pray

## CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

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