STATE OF WISCONSIN

IN SUPREME COURT

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-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING 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

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. TOURVILLE'S COUNSEL WAS NOT INEFFECTIVE BECAUSE THE STATE DID NOT BREACH THE PLEA AGREEMENT. 8

A. Applicable legal standards. 10

B. The prosecutor did not breach the plea agreement when he asked the court to impose consecutive sentences. 11

C. The court should not overrule *Bowers*. 17

II. THERE WAS A FACTUAL BASIS FOR TOURVILLE'S GUILTY PLEA TO THEFT IN CASE NUMBER 2012CF27. 21

A. Applicable legal standards. 23

B. There was a sufficient factual basis for Tourville's plea. 23

CONCLUSION 27

Page

CASES CITED

Berry v. State,
90 Wis. 2d 316,
280 N.W.2d 204 (1979).....25

Doles v. State,
55 P.3d 29 (Wyo. 2002) 18

Hawpetoss v. State,
52 Wis. 2d 71,
187 N.W.2d 823 (1971).....25

State v. Bokenyi,
2014 WI 61, 355 Wis. 2d 28,
848 N.W.2d 759.....10, 11

State v. Bowers,
2005 WI App 72, 280 Wis. 2d 534,
696 N.W.2d 255..... 11, passim

State v. Deilke,
2004 WI 104, 274 Wis. 2d 595,
682 N.W.2d 945.....17, 18

State v. Dillard,
2014 WI 123, 358 Wis. 2d 543,
859 N.W.2d 44.....26

State v. Grady,
93 Wis. 2d 1, 286 N.W.2d 607
(Ct. App. 1979).....25

State v. Howard,
2001 WI App 137, 246 Wis. 2d 475,
630 N.W.2d 244.....12, 13

Page

State v. Johnson,
207 Wis. 2d 239,
558 N.W.2d 375 (1997) 23

State v. Marshall,
92 Wis. 2d 101,
284 N.W.2d 592 (1979) 24, 25

State v. Naydihor,
2004 WI 43, 270 Wis. 2d 585,
678 N.W.2d 220 10

State v. Nielsen,
2001 WI App 192, 247 Wis. 2d 466,
634 N.W.2d 325 11

State v. Oglesby,
2006 WI App 95, 292 Wis. 2d 716,
715 N.W.2d 727 16

State v. Pettit,
171 Wis. 2d 627, 492 N.W.2d 633
(Ct. App. 1992) 26

State v. Rohl,
160 Wis. 2d 325, 466 N.W.2d 208
(Ct. App. 1991) 16

State v. Thomas,
2000 WI 13, 232 Wis. 2d 714,
605 N.W.2d 836 22

State v. Wesley,
2009 WI App 118, 321 Wis. 2d 151,
772 N.W.2d 232 9

Page

State v. Williams,
2002 WI 1, 249 Wis. 2d 492,
637 N.W.2d 733 10

Strickland v. Washington,
466 U.S. 668 (1984) 11

United States v. Anderson,
921 F.2d 335 (1st Cir. 1990) 19

United States v. Danou,
260 Fed. Appx. 864 (6th Cir. 2008) 19

United States v. Fentress,
792 F.2d 461 (4th Cir. 1986) 18

United States v. Peglera,
33 F.3d 412 (4th Cir. 1994) 19

White v. United States,
308 F.3d 927 (8th Cir. 2002) 18

Wurtz v. Fleischman,
97 Wis. 2d 100,
293 N.W.2d 155 (1980) 9

STATUTES CITED

Wis. Stat. § 943.20(3)(d)5 26

Wis. Stat. § 943.34(1)(bm) 26

Wis. Stat. § 973.15(2)(a) 15

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

This is an appeal by defendant-appellant-petitioner Patrick K. Tourville from judgments of conviction in four Polk County cases convicting him of theft of a firearm, armed burglary, misdemeanor theft, and felony bail jumping and from an order denying his motion for postconviction relief.

Tourville was originally charged with a total of sixteen criminal counts in the four cases:

- In case no. 2011CF293, Tourville was charged with operating a motor vehicle without the owner's consent, misdemeanor theft, and obstructing an officer, with all counts charged as a repeater (2014AP1248-CR:22:1).

- In case no. 2011CF376, Tourville was charged with burglary while arming himself with a dangerous weapon, two counts of theft of a firearm, misdemeanor theft, felony bail jumping, and possession of a firearm by a felon, with all counts charged as a repeater (2014AP1249-CR:19:1-2).

- In case no. 2012CF27, Tourville was charged with theft of a firearm and possession of a firearm by a felon, with both counts charged as a repeater (2014AP1250-CR:11:1).

- In case no. 2013CF107, Tourville was charged with possession of drug paraphernalia and five counts of felony bail jumping, with all counts charged as a repeater (2014AP1251-CR:6:1-2).

Tourville and the State reached a plea agreement pursuant to which Tourville pled guilty or no contest to one count in each of the four cases and the remaining counts were dismissed and read in (2014AP1251-CR:26:5-6). An addendum to the plea questionnaire in three of the cases 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" (2014AP1248-CR:44:4; 2014AP1249-CR:32:4; 2014AP1250-CR:31:4; Pet-Ap. D1:4, D2:4, D3:4). The plea questionnaire in the fourth case was silent with respect to any sentencing recommendation by the State (2014AP1251-CR:13:1-3). Tourville stated in the signed plea questionnaires that "[n]o promises have been made to me other than those contained in the plea agreement" (2014AP1248-CR:44:2; 2014AP1249-CR:32:2; 2014AP1250-CR:31:2; Pet-Ap. D1:2, D2:2, D3:2).

At the plea hearing, there was no mention of any agreement by the State regarding a sentencing recommendation (2014AP1251-CR:26:3-22). During the plea colloquy, the court explained to Tourville that it would order a presentence investigation report (PSI), that the PSI would "provide a recommendation as to what your sentence should be," that "at a sentencing the state will make an argument, defense will make an argument, you have an opportunity to speak if you choose to, and there will be that recommendation in the PSI" (2014AP1251-CR:26:18-19). The court also explained that it did not have to follow any of those recommendations (2014AP1251-CR:26:19). Tourville told the court that he understood (*id*.).

The PSI recommended that the court sentence Tourville to sixteen to eighteen months of initial confinement and six months of extended supervision in case no. 11CF293; four to six years of initial confinement and three to four years of extended supervision in case no. 11CF376; sixteen to eighteen months of initial confinement and six months of extended supervision in case no. 12CF27; and one to two years of initial confinement and two years of extended supervision in case no. 13CF107 (2014AP1251-CR:13:16). The PSI did not include a recommendation regarding whether those sentences should be served concurrently or consecutively (2014AP1251-CR:13:16-17).

At the sentencing hearing, neither party said anything about an agreement by the State regarding a sentencing recommendation (2014AP1248-CR:53A:18-37, 42-55). In his sentencing argument, the prosecutor asked the court to impose sentences that were near or at the upper end of the sentences recommended by the PSI (2014AP1248-CR:53A:36-37; Pet-Ap. D1-2). The prosecutor noted that the PSI did not recommend whether those sentences should be concurrent or consecutive and asked the court to impose consecutive sentences on the four counts (2014AP1248-CR:53A:37; Pet-Ap. D2). Defense counsel argued that the State's recommendation of consecutive sentences would result in an excessively lengthy sentence, asked the court to place Tourville on probation, and argued in the alternative that if the court were to order a prison sentence that the sentences be concurrent (2014AP1248-CR:53A:50, 54). The court imposed prison sentences on all four

counts and ordered that they be served consecutively (2014AP1248-CR:53A:83-84).

Tourville filed a postconviction motion in which he alleged that the plea agreement required the State to cap its sentencing recommendation at the high end of the sentences recommended in the presentence investigation report and that the State breached the plea agreement by recommending consecutive sentences (2014AP1248-CR:69:3-5). Tourville acknowledged that his lawyer had not objected to the alleged breach and asserted that counsel was ineffective for failing to do so (*id.*). He also alleged that his plea to the theft charge in case no. 2012CF27 was invalid because it lacked an adequate factual basis (2014AP1248-CR:69:5-7).

The circuit court denied the motion in a written decision (2014AP1248-CR:83:1-7; Pet-Ap. B1-7). With respect to Tourville's breach of the plea agreement claim, the court ruled that "presuming the State was bound by the high end of the PSI," the prosecutor met that obligation (2014AP1248-CR:83:3; Pet-Ap. B3). The court said that "[t]he PSI was silent on the issue of consecutive vs. concurrent and Defendant provides no authority to support his conclusion that if a PSI is silent, it is presumed to be a recommendation for concurrent sentences" (*id.*). The court held that "[a]s in *State v. Bowers*, [2005 WI App 72,] 280 Wis. 2d 534, [696 N.W.2d 255,] the parties['] plea negotiation did not consider the issue of concurrent or consecutive sentences and therefore when the State recommended consecutive, it did not violate the plea agreement" obligation (2014AP1248-CR:83:3-4; Pet-Ap. B3-4).

The circuit court concluded that because the prosecutor did not violate the plea agreement, Tourville's claim that his lawyer was ineffective was without merit (2014AP1248-CR:83:4; Pet-Ap. B4). The court further held that there was a factual basis for Tourville's guilty plea to the theft charge in case no. 2012CF27 (2014AP1248-CR:83:4-7; Pet-Ap. B4-7).

The court of appeals affirmed the judgments of conviction and the order denying postconviction relief. *State v. Patrick K. Tourville*, nos. 2014AP1248-CR, 2014AP1249-CR, 2014AP1250-CR, 2014AP1251-CR (Ct. App. March 31, 2015) (per curiam) (Pet-Ap. A1-5). With respect to Tourville's argument that his lawyer was ineffective for failing to object to a breach of the plea agreement, the court of appeals held that "[b]ecause the State did not violate the terms of the plea agreement, Tourville established neither deficient performance nor prejudice from his counsel's failure to object to the State's recommendation." *Id*., ¶4; Pet-Ap. A-3.

The court noted that in *Bowers*, "the plea agreement did not specify whether the recommended sentences would be concurrent or consecutive," and that the court of appeals had "refused to engraft onto the plea agreement conditions that were not contained in that document." *Id*. The court rejected Tourville's attempt to distinguish his case from *Bowers* based on his contention that the plea agreement was not "silent as to recommending consecutive or concurrent sentences" because it required the State to limit its recommendation to that of the PSI. *Id*., ¶5; Pet-Ap. A-3. It held that, as in *Bowers*, "[t]he plea agreement

and PSI both were silent as to recommending consecutive or concurrent sentences." *Id*.

The court of appeals also rejected Tourville's argument that there was no factual basis for the felony theft charge because the complaint did not allege that he was aware of the theft until after the asportation occurred and he did not admit during the plea colloquy to participating in the others' taking and carrying away of the safe. *Id*., ¶6; Pet-Ap. A4. The court noted that Tourville "was charged as an aider and abettor because he willingly aided the thieves in their efforts to carry away the safe and guns, and assisted them in the asportation of the safe from the residence to the swamp." *Id*., ¶9; Pet-Ap. A5. "These activities," the court held, "constitute a sufficient factual basis to support Tourville's guilty plea." *Id*.

ARGUMENT

As he did below, Tourville argues that the State breached the plea agreement when it recommended that the circuit 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 felony theft charge in case no. 2012CF27. Because the court of appeals correctly rejected those claims, this court should affirm the decision of the court of appeals affirming 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 prosecutor added . . . a recommendation that the sentences be served consecutively." Tourville's brief at 10. "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 at the postconviction hearing 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; Pet-Ap. B2). The circuit court did not decide whether there was such an agreement (2014AP1248-CR:83:2-4; Pet-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; Pet-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, were this court to 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 purposes of this brief, the State will assume that the plea agreement required the State to cap its sentencing recommendation at the high end of the PSI's recommendation.

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[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 circuit 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.6.

Tourville argues that a remand for fact finding is not necessary because the State did not present evidence at the postconviction hearing regarding the terms of the plea agreement. *See id*. at 12 n.6. But the fact that neither party mentioned at the plea hearing or the sentencing hearing any agreement by the State concerning a sentencing recommendation (2014AP1251-CR:26:3-22; 2014AP1248-CR:53A:18-37, 42-55) supports the district attorney's contention that there was no such agreement.

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 or, in the alternative, should conclude that Tourville's counsel was not ineffective for failing to make a meritless objection. *See Bokenyi*, 355 Wis. 2d 28, ¶5; *State v. Naydihor*, 2004 WI 43, ¶31, 270 Wis. 2d 585, 678 N.W.2d 220.

A. Applicable legal standards.

A defendant 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 a defendant agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the defendant'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 defendant bargained. *Id*. When the breach is material and substantial, a plea agreement may be vacated or the defendant may be entitled to resentencing. *Id*.[2]

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

[2]Tourville seeks resentencing, not plea withdrawal. *See* Tourville's brief at 20 n.6.

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.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

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

Both the circuit court and the court of appeals relied on *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, as the basis for their conclusion that because the plea agreement did not

address the issue of concurrent or consecutive sentences, the prosecutor did not violate the plea agreement when he recommended consecutive sentences. The State agrees that *Bowers* mandates rejection of Tourville's argument.

In *Bowers*, the defendant pled guilty to one count and 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 on appeal "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 holding 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 prison sentences in each of the four cases (2014AP1251-CR:16:17). But, as the circuit court found and Tourville acknowledges, the PSI was silent with regard to whether those recommended sentences should be imposed concurrently or consecutively (2014AP1251-CR:16:17-18). Thus, the maximum sentence that the court could have imposed consistent with the PSI's recommendation – and that the prosecutor could seek consistent with that recommendation – was consecutive sentences at the high end of the individual sentence recommendations.

Had the plea agreement called for the State to recommend prison sentences of specific lengths but been silent about whether the State would recommend concurrent or consecutive sentences, there could be no argument that, under *Bowers*, the State would be free to recommend 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 noting that the plea agreement in *Bowers* involved a single charge while his agreement involved four charges. *See* Tourville's brief at 14. He argues that "[w]hen 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)." *Id*.

The State does not understand the logic of Tourville's suggestion that it somehow is less important to a defendant already serving a sentence whether a new sentence will be served concurrent with or consecutive to the existing sentence. More importantly, even if Tourville were correct that a defendant serving an existing sentence is less

concerned about whether a new sentence will be concurrent or consecutive, he does not explain why that has any legal significance.

Tourville also argues that the language of his plea agreement "is significantly different from Bowers'" because "[t]he plea agreement in Bowers' case simply stated: 'State to recommend 2 yrs initial confinement; 3 yrs extended supervision,'" while his agreement required the state to "cap its recommendation at the high end of what the PSI orders." Tourville's brief at 15. His case differs from *Bowers*, he argues, because "the State agreed to have the PSI's recommendation set the parameters of what the prosecutor could recommend." *Id*. Because the PSI did not recommend consecutive sentences, he argues "the State went beyond the 'upper limit' of the PSI's recommendation." *Id*.

The flaw in that argument is that Tourville treats the absence of a recommendation of concurrent or consecutive sentences as a recommendation of concurrent sentences. Because a sentencing court "may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously," Wis. Stat. § 973.15(2)(a), in the absence of any recommendation in the PSI regarding concurrent or consecutive sentences, the "upper limit" of the PSI's recommendation was for consecutive sentences.

Tourville also argues that "to the extent there is ambiguity as to whether the State breached the

plea agreement, this Court should favor Tourville's interpretation." Tourville's brief at 17. He deems "instructive" cases that hold that when the trial court does not clearly state that a sentence is to be consecutive, the sentences are deemed to run concurrently. *See id. (citing State v. Oglesby*, 2006 WI App 95, 292 Wis. 2d 716, 715 N.W.2d 727, and *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991)). He also invokes the rule of lenity, which requires that penal laws be construed strictly. *See id*.

Tourville "acknowledges the different contexts for these cases, but contends that they are nevertheless relevant to the Court's analysis." *Id*. But he does not explain why they are relevant; he simply asserts that they are.

Those cases are not relevant or helpful to the court's analysis in this case. A defendant has no input into the manner in which a court pronounces sentence or how the legislature drafts a statute. But a defendant does have a say in the terms of a plea agreement and may reject an agreement whose terms he or she is unwilling to accept. And while Tourville stresses the importance of prosecutors' sentencing recommendations to the court, *see* Tourville's brief at 16-17, he could have attempted to negotiate a plea agreement with the prosecutor that precluded a recommendation of consecutive sentences. He did not do that.

Tourville does not argue that he believed that his plea agreement precluded the State from recommending consecutive sentences. Had the PSI recommended consecutive sentences, he could not

plausibly argue that the State's recommendation of consecutive sentences violated its agreement to cap its sentencing recommendation at the high end of the PSI's recommendation. Conversely, had the PSI recommended concurrent sentences, the State's recommendation of consecutive sentences would have violated the agreement. 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.

C. The court should not overrule *Bowers*.

Tourville further argues that if *Bowers* governs his situation, the court "should decide that *Bowers* was wrongly decided, and overrule that case." Tourville's brief at 15. The court should reject that invitation because *Bowers'* rationale is sound.

The court of appeals' decision in *Bowers* was based on the principles that "[t]he interpretation of plea agreements is rooted in contract law," and that "basic contract law dictates that we recognize the parties' limitation of their assent." *Bowers*, 280 Wis. 2d 534, ¶16 (citing *State v. Deilke*, 2004 WI 104, ¶12, 274 Wis. 2d 595, 682 N.W.2d 945). "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*. Because the parties did not bargain for a promise by the State to refrain from asking for consecutive sentences, the court of appeals concluded, the State did not violate

the plea agreement when it recommended consecutive sentences. *Id*.

The court of appeals noted in *Bowers* that "when faced with similar fact patterns, courts in other jurisdictions have reached the same conclusion as we do here." *Id*., ¶18. The court cited *United States v. Fentress*, 792 F.2d 461, 464-65 (4th Cir. 1986), which held "that the prosecution did not breach a plea agreement by asking the court to order restitution and consecutive sentences, where the agreement did not mention either restitution or consecutive sentences and the government otherwise kept its promises on the proposed length of imprisonment," *White v. United States,* 308 F.3d 927, 929 (8th Cir. 2002), which "conclud[ed] that the government did not breach a plea agreement by recommending that the defendant's new sentence should run consecutive to his probation revocation sentence because the plea agreement contained no provision for the sentences to be served concurrently," and *Doles v. State,* 55 P.3d 29, 34 (Wyo. 2002), which "determin[ed] that because there was no agreement that the sentence was to be concurrent, and the terms of the agreement did not establish that the prosecutor was required to refrain from asking for a consecutive sentence, it was permissible for the prosecutor to argue for a consecutive sentence." *See Bowers*, 280 Wis. 2d 534, ¶19.

In other cases of alleged breaches of a plea agreement, courts likewise have held that "[w]e will hold the Government to promises it made, but we will not hold the Government to promises it *did not*

make." *United States v. Danou*, 260 Fed. Appx. 864, 868 (6th Cir. 2008).

> The Court has cautioned in connection with plea agreements that it is error for an appellate court "to imply as a matter of law a term which the parties themselves did not agree upon." Under traditional contract principles, we should take an opposite tack, treating a plea agreement as a fully integrated contract and enforcing it according to its tenor, unfestooned with covenants the parties did not see fit to mention.

United States v. Anderson, 921 F.2d 335, 338 (1st Cir. 1990) (citation omitted); *see also United States v. Peglera*, 33 F.3d 412, 413 (4th Cir. 1994) ("in enforcing plea agreements, the government is held only to those promises that it actually made to the defendant").

In his plea questionnaires in these cases, Tourville stated that "[n]o promises have been made to me other than those contained in the plea agreement" (2014AP1248-CR:44:2; 2014AP1249-CR:32:2; 2014AP1250-CR:31:2; Pet-Ap. D1:2, D2:2, D3:2). During the plea colloquy, Tourville told the court that no promises other than the terms of the plea agreement had been made to him (2014AP1251-CR:26:15). The court should reject Tourville's suggestion that it imply as a matter of law a provision not stated in the plea agreement.

Tourville does not cite, and the State's research has not yielded, a single case from any jurisdiction that supports his argument that "[i]f 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." Tourville's brief at 15-16. *Bowers*' holding to the contrary appears to be supported by every court that has addressed the issue.

Tourville's argument relies primarily on the dissenting opinion in *Bowers*. Judge Brown wrote in dissent that "[i]f 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." *Bowers*, 280 Wis. 2d 534, ¶26 (Brown, J., concurring in part and dissenting in part). He argued that Bowers "was entitled to a clear understanding of exactly how the State's promise would affect him." *Id*., ¶27.

But, as this case demonstrates, there are times when a defendant agrees to a plea agreement that does not provide certainty about the sentence the State will recommend. There was no mutual assent that the State would recommend concurrent sentences. Tourville's plea agreement indisputably allowed the State to recommend consecutive sentences had the PSI recommended consecutive sentences. Had Tourville sought to limit the State's sentencing recommendation to concurrent sentences, he could have sought an agreement that did that.

Tourville does not contend that his plea was invalid because he did not understand the range of sentences that the State could recommend under the plea agreement. Rather, he asks the court to read into the plea agreement a limitation on the State's sentencing recommendation to which neither party agreed.

The plea agreement allowed the State to recommend a sentence at the high end of the PSI's sentencing recommendation. Because the PSI made no recommendation with respect to whether the individual sentences it recommended should be imposed concurrently or consecutively, the high end of the PSI's recommendation was consecutive sentences. This court should conclude, therefore, that the State did not breach the plea agreement when it asked the circuit court to impose consecutive sentences.

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

Tourville next argues that there was an inadequate factual basis for his guilty plea to the charge of theft as a party to a crime in case number 2012CF27.[3] 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.*

[3]In his argument heading, Tourville mistakenly identifies the case number as no. 2012CF278. *See* Tourville's brief at 20.

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; Pet-Ap. G2). 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.

A. Applicable legal standards.

A postconviction motion to withdraw a guilty plea may be granted only 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 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 was charged with theft by taking and carrying away the movable property of another, as a party to a crime (2014AP1250-CR:2:1; Pet-Ap. G1). He argues that "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." Tourville's brief at 23.

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 24-29. 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 its 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 argues that he did not aid in the carrying away of the safe because he "had nothing to do with the taking or carrying away of property from K.B.'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.'" *Id*. at 25.

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 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.

Tourville attempts to distinguish his case from two other cases cited by the court of appeals, *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). *See* Tourville's brief at 26-28. He argues that in *Grady*, "Grady was present when the radio was stolen, knew about it, and helped transport the radio directly away from the victim," *id.* at 28, and that in *Hawpetoss*, "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," *id*. at 29. But, as discussed above, it was not necessary that Tourville be present when the other men took the safe – all that was necessary is that he aided the other men in carrying it away.

Tourville argues that "[a]t best, he received stolen property and then moved it to another

location." *Id*. at 28. The unarticulated assumption behind that argument is that, as a matter of law, the "carrying away" ended when the other men arrived at Tourville's home with the safe. Tourville does not explain why that is so, nor does he cite any authority to support that proposition. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

Tourville's "at best" argument implies that he was guilty of a less serious offense, receiving stolen property, than the theft charge to which he pled guilty. But the offense of receiving stolen property is a Class H felony if the property is a firearm. *See* Wis. Stat. § 943.34(1)(bm) (2011-12). The offense to which Tourville pled guilty, theft of a firearm (2014AP1251:26:8-9), likewise is a Class H felony. *See* Wis. Stat. § 943.20(3)(d)5 (2011-12). Given Tourville's tacit acknowledgment that there was a factual basis for a related crime of equal severity, no manifest injustice will result from denying his request to withdraw his plea. *See State v. Dillard*, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44 ("To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice, that is, that there are 'serious questions affecting the fundamental integrity of the plea.'").

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 a 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 decision of the court of appeals affirming the judgments of conviction and the order denying postconviction relief.

Dated this 19th day of October, 2015.

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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 brief produced with a proportional serif font. The length of this brief is 6,129 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 19th day of October, 2015.

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