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STATE OF WISCONSIN

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

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent, Case No. 2014AP1254-CR

v.

WARREN E. SCHABOW,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, BRANCH 8, THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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DEFENDANT-APPELLANT'S BRIEF

STATEMENT OF ISSUE

DID THE TRIAL COURT ERR IN DENYING SCHABOW'S MOTION FOR RESENTENCING DUE TO VIOLATION OF THE PLEA AGREEMENT BY THE STATE IN SUGGESTING THAT MORE INITIAL CONFINEMENT THAT IT RECOMMENDED WAS WARRANTED?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Schabow) believes that the briefs of the parties will fully meet and discuss the issues on appeal. Publication is not warranted as this case involved the application of well-settled case law to a unique set of facts.

STATEMENT OF THE CASE

This case was commenced on July 16, 2012 by the filing of a three count criminal complaint (4) charging Schabow with the party to the crime of armed burglary, theft of a firearm and felony theft for offenses committed on July 9, 2012 contrary to Sec. 939.05, 943.10(2)(b) and 943.20(1)(a), Wis. Stats. Schabow also had his initial appearance on July 16, 2012 (42) at which bond was set at $10,000 cash (37). Attorney Luanna Marko was appointed to represent Schabow (14). After a continued initial appearance (50), Schabow' waived his preliminary examination (51). The State filed an information (12) that included the same offenses as those in the complaint. Schabow filed a substitution request against Judge Kendall Kelly (16) and Judge William Atkinson was assigned (17). Schabow pleaded not guilty at his arraignment before Judge Atkinson on September 17, 2012 (52) .

On October 15, 2012, Schabow plead no contest to all three counts in the information and an operating after revocation file (12 CT 1230) was dismissed (53). The court ordered a presentence investigation (PSI) (29) which was later filed (30). After victim statements (20 and 23) were filed, the court conducted sentencing on November 30, 2012 (54).

Judge William Atkinson sentenced Schabow to consecutive sentences of 2 years initial confinement (IC) and three years of extended supervision (ES) on Count One and 1 year IC and 2 years ES consecutive on Counts 2 and 3 . The court found Schabow eligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP) and granted 140 days of sentence credit. (35; App. 101-102).

After sentencing, Schabow filed a notice of intent to pursue post-conviction relief (36) and the undersigned attorney was appointed to represent Schabow. On February 18, 2014, the Court of Appeals issued an order that the undersigned attorney engage in further action with respect to Case No. 2013 AP 1456- CRNM. In response thereto, Schabow filed a post conviction motion asking for resentencing (59; App. 103-111). It alleged that the State violated the plea agreement by its remarks at sentencing. On May 2, 2014, the court held a hearing on the motion at which it was denied (75) . On May 14, 2014, Judge Atkinson issued a written order denying relief regarding the post conviction motion (66; App. 112).

Schabow subsequently filed a notice of appeal directed at the judgments of conviction and the order denying the post conviction motion (67).

STATEMENT OF FACTS

A. Original Sentencing

On October 15, 2012, Schabow entered no contest pleas in the above matter to one count of burglary and two counts of theft of a firearm arising from the same incident pursuant to an offer memo tendered by Assistant District Attorney (ADA) John F. Luetscher (25). The plea agreement provided for, among other terms, that the State "cap its recommendation at 2 years Initial Confinement and 4 years Extended Supervision."

John Melendy, the victim of the burglary, described the impact of the offense upon his family emotionally and financially (54: 4-5). Melendy also mentioned Schabow's prior record of involvement in similar offenses (54: 5) Melendy asked for a 5-10 year prison sentence (54: 6).[1]

The State's sentencing argument at issue in this case is set forth completely in the appendix (A54: 6-13; App. 112-119) . Remarks of parties and the court at sentencing are summarized below.

---

[1] Schabow understands that victims such as Melendy have an independent right to make a sentencing recommendation. Respecting a victim's rights under Chapter 950 does not violate a plea agreement. See *State v. Stewart*,2013 WI App 86, ¶15, 349 Wis.2d 385, 83 N.W.2d 456

At the sentencing proceeding, ADA Luetscher recommended the court sentence Schabow to two years IC and 4 years ES on the armed burglary count (54: 8). On the theft of a firearm offenses, Luetscher asked the court to concurrent terms of one year IC and 3 years ES (54: 8).

However, in making his recommendation, ADA Luetscher made a number of remarks that, taken as a whole, suggested that he was making his recommendation because he was bound to by the plea agreement and not because he believed it was appropriate. Examples of Luetscher's less than enthusiastic compliance with the terms of the plea agreement included (but were not necessarily limited to) the following:

a. Schabow also had a prior record of offenses that reflected poorly upon his character (explicitly repeating remarks by Melendy as to Schabow's status on probation at the time of the offense) (54: 8-9; App. 114-115).

b. After graduation from high school, Schabow began using drugs including heroin, suboxone and xanax (54: 9-10; App. 115-116). Schabow completed an outpatient drug program prior to the offenses which appeared to be a failure (54: 10; App. 116).

c. Schabow had no significant employment history (54: 10). Schabow did not understand the gravity of his criminal activity (54: 11; App. 117).

d. ADA Luetscher explicitly endorsed Melendy's comments that home burglary undermined the feeling of safety in the home that Melendy and his wife

needed (54: 11-12; App. 117-118). Schabow was dangerous to the community in his current state (54: 12-13; App. 118-119).

e. In concluding his recommendation, ADA Luetscher stated

> So, I think that the prison sentence of six years is appropriate. I think the initial confinement is *the very minimum* (emphasis added) that should be considered, and I think as length period of extended supervision. The four years that the State has recommend is wholly appropriate. That's all I've got to say. (54: 13; App. 119)

Attorney Marko did not object to any of ADA Luetscher's sentencing remarks and agreed with his sentencing recommendation (54: 14). Schabow had a difficult upbringing (54: 14). Schabow had a minimal record and his upbringing contributed to his AODA problems for which he needed intensive treatment (54: 14). Schabow cooperated with the officers in recovering property (54: 15). Marko asked that contact with the co-defendant be at the discretion of the agent (54: 15). There was no indication that Marko consulted with Schabow about failing to object to the remarks and not asking for sentencing before a judge not tainted by the at least arguable violation of the plea agreement.

Schabow stated that he was sorry for what he did and wanted to get into treatment and boot camp (54: 16).

Judge Atkinson imposed two years of initial confinement followed by three years of extended supervision on Count One (54: 20). On Counts 2 and 3 (theft of a firearm), Judge Atkinson imposed consecutive terms of one year of initial confinement followed by two years of extended supervision (54: 20). All

sentences were consecutive to each other and with eligibility for the Challenge Incarceration Program and Earned Release Program (54: 20-23). Conditions of ES included restitution and no contact with the victim and co-defendant (54: 22). The court granted 140 days of sentence credit (54: 22).

B. Post Conviction Motion Hearing

Attorney Luanna Marko testified that she did not object to ADA Luetscher's sentencing argument because she did not think it violated the plea agreement (75: 4-6). ADA Luetscher argued that the origin of the phrase "very minimum period of confinement" was the *Gallion*[2] case where the Wisconsin Supreme Court stated in part that a sentence imposed in a case must be the very minimum period consistent with the protection of the public and the defendant's needs (75: 8-9). The undersigned attorney argued that the test of whether there was a breach of a plea agreement was an objective one and not dependent upon the good faith of the prosecutor (75: 10; App. 120).

Judge Atkinson ruled that using the phrase in *Gallion* was appropriate and denied Schabow's post conviction motion (75: 11; App. 121).

Further facts will be stated in the argument below.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING SCHABOW'S POST CONVICTION MOTION FOR RESENTENCING BECAUSE THE STATE

[2] *State v. Gallion*, 2004 WI 42; 270 Wis. 2d 535, 678 N.W.2d 197

VIOLATED THE PLEA AGREEMENT BY SUBTLELY SUGGESTING THAT THE FACTS JUSTIFIED A LONGER SENTENCE.

1. Standard of review and general principles

The standard of review in plea agreement cases was set forth by the Wisconsin Supreme Court in *State v. Williams,* 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733:

> Our first inquiry is the standard of review this court applies in breach of plea agreement cases. This court clearly set forth the standard of review an appellate court is to apply in *State v. Wills*, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).
>
> ¶ 5. According to the *Wills* case:
>
> (1) The terms of the plea agreement and the historical facts of the State's conduct that allegedly constitute a breach of a plea agreement are questions of fact. An appellate court reviews the circuit court's findings of fact under the clearly erroneous standard of review.
>
> (2) Whether the State's conduct constitutes a breach of a plea agreement is a question of law. The *Wills* case does not explicitly address the standard to be used to review the issue of whether a breach is material and substantial. When a breach is material and substantial, a plea agreement may be vacated or resentencing ordered. We conclude that the question of material and substantial breach is one of law because the court is determining whether the facts fulfill a particular legal standard. This court determines questions of law independently of the circuit court and court of appeals, but benefiting from their analyses.
>
> (3) Some breach of plea agreement cases present both disputed questions of fact and questions of law. In such cases, this court reviews the facts under a clearly erroneous standard of review and then determines questions of law independent of the circuit court and court of appeals, but benefiting from their analyses.
>
> *Id.,* 2002 WI 1, ¶4-5, 249 Wis. 2d 492, 637 N.W.2d 733 (footnotes omitted)

In this case, Judge Atkinson denied Schabow's post conviction motion after an evidentiary hearing (75: 10-11: App. 120-121). There was no dispute about questions of fact on review. The issue is whether ADA Luetscher's remarks violated the plea agreement. Thus, this court reviews the question of law presented independently of the trial court.

Schabow's trial counsel did not make a timely objection to ADA Luetscher's sentencing remarks. However, that did not bar Schabow from seeking relief. As noted in *State v. Liukonen*, 2004 WI App 157, ¶ 6; 276 Wis.2d 64; 686 N.W.2d 689, the proper course is to follow the analysis used in *State v. Howard*, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244:

> When [the defendant] 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, this case comes to us in the context of an ineffective assistance of counsel claim.We first consider whether the State breached the plea agreement. If there was a material and substantial breach, the next issues are whether [defendant's] counsel provided ineffective assistance and which remedy is appropriate.

Id., ¶12 (citation omitted) ; see also *State v. Naydihor*, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220.

If the State materially and substantially breaches a plea agreement, a defendant may be entitled to vacation of the agreement or resentencing. *State v.*

Williams, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. At sentencing, "[t]he State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Williams*, 249 Wis. 2d 492, ¶42 (citations omitted). That said, the State also cannot agree to keep relevant information from the sentencing judge. ***Id.***, ¶43. As such, the State walks a "fine line" in balancing "its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." ***Id.***, ¶44 (citation omitted).

2. The State violated the plea agreement by its remarks at sentencing that implied that the amount of incarceration it recommended was less the amount justified by the facts it recited.

If the State materially and substantially breaches a plea agreement, a defendant may be entitled to vacation of the agreement or resentencing. *State v.* *Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. At sentencing, "[t]he State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Williams*, 249 Wis. 2d 492, ¶42 (citations omitted). That said, the State also cannot agree to keep relevant information from the sentencing judge. ***Id.***, ¶43. As such, the State walks a "fine line" in balancing "its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." ***Id.***, ¶44 (citation omitted).

Schabow submits that the less-than-enthusiastic support provided for by ADA Luetscher in support of his recommendation for a period of initial confinement of two years constituted a breach of the plea agreement. As the *Linkonen* court noted:

> ¶10. The plea agreement breach topic we address today involves a "fine line." Plea agreements in which a prosecutor agrees to cap his or her sentencing recommendation and hopes the court will impose the full recommendation "represent a fine line for the State to walk." …
>
> ¶11. Prosecutors may provide relevant negative information and, in particular, may provide negative information that has come to light after a plea agreement has been reached. However, prosecutors may not make comments that suggest the prosecutor now believes the disposition he or she is recommending pursuant to the agreement is insufficient. … …
>
> ¶13. We acknowledge the challenge faced by prosecutors, but conclude that the prosecutor in this case crossed the "fine line." …
>
> ¶14. For the most part, the prosecutor's remarks constituted fair comment on the seriousness of Liukonen's conduct, criminal history, and character, even when the prosecutor employed strong language. However, the prosecutor also talked about information he had learned and testimony he had heard after he entered into the plea agreement, and then used language suggesting he now thought the agreement was too lenient. …
>
> ¶15 … These comments communicated to the circuit court that the prosecutor was making the plea agreement recommendation because he was bound to do so, not because he thought it constituted an appropriate prison term. …

Schabow submits the same was the case here. ADA Luetscher assembled his argument by finding and emphasizing every negative remark in the PSI (30) about Schabow.

The PSI recommended the same amount of IC and ES provided forth in ADA Luetscher's recommendation in the plea agreement and the beginning of his sentencing remarks. Judge Atkinson's decision denying Schabow's post conviction motion held that the State's remarks at the end of the argument about its recommendation being the "minimum" required were not a breach of the agreement because although the State argued that its recommendation was "the minimum" necessary, it used a common phrase from appellate cases (75: 11; App. 121). The problem with that ruling is that it ignored the context of ADA Luetscher's sentencing argument which was followed the request of John Melendy, the victim, for a 5-10 year prison sentence (54: 6). Further, as noted earlier, ADA Luetscher noted many negative facts about Schabow's character and almost no positive aspects of it. About the only positive fact that ADA Luetscher could find to say about Schabow was that he graduated from high school and adapted to a foster home (54: 9; App. 115).

Luetscher's argument was inconsistent with the State's recommendation for two years of initial confinement. By reciting facts in a manner that suggested that Schabow had thus far in life shown little rehabilitative potential and agreeing with the substance of the argument if not the exact figures stated by Melendy , the State breached the plea agreement.

The Court of Appeals ordered a resentencing in another case similar in many ways to the present one. In *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, the prosecutor noted recommendations by the PSI and others for a harsher sentence than the prosecutor recommended and implicitly agreed with them by its highly negative remarks about the defendant:

> ¶22 Further distinguishing this case from *Naydihor* and likening it to *Williams* are the prosecutor's observations that (1) both the PSI and sex offender assessment reports disagreed with the probation recommendation set out in the plea agreement; and (2) Sprang was "high risk" and had not previously done well on probation.
>
> ¶23 "[W]hat the prosecutor may not do is personalize the information, adopt the same negative impressions as [the author of the presentence investigation report] and then remind the court that the [author] had recommended a harsher sentence than recommended." *Williams*, 249 Wis. 2d 492, ¶48 (citation and footnote omitted). While not expressly stating that he had changed his impression of Sprang, see id., ¶47, the prosecutor observed that he found it "troubling" that Sprang's version of the offense in the PSI report contradicted his guilty plea, that he found it clear from the PSI report and sex offender evaluation that Sprang was "high risk," and finally, that he was "concerned" that the PSI report and sex offender assessment did not agree with the plea agreement and made a recommendation of initial confinement in the three- to five-year range.
>
> ¶24 We conclude that the prosecutor's comments, including a recitation of the PSI recommendation for confinement, constituted a breach of the plea agreement by "insinuat[ing] that [the State] was distancing itself from its recommendation," see *Naydihor*, 678 N.W.2d 220, ¶28, and "cast[ing] doubt on … its own sentence recommendation." See *Williams*, 249 Wis. 2d 492, ¶50. In doing so, we acknowledge the State's contention that the prosecutor's remarks were merely informative in nature. Such an argument begs the question. No doubt the prosecutor's remarks were informative; however, the core inquiry is whether such "information" breached the terms of the plea agreement. Our inquiry does not turn on

> whether the prosecutor intended to breach the agreement, 6 see *State v. Howland*, 2003 WI App 104, ¶31, 264 Wis. 2d 279, 663 N.W.2d 340, but rather we look to the practical effect of the prosecutor's statements. Here, that effect was to deprive Sprang of his constitutional right to the enforcement of the negotiated terms of his plea agreement. See *Williams*, 249 Wis. 2d 492, ¶37.

In this case, ADA Luetscher avoided the *Spang* prosecutor's error of mentioning and implicitly endorsing the victim's sentencing recommendation. However, that is a distinction without a difference. The effect of the argument ADA Luetscher made and the message was the same: Schabow was bad with minimal redeeming qualities. The State's recommended 2 years IC was the "minimum" necessary and not the result of a thoughtful balancing of factors to be considered in sentencing. The State would not be heartbroken if the court actually imposed more time.

The court's sentencing rationale in this case mirrored the theme of and many of the remarks by ADA Luetscher. However, simply because the sentencing court did not explicitly endorse part of Melendy's or the State's sentencing argument in imposing sentence in excess of the State's nominal recommendation does not mean Schabow is not entitled to relief. As the *Sprang* case further noted in a footnote:

> 6 Nor does our inquiry turn on whether the sentencing court was influenced by the State's breach. *State v. Poole*, 131 Wis. 2d 359, 363, 394 N.W.2d 909 (Ct. App. 1986). Therefore, we do not consider the trial court's statement that it did not base its sentencing decision in this case on the State's remarks.

The State's sentencing argument deprived Schabow of the benefit of the plea agreement he agreed to as a condition of entering his no contest pleas. A claim of "harmless error" is insufficient to avoid the requirement for a resentencing to insure him the benefit of the bargain he was entitled to as a matter of due process.

Luetscher's use of a common appellate court phrase in describing the rendering of a criminal sentence and his claim of good faith did not mean it complied with the plea agreement. The test is an objective one: Did the remarks violate the terms of the agreement? It is not enough to have an afterthought about the origins of the offending remark.

Judge Atkinson's decision that the State did not violate the plea agreement by its remarks was incorrect as a matter of law. Denying Schabow's motion for resentencing was error.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the Judgment of Conviction and the order denying the post conviction motion in the above matter and remand this case to the trial court for resentencing before a different judge.

Dated this 9th day of December 2014

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 3765 words, including certifications.

Dated this 9th day of December, 2014.

LEN KACHINSKY

CERTIFICATION AS TO ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of 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 9th day of December 2014.

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LEN KACHINSKY