STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP1392-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JOHNNY E. MILLER, JR.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN B. TORHORST, CIRCUIT JUDGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument or publication. This case presents straightforward, undisputed facts. Well-established principles of law compel affirmance.

ISSUE PRESENTED FOR REVIEW

In Wisconsin, a criminal defendant has a constitutional right to enforce a negotiated plea agreement. But the law doesn't bind the State to promises it never made. The State made no promises in the plea agreement or during negotiations regarding Miller's eligibility for the Earned Release Program.[1] Did the State breach that agreement by asking the circuit court to defer Miller's eligibility until he served a specified portion of his sentences?

The circuit court said "no."

This court should say "no."

STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

The State originally charged Miller with possession of heroin, cocaine, and THC, all with intent to deliver; maintaining a drug trafficking place; possession of a firearm by a convicted felon; and possession of drug paraphernalia (2:1-2). The heroin, cocaine, and THC charges all contained proximity-to-a-school penalty enhancers (2:1-2).

Miller and the State struck an agreement. In return for Miller's guilty pleas to possessing heroin with intent to deliver

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[1] "The [Earned Release Program] is a substance abuse program administered by the Department of Corrections. Wis. Stat. § 302.05. An inmate serving the confinement portion of a bifurcated sentence who successfully completes the ERP will have his or her remaining confinement period converted to extended supervision, although the total length of the sentence will not change. Wis. Stat. § 302.05(3)(c)2." *State v. Owens*, 2006 WI App 75, ¶ 5, 291 Wis. 2d 229, 713 N.W.2d 187 (footnote omitted).

and possessing a firearm as a convicted felon, the State promised to:

- dismiss the penalty enhancer from the heroin charge.

- recommend an eight-year prison sentence on the heroin charge, with six years of initial confinement and two years of extended supervision.

- recommend a six-year consecutive prison sentence on the firearm charge, with three years of initial confinement and three years extended supervision.

- dismiss the four remaining felony charges, while preserving them for read-in purposes.

(41:2). *See also* 14:1 (plea questionnaire and waiver of rights form, specifying guilty pleas).

That's the sum total of the plea agreement. The State made no promises in the agreement or during the negotiations regarding Miller's eligibility for the Earned Release Program. Defense counsel confirmed that the issue of Miller's eligibility never came up in the negotiations. *See* 42:22 ("[T]hat wasn't discussed as far as the plea bargain.").

Miller did what he promised to do. He pleaded guilty to both charges (41:6).

And the State did everything it promised to do. *See* 16 (judgment dismissing four remaining felony charges); 20 (judgment convicting Miller of possessing heroin with intent to deliver, minus the proximity-to-a-school penalty enhancer); 42:5 (State's sentencing recommendation on charge of

possessing heroin with intent to deliver); 42:6 (State's sentencing recommendation on charge of possessing a firearm as a convicted felon).

The circuit court imposed the bargained-for sentences (20; 42:17-18). It also found Miller eligible for the Earned Release Program (42:20).

The prosecutor responded to that finding with a request:

> [BY THE PROSECUTOR:] Your Honor, I would ask that the Court find that he is eligible for the Earned Release Program after serving a specific period within the Wisconsin State Prison System so that he is not immediately eligible and immediately subject to release.
>
> [BY DEFENSE COUNSEL:] Well, that wasn't discussed as far as the plea bargain. I understand the Court may have its discretion but I would object to that.
>
> [BY THE COURT:] I'm going to receive the State's suggestion, find that Mr. Miller is not eligible for earned release until he's served the sentence on Count 1. It's the weapons charge that would be second to that, but the drug charge in this is so serious, I agree with the State's request, and I'll issue the judgment of conviction accordingly.

(42:20-21).

Miller now appeals from the judgment of conviction (23).[2]

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[2] In intermediate orders entered August 4, 2014, and September 3, 2014, this court questioned—and then confirmed—its jurisdiction over this appeal. Accordingly, the State construes defense counsel's objection as properly preserving the allegation of breach Miller raises in this appeal.

STANDARD OF APPELLATE REVIEW

"The question of whether the State's conduct breached the terms of the plea agreement is a question of law that we review de novo." *State v. Bowers*, 2005 WI App 72, ¶ 5, 280 Wis. 2d 534, 696 N.W.2d 255 (citation omitted).

CONTROLLING PRINCIPLES OF LAW

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." *Bowers*, 280 Wis. 2d 534, ¶ 7 (citation omitted).

A material and substantial breach of a plea agreement by the State entitles the defendant to appellate relief. *Id.* ¶ 9. A material and substantial breach "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." *Id.*

Bowers—not cited by Miller—contains the principle of law that defeats Miller's appellate argument. The State must keep the promises it makes in a plea agreement, but "it will not be bound to those it did not make." *Id.* ¶ 16 (citation and internal quotation marks omitted). In the absence of a promise by the State not to ask the circuit court to defer Miller's eligibility for the Earned Release Program, or some other indication that both parties expected the State to stand silent on point, this court shouldn't add that condition to the plea agreement. *Id.* ¶¶ 14-21. "[T]he State should be held only to those promises it actually made to the defendant." *Id.* ¶ 16.

ARGUMENT

Because The Plea Agreement Said Nothing About The Issue Of Miller's Eligibility For The Earned Release Program—And Because Miller Never Bargained For The State's Promise Not To Address That Issue—The State's Request For Deferred Eligibility Didn't Breach The Agreement.

Miller claims that, since the parties didn't negotiate the issue of his eligibility, the prosecutor's request for deferred eligibility "was illegal for that reason." Miller's brief-in-chief at 12.[3] Alternatively, he claims the State's request constitutes an impermissible end-run around the terms of the agreement. *See id.* at 10-13.

Bowers compels rejection of Miller's claims.

In *Bowers*, the defendant claimed the State breached the plea agreement by recommending that his sentence run consecutive to a sentence he had begun serving in another case. 280 Wis. 2d 534, ¶ 4. The plea agreement contained no provision requiring it to either remain silent on the issue or recommend concurrent sentences. *Id.* ¶ 14.

This court found no breach in *Bowers*. It reasoned as follows:

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[3] This pronouncement of "illegality" also appears in Miller's statement of facts, interspersed with other partisan commentary and argument. *See, e.g.*, Miller's brief-in-chief at 7-8. This court has said that "[t]he fact section of a brief is no place for argument" *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194. That message bears repeating here.

- "Here, the issue, as we see it, is whether the State actually breaches a plea agreement when it makes no commitment in the plea agreement or during the negotiations process either to recommend concurrent sentences or to remain silent on the question." *Id.* ¶ 17 n.3.

- "[A] material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party." *Id.* ¶ 15. The plea agreement in *Bowers* said nothing about sentence structure. "Thus, when the State recommended consecutive sentences, it did not violate the express terms of the agreement and Bowers was not denied his due process right to have the full benefit of the plea bargain upon which he relied." *Id.*

- Contract law governs interpretation of plea agreements, and "dictates that we recognize the parties' limitation of their assent. 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.* ¶ 16 (citations omitted). "[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.*

- "While the government must be held to the promises it made, it will not be bound to those it did not make. To do otherwise is to strip the

> bargaining process itself of meaning and content." *Id.* (internal quotation marks and citation omitted).

Here, as in *Bowers*, the claimed breach involved a nonexistent term in the plea agreement. The State made no promises in the plea agreement regarding Miller's eligibility for the Earned Release Program.

And here, as in *Bowers*, nothing suggests the parties expected the State to remain silent regarding Miller's eligibility. Defense counsel told the court that issue never came up in plea negotiations. *See* 42:22 ("[T]hat wasn't discussed as far as the plea bargain."). In both his plea questionnaire (14:2) and during his plea hearing (41:3-4), Miller also stated no promises had been made to him other than those contained in the plea agreement.

This court shouldn't add such a condition to the fully integrated, straightforward plea agreement negotiated in this case. *Bowers*, 280 Wis. 2d 534, ¶ 16. That agreement spelled out the State's obligations, which the prosecutor discharged in full. Well-established principles of contract law prevent appellate courts from adding additional obligations.

> The interpretation of plea agreements is rooted in contract law, and basic contract law dictates that we recognize the parties' limitation of their assent. 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.

Bowers, 280 Wis. 2d 534, ¶ 16 (citations omitted). Both parties received the benefit of their bargain.

Miller's claim that the prosecutor's request for deferred eligibility constitutes an impermissible "end run" around the plea agreement also fails.

The State agrees that it can't perform end runs around its plea agreements. *State v. Williams*, 2002 WI 1, ¶ 42, 249 Wis. 2d 492, 637 N.W.2d 733. More precisely, the 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." *Id.* (internal quotation marks and citation omitted).

None of that happened here.

The State never promised, directly or indirectly, to stand silent regarding Miller's eligibility for the Earned Release Program.

And the prosecutor's request for deferred eligibility didn't convey to the circuit court that Miller really deserved a more severe sentence than what the parties recommended. How could it? By the time the prosecutor made her request, both parties had discharged all their responsibilities under the agreement. The prosecutor had already argued forcefully and well for the exact sentencing recommendation Miller had bargained for (42:5-6). The circuit court had already "embraced" and "accept[ed]" the agreed-upon recommendation, and had sentenced Miller accordingly (42:17-18). The deal was done.

CONCLUSION

This court should affirm Miller's judgment and sentence.

Dated at Madison, Wisconsin, this 21st day of October, 2014.

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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 1,666 words.

Dated this 21st day of October, 2014.

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Gregory M. Weber
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of October, 2014.

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