STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP001448-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESMOND MYERS LAPEAN,

Defendant-Appellant.

Appeal of a Judgment Entered in the St. Croix County Circuit Court, the Honorable Eric J. Lundell, Presiding, and from the Order Entered in the St. Croix County Circuit Court, the Honorable Scott J. Nordstrand, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Mr. LaPean is entitled to resentencing as the state materially and substantially breached the plea agreement and he was denied the effective assistance of counsel.

There is no dispute that the state breached the plea agreement in this case by twice asking the court to sentence Mr. LaPean to 24 years of imprisonment. (Response Br. 1-2, 3, 10). As this breach was material and substantial, Mr. LaPean's counsel performed deficiently in failing to object to the state's second misstatement and failing to correctly advise Mr. LaPean of both remedies for the breach. Further, Mr. LaPean was prejudiced by this deficient performance. Consequently, Mr. LaPean was denied the effective assistance of counsel and is entitled to resentencing before a different judge at which the state complies with the plea agreement.

A. The state's breach of the plea agreement was material and substantial.

Despite its promise to recommend no more than 20 years' imprisonment, at the sentencing hearing the prosecutor asked the circuit court to sentence Mr. LaPean to 24 years. Initially she requested that the 24 years be composed of 12 years of initial confinement and 12 years of extended supervision. (88:14; App. 127). After an objection from defense counsel, the prosecutor maintained her

request for 24 years of imprisonment, but asked for 10 years of initial confinement and 14 years of extended supervision. (88:14; App. 127). It was not until much later, after completion of her argument and after defense counsel's presentation and argument, that the prosecutor requested a sidebar and informed the court of the correct terms of the plea agreement. (88:42; App. 155). This recitation of the plea agreement, however, was "too little, too late" and did not cure the state's breach. *See State v. Williams*, 2002 WI 1, ¶52, 249 Wis. 2d 492, 637 N.W.2d 733.

The prosecutor breached the plea agreement by twice requesting a sentence of four more years of imprisonment than it had agreed to recommend.[1] The state asserts, however, that this breach was not material and substantial because, in its view, the prosecutor promptly corrected her error, the court "was unquestionably aware of the plea provision," and the prosecutor was not covertly arguing that Mr. LaPean deserved a harsher sentence. (Response Br. 2, 9-11).

First, the prosecutor's recitation of the correct terms of the plea agreement was not prompt and did not correct the error, distinguishing this case from *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534,

[1] Although the state frames the breach as simply asking for four more years of extended supervision, imprisonment consists of both initial confinement and extended supervision. (Response Br. 10). Wis. Stat. § 973.01.

696 N.W.2d 55, and *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997). (*See* Initial Br. 16-20). Unlike *Knox*, the state's breach in this case was not "quickly acknowledged and rectified" by "advocating the corrected proposed disposition." *See Knox*, 213 Wis. 2d 318, 323. Despite an initial objection by defense counsel, the prosecutor in this case continued to argue for a 24 year prison sentence and defense counsel did not immediately object again. Consequently, the error was not corrected shortly after it was made. Rather, the prosecutor was able to argue to the circuit court that it needed to impose a 24 year sentence, and it was not until much later in the hearing that the breach was brought to the court's attention. (88:14-15, 42; App. 127-128, 155). Further, the prosecutor never actually advocated for, or proposed, a sentence of 20 years. Instead, using qualified language, she simply stated the correct terms of the plea agreement and her choice of words implied that she was only stating what she was required to, not that she believed a 20 year sentence was appropriate. (88:42; App. 155).

Second, the circuit court in this case was not "unquestionably aware of the plea provision." (*See* Response Br. 2). Rather, after defense counsel's initial objection to the state's breach, the circuit court stated, "I don't know either way, so." (88:14; App. 127). Moreover, unlike the circuit court in *Bowers*, the court never mentioned or referenced the correct sentence recommendation from the state while imposing its sentence in this case. *See Bowers*, 2005 WI App 72 ¶¶3, 13. There is nothing on the

record, other than the prosecutor's inconsistent statements, which indicates that the circuit court knew and understood the terms of the plea agreement.

Third, there is no requirement that the state covertly argued for a harsher sentence, or make statements reflecting a change of heart, in order for this court to find a material and substantial breach of a plea agreement. *See Williams*, 2002 WI 1, ¶52 ("That the prosecutor did not intend to breach the agreement or that a breach was inadvertent 'does not lessen its impact.'"). Were there such a requirement, however, it would be met here.

The prosecutor's argument in this case implied that a harsher sentence was warranted. She took the unusual step of having the victim's foster mother speak in the middle of her argument, and both before and after the foster mother requested the maximum sentence, the prosecutor reminded the court that it was sentencing Mr. LaPean on a Class B Felony with a maximum penalty of 60 years' imprisonment. (88:4, 9-11). Further, by directly arguing to the court that she believed the case warranted high prison time in the amount of 24 years, and that the court needed to sentence Mr. LaPean to that amount to meet its sentencing goals, the prosecutor not only created the impression that she was, but actually did argue against the terms of the plea agreement. (88:14-15; App. 127-128). *See Id.*, ¶48.

Just as in *Williams*, the prosecutor argued for a sentence greater than that which she had agreed to recommend and then, at the end of the hearing, stated the correct recommendation. The difference in this case, however, is that the state's breach was an explicit, rather than implicit, request for a harsher sentence. The state's explicit request, and argument in support thereof, "substantially and materially breached the plea agreement because it undercut the essence of the plea agreement." *Id.*, ¶46.

In its attempt to diminish the magnitude of the breach in this case, the state repeatedly emphasizes that the prosecutor simply requested four more years of extended supervision than it was supposed to. (Response Br. 13-15). It ignores the fact that the prosecutor agreed to cap its recommendation at 20 years' imprisonment and instead twice asked the court to impose a 24 year sentence. The prosecutor's argument that this amount of time was necessary was not limited to the length of initial confinement. The prosecutor specifically stated, "[t]he need to not unduly depreciate what happened here I think warrants a high prison time. The state recommends to this court 24 years," and "I think that the court needs to sentence Desmond LaPean to that high amount because to do so[sic] anything less would unduly depreciate the seriousness of the crime, the gravity of the offense, and the need to protect the public." (88:14; App. 127). Prison includes both initial confinement and extended supervision and the prosecutor's argument regarding the "high amount" requested didn't distinguish between them. The

prosecutor suggested that Mr. LaPean deserved more time that what she agreed to recommend – she argued for a total sentence of 24 years.

The state asserts that the "tenor of the prosecutor's argument was that the cap she had agreed to argue was justified based on the facts of the case and the relevant sentencing factors," and that she "zealously advocated for the longest sentence she could, consistent with the plea agreement." (Response Br. 14-15). But how can that be so when the prosecutor's argument was not capped at 20 years as was agreed? The prosecutor zealously argued that the sentence she requested – 24 years – was justified. A sentence four years longer than the longest sentence she could have requested under the plea agreement. This zealous advocacy impaired the integrity of the sentencing process. It makes no difference whether the circuit court was actually influenced by the prosecutor's breach. *See Bowers*, 2005 WI App 72 ¶8 ("When examining a defendant's allegation that the State breached a plea agreement…it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation."). The state's breach, twice telling the circuit court that it needed to impose a sentence of at least 24 years of imprisonment was material and substantial; it deprived Mr. LaPean of the benefit of his bargain.

B. Defense counsel performed deficiently and Mr. LaPean was prejudiced by that deficient performance.

Mr. LaPean was denied the effective assistance of counsel as the state's breach was material and substantial. The state concedes that, if the breach was material and substantial, defense counsel performed deficiently in failing to object to the prosecutor's second request for a 24 year sentence. (Response Br. 16, fn. 1). In failing to address it, the state also concedes that defense counsel performed deficiently when he failed to inform Mr. LaPean of both remedies available to him as a result of the breach. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W. 2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded.). As Mr. LaPean was prejudiced by this deficient performance, he is entitled to resentencing at which the state recommends a sentence of no more than 10 years of initial confinement and 10 years of extended supervision.

1. Prejudice is presumed.

In *State v. Smith*, 207 Wis. 2d 258, ¶38, 558 N.W.2d 379 (1997), the Wisconsin Supreme Court held that a material and substantial breach of a plea agreement by the state is a "'manifest injustice' and always results in prejudice to the defendant." In so holding, the court discussed the difficulty in measuring the harm caused by the breach, that it would involve speculation and calculation, and also

the rule in *Santobello*[2] that "when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." *Smith*, 207 Wis. 2d 258, ¶¶36-38. The court also relied in large part on the holding in *Strickland*[3] that, "proof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable. The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different." *Id.*, ¶27. It noted that the *Strickland* test is not an outcome-determinative test. *Id.*, ¶28.

The state argues that, pursuant to *State v. Jennings*, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142, this court must find that *Smith's* holding is no longer good law. (Response Br. 16-18). It asserts that the United States Supreme Court decision in *Puckett v. United States*, 556 U.S. 129 (2009), conflicts with and overrules that case.[4] (Response Br. 5, 16-19). As set forth below, the state's argument fails and this court remains bound by the holding in *Smith* and its progeny. *See Cook v. Cook*, 208 Wis. 2d 166, ¶53, 560 N.W.2d 246 (1997).

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[2] *Santobello v. New York*, 404 U.S. 257 (1971).

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

[4] The state also cites to *Campbell v. Smith*, 770 F.3d 540 (7th Circ. 2014) which does not control and is not binding on this court. *See In re Guardianship of Jane E.P.*, 2005 WI 106, ¶6, 283 Wis. 2d 258, 700 N.W.2d 863 (noting that a decision of the United States Court of Appeals for the Seventh Circuit was not binding on state courts).

First, the state forfeited its argument that *Smith* is no longer good law and that Mr. LaPean must establish prejudice by failing to make it below. In fact, as the state acknowledges, in the circuit court it conceded that Mr. LaPean had established ineffective assistance of counsel if the plea breach was found to be material and substantial. (Response Br. 16)(72:11; 91:47).

Ignoring the fact that the state did not raise this issue below, the United States Supreme Court decision in *Puckett* does not involve a question of federal law which is binding on this court, nor does it conflict with *Smith*.

The question addressed in *Puckett* was "whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure." *Puckett*, 556 U.S. 129, 131. The Court discussed the four prongs of review under Rule 52(b) and found that each of the prongs, including a finding that the error affected the outcome of the proceeding, must be met when a defendant appeals a forfeited plea breach claim. *Id.*, at 135-143. The Court's holding did not discuss ineffective assistance of counsel or any other constitutional claims; rather, it was limited to review of claims brought under Rule 52(b) of the Federal Rules of Criminal Procedure. *Id.*, at 143.

Moreover, should this court find that *Puckett* does involve a question of federal law that is binding on this court, the decision in that case does not conflict with the Wisconsin Supreme Court's decision in *Smith*. The Court in *Puckett* did not limit any of the provisions in *Santobello* that *Smith* relied on. Instead, the *Puckett* Court found that *Santobello* did not apply, as that case addressed whether a plea breach could be found harmless, which "is simply a different question from whether it can be subjected to plain-error review." *Puckett*, 556 U.S. 129, 139. The Court did note that *Santobello*'s holding of automatic reversal only applied to preserved plea breach claims, but it did not overrule or limit the rule relied upon by the Wisconsin Supreme Court that "when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." *Puckett*, 556 U.S. 129, 141; *Smith*, 207 Wis. 2d 258, ¶38.

Finally, the holding in *Puckett* involved application of the prejudice prong of review under Rule 52(b), which is not the same as prejudice under *Strickland* – the issue decided by *Smith*. The third prong of Rule 52(b)'s plain error standard requires the defendant to "demonstrate that he probably would have received a more favorable sentence if not for the government's breach." *United States v. Navarro*, 817 F.3d 494, 500 (7th Cir. 2016). As set forth above, however, *Strickland's* prejudice test is not outcome determinative; rather, the "touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial

unreliable or the proceeding fundamentally unfair.'" *Smith*, 207 Wis. 2d 258, ¶28.

Puckett does not conflict with *Smith* and, consequently, *Smith's* holding that prejudice is to be presumed when the state commits a material and substantial breach of a plea agreement governs this case.

2. Mr. LaPean has established prejudice.

Should this court find that prejudice is not presumed, Mr. LaPean maintains that he was denied the effective assistance of counsel as defense counsel's deficient performance in this case resulted in prejudice.

Contrary to the state's assertion, Mr. LaPean did not obtain the sentence the prosecutor promised to request. (Response Br. 19). The state promised to recommend a sentence of no more than 20 years' imprisonment, as 10 years' initial confinement and 10 years' extended supervision. (30:2; 87:3-4). Mr. LaPean received a sentence of 22 years' imprisonment, as 12 years of initial confinement – the amount initially requested by the state – and 10 years of extended supervision. (52; 88:14) This sentence is two years longer than the maximum the state had agreed to request.

Further, there is a reasonable probability that had counsel objected, or had he informed Mr. LaPean of both remedies available for the state's breach, the

result of the proceeding would have been different – the sentence would have been different or Mr. LaPean would have obtained a new sentencing hearing at which the state actually complied with the plea agreement.

The state breached the plea agreement by twice asking the court to impose a sentence of 24 years' imprisonment. The state's first misstatement was not immediately cured, as the state continued to request a sentence in excess of that which it agreed to. (*See* Response Br. 20). Moreover, the fact that defense counsel only noticed the first, and not the second, misstatement, does not mean that Mr. LaPean was not prejudiced by counsel's failure to inform him of the proper remedies for the breach. Defense counsel did not recall exactly when he discussed the remedies for the breach with Mr. LaPean, but he was clear that based on his interaction with Mr. LaPean, Mr. LaPean would have chosen specific performance before a new judge had he known it was an option. (91:9-12, 22; App. 159-62). Additionally, Mr. LaPean testified that had he been informed that he could seek specific performance at a new sentencing hearing before a different judge, he would have done so. (91:27-28; App. 177-178). Had he been properly advised by his attorney, Mr. LaPean would not have chosen to proceed with sentencing that day

Finally, the record supports a finding that defense counsel's failure to object to the breach rendered the sentencing hearing unreliable or fundamentally unfair. While pronouncing sentence,

the circuit court noted that it had listened to the arguments of counsel – including the state's argument for a 24 year sentence – before imposing a sentence which was higher than either party was supposed to request under the plea agreement. (88:43). That sentence included 12 years of initial confinement, the amount the state originally argued that the court should impose. There is a reasonable probability that, had the defense counsel objected, the result of the proceeding would have been different.

CONCLUSION

For the reasons state above, and in the initial brief, Mr. LaPean respectfully requests that this court reverse the circuit court's denial of his postconviction motion and remand the case for resentencing before a different judge.

Dated this 14th day of January, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,995 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 14th day of January, 2020.

Signed:

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Assistant State Public Defender