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CASE NO. 2021AP000021-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2018 CF 81**
(Vernon County)

ROBERT K. NIETZOLD, SR.,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY J. ROOD PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

Pages

STATEMENT OF ISSUE……1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION……1

STATEMENT OF THE CASE……1

STATEMENT OF FACTS……2

ARGUMENT……5

I. DEFENDANT NIETZOLD MUST BE GRANTED A RESENTENCING BECAUSE THE STATE FAILED TO HONOR THE TERMS OF THE PLEA AGREMENT………5

A. Relevant law……6

B. The State materially breached the plea agreement..9

C. Trial counsel's performance was deficient…10

D. Defendant was prejudiced by trial counsel's deficient performance……...11

E. If the State argues trial counsel's inactions waived this issue, trial counsel was ineffective and the case should be remanded for a Machner hearing…….11

CONCLUSION……...12

CERTIFICATIONS……12-13

INDEX TO APPENDIX……14

CASES CITED

Mabry v. Johnson,
467 U.S. 504 (1984) ……6

State v. Bangert,
131 Wis.2d 246,
389 N.W.2d 12 (1986)……..……..7

State v. Howard,
2001 WI App 137,
246 Wis.2d 475,
630 N.W.2d 244……..……..7

State v. Liukonen,
2004 WI App 157,
276 Wis.2d 64,
686 N.W.2d 689,
394 N.W.2d 909……..6

State v. Smith,
207 Wis.2d 258,
558 N.W.2d 379 (1997)……6-7, 11

State v. Sprang,
2004 WI App 121,
274 Wis.2d 784,
683 N.W.2d 522…….……..7, 8, 11

State v. Williams,
2002 WI 1,
249 Wis.2d 492,
637 N.W.2d 733…….……..5

State v. Wills,
187 Wis.2d 529,
523 N.W.2d 569 (Ct.App.1994)…….……6

State v. Woods,
173 Wis.2d 129,
496 N.W.2d 144 (Ct.App. 1992)…….9, 11

OTHER LAW

Daniel Frome Kaplan, Comment, Where Promises
End: Prosecutorial Adherence To Sentence
Recommendation Commitments in Plea Bargains,
52 U. Chi. L.Rev. 751, 755 (1985)…….6

STATEMENT OF ISSUE

I. WHETHER DEFENDANT SHOULD BE GRANTED A RESENTENCING BASED ON STATE'S BREACH OF DEFENDANT'S PLEA AGREEMENT AT THE TIME OF SENTENCING.

On 12/20/20, the trial court denied defendant Nietzold's motion for a resentencing without a hearing by having filed a face page of defendant's motion document with "Denied" written in and initialed, presumably by the court (39, App. at 101). On 2/8/21, a more formal order was entered by the trial court, again denying postconviction relief (45, App. at 102).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE

On 9/21/18, defendant was charged in Vernon County Circuit Court Case 2018 CF 81 with the commission of five counts of second-degree sexual assault as a Class C felony, the offenses allegedly committed over the period between 2014 and July of 2017 (2). On 11/14/18, defendant waived his right to a preliminary hearing (7). An information was filed which alleged the same offense as in the criminal complaint (6). On 4/22/19, an amended information was filed, alleging a single count of repeated acts of sexual assault, the offense allegedly committed in 2014 (16). On 5/6/19, defendant entered a plea to the offense alleged in the amended information (55:4-8). The court accepted defendant's plea and found defendant guilty (55:8). A presentence report was ordered (19).

On 6/26/19, a sentencing hearing was held (48). At the conclusion of the hearing, the court sentenced defendant Nietzold to 25 years in prison, 15 years initial confinement followed by 10 years of extended supervision (48:38-39). Defendant filed a timely notice of intent to seek postconviction relief (26).

On 12/4/20, defendant filed a postconviction motion for a resentencing (37). On 12/20/20, the trial court denied defendant Nietzold's motion for a resentencing without a hearing by having filed the face page of defendant's postconviction motion document with "Denied" written in and initialed, presumably by the court (39, App. at 101). On 2/8/21, a more formal order was entered by the trial court, again denying postconviction relief (45, App. at 102).

STATEMENT OF FACTS

On 5/6/19, defendant entered his plea to the sole count of the amended information, repeated sexual assault of a child as a Class C felony (55). A plea questionnaire was filed by trial counsel and was part of the record during the plea colloquy (17). The plea questionnaire indicated there was a plea agreement to the effect "DA not making specific term of imprisonment" (17:2, App. at 103). During the plea hearing, the State informed the court, "I will be asking for prison, but it won't be any specific length, is what the agreement is, Your Honor" (55:3). A presentence report was ordered (19).

The presentence report was filed with the court prior to sentencing (20). The report recommended 22 years prison, 10 years initial confinement followed by 12 years of extended supervision (20:24).

On 6/26/19, the matter proceeded to sentencing (48). The victim and her mother requested a maximum sentence (48:3-12). The State, in its sentencing remarks said the following:

> You know, most of us in this courtroom sit here as fathers, mothers, grandmothers, grandparents. And you try to wrap your head around it. Judge the PSI asks for 22 years. You know, we get to sentencing in serious cases, this is a serious case. But, again, Mr. Nietzold stands before this Court not convicted previously, but, again, pled to repeated acts of sexual assault against his daughter.
>
> So what is—again, what's the magic number? And as I've said before, that's a difficult position that this court is in. And a lot of times the PSI may be the best barometer because they do have their grids and their guidelines, and thy understand throughout either this region, or at least the state, what—I don't want to say typical, because there isn't a typical sentence, but at least—you have to put a number on it eventually. And the

> number that they came up with was 22, 12 years of initial confinement and ten of extended supervision.
>
> Judge, I—you know, again, whether that's the right number, not the right number, [The victim] was talking about the maximum term, which would be 40 years, 25 in and 15 out. Again, I don't know what the number is. I think the number that the PSI put on is a reasonable number. I've looked at other sentences to—again, when I say similar, at least the charge-wise, that that certainly is in the range in this area.
>
> Judge, the only thing I would ask the Court to consider would be 15 years is the maximum time of extended supervision. Maybe keep Mr. Nietzold on extended supervision for a 15-year period rather than the 10 that's being requested.
>
> So, I guess that's what I would ask that the Court consider, is a 27-year sentence with 12 years of initial confinement and 15 years of extended supervision. That would be a –depending upon potentially early discharge from prison at some point, that would be about 25 years out that he would be under some formal either incarceration or supervision, which I think just makes sense in regards to the heinous nature of these crimes (48:15-16).

Only after the State had completed its remarks, did defense counsel object to the State's argument being a breach of the plea agreement (48:17). In response to defense counsel's objection, the State conceded its argument could only be for a prison sentence of unspecified length (48:17). Defense counsel did not ask for any relief based on the State's breach (48). There is no evidence in the record that defense counsel consulted with defendant about his options in the face of the State's breach of the plea agreement (48).

Defense counsel recommended a prison sentence of two to three years initial confinement followed by a term of extended supervision left to the discretion of the trial court (48:24). After defendant's allocution, the Court took a brief recess (48:32). In pronouncing sentence, the following took place:

> The Court: It's always so hard to put a number what the sentence should be. The state recommended 12 years. We say 12 years in--.
>
> DA Gaskell: Judge, recall that I didn't make a recommendation.

> The Court: The State. I meant DOC by the state, not you.
>
> DA Gaskell: Oh, I'm sorry.
>
> The Court: I'm sorry. I'm thinking of the DOC as the state, not Attorney Gaskell.
>
> Mr. Gaskell: Department of Corrections.
>
> The Court: Department of Corrections. Thank you for clarifying that. I would not want the record to state that, because I did not listen to what you wee saying, essentially were echoing what the PSI said.
>
> Mr. Thibodeau: Well, the record does--
>
> The Court: Other than asking for a longer extended supervision, but you didn't ask for any more--.
>
> Mr. Gaskell: Right, but, Judge,--
>
> The Court: --confinement—
>
> Mr. Gaskell: The negotiation—
>
> The Court: I understand.
>
> Mr. Gaskell: I was not to make any recommendation.
>
> The Court: And you withdrew your recommendation.
>
> Mr. Gaskell: Yeah.
>
> The Court: I get that. I'm just saying it was DOC. It was DOC that made this recommendation.
>
> Mr. Gaskell: Right.
>
> The Court: I get that. I'm just saying it was DOC. It was DOC that made this recommendation.
>
> Mr. Gaskell: Right.
>
> The Court: So I was trying to figure out what would be appropriate (48:37-38).

The trial court imposed a sentence of 25 years, 15 years initial confinement followed by 10 years of extended supervision (48:38-39).

Defendant Nietzold, brought a postconviction motion asking for a new sentencing based on the State's failure to honor the terms of the plea agreement (37). In the alternative, the defense asserted that if the State argued the issue was waived because it was not timely preserved, that trial counsel was ineffective (37). A postconviction motion hearing was not held. On 12/4/20 and 2/8/21, orders were entered denying the postconviction relief (39, 45, App. at 101-02).

ARGUMENT

J. DEFENDANT NIETZOLD MUST BE GRANTED A RESENTENCING BECAUSE THE STATE FAILED TO HONOR THE TERMS OF THE PLEA AGREMENT.

Standard of review

The standard of review is set forth in *State v. Naydihor,* 2004 WI 43, ¶10, 270 Wis.2d 585, 678 N.W.2d 220:

> A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing. [*State v. Williams,* 2002 WI 1, ¶¶ 37-38, 249 Wis.2d 492, 637 N.W.2d 733]. Whether the State breached a plea agreement is a mixed question of fact and law. The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State's alleged breach of that agreement are questions of fact. *Id.,* ¶2. On appeal, the circuit court's determinations as to these facts are reviewed under the clearly erroneous standard. *Id.,* ¶20. Whether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo. *Id.* A breach is material and substantial when it "defeats the benefit for which the accused bargained." Id., ¶ 38.

A. Relevant law.

In *State v. Smith,* 207 Wis.2d 258, 558 N.W.2d 379 (1997), the court addressed an issue related to State's violation of a plea agreement. In *Smith,* defendant negotiated a plea agreement with the State. The State agreed to make no sentencing recommendation at sentencing. Defendant entered his pleas. At sentencing, the State argued for a lengthy prison sentence. The defense attorney did not object. In addressing the issue, the court said:

> A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. *State v. Wills*, 187 Wis.2d 529, 536, 523 N.W.2d 569 (Ct.App.1994) aff'd, 193 Wis.2d 273, 533 N.W.2d 165 (1995)(citing *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)). Due process concerns arise in the process of enforcing a plea agreement. *Wills*, 187 Wis.2d at 537, 523 N.W.2d 569 (citing Daniel Frome Kaplan, Comment, Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains, 52 U. Chi. L.Rev. 751, 755 (1985)). "Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." 187 Wis.2d at 537, 523 N.W.2d 569 (quoting Kaplan, 52 U. Chi. L.Rev. at 755).
>
> The *Wills* court concluded that a contract law analysis of a plea agreement leads to the same result as a due process analysis. 187 Wis.2d at 537, 523 N.W.2d 569. An agreement by the State to make a particular sentence recommendation may induce the defendant to waive his fundamental right to a trial. "Government sentence recommendation commitments fundamentally influence the defendant's calculus by altering the expected outcome of a sentencing proceeding." Id. (quoting Kaplan, 52 U. Chi. L.Rev. at 769). When a prosecutor does not make the negotiated sentencing recommendation, that conduct constitutes a breach of the plea agreement. *State v. Poole*, 131 Wis.2d at 364, 394 N.W.2d 909.
>
> In a case where the defendant sought to withdraw his guilty plea because the prosecutor may have technically breached the agreement, we said that a plea agreement may be vacated where a "material and substantial breach

> of the agreement" is proven. *State v. Bangert*, 131 Wis.2d 246, 289, 389 N.W.2d 12 (1986). Such a breach must deprive the defendant of a material and substantial benefit for which he or she bargained. *Id.* at 290, 389 N.W.2d 12. Further, we said that a material and substantial breach amounts to a "manifest injustice." *Id.* at 289, 389 N.W.2d 12.

In *Smith,* the court indicated that prejudice is presumed when the prosecutor materially breaches the plea agreement and the defense attorney fails to object. *Id.* at 278-82.

In *State v. Howard,* 2001 WI App 137, 246 Wis.2d 475, 630 N.W.2d 244, the court addressed an issue related to whether a plea agreement had been breached by the State during its sentencing remarks. In the case, the parties reached an agreement whereby the State would argue for concurrent sentences on several charges, with a cap of 25 years in prison on a count of sexual assault. At sentencing, while the State argued for a total of 25 years in prison, it did so by arguing for several consecutive sentences to the count of sexual assault. The defense did not object to the State's argument.

On appeal, the court found the State had breached the plea agreement. The court remanded for a hearing on the issue of whether trial counsel was ineffective in failing to object. As to possible remedies, the court recognized specific performance of the agreement as an appropriate remedy. *Id.* at ¶32.

In *State v. Sprang,* 2004 WI App 121, 274 Wis.2d 784, 683 N.W.2d 522, the court addressed an issue where the State breached a plea agreement. In *Sprang,* the defendant pleaded to first-degree sexual assault of a child. The State agreed to recommend no more than probation with any appropriate conditions. Prior to sentencing, the presentence report and a sexual offender assessment were filed. Both recommended prison.

At sentencing, the State proceeded to flagrantly undercut the terms of the original plea agreement:

> The prosecutor noted that Sprang had not traditionally done well with supervision and had committed "one of the most serious offenses that the State can charge in this state" which carries "the second highest penalty that a non-enhanced felony can carry." The prosecutor noted a definite need to protect the public. He then expressed his concern about appropriate treatment while noting that the sexual offender assessment and the PSI author, after conducting a "thorough presentence," made "a recommendation referring to initial confinement in the three-to five-year range." The prosecutor then explained that he had inquired of the PSI author how treatment would be run in prison and was informed that it would take six to nine months to get someone into the program and then six months to four years to complete a treatment. He indicated that he was "pass[ing] that along to the Court for whatever help it may or may not be in terms of if the Court … chooses to send [Sprang] to prison … or chooses to accept the plea agreement." *Id.* at ¶10.

Sprang's counsel sat silently during these remarks. The defense presentation was characterized as follows:

> [H]e began his statements by observing that "what the [the prosecutor] has said, I fear if someone ever looks at a transcript, this might be considered a violation of the plea agreement. He then asked the prosecutor to summarize his recommendation one more time. The prosecutor declined to do so and the trial court directed the defense to move on, stated that the recommendation was clear. *Id.* at ¶11.

The appellate court found the State had breached the plea agreement. *Id.* at ¶24.

The court then analyzed the ineffective assistance of counsel claim. The court recognized that when trial counsel performs deficiently in failing to object to a substantial and material breach of the plea agreement, prejudice is presumed. *Id.* at ¶25. During the *Machner* hearing, trial counsel explained why he had not objected to the State's remarks. On appeal, the State argued defense counsel had strategic reasons for having not objecting to the State's argument.

In response to the State's argument, the court of appeals wrote:

> We agree with the State that defense counsel had valid strategic reasons for choosing not to object to the prosecutor's remarks. However, we have already concluded that those remarks constituted of the negotiated plea agreement. When defense counsel made the decision to forego an objection, he did not consult with Sprang regarding this new development or seek Sprang's opinion in the matter. Thus, Sprang had no input into a situation where the original plea agreement, which limited the State to arguing for conditions of probation, had morphed into one in which the State could suggest that the court impose a prison sentence without probation. As such, the plea agreement to which Sprang plead no longer existed. That defense counsel failed to consult Sprang as to the new agreement violates the holding of *State v. Woods,* 173 Wis.2d 129, 132-33, 141, 496 N.W.2d 144 (Ct.App. 1992). … [In *Woods*], we held that a guilty plea is a personal right of the defendant and that the defendant was entitled to withdraw his plea on grounds that defense counsel's failure to object had resulted in a renegotiated plea agreement to which the defendant was never a party. *Id.* at ¶¶27-28.

B. The State materially breached the plea agreement.

In this case, the State clearly breached the plea agreement. When defendant Nietzold entered his plea, the plea agreement was that the State would not make a specific prison recommendation. That is reflected in the plea questionnaire, where the agreement was summarized as, "DA not making a specific term of imprisonment" (32, App. at 103). During the plea hearing, the State confirmed this was the plea agreement (55:3). However, during sentencing, the State asked the court to impose a specific prison sentence of 27 years in prison, 12 years of initial confinement followed by 15 years of extended supervision (48:15-16). The State presented the court with a lengthy analysis as to how it arrived at its recommendation, including a reference to the PSI recommendation (48:15-16).

It goes without saying, defendant Nietzold did not reach a plea agreement with the State whereby the State would agree not to recommend a specific prison sentence, but during sentencing, would make a recommendation for a specific term of prison, but would later withdraw that specific recommendation when the defense objected. Who would make this kind of plea deal? Defendant Nietzold received no benefit from his plea agreement.

Any suggestion this was not a breach of the plea agreement is absurd. No prosecutor, no judge, no other court official would find what happened in this case acceptable if it happened to their beloved father, son or brother during a sentencing hearing. Defendant Robert Nietzold doesn't have to either.

Defendant has no reason to believe the State acted maliciously in making its recommendation in contravention of the plea agreement. Defendant has no duty to prove the State acted intentionally in breaching the plea agreement. The stark reality is the Court could not ignore the State's argument when it imposed sentence. While the State later tried to remedy the error, it was too little, too late. One cannot unring a bell. The prosecutor's later statement to the Court that it could not make a specific prison recommendation cured nothing. The damage was done when the State's argument was made. Regardless of trial counsel's inactions, the State breached the plea agreement. Resentencing before another judge is the proper remedy.

C. Trial counsel's performance was deficient.

If the State attempts to make the untenable argument that the plea agreement was not breached or that trial counsel waived the breach, defendant asserts in the alternative that trial counsel was ineffective.

The State's specific recommendation for prison was not a momentary reference. The State's detailed remark as to why its specific prison recommendation of 12 years initial confinement and 15 years of extended supervision was appropriate spans two pages of the transcript (48:15-16). As in *Sprang,* trial counsel said *nothing* while this blatant violation of the plea agreement was occurring.

Like in *Sprang,* defense counsel raised an issue only when it was his turn to speak. He told the Court the State breached the plea agreement (48:15-16). However, counsel did nothing beyond that. He did ask to conclude the proceedings and to set the matter for sentencing before another judge. He did not ask for any other remedy. There is no evidence in record that he consulted with defendant about his options in the face of the blatant breach of the plea agreement by the State. In effect, he allowed the plea agreement to be rewritten to one with the useless terms of:

> DA not making specific term of imprisonment except that State will argue for a specific terms but will later tell the Court it could not make a specific recommendation.

This rewriting of the plea agreement was done without defendant Nietzold's input, in violation of the law from *Woods,* cited above. If the State's actions were not an outright, actionable breach of the plea agreement, then trial counsel's actions after the violation of the plea agreement were deficient.

D. Defendant was prejudiced by trial counsel's deficient performance.

If the State in fact breached the plea agreement, under the law from *Smith* and *Sprang,* cited above, prejudice is presumed.

E. If the State argues trial counsel's inactions waived this issue, trial counsel was ineffective and the case should be remanded for a Machner hearing.

If this Court finds there is an insufficient basis to conclude the plea agreement was breached, then, consistent with the law from *State v. Liukonen,* 2004 WI App 157, ¶19, 276 Wis.2d 64, 686 N.W.2d 689, this matter should be remanded to the trial for a *Machner* hearing to determine whether trial counsel may have had a strategic reason for having not objected more promptly to the State's argument and for having failed to consult with defendant Nietzold about his options in the face of the State's improper sentencing argument.

CONCLUSION

For the reasons set forth above, defendant should be granted a resentencing before another judge. In the alternative, this matter should be remanded to the trial court for a *Machner* hearing whereby the trial court will be required to hold a hearing and to make findings of fact on relevant issues.

Dated: June 12, 2021

_____
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 3641 words.

Dated: June 12, 2021

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Philip J. Brehm

APPENDIX CERTIFICATION

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

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

Dated: June 12, 2021

_____
Philip J. Brehm

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with 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 on or after this date and that 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: June 12, 2021

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Philip J. Brehm

INDEX TO APPENDIX

Pages

Trial court's 12/10/20 order denying postconviction relief……101

Trial court's 2/5/21 order denying postconviction motion……102

Plea questionnaire page reflecting plea agreement……..103