STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT K. NIETZOLD, SR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY JO ROOD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

A defendant is entitled to relief for a breach of the plea agreement when that breach deprives the defendant of a substantial and material benefit for which he or she has bargained. At Defendant-Appellant Robert K. Nietzold's sentencing hearing, the prosecutor mistakenly breached the plea agreement by recommending a specific term of confinement. But defense counsel objected to the breach, and the prosecutor, upon recognizing his mistake, withdrew the recommendation. The prosecutor then clarified that the State's position was not to recommend a specific sentence, and the court indicated that it understood.

Did the prosecutor's breach of the plea agreement deprive Nietzold of a substantial and material benefit of the agreement, entitling him to resentencing?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs adequately present the issue, and it can be resolved by application of well-settled law to the facts.

STATEMENT OF THE CASE

In 2018, Robert Nietzold's adult daughter reported to police that Nietzold sexually assaulted her on an on-going basis when she was a child. (R. 2:2–4.) Nietzold confessed to the assaults, and he was charged with five counts of sexual assault of a child under the age of 16, contrary to Wis. Stat. § 948.02(2). (R. 2:1–4.)

Pursuant to a plea agreement, Nietzold pleaded no contest to one count of repeated sexual abuse of a child, contrary to Wis. Stat. § 948.025(1), charged in an amended

information. (R. 16:1; 17:1–2.) The court accepted the plea at a hearing and found Nietzold guilty, and the case proceeded to sentencing. (R. 55:8–10.)

The plea agreement called for the State to ask for a prison sentence without recommending a specific term of imprisonment. (R. 17:2; 55:3.) But at the June 2019 sentencing hearing, the prosecutor recommended a specific term of imprisonment. The prosecutor noted the presentence investigator's recommendation—12 years of initial confinement and 10 years of extended supervision—and the maximum term of imprisonment provided by statute, 25 years of initial confinement and 15 years of extended supervision. (R. 54:15–16.) The prosecutor then concluded his remarks by asking the court to impose a sentence of 12 years of initial confinement and 15 years of extended supervision:

> 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 ten 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 some sense in regard to the heinous nature of these crimes. And so that's what I would ask the Court to consider in regards to the sentence.
>
> Thank you.

(R. 54:16–17.)

Defense counsel then addressed the court and immediately noted that the prosecutor's request of a specific term of imprisonment violated the plea agreement:

> Thank you, Your Honor.
>
> First of all, going to point out as part of our plea agreement that the State was not going to make any recommendation with respect to any period of time. And that seems to just happen. He was certainly going to recommend prison. I knew that. He knew that. But he was not to make any specific recommendation.

(R. 54:17.)

The prosecutor interjected to admit his mistake and withdraw the recommendation in the following exchange:

> [PROSECUTOR]: And, Judge, now that—I wish [defense counsel] would have mentioned that. And that's an accurate statement [that the State was not to recommend a specific prison term], Judge. So—
>
> THE COURT: So you'll make no recommendation separate from that of the PSI.
>
> [PROSECUTOR]: Well, not even that. Just a prison sentence.
>
> THE COURT: Okay. All right.

(R. 54:17–18.)

In passing sentence, the court remarked that "the state" recommended 12 years of initial confinement. (R. 54:37.) The prosecutor then interrupted to remind the Judge "I didn't make a recommendation," and the court clarified, "I meant DOC by the state, not you." (R. 54:37.) The court added: "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 were saying, essentially [you] were echoing what the PSI said." (R. 54:37.) The prosecutor then reiterated his promise not to recommend a specific term of imprisonment, and the Court said it understood:

> THE COURT: Other than asking for a longer extended supervision, but you didn't ask for any more—

> [THE PROSECUTOR]: Right, but, Judge—
>
> THE COURT: —confinement—
>
> [THE PROSECUTOR:] The negotiation—
>
> THE COURT: I understand.
>
> [THE PROSECUTOR]: I was not to make any recommendation.
>
> THE COURT: And you withdrew your recommendation.
>
> [THE PROSECUTOR]: Yeah.
>
> THE COURT: I get that. I'm just saying it was DOC. It was DOC that made this recommendation.
>
> [THE PROSECUTOR]: Right.

(R. 54:37–38.)

The court subsequently imposed a sentence of 25 years of imprisonment, consisting of 15 years of confinement and 10 years of extended supervision. (R. 54:38–39.) The court explained that it arrived at 15 years of confinement to punish Nietzold for each of the 15 years in which he sexually assaulted the victim.[1] (R. 54:38–39.)

In December 2020, Nietzold, by counsel, filed a Wis. Stat. § (Rule) 809.30 motion requesting resentencing before another court for the State's breach of the plea agreement. (R. 37:1.) The circuit court summarily denied the motion without an evidentiary hearing in a hand-written order issued December 10, 2020, and a printed, one-sentence order issued February 8, 2021. (R. 39:1; 45:1.)

Nietzold appeals.

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[1] The victim told law enforcement that Nietzold's assaults began when she was 4 years old and continued until she was 18. (R. 2:2–3.)

ARGUMENT

Nietzold is not entitled to resentencing because the State's breach of the plea agreement did not deprive him of a material and substantial benefit for which he bargained.

A. Standard of review

A breach of plea claim is reviewed under a mixed standard of review. *State v. Williams*, 2002 WI 1, ¶ 20, 249 Wis. 2d 492, 637 N.W.2d 733. The circuit court's findings of historical fact relevant to the claim are reviewed under the clearly erroneous standard of review. *Id.* Whether the State breached the agreement, and, if so, whether the breach deprived the defendant of a material or substantial benefit for which he or she has bargained, are questions of law that are reviewed *de novo*. *See id.*; *State v. Quarzenski*, 2007 WI App 212, ¶ 19, 305 Wis. 2d 525, 739 N.W.2d 844.

B. Principles of law

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "[O]nce an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain." *Williams*, 249 Wis. 2d 492, ¶ 37.

A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. *Smith*, 207 Wis. 2d at 271. But to be actionable "[a] breach must not merely be technical." *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). "[R]ather, [it] must deprive the [defendant] of a substantial and material benefit for which he [or she] bargained." *Id.* If the breach is material and substantial, a defendant may be entitled to resentencing or plea withdrawal, as the sentencing court, in its discretion,

deems appropriate. *See State v. Howard*, 2001 WI App 137, ¶¶ 36–37, 246 Wis. 2d 475, 630 N.W.2d 244.

C. Nietzold was not deprived of the benefit of the State not recommending a specific sentence because the prosecutor withdrew the mistaken recommendation and clarified that the State was not seeking a specific sentence.

Nietzold seeks resentencing before a different judge because the prosecutor breached the terms of the plea agreement by recommending a specific sentence. (Nietzold's Br. 8–13, 15.) Though the prosecutor breached the agreement, Nietzold is not entitled to relief because he fails to show that he was actually deprived of the benefit of this term of the agreement. *See Bangert*, 131 Wis. 2d at 290.

Nietzold still received the benefit of the State's promise to make no specific sentencing recommendation because, upon defense counsel's objection to the prosecutor's erroneous recommendation, the prosecutor promptly withdrew the recommendation and asserted that the State's position was to make no specific recommendation. (R. 54:17–18.) The prosecutor admitted that defense counsel's objection that the State was not to make a specific sentencing recommendation was "accurate" and told the court that the agreement permitted him to request imprisonment without recommending a specific term. (R. 54:17–18.) The prosecutor thus made clear that, despite his apparent mental lapse, the State's actual position was consistent with the plea agreement: Prison without the recommendation of a specific term of imprisonment. Thus, the State ultimately kept its promise to Nietzold by withdrawing the mistaken recommendation and asserting the agreed upon term of no specific sentencing recommendation.

Later, the prosecutor even sought to ensure that the court did not rely on the withdrawn recommendation in passing sentence. (R. 54:37–38.) When the court mentioned the sentencing recommendation of "the state," the prosecutor interrupted to remind the court that he was not recommending any specific term of imprisonment. (R. 54:37.) The court clarified that, by "the state," it meant the Department of Corrections, not the district attorney's office, but thanked the prosecutor for the reminder. (R. 54:37.)

The court did not rely on the erroneous recommendation, imposing a sentence that was different than the erroneous recommendation—15 years of initial confinement and 10 years of supervision. (R. 54:38–39.) The rationale for this sentence was original to the court: one year of confinement for each year in which Nietzold abused the victim, from age 4 to age 18. (R. 54:38–39.)

Granted, a defendant need not prove reliance by the court to prevail on a claim that the prosecutor breached the plea agreement by recommending a specific term of imprisonment. *See State v. Bowers*, 2005 WI App 72, ¶ 8, 280 Wis. 2d 534, 696 N.W.2d 255. No, Nietzold's claim fails because he cannot show that he was deprived of the benefit of the State's pledge not to recommend a specific sentence where his attorney objected to the erroneous recommendation, and the prosecutor withdrew it and clarified that the State's position was to request prison without seeking a specific prison term. But it is worth noting that the sentence imposed indicates that the court set aside the prosecutor's erroneous, withdrawn recommendation and charted its own course in sentencing Nietzold.

Nietzold relies primarily on *Smith* and *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, but these cases are distinguishable. In *Smith*, 207 Wis. 2d at 272–73, 282, the supreme court held that the defendant was entitled to resentencing where the prosecutor breached the plea

agreement by making a specific sentencing recommendation. But there, Smith's attorney never objected to the prosecutor's breach, and the prosecutor did not withdraw his recommendation and assert the position on sentence outlined in the plea agreement. *Smith*, 207 Wis. 2d at 272–73. As a result, Smith, unlike Nietzold, was actually denied the benefit of the State's promise not to recommend a specific sentence.

In *Sprang*, 274 Wis. 2d 784, ¶¶ 4, 7–11, the plea agreement called for the State to recommend probation, but the prosecutor made comments that undermined this position at sentencing. Like Smith's attorney, counsel for Sprang did not object to the prosecutor's violation of the agreement; he merely observed that the prosecutor's comments "might be considered a violation of the plea agreement." *Sprang*, 274 Wis. 2d 784, ¶ 11. As in *Smith*, the prosecutor did not withdraw the recommendation and assert the sentencing position the State had committed to in the plea agreement. By contrast, Nietzold's attorney did make a clear objection and, most importantly, the prosecutor withdrew the erroneous sentencing recommendation and brought his position into alignment with the terms of the plea agreement. As a result, Nietzold received the benefit of the State's promise not to recommend a specific term of imprisonment.

Finally, Nietzold argues that the prosecutor's withdrawal of the erroneous recommendation was "too little, too late," the bell was rung, and "[t]he damage was done" once the prosecutor uttered the recommendation. (Nietzold's Br. 13.) The State believes this gives sentencing courts far too little credit. At trial, when a witness gives inadmissible testimony, the problem may be remedied by the court instructing the jury to ignore the testimony. If the evidence is potentially prejudicial, the court may also issue a cautionary instruction before jury deliberations, and courts presume juries follow these instructions. *See State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399.

Likewise, judges should be trusted to set aside information mistakenly provided at sentencing that may not be considered. Here, the transcript indicates that the sentencing court was able to focus on proper considerations, not on the prosecutor's withdrawn recommendation. (R. 54:37–39.) Where the prosecutor withdrew the mistaken recommendation, and asserted the State's sentencing position contained in the plea agreement, Nietzold cannot show that he was deprived of a material and substantial benefit of the plea agreement.[2]

For these reasons, Nietzold is not entitled to resentencing on his breach-of-plea-agreement claim.

[2] Because the State believes that counsel's objection to the prosecutor's mistaken breach of the agreement was timely and adequate, it does not address further Nietzold's alternative ineffective assistance of counsel argument. (Nietzold's Br. 13–14.)

CONCLUSION

The order denying resentencing should be affirmed.

Dated this 31st day of August 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,167 words.

Dated this 31st day of August 2021.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 31st day of August 2021.

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