STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
****

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 REPLY BRIEF

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ARGUMENT

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

The State argues that while there was technical breach of the plea agreement, it did not deprive defendant Nietzold of the benefit of his bargain with the State. (State's brief at 9-10). It argues defendant is not entitled to relief. The State argument fails to recognize the significance of the State's breach of the plea agreement in this case.

In support of its position that technical breaches of plea agreements are not actionable, it cites *State v. Bangert,* 131 Wis.2d 246, 290, 389 N.W.2d 12 (1986). In *Bangert,* defendant worked out a plea agreement with the State whereby the State would not use the word "maximum" directly or indirectly in its sentencing recommendation. *Id.* at 286. During sentencing, the State told the court it was not going to seek a maximum sentence. *Id.* at 287. In *Bangert,* the Wisconsin Supreme Court found that because this was a technical breach of the plea agreement, defendant was not entitled to relief. *Id.* at 289.

That is not close to what happened in this case. The State promised not to make a specific sentencing recommendation in this case (17:2). There is no dispute this was the plea agreement (State's brief at 5). At sentencing, the prosecutor specifically referenced the recommendation of the presentence author for a 22-year sentence, 12 years of initial confinement and 10 years of extended supervision[1] (48:15). The State then analyzed this number and made his own recommendation for 15 years, as opposed to 10 years of extended supervision (54:16-17). During its significant presentation, the State referenced specific numbers related to sentencing three times (54:16-17). The State's entire presentation was done without an objection from defense counsel.

[1] Arguably, any reference to the presentence report recommendation would have been a violation of the plea agreement. In this case, there is no doubt the reference to the PSI recommendation by the State was a violation of the plea agreement because it was incorporated into the State's presentation as reference point as to an appropriate term of initial confinement to be imposed.

Defense counsel's delay in objecting to the specific sentencing argument by the State is puzzling. It is difficult to understand why there would not have been an immediate, on the record rebuke of the prosecutor when he made his specific sentencing recommendation. Had defense counsel had done so, arguably, this would have been a technical breach that would have been easily remedied.[2]

Instead, defense counsel allowed the error to irreparably undermine the integrity of the proceedings. The prosecutor made a substantial, persuasive and uninterrupted argument why a lengthy term of initial confinement and an even longer term of extended supervision than recommended by the presentence author was appropriate before defense counsel said anything.

The State makes the untenable argument that because the prosecutor corrected his mistake on the record, any issue was resolved (State's brief at 9). How does that work? How was the trial court supposed to disregard the State's substantial, persuasive and uninterrupted argument in sentencing defendant? The following took place during the trial court's sentencing remarks:

> Trial Court: It's always so hard to put a number on what the sentence should be. The State recommended 12 years. We say 12 years in –
>
> Prosecutor: Judge, recall, I didn't make a recommendation.
>
> Trial Court: The state. I meant DOC by the state, not you.
>
> Prosecutor: Oh, I'm sorry.
>
> Trial Court: I'm sorry. I'm thinking of the DOC as the State not [the prosecutor].
>
> Prosecutor: Department of Corrections.
>
> Trial 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 were saying, essentially were echoing what the PSI said.** (emphasis added).
>
> Prosecutor: Well, the record does—

[2] Defendant Nietzold continues to argue in the alternative that trial counsel's performance was deficient and prejudicial in failing to immediately object.

> Trial Court: Other than asking for a longer extended supervision, but you didn't ask for any more—
>
> Prosecutor: Right, but Judge—
>
> Trial Court: --confinement—
>
> Prosecutor: The negotiation—
>
> Trial Court: I understand.
>
> Prosecutor: I was not to make any recommendation.
>
> Trial Court: And you withdrew your recommendation.
>
> Prosecutor: Yeah.
>
> Trial Court: I get that. I'm just saying it was DOC. It was DOC that made this recommendation (54:37-38).

The emphasized statement made by the trial court about not listening to the prosecutor would be comical if not uttered in such a serious proceeding. The trial court essentially told the prosecutor, "I hereby unhear you." This excerpt took place immediately prior to the trial court's pronouncement of sentence. Seconds before the actual sentence was pronounced, the trial court still was mindful of the State's recommendation for a term longer term of extended supervision that recommended in the PSI. The trial court had apparently listened to the State better than it initially thought.

The State points out that the trial court sentenced defendant harsher than recommended by the State and implies there could not have been any reliance on the State's erroneous recommendation (State's brief at 10). To be charitable, that is not a very persuasive argument. The defense recommended two to three years initial confinement (54:24). The trial court's sentence was much closer to the State's recommendation.

Finally, the integrity of the sentencing proceeding was compromised in this case. There was a material breach of the plea agreement. Prejudice is presumed under *State v. Smith,* 207 Wis.2d 258, 278-82, 558 N.W.2d 379 (1997). No reasonable member of the public watching these proceeding would find the process was fair. Resentencing before another judge is the only way to correct the error. Resentencing will not take an undue amount of time. Defendant Nietzold did not contribute in any way to this error. Defendant Nietzold should not have to serve the entire 15-year sentence wondering whether the outcome would have been different had the State honored his plea agreement.

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 if waiver is an issue.

Dated: September 13, 2021

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CERTIFICATION AS TO FORM AND LENGTH/APPENDIX CERTIFICATION

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 971 words.

Dated: September 13, 2021

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Rule 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 how are registered users

Dated: September 13, 2021

Attorney for Defendant
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