STATE OF WISCONSIN
SUPREME COURT
****
CASE NO. 2021AP21-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

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

ROBERT K. NIETZOLD, SR.,
Defendant-Appellant.

REVIEW OF A DECISION AND ORDER OF THE COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT AND ORDER OF VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY JO ROOD PRESIDING, AND REMANDING FOR RESENTENCING

RESPONSE BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

ISSUES PRESENTED

I. DID DEFENSE COUNSEL TIMELY OBJECT TO THE STATE'S RECOMMENDATION FOR A SPECIFIC PRISON SENTENCE.

The trial court did not rule on this issue. The court of appeals did not address this issue in its decision.

II. IF DEFENSE COUNSEL TIMELY OBJECTED TO THE STATE'S IMPROPER ADVOCACY FOR A SPECIFIC LENGTH OF PRISON, DID THE STATE'S WITHDRAWAL OF THAT RECOMMENDATION REMEDY THE STATE'S BREACH OF THE PLEA AGREEMENT.

The trial court did not rule on this issue. The court of appeals found the State's withdrawal of its recommendation for a specific prison term did not remedy the State's breach of the plea agreement (Pet-App. at 8-9).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both are appropriate.

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). 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 were 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).

ARGUMENT

Summary of argument

No one can reasonably argue defendant Nietzold realized the benefit of his plea agreement. The record clearly demonstrates defendant was denied his right to a fair and reliable sentencing proceeding. Defendant Nietzold is entitled to resentencing in this matter. The prosecutor materially and substantially breached the plea agreement. Pursuant to the law from *State v. Williams,* 202 WI 1, 249 Wis.2d 492, 637 N.W.2d 733, defendant is entitled to relief regardless of whether defense counsel lodged a timely objection to the breach. In the alternative, defendant is entitled to resentencing based on trial counsel's ineffective assistance of counsel in failing to lodge a timely objection to the State's argument.

I. THE STATE'S ARGUMENT FOR SPECIFIC PRISON TIME IN THIS CASE WAS A MATERIAL AND SUBSTANTIAL BREACH REQUIRING RESESENTENCING.

A. Standard of review.

Defendant agrees with the standard of review set forth in the State's brief (State's brief at 10). The State recognizes that whether a breach occurred, and if so, whether it 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* (State's brief at 10-11).

B. A prosecutor's breach of the plea agreement must be material and substantial.

Defendant agrees with the State's general law in support of this concept (State's brief at 11-12). Defendant highlights a portion of the State's argument:

> [T]o 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.* (emphasis added). 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 N.W.2d 475, 630 N.W.2d 244 (State's brief at 11).

In *State v. Smith,* 207 Wis.2d 258, 281, 558 N.W.2d 379, 388 (1997), the court recognized that the breach of a material and substantial term of a plea agreement by the prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable.

C. Under *Williams*, a defendant is entitled to relief when the prosecutor materially and substantially breaches the plea agreement by not making the promised sentencing recommendation.

The issue raised in this case can be resolved by applying the law from *State v. Williams,* 202 WI 1, 249 Wis.2d 492, 637 N.W.2d 733. In *Williams,* the State entered into a plea agreement whereby it agreed to recommend jail and probation upon the defendant plea to felony failure to support. *Id.* at ¶¶24-25. The presentence report recommended an 18-month prison sentence. *Id.* at ¶25. At sentencing, the prosecutor accurately set forth the terms of the plea agreement, but undercut the agreement by twice quoting the presentence writer's opinion that defendant needed to go to prison. *Id.* at ¶26. At this point, defense counsel objected and accused the prosecutor of undercutting the plea agreement. *Id.* at ¶27. The trial court agreed. *Id.* at ¶27. The prosecutor then stated she was not changing her recommendation but was merely relaying information from the presentence writer, who was absent:

> And Judge, if I indicated anything other than what our recommendation is, the presentence was here. We were preparing to go to sentencing, and the agent relayed this information to us. And I am merely supplying the Court with that information. I am in no means suggesting that I am asking the Court to adopt the agent's recommendation. I believe the sentencing court should have all information necessary. And I am just merely relaying it. She had indicated she would be here, and that was the information she had given us. So again I will reiterate, Judge, we are standing by our recommendation, and I have not changed that, and that's why I started off by saying we are recommending the three years probation. We had placed that on the record when the defendant entered his plea, and again today at sentencing. *Id.* at ¶29.

In granting defendant a resentencing, the court wrote:

> This case presents a close question. The overall impression from reading the entire record of the sentencing hearing is, however, the State's comments affirming the plea agreement were too little, too late. We agree with the court of appeals that "just because the prosecutor says there was no breach does not make it so." That the prosecutor did not intend to breach the agreement or that a breach was inadvertent "does not lessen its impact." *Id.* at ¶52.

In finding in defendant's favor, the *Williams* court specifically cited *Smith,* the cornerstone of the State's argument:

> In *State v. Smith,* 207 Wis.2d 258, 272, 558 N.W.2d 379 (1997), this court remanded the cause for new sentencing, holding that the prosecutor materially and substantially breached the plea agreement by recommending 58 months of incarceration. The terms of the plea agreement required the State to make no recommendation to the circuit court regarding the length of sentence imposed. The effect of the State's conduct in the present case, like the effect of the prosecutor's conduct in *Smith,* was to undercut the plea agreement, thereby depriving the defendant of his bargain and rendering the sentencing proceeding fundamentally unfair.
>
> In summary, we conclude that the prosecutor's statements at the sentencing hearing undercut the defendant's plea agreement, resulting in a material and substantial breach of the defendant's plea agreement. Consequently, we affirm the decision of the court of appeals reversing the judgment of the circuit court denying defendant's motion for resentencing, and we remand the cause to the circuit court for resentencing. *Id.* at ¶¶58-59.

Although in *Smith,* the court conducted an analysis based in part on ineffective assistance of counsel, arguably, it decision did not turn on whether trial counsel was ineffective in failing to object to the State's specific recommendation for prison in spite of its agreement not to do so:

> [W]e conclude that when a prosecutor agrees to make no sentencing recommendation but instead recommends a significant person term, such conduct is a material and substantial breach of the plea agreement. **Such a breach of the State's agreement on sentencing is a "manifest**

> **injustice" and always results in prejudice to the defendant.** *See Bangert,* 131 Wis.2d at 289, 389 N.W.2d 12.[1] (emphasis added). The breach of a material and substantial term of a plea agreement by a prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable. **Our conclusion precludes the need to consider what the sentencing judge would have done if the defense attorney had objected the breach by the district attorney.** *Id.* at 281 (emphasis added).

D. Pursuant to *Williams,* defendant is entitled to resentencing.

In this case, the State clearly breached the plea agreement in a material and substantial way. This was not a technical breach. When defendant Nietzold entered his plea, the plea agreement was that the State would not make a specific prison recommendation. 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 and uninterrupted 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 finally objected.

[1] The *Bangert* court wrote, "A breach of a plea agreement does not give rise to a *per se* right to withdraw a plea. A material and substantial breach, however, amounts to a manifest injustice and results in the vacating of the plea agreement and the withdrawal of the plea of no contest. " *Id.*

Unfortunately, like in *Williams,* the error committed by the State in this case could not be corrected. The effort to correct the error by the State was too little and too late. Obviously, one cannot unring a bell. The trial court's comments related to one of the last attempts to do so by the State would be comical if not in the context of a somber sentencing proceeding. Even after State's final attempt to disavow its specific prison recommendation, the trial court said to the prosecutor:

> 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) (48:38)**.**

The record confirms defendant Nietzold in fact received no benefit from his plea agreement. He was deprived his right to a sentencing proceeding whose result is fair and reliable. Resentencing is necessary.

E. The holdings in *Knox* and in *Bowers* are easily distinguishable from this case.

In support of its argument, the State cites two court of appeals cases, where the courts found an erroneous statement of the plea agreement by the State could be corrected by the State during the sentencing hearing, avoiding error. Neither is compelling precedent to resolve the issues in this case.

In *State v. Knox,* 213 Wis.2d 318, 570 N.W.2d 599 (Ct. App. 1997), the defendant worked out an agreement whereby defendant would plead to felony offenses in exchange for an agreement by the State whereby the parties would jointly recommend a six-year prison sentence, to run concurrently with other sentences. *Id.* at 320. At sentencing a few weeks later, a prosecutor not involved in the negotiations appeared for the State. She argued for a five-year prison term consecutive to any other sentence. *Id.* Defense counsel i*mmediately* requested a recess to speak with the assigned prosecutor, a recess was called and the prosecutor corrected her recommendation to accurately reflect the plea agreement when the case was recalled. *Id.* (emphasis added).

The *Knox* court found there was no substantial breach of the plea agreement:

> The perceived breach in this case was not substantial. It was not intended to affect the substance of the agreement by sending a veiled message to the sentencing court that greater punishment than provided for in the plea agreement was warranted. Rather, the deviation from the original terms drew a prompt objection and was shown to be the result of a misstate that was quickly acknowledged and rectified. Indeed, the prosecutor's earnest manner in advocating the corrected proposed disposition, commented upon by the trial court, further circumstantially belies an implication of improper motive. For these reasons, the momentary and inadvertent misstatement of the parties' agreement did not constitute an actionable breach. *Id.* at 322-23.

There was no substantial breach in *Knox* because the error was immediately corrected before it was allowed to taint the entire sentencing proceeding. Obviously, in this case the error was not corrected until the State had made a full, uninterrupted presentation for a specific prison sentence in part based on the presentence report.

In *State v. Bowers,* 2005 WI App 72*,* 280 Wis.2d 534, 696 N.W.2d 255, on 12/27/02, the defendant entered into a plea agreement with the State whereby the parties would jointly recommend a prison sentence of four years prison, two years initial confinement and three years of extended supervision. *Id.* at ¶2. The agreement was silent on whether the recommendation as to whether the recommendation was to be concurrent or consecutive. *Id.* At sentencing on 7/30/03, the State recommended two and one-half years initial confinement and two and one-half years of extended supervision, to run consecutively to any other sentence. *Id.* at ¶3. Immediately after the State completed its sentencing argument, the defendant advised his counsel that the State had had misstated the plea agreement. *Id.* Upon confirming the error, the State immediately amended its recommendation to "two years in, three years out." *Id.* Defendant was ultimately sentenced to three years initial confinement and two years of extended supervision. *Id.*

The *Bowers* court, citing *State v. Dielke,* 2004 WI 104, ¶14, 274 Wis.2d 595, 682 N.W.2d 945, recognized a material and substantial breach of a plea agreement is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he bargained. *Bowers* at ¶9. Ultimately, because the State's misstatement was "inadvertent and insubstantial," the *Bowers* court found no breach had occurred. *Id.* at ¶2.

While this case is somewhat similar procedurally to *Bowers*, the misstatement by the State was *de minimus* or "insubstantial" as recognized in *Bowers.* The State was bound to recommend two years of initial confinement but instead argued for two years and six months of initial confinement, an additional six months. The error was corrected before sentencing was pronounced.

On appeal in *Bowers,* the State conceded the misstatement was material but not substantial. *Id.* at ¶11. The court found the state's inadvertent misstatement was neither material nor substantial because the error was corrected promptly and did not impair the integrity of the sentencing process. *Id.* at ¶12.

Unlike in *Bowers,* in this case, the State's recommendation was not a mere misstatement of the plea agreement, it was the advocacy for a specific length of prison, the one argument the State had agreed not to make. Its recommendation was also for a specific, lengthy period of initial confinement. There is there is no easy way to fix this type of error. The trial court cannot unhear this type of argument. When one looks at the entire sentencing transcript, it is apparent the trial court was still aware of the State's erroneous recommendation when it imposed sentence, regardless of the State efforts to correct it.

The court of appeals correctly concluded the State was unable to cite a case where a prosecutor's disavowal of a specific prison sentence recommendation in the face of an agreement not to recommend a specific recommendation was sufficient to cure any breach of the plea agreement. *State v. Robert Nietzold,* District IV Case 2021AP21-CR, decided 12/9/21 at ¶15 (Pet-App. 8).

II. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO TIMELY OBJECT TO THE STATE'S BREACH OF THE PLEA AGREEMENT.

Under the law from *Williams,* defendant need not demonstrate ineffective assistance of counsel in order to prevail. Nevertheless, under the facts of this case, defendant could meet that burden in this case.

In *State v. Smith,* 207 Wis.2d 258, 558 N.W.2d 379 (1997), defendant pleaded to burglary and four misdemeanors. *Id.* at 262. The prosecutor agreed to make no sentencing recommendation. *Id.* At sentencing, the State argued for 58 months in prison in spite of the plea agreement. *Id.* Defense counsel did not object. *Id.* Instead, the defense argued for 36 months in prison. *Id.* at 262-63. The court imposed six years in prison. *Id.* at 263.

Defendant filed a postconviction motion alleging trial counsel was ineffective in failing to object to the State's breach of the plea agreement. *Id.* While the trial court agreed defense counsel's performance was deficient in not objecting to the breach of the plea agreement, it found there was no prejudice before the trial court had not relied on the State's recommendation. *Id.* at 263-634.

On appeal, defendant asserted the State had committed a material and substantial breach of the plea agreement warranting relief. *Id.* at 264. Defendant agreed with the trial court that defense counsel had performed deficiently and argued that prejudiced must be presumed under the facts of his case. *Id.* The State conceded defendant was entitled to resentencing because the sentencing proceedings were flawed and unfair. *Id.* at 264-65. The court of appeals held that notwithstanding defense counsel's deficient performance, defendant was unable to show prejudice. *Id.* at 265.

In the Wisconsin Supreme Court, defendant argued: (1) the prosecutor's recommendation was a material and substantial breach of the plea agreement; (2) defense counsel's failure to object was deficient performance; and (3) defendant was prejudiced by not getting the benefit of his bargain. *Id.* at 268. The State agreed defense counsel's performance was deficient, but denied he was prejudiced. *Id.* at 268-69. The State advocated for remand so the trial court could determine

whether the outcome of the proceedings would have been different, but for defense counsel's error. *Id.* at 269.

The Wisconsin Supreme Court found the failure of defense counsel to timely object to the State's breach was deficient performance. *Id.* at 273. For this type of error, it found prejudice is presumed. *Id.* at 281. However, as argued above, it is unclear whether the *Smith* court's opinion turned on an ineffective assistance of counsel analysis:

> [W]e conclude that when a prosecutor agrees to make no sentencing recommendation but instead recommends a significant person term, such conduct is a material and substantial breach of the plea agreement. Such a breach of the State's agreement on sentencing is a "manifest injustice" and always results in prejudice to the defendant. *See Bangert,* 131 Wis.2d at 289, 389 N.W.2d 12. The breach of a material and substantial term of a plea agreement by a prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable. Our conclusion precluded the need to consider what the sentencing judge would have done if the defense attorney had objected the breach by the district attorney. *Id.* at 281

If one assumes for the sake of argument that the holding in *Smith* is controlling as it relates to ineffective assistance of counsel, defendant would still prevail under an ineffective assistance of counsel argument. Defense counsel had a duty to *timely* object to the State's breach of the plea agreement. (emphasis added). Defense counsel's actions in *Knox, supra,* were timely, allowing the error to quickly and effectively to be fixed. Immediately after the error occurred in *Knox*, defense counsel sought a recess to correct the error. The error was corrected before damage accumulated.

Defense counsel's action in this case was not timely. The State's characterization to the contrary is charitable to defense counsel, but wrong. Defense counsel's actions were indefensible. Defense counsel said nothing as the prosecutor methodically presented a lengthy and persuasive argument as to why a 12-year term of initial confinement was appropriate and why a lengthy term of extended supervision was necessary. It was only after the prosecutor completed his presentation that defense counsel objected. Defense counsel's objection was not timely. The damage occasioned to the defense accumulated and accumulated during the State's sentencing presentation until the breach could not be fixed. Had defense counsel immediately

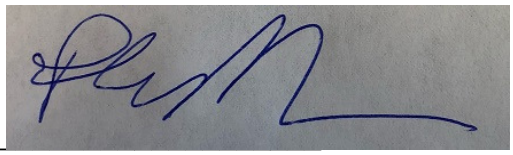
objected when specific numbers were mentioned by the State, the breach of the plea agreement could have been remedied.

Defense counsel's failure to timely object to the State's material and substantial breach of the plea agreement was deficient performance. There is nothing in the record to suggest that defense counsel consulted with defendant Nietzold as to his options in the face of the breach of the plea agreement. Under *Smith,* prejudice is presumed. If further facts need to be developed for this issue, then remand would be necessary.

CONCLUSION

For the reasons set forth above, the Wisconsin Supreme Court should remand this case for resentencing before another judge. In the alternative, this court should remand the case on the issue of whether defense counsel was ineffective in failing to timely object to the State's substantial and material breach of the plea agreement.

Dated: June 27, 2022



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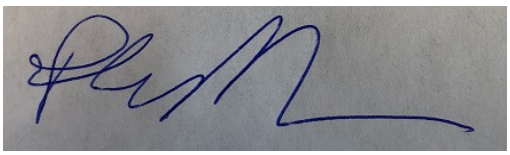
FORM AND LENGTH CERTIFICATION

I hereby certify this response brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief produced with proportional serif font. The length of this response is 4,162 words.

Dated: June 27, 2022



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §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: (1) This electronic brief is identical in content and format to the printed form of the brief filed as of this date; and (2) 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.

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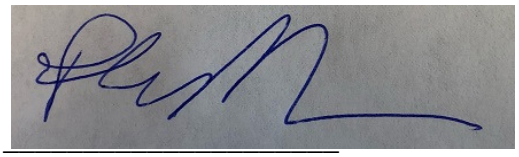

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