STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP001792-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE LEE WEIGEL,

Defendant-Appellant.

Appeal from an Order and Judgment of Conviction Entered in Lafayette County Circuit Court, the Honorable Duane M. Jorgenson, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The state breached the plea agreement.

The state concedes that there was a plea agreement, and that it required the state to cap its recommendation at a 20-year sentence. (Response Br. at 9). However, it argues that it didn't breach the agreement when it agreed that "25 years in total is appropriate." (62:32). The state's arguments fail.

A. The state did not recommend probation.

First, the state argues that probation is not a sentence and that it, therefore, didn't breach because the extra 5 years was probation. (Response Br. at 11-12). The state asserts that at sentencing, it "recommended a sentence of no more than 20 years (based on the DOC PSI) plus an additional five years of probation (based on Weigel's recommendation and the alternative PSI)." (Respondent's Br. at 13). This assertion inaccurately depicts what happened at sentencing.

The state did *not* recommend a 20-year sentence plus 5 years of probation. The state didn't recommend any probation at all. Throughout the entirety of its sentencing remarks, the state only mentioned probation once, when it said, "I appreciate . . . that the defense is not requesting probation today." (62:31). It told the court that it agreed "25 years in total is appropriate," and then it recommended 16 years of initial incarceration. (62:32-33).

More telling, the district attorney who negotiated the plea and argued at sentencing never asserted that her recommendation included a 5-year probation recommendation. Rather, she argued at the postconviction motion hearing that she had only recommended 20 years and that her reference to 25 years was merely a passing reference to the defense's recommendation. (94:27-28). The state's assertion now that its recommendation was actually for a 20-year prison sentence on count 1 and 5 years of probation on count 3 is nothing but a post hoc attempt to justify an obvious plea breach. This court should reject the state's argument because it is not supported by the record.

B. The state was not permitted to recommend probation under the agreement.

Even if the state had recommended probation, it still would have breached the agreement. The state's argument that that a probation recommendation in excess of the 20-year cap was permissible makes no sense. The plea agreement was a global resolution to dispose of both counts with a prison sentence, not to exceed 20 years. A prison sentence excludes other dispositions, like probation. In other words, the state could not have recommended a prison sentence on count 3 (as was required by the plea agreement) and also recommend probation on count 3 (as the state now argues it did).

Further, the state's attempt to inject a technical definition of the word "sentence" into the context of plea negotiations is misguided. The case law the state cites about probation not being a "sentence" involves statutory interpretation of a legal term of art, not the colloquial use of the word. The word "sentence" "'is a legal term and should be given its legal meaning when used in the statutes.'" *State v. Dowdy*, 2010 WI App 158, ¶26, 330 Wis. 2d 444, 792 N.W.2d 230 (quoting *State v. Fearing*, 2000 WI App 229, ¶6, 239 Wis. 2d 105, 619 N.W.2d 115). However, the term "'may also be used in a more general sense, to include probation.'" *Id.*

When negotiating plea agreements, parties do not use the term "sentence" as a term of art the same way the legislature does when drafting statutes. They use the term in the colloquial sense, as the disposition of a case. Even in this case, the district attorney used the term "sentence" to include probation, referring to Ms. Weigel's recommendation as a "25 year sentence" even though those 25 years included a 5-year term of probation. (62:32). When agreeing to cap its recommendation at a 20-year sentence, the parties didn't contemplate that the term didn't encompass probation.

In the context of plea negotiations, focusing on the technical meaning of a word rather than the way parties actually use the word during negotiations runs the risk of tricking defendants into agreements that they don't understand. Here, Ms. Weigel thought that the 20-year recommendation included all dispositional

options, including probation. She testified at the postconviction motion hearing that her understanding was that "everything would be capped at 20 years." (94:20).

And probation itself is a serious disposition with major consequences. Supervision comes with added burdens, and Ms. Weigel would face revocation and possible prison time. Her exposure would be much more significant than the 20-year cap agreement contemplated. These are added burdens that she had not bargained for. Allowing the state to read into the agreement the ability to recommend probation based on a technical, semantic argument defeats the purpose and spirit of the agreement.

C. The state's endorsement of a 25-year sentence was a breach.

The state also argues that its statement that "25 years in total is appropriate" was just "observing" Ms. Weigel's recommendation, and that the state's actual sentencing recommendation was for 16 years of initial confinement, which was under the 20-year cap. (Response Br. at 13). As discussed in the opening brief, agreeing with a recommendation that was 5 years longer than the agreed-upon cap is a breach, even if it is the defense's recommendation. *See State v. Williams*, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733. (The state may not "covertly convey to the trial court that a more severe sentence is warranted" than it agreed to recommend.)

And the fact that the state recommended initial confinement time within the 20-year cap does not save it. The agreement was that the state would cap its recommendation at 20 years, including initial confinement time and extended supervision, not just initial confinement. When it agreed that 25 years was appropriate, that was a breach, as it exceeded the overall 20-year cap.

II. The breach was material and substantial.

The state argues that its breach was not material and substantial because of circumstances that developed between plea and sentencing. (Response Br. at 14-15). The state concedes that under normal circumstances, a state sentencing recommendation 5 years longer than the agreed-on cap, even an implicit one, would be a material and substantial breach. (Respondent's Br. at 14). The state attempts to argue that Mr. Hopper's sentence and Ms. Weigel's sentencing recommendation relieved the state of its obligation under the plea agreement or rendered the state's breach not material or substantial. Neither is true.

"The state may not refuse to adhere to the terms of a plea bargain because it later discovers information which may have caused it to enter a different bargain without suffering the consequences of a breach." *State v. Poole*, 131 Wis. 2d 359, 364 n.2, 394 N.W.2d 909 (Ct. App. 1986) (internal quotations and citation omitted). Frequently, circumstances change in criminal cases between a plea and sentencing. Sometimes a PSI

comes out with new information or an unexpected recommendation. *See Williams*, 249 Wis. 2d 492. Sometimes the state learns new information that makes it rethink its position. *See Poole*, 131 Wis. 2d 359. *Williams* and *Poole* make clear that a change in circumstances does not relieve the state of its obligations under a plea agreement, and that a breach is still material and substantial regardless of what happened between plea and sentencing if it deprives a defendant of a benefit for which she bargained. Ms. Weigel bargained for a 20-year sentencing cap. Instead, the state recommended 25 years, depriving her of that benefit.

A. Mr. Hopper's sentence did not render the state's breach immaterial.

First, the state argues that the sentencing of Ms. Weigel's co-defendant, Dalton Hopper, "recalibrated [the parties'] expectations" of her likely sentence, rendering the state's plea breach immaterial. (Response Br. at 14). Mr. Hopper was sentenced to a total of 15 years' confinement and 10 years' supervision.

Regardless of Mr. Hopper's sentence, the state was still bound by the plea agreement. Trial counsel testified that the agreement was never re-negotiated, even after Mr. Hopper was sentenced. (94:6). The state may have regretted that agreement after learning Mr. Hopper's sentence, but it didn't relieve the state of its obligation.

It also didn't render the agreement any less material or substantial. The state argues that Mr. Hopper's sentence rendered the breach immaterial because everyone expected Ms. Weigel to get a sentence equal to or more than Mr. Hopper. (Respondent's Br. at 14). First, the notion that Ms. Weigel's sentence was predetermined, in and of itself, is problematic. Ms. Weigel had a right to a sentencing hearing independent of Mr. Hopper, at which the judge would consider facts and recommendations individual to her. *See State v. Gallion*, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197 ("Individualized sentencing, after all, has long been a cornerstone to Wisconsin's criminal justice jurisprudence."); *see also Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005) ("[W]hen the judge has prejudged the facts or the outcome of the dispute before her[,] . . . the decisionmaker cannot render a decision that comports with due process.").

The idea that Mr. Hopper's sentence made the state's recommendation less impactful because it set a minimum for Ms. Weigel is inconsistent with this principle. If this court finds that to be true, it exposes an even larger concern about Ms. Weigel's sentencing hearing—that her sentence was predetermined by Mr. Hopper's and that she didn't receive a constitutionally sound sentencing hearing.

Further, Mr. Hopper's sentence made the state's breach even more material and substantial. Mr. Hopper's sentence was 5 years longer than the

state's cap. Keeping the state's recommendation at the 20-year cap, therefore, would have been even more important in order to counteract Mr. Hopper's 25-year sentence. In this context, the state's 5-year deviation from the agreement was material and substantial.

B. Ms. Weigel's strategy at sentencing did not render the breach immaterial.

Next, the state argues that Ms. Weigel's own sentencing strategy rendered the state's breach immaterial. (Response Br. at 15). The state argues that Ms. Weigel's "expectations changed" and that her recommendation of 10 years of confinement and 15 years of supervision "implicitly modified the terms of the agreement" and therefore "did not deprive her of a bargained-for benefit." (Response Br. at 15).

First, there was no modification of the terms of the agreement, explicit or implicit. As discussed, the terms of the plea agreement were never renegotiated, (94:6), and any modification of the terms of the agreement would have to be agreed on by Ms. Weigel, which never happened. *See State v. Sprang*, 2004 WI App 121, ¶30, 274 Wis. 2d 784, 683 N.W.2d 522. The state cites no authority for the proposition that a defendant can "implicitly" change the terms of a plea agreement simply by making her own sentencing recommendation. For good reason; there is none. Under the terms of the agreement, Ms. Weigel was free to argue at sentencing, and that is what she did.

Ms. Weigel's strategy at sentencing didn't render the plea breach immaterial. The state asserts that in a "normal" plea agreement situation, the defendant's sentencing recommendation sets the "floor" of a proposed range of punishment and the state's recommendation sets the "ceiling." (Respondent's Br. at 14). It argues that Ms. Weigel's 25-year recommendation made the state's breach immaterial because the state recommended the same overall sentence.

There are several reasons why Ms. Weigel's 25-year recommendation didn't affect the materiality of the breach. First, Ms. Weigel recommended 25 years overall, but she recommended significantly less initial confinement time—10 years compared to the state's recommendation of 16 years. There could be a number of strategic reasons Ms. Weigel decided to recommend a longer period of supervision. Perhaps she thought the recommendation of a shorter period of confinement time would be more palatable to the judge if paired with a longer recommendation for supervision. Regardless of the strategy, the recommendation was not the same as the state's, and the difference was significant.

Second, we know that Ms. Weigel's strategy was informed in part by the other recommendations the court would receive. (94:10). Ms. Weigel's reliance on the state's promise to only recommend 20 years when she was crafting her own recommendation renders the breach material and substantial.

Finally, Ms. Weigel's recommendation still would have set the floor at sentencing had the state abided by the recommendation. Ms. Weigel would have recommended 10 years of confinement and 15 years of supervision, and the state would have recommended 16 years of confinement and 4 years of supervision. Confinement time is inherently more onerous and restrictive than supervision. Thus, Ms. Weigel's recommendation still would have been the lower one, and the state's recommendation still would have provided the ceiling. By adding 5 more years to its recommendation, the state raised the ceiling higher than it agreed to. This is a material and substantial breach.

III. Trial counsel was deficient for failing to object.

The state argues that even if the state breached the plea agreement, and even if that breach was material and substantial, Ms. Weigel should still be denied relief because her attorney's failure to object was not deficient performance. (Response Br. at 16-17). However, the record shows that trial counsel did not consult Ms. Weigel and had no strategic reason for not objecting.

A. Trial counsel's failure to consult Ms. Weigel was deficient performance, regardless of strategy.

The state argues that trial counsel's decision not to object was a strategic one. However, deficient performance in the context of a plea breach does *not*

turn on whether trial counsel had a strategic reason for not objecting. As discussed in the opening brief, a defendant has a personal right to decide whether or not to object to a plea breach. *Sprang*, 274 Wis. 2d 784, ¶¶28-29. Thus, the question of whether trial counsel's performance was deficient turns on whether he consulted with Ms. Weigel about her right to object and whether she personally decided not to. *Id.* ¶28.

The state does not argue that Ms. Weigel was consulted and agreed to forego the objection, and the record shows that neither trial counsel nor Ms. Weigel remember any conversation about the plea breach. (94:8, 20). Even if trial counsel had had a strategic reason for not objecting, his doing so without consulting Ms. Weigel amounts to deficient performance. *Id.* ¶29.

B. Trial counsel had no strategic reason for not objecting.

Even if this court were to consider whether trial counsel had a strategic reason for not objecting to the plea breach, the state's argument still fails. At no point did trial counsel testify that he had a strategic reason for not objecting. When asked why he didn't object, trial counsel testified, "I don't know. I may have just simply missed it." (94:7). He stated, "I can't even recall in that moment whether I was realizing there was a breach of the plea agreement." (94:18). He admitted, "I don't even know that I was aware of [the breach] until I was contacted by" appellate counsel. (94:18).

The state hypothesizes that trial counsel didn't object because it would have been inconsistent with his sentencing strategy. (Response Br. at 17-18). But this is just conjecture given trial counsel's testimony that he didn't remember even noticing the plea breach, let alone considering whether to object to it.

Finally, the state argues that because trial counsel planned to recommend a 25-year sentence, this justifies trial counsel's failure to object. (Response Br. at 17). But trial counsel's sentencing strategy is *not* the same as his strategy for failing to object. He may have put a lot of thought into what sentencing recommendation to make. But there is no evidence that he put any thought into the decision to object to the plea breach. Trial counsel's sentencing strategy didn't relieve him of his obligation to discuss the plea breach with Ms. Weigel and let her make the decision as to whether or not to object to it. "[F]orgo[ing] an objection to the State's breach of the plea agreement without consulting [Ms. Weigel is] tantamount to entering a renegotiated plea agreement without [Ms. Weigel's] knowledge or consent." *Id.* ¶29.

IV. The appropriate remedy is resentencing before a different judge.

The state briefly argues that Ms. Weigel's requested remedy, resentencing, may not be the appropriate remedy, and that "it may be that plea withdrawal would be the appropriate remedy if Ms. Weigel's arguments are meritorious." (Respondent's Br. at 17). The state fails to develop any

argument that plea withdrawal is appropriate, despite the fact that such a question requires a fact-intensive consideration of the totality of the circumstances. *State v. Reed*, 2013 WI App 132, ¶13, 351 Wis. 2d 517, 839 N.W.2d 877. This court, therefore, should deem this argument waived. *See State v. Anderson*, 2017 WI App 17, ¶27, 374 Wis. 2d 372, 896 N.W.2d 364.

Further, "if the defendant seeks only specific performance by resentencing, then the court can simply order resentencing by a different judge." *State v. Howard*, 2001 WI App 137, ¶¶36-37, 246 Wis. 2d 475, 630 N.W.2d 244. Resentencing before a different judge is a less extreme remedy than plea withdrawal and is, therefore, preferred. *Id.* Ms. Weigel is only requesting resentencing before a different judge, not plea withdrawal. Because Ms. Weigel is not requesting plea withdrawal, and because resentencing before a different judge is the less extreme and the preferred remedy, that is the relief this court should grant. In a situation like this, allowing the state to force withdrawal of the plea it breached, over the objection of Ms. Weigel who followed the plea agreement, would not be a fair result. *See id.* ¶37 n.10.

CONCLUSION

Therefore, Ms. Weigel requests that this court reverse the circuit court and remand for resentencing before a different judge.

Dated this 21st day of April, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,951 words.

Dated this 21ST day of April, 2022.

Signed:
Electronically signed by
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