FILED
05-02-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2022AP000876 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVEN C. SPRAGUE,

Defendant-Appellant.

On appeal from a judgment of conviction
and decision denying postconviction relief,
both entered in the Barron County Circuit Court,
the Honorable J. Michael Bitney, presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Donaven Sprague pleaded guilty in exchange for a favorable sentence recommendation: the State agreed to seek five years' initial confinement, five years' extended supervision. At sentencing, however, the State urged the circuit court to impose 16 years of initial confinement—11 more years than the plea deal permitted. Trial counsel waited for his turn to argue before noting the State's plea breach. The State then conceded error and said it "would stand with" its promised 5-year recommendation. (44:12; App. 81). It offered no further argument to support the abrupt, drastic reduction in its recommendation.

Immediately following the State's plea breach, trial counsel told Mr. Sprague that the State had sufficiently corrected its mistake. Counsel advised Mr. Sprague to go forward with sentencing that day, though—at the circuit court's suggestion—he also said they could come back another day instead.

Mr. Sprague followed his attorney's advice. Sentencing continued. After trial counsel finished arguing for 3 years of initial confinement, the circuit court ordered 10.

> **Given the severity of the State's plea breach and its minimal effort to revise its confinement recommendation, was trial counsel ineffective for advising Mr. Sprague to continue with sentencing?**

The circuit court answered "no." This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Sprague does not request oral argument or publication.

STATEMENT OF THE CASE AND FACTS

This appeal revolves around constitutional defects in Mr. Sprague's sentencing proceeding—namely the State's breach of the plea deal during its sentencing argument and trial counsel's inadequate response. The following facts thus center on Mr. Sprague's sentencing hearing, but they begin with the context necessary to understand the stakes.

In the fall of 2018, the State charged Mr. Sprague with one count of repeated sexual assault of a child. (1:1). According to the complaint, Mr. Sprague's 12-year-old daughter, J.M.S., told a school counselor she'd been sexually assaulted by her father. (1:1). Law enforcement interviewed J.M.S., and she said the assaults began when she was in fourth grade, took place in multiple locations, and included intercourse. (1:1-2). After this interview, law enforcement approached Mr. Sprague, who spoke candidly with them right away. (1:2). He admitted to repeatedly sexually assaulting his daughter since she was about 9 years old, and he corroborated various specifics that J.M.S. had reported. (1:3). Mr. Sprague told police he was sorry and didn't mean to hurt J.M.S. but understood "he had mentally hurt her." (1:3).

Mr. Sprague ultimately pleaded guilty to the sole charge. (66:20). Under the plea deal, the State agreed to recommend no more than 5 years of initial confinement and 5 years of extended supervision, while trial counsel was free to argue. (66:2).

The circuit court ordered a PSI. (24). The PSI recommended a prison sentence consisting of 13 to 16 years of initial confinement followed by 3 to 4 years of extended supervision. (33:21).

At sentencing, after a brief statement by J.M.S., the circuit court invited the State to argue. (44:4-6; App. 72-75). The State began by describing the crime at issue, its gravity, its impact on Mr. Sprague's family, and the mitigating factors of Mr. Sprague's remorse and decision to plead guilty. (44:6-8; App. 75-77). It then referred to the PSI's discussion of Mr. Sprague's "sexual proclivities" and opined that they undermined the COMPAS evaluation's conclusion that he is at low risk to reoffend. (44:9; App. 78). And it concluded its remarks with a specific sentence request:

> The PSI recommendation is coming in at a 16- to 20-year prison sentence with 13 to 16 years confinement, followed by three to four years extended supervision. I think given the aggravated nature of this case and the position of trust that
>
> Mr. Sprague was in, he falls on the upper end of that, of the 16 years confinement …. [T]hat's the recommendation that I think is appropriate ….

(44:11; App. 80).

The State's 16-year recommendation is a far cry from the 5 years' initial confinement it had promised to seek. Trial counsel did not immediately object, but he began his sentencing argument by pointing out the discrepancy: "Your Honor, I'm going to start off by at least stating on the record that … Mr. Sprague [accepted] a plea agreement where … the State was capped at … five years actually incarcerated and five years" of extended supervision. (44:11-12; App. 80-81). The circuit court and parties then had the following exchange:

> COURT: So has [the State], in your opinion, violated the plea agreement by arguing for a sentence that is in excess of what he agreed to as part of the plea agreement?
>
> COUNSEL: I would say so, Your Honor.
>
> COURT: [State], do we have an issue there?
>
> STATE: I'm just trying to go back and look through here.
>
> COURT: I think we should.
>
> STATE: Yeah. That was my letter on December 13th, 2018. Yeah, that was. That is correct. I would stand with the recommendation of ten years, five years in, five years out.
>
> COURT: [Counsel], does that cure the defect, in your opinion, or not, or where does that leave us going forward today if we can?
>
> COUNSEL: Just one more statement about that…. I was free to argue for [less] ….
>
> COURT: So his cap was ten, five/five split, and you're free to argue.

COUNSEL: Correct.

COURT: Is that a fair summary of your plea agreement parameters ….?

STATE: Yes, it is. That was in my letter. My apologies.

COURT: Anything further with regards to that? Do you want to confer with Mr. Sprague to see if he wants to go forward with the sentencing in light of what just was brought to the Court's attention … ? ….

….

I know that that there are … some people that [would] feel as though the comments of the prosecutor that were in error are so egregious that they want to consider whether or not they want to withdraw their plea …. That's an option for you to consider with [counsel]. I want you to talk to him about that.

…. You don't have to do that. That's a decision I want you to make after consulting with [counsel], whether you think that the comments … were so out of bounds that you can't get a fair sentencing, or that the cat's out of the bag, it can't be stuffed in it.

… [But] the error has been caught and acknowledged by [the State] and he's now indicated to the Court, yes, Judge, you know, my original offer … [was] a five and five split.

Now that he has brought that to the Court's attention and I know that's what his recommendation is, do you still feel comfortable going through with the sentence … ? I want you to talk about those things with [counsel]

> before we decide whether we can go ahead … or whether you want to withdraw your plea or some other option in between….

(44:12-15; App. 81-84).

During the 20-minute recess that followed, trial counsel told Mr. Sprague that he had the right to "come back at a different day or … [to] continue with the hearing" despite the State's plea breach; if Mr. Sprague chose to move forward, trial counsel explained, he'd "steer it back on course with what [the plea] agreement was." (114:22, 27; App. 34, 39). Per trial counsel's *Machner* hearing testimony, which the circuit court found credible, he did not tell Mr. Sprague he could be sentenced on a different day *by a different judge*—one who hadn't heard the State argue for 16 years of initial confinement. (*See* 122:1; App. 4).

In the end, trial counsel conveyed to Mr. Sprague that he needn't be concerned about the plea breach; he believed he could adequately correct it "and that it would [then] be put back in the Judge's hands." (114:22; App. 34). Mr. Sprague followed his attorney's advice. (114:22; App. 34). He later explained, "I don't know much about the system …. [but] he's been through this many times." (114:40; App. 52).

Back in the courtroom, trial counsel informed the circuit court that Mr. Sprague would move forward with sentencing that day. (44:15; App. 84). The circuit court asked Mr. Sprague whether that was correct, and Mr. Sprague said it was. (44:15; App. 84). Trial counsel then returned to his sentencing argument, discussing Mr. Sprague's honesty, remorse, and cooperation with

the authorities; the close ties he'd maintained with family and the continuing support they offered him; the counseling he took advantage of in jail; the findings of the COMPAS and psychosexual evaluations that he is at low risk for reoffending; and his minimal criminal history. (44:16-19; App. 85-88). Trial counsel concluded by recommending 3 years' initial confinement, 7 years' extended supervision—a 10-year prison sentence like the one the State had agreed to request. (44:19-20; App. 88-89).

After a brief, apologetic allocution, the circuit court imposed 10 years of initial confinement and 5 years of extended supervision. (44:34; App. 103).

Mr. Sprague initiated an appeal. His first appellate lawyer filed a no-merit report. (*See* 92:1). Mr. Sprague filed a response, raising various meritorious issues. (*See* 92:1). Successor appellate counsel—appointed after Mr. Sprague's first appellate lawyer went on parental leave—withdrew the no-merit report, and the court of appeals remanded Mr. Sprague's case for postconviction litigation. (*See* 92:1; 93).

Mr. Sprague then filed a postconviction motion for resentencing based on the violation of his constitutional rights to effective assistance of sentencing counsel[1] and to review his PSI before sentencing.[2] (102:1). After a

[1] Mr. Sprague raised several ineffectiveness claims at the postconviction level. He renews just one on appeal: trial counsel was ineffective for advising him to move forward with sentencing despite the State's egregious plea breach.

[2] Mr. Sprague does not appeal the denial of his PSI claim.

Machner[3] hearing (114; App. 13-67) and briefing (107; 108; 117; 119), the circuit court issued a written decision (122; App. 4-12). On the ineffectiveness issue, it concluded that there was no problem with the way trial counsel handled the State's plea breach, and that the breach itself did not rise to the level of material and substantial. (122:6-8; App. 9-11). On the PSI issue, the circuit court held that Mr. Sprague had gotten enough of an opportunity to review it, and that there was no indication he was prejudiced by his possible inability to review the full document. (122:7; App. 10). Thus, the circuit court denied resentencing. (129; App. 3).

ARGUMENT

Trial counsel performed deficiently by advising Mr. Sprague to move forward with sentencing despite the State's incurable breach of the plea agreement. Mr. Sprague was prejudiced by counsel's misadvice, as he followed it and moved forward with a sentencing hearing that violated his due process rights.

A. Overview.

The State materially and substantially breached the plea agreement by urging the circuit court to impose 16 years of initial confinement instead of 5. By arguing for the "upper end" of the PSI's 13-to-16-year initial confinement recommendation, and by enumerating the aggravating factors underlying its request, the State

[3] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

moved so flagrantly out of bounds that no cure for its misstep was possible. (*See* 44:11; App. 80). There was, in short, no way to unring the bell. Specific performance of the plea deal at a new sentencing hearing before a different judge was, and still is, the only adequate solution.

Trial counsel failed to appreciate the significance of the State's plea breach and thus offered objectively unreasonable advice in response. Instead of clarifying that Mr. Sprague could be sentenced by a different judge—one who hadn't heard the State argue for 16 years of initial confinement and would hear it request 5 years from the get-go—trial counsel simply said Mr. Sprague could come back on a different day. (It is unclear why anyone thought that might help.) Trial counsel also made clear that he believed there was no need to call that day's hearing off since the State had corrected its request.

When Mr. Sprague received this unreasonable advice, he had minimal experience with criminal proceedings and was easily confused in court—indeed, he still is, as the State acknowledged in a postconviction brief. (*See* 117:3). When confronted with the State's breach and his attorney's assessment that it wasn't a big deal, Mr. Sprague did what many inexperienced, confused defendants would do: he followed his lawyer's advice and agreed to proceed with sentencing that day.

On this record, trial counsel was ineffective. Because he gave Mr. Sprague objectively unreasonable advice, Mr. Sprague was sentenced by a judge who listened to the State make a detailed recommendation for

16 years' confinement but offered *no* explanation for the 5-year term it requested after the fact. A new sentencing before a different judge is warranted.

B. Mr. Sprague has the right to effective assistance of sentencing counsel.

Both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution guarantee criminal defendants the right to effective assistance of counsel. Courts have long held that this right extends to sentencing. *See, e.g.*, *State v. Smith*, 207 Wis. 2d 258, 273-82, 558 N.W.2d 379 (1997).

To establish ineffective assistance of counsel, a defendant must show "that counsel's performance was both deficient and prejudicial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An attorney performs deficiently when his errors or omissions fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. A defendant suffers prejudice when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In deciding whether Mr. Sprague received ineffective assistance of counsel at his sentencing hearing, this Court will accept the circuit court's "underlying findings of what happened, unless they are clearly erroneous." *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate questions of deficient performance and prejudice, however, are legal

ones: the Court will decide them de novo, "without deference to the decision of the circuit court." *Id.*

C. Mr. Sprague has the right to specific performance of his plea agreement.

"[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." *State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. The State breaches a plea agreement when, as here, it "fails to abide by the negotiated sentencing recommendation." *State v. Nietzold*, 2023 WI 22, ¶8. The State's failure must be meaningful to necessitate any correction; "mere technical breaches are generally not enough." *Id.*

Even material and substantial plea breaches may, at times, be "cured"—usually by an objection from trial counsel and a clarification from the State regarding its recommendation. *Id.*, ¶9. But a cure is not always possible, and even when it's possible, it doesn't always happen: a breach may be so egregious that the State cannot effectively backtrack; the State's efforts to cure its breach may be inadequate, such that its overarching message still violates the plea deal; or trial counsel may fail to object to the State's plea breach without first conferring with the defendant. Under any of these circumstances, a remedy (not a cure) is due. The presumptive remedy is resentencing before a different judge. *State v. Weigel*, 2022 WI App 48, ¶35, 404 Wis. 2d 488, 979 N.W.2d 646.

In resolving whether a plea breach took place, whether a cure was available, and whether a remedy is due, this Court will accept the circuit court's findings of fact unless clearly erroneous. It will decide de novo whether the State's plea breach was material and substantial (*State v. Bowers*, 2005 WI App 72, ¶5, 280 Wis. 2d 534, 696 N.W.2d 255), whether the State cured the breach (*Nietzold*, 2023 WI 22, ¶13), and what, if any, remedy is due (*Weigel*, 404 Wis. 2d 488, ¶35).

D. The State committed an incurable plea breach when it requested—and vigorously argued for—16 years of initial confinement instead of 5. Trial counsel was ineffective for advising Mr. Sprague to go forward with sentencing anyway.

This case presents a paradigmatic example of a plea breach that merits either a cure or a remedy. But whether a cure was possible here is a closer call. So, too, is the question of whether trial counsel was ineffective for telling Mr. Sprague that the State's concession of error would ensure a fair sentencing. Still, a careful review of the record shows Mr. Sprague did not get the benefit of his bargain. The State's opinion that 16 years was warranted shone through despite its cursory switch from 16 to 5. Trial counsel, meanwhile, offered no cogent reason for advising Mr. Sprague to carry on despite the uncured breach; he failed to grasp either the significance of the breach or the inadequacy of the cure. Thus, Mr. Sprague was deprived of his due process right to enforcement of his plea deal *and* his Sixth Amendment right to effective assistance of counsel.

There are three steps to the analysis here. First, was the State's plea breach cured when the State said it "would stand with" the recommendation it promised, but failed, to make? Second, if the breach wasn't cured, was trial counsel's advice (that Mr. Sprague carry on with sentencing) objectively unreasonable? And third, if trial counsel's advice was objectively unreasonable, is it reasonably probable that appropriate advice would have led Mr. Sprague to seek a new sentencing date, a new judge, and specific performance of his plea deal?

The State's plea breach was too egregious for a cure. The State gave a lengthy, detailed explanation of the aggravating factors it had identified before urging the circuit court to impose more than triple the confinement the plea deal permitted. Given the State's persuasive rationale for requesting 16 years of initial confinement, and given the time and care with which the State presented that position, how could the circuit court credit the State's abrupt amendment of its request all the way down to 5 years?

The State could not plausibly contend that 5 years was appropriate on the 16-year foundation it had laid, and the circuit court could not plausibly believe that the State viewed 5 years as appropriate given the comments the State had made. Mr. Sprague, it follows, could not plausibly get the benefit of his bargain.

Even if the State's plea breach were curable, somehow, its brief comments upon realizing its error did not do the trick. The State responded to trial counsel's reminder about the plea deal, and to the circuit court's

follow-up questions, as follows: "Yeah. That was my letter on December 13th, 2018. Yeah, that was. That is correct. I would stand with the recommendation of ten years, five years in, five years out." (44:12; App. 81). Moments later, after trial counsel further clarified the terms of the plea deal, the State added: "Yes …. That was in my letter. My apologies." (44:13; App. 82). The State did not say anything else regarding the plea deal or the appropriate disposition. It did not even try to explain why 5 years of incarceration might be appropriate even though it had asked for 16 just moments before.

Thus, the State made a cursory retraction of its prior, wildly inconsistent position. It did nothing to alter the overall impression any reasonable listener would have: that the State believed 16 years was appropriate but was amending its recommendation to 5 because it was bound to do so. As in *Williams*, the State's superficial recitation of the deal does not cut it here; "[t]he overall impression from reading the entire record of the sentencing hearing is … that the State's comments affirming the plea agreement were too little, too late." *Williams*, 249 Wis. 2d 492, ¶52.

The question thus becomes whether trial counsel provided effective representation when confronted with a severe, uncured plea breach. He did not.

First, his advice omitted a key option—the presumptive remedy available to Mr. Sprague, i.e., resentencing before a different judge. Nothing in the record (not trial counsel's testimony at the *Machner* hearing, not Mr. Sprague's, and not the circuit court's

statements to Mr. Sprague at sentencing) suggest Mr. Sprague was informed that he could be sentenced by an untainted judge. Trial counsel's failure to provide that critical option during their post-breach recess rendered his advice objectively unreasonable.

But it wasn't just what he failed to say: trial counsel also erred in affirmatively advising Mr. Sprague that the State's correction of its recommendation was adequate. Trial counsel ignored the massive discrepancy between the two recommendations the State had set forth, and he ignored the fact that the State had vigorously advocated for the higher recommendation only. Trial counsel was, in short, untroubled by the egregious wrong turn the State had taken and the minimal effort it made to get back on track. He failed to grasp the influence the State's request for 16 years might still have, expressing undue confidence in the fairness of Mr. Sprague's sentencing.

Finally, by advising Mr. Sprague to continue his sentencing that day, trial counsel led him to do just that: proceed with a sentencing hearing at which he didn't get the benefit of his bargain. That, in this context, is prejudice (a reasonable probability of a different outcome).

Mr. Sprague made clear that he was inclined to do whatever trial counsel told him to do. The record provides no reason to doubt that fact. Had trial counsel given Mr. Sprague reasonable advice—saying the State's correction of its recommendation was unconvincing and Mr. Sprague would have a fairer sentencing before a judge who hadn't heard the State ask for 16 years—

Mr. Sprague would have listened. So, given effective assistance of sentencing counsel, he would have had a new hearing, a new judge, and specific performance of his plea agreement. Since he was deprived of these entitlements at the trial level, he asks this Court to grant them to him now.

CONCLUSION

Mr. Sprague respectfully requests that this Court reverse the circuit court's decision and order denying postconviction relief and remand the matter with instructions to vacate the judgment of conviction and hold a resentencing before a different judge.

Dated this 2nd day of May, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,714 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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 and filed this 2nd day of May, 2023.

Signed:

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