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STATE OF WISCONSIN

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

DISTRICT III

Case No. 2022AP876 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVEN C. SPRAGUE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN BARRON COUNTY CIRCUIT COURT, THE HONORABLE J. MICHAEL BITNEY, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Defendant-Appellant Donaven C. Sprague pleaded guilty to repeated sexual assault of a child in exchange for the State capping its sentencing recommendation at five years of initial confinement and five years of extended supervision. At the close of his sentencing argument, the prosecutor recommended a sentence longer than the agreed-on 10 years. Sprague's trial counsel objected. In response, the prosecutor acknowledged the error and corrected the State's recommendation. After meeting with his attorney in private, Sprague elected to continue with sentencing.

Sprague now claims his counsel was ineffective for not advising him during that meeting to seek sentencing before a different judge—a remedy for a material and substantial breach of a plea agreement. The circuit court properly rejected this claim. The State cured its initial breach of the plea agreement by promptly and unequivocally correcting its sentence recommendation. Consequently, Sprague could not obtain a plea-breach remedy like sentencing before another judge. Moreover, Sprague declined to substitute judges prior to sentencing. He has provided no reason to believe sentencing changed his mind, making trial counsel's failure to mention that option nonprejudicial.

ISSUE PRESENTED

Did Sprague prove that trial counsel performed ineffectively by not incorrectly advising him that he could be sentenced before a new judge after the State cured its breach of the plea agreement?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying well-established law to the facts, which the parties' briefs adequately set forth.

STATEMENT OF THE CASE

A. Sprague's Guilty Plea

Sprague pleaded guilty to one count of repeated sexual assault of a child under Wis. Stat. § 948.025(1)(d) for sexually abusing his daughter, Janice,[1] for three years when she was 9 to 12 years old. (R. 1:1.) At the age of 12, Janice reported the abuse to her school counselor. (R. 1:1.) She recounted multiple sexual interactions with her father that included vaginal sexual intercourse, anal sexual intercourse, oral sex that he performed on her, and oral sex that she performed on him. (R. 1:1–2.) Sprague subsequently confessed to police. (R. 1:2–3.)

Sprague pleaded guilty pursuant to a plea agreement. In exchange for his plea, the State agreed to recommend a 10-year prison sentence, bifurcated into a five-year term of initial confinement and a five-year term of extended supervision. (R. 66:2.) After a written and oral colloquy, the trial court accepted Sprague's plea. (R. 66:20–21.)

The trial court ordered a presentence investigation report (PSI). (R. 66:21.) In his PSI interview, Sprague admitted that he sexually assaulted Janice, that he regretted doing so and knew it was wrong but said he could not explain why he continued assaulting her. (R. 33:4.) He disclosed an addiction to pornography and sex. (R. 33:4.) The PSI author

[1] The State uses a pseudonym for the victim. Wis. Stat. § (Rule) 809.86(4).

recommended a sentence of 16 to 20 years, comprised of 13 to 16 years of initial confinement and three to four years of extended supervision. (R. 33:21.)

B. Sentencing

At sentencing, the prosecutor applied the relevant circumstances of Sprague's case to the three primary sentencing factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. (R. 44:6–7.) *See State v. Gallion*, 2004 WI 42, ¶¶ 23, 44, 59–61, 270 Wis. 2d 535, 678 N.W.2d 197.

First, the prosecutor categorized the gravity of Sprague's offense as extremely high. (R. 44:7.) Sprague used his position of trust as Janice's father to sexually assault her in myriad ways for three years. (R. 44:7–8.)

Second, in regard to Sprague's character, the prosecutor acknowledged that Sprague deserved credit for pleading guilty and that he appeared remorseful in the PSI. (R. 44:8.) He noted Sprague's limited criminal history. (R. 44:8.) However, he also informed the court that Sprague had a 2006 charge for child pornography. (R. 44:8–9.) Given that charge, Sprague's criminal conduct, and his addiction to sex and pornography, the prosecutor concluded that Sprague had major issues with controlling his sexual impulses. (R. 44:8–10.)

Third, because Sprague sexually assaulted his own daughter over a lengthy period of time and reported not being able to stop himself, the prosecutor categorized him as a significant threat to the public. (R. 44:10.)

In conclusion, the prosecutor adopted the PSI's sentence recommendation of 20 years, bifurcated into 16 years of initial confinement and four years of extended supervision. (R. 44:11.)

Defendant, through trial counsel, immediately objected to the State's sentencing recommendation as a violation of the plea agreement. (R. 44:11–12.) After reviewing his file, the prosecutor conceded the error. He stated, "I would stand with the recommendation of ten years, five years in, five years out." (R. 44:12.) He apologized for the error. (R. 44:13.)

The circuit court then told Sprague that it was going to order a recess so that he could speak with his attorney and review his options. (R. 44:14–15.) It noted that Sprague might want to withdraw his plea because the "cat's out of the bag, it can't be stuffed back in it." (R. 44:14.) On the other hand, it commented that Sprague might be satisfied with the State's correction. (R. 44:14.) It concluded by instructing Sprague to consider with his attorney continuing with sentencing, withdrawing his plea, "or some other option in between." (R. 44:15.)

Sprague conferred with his attorney for 20 minutes. (R. 44:15.) He elected to proceed with sentencing. (R. 44:15.) Through a brief colloquy, Sprague confirmed that he "may waive certain objections" by proceeding and that the trial court had "the ultimate discretion" to impose his sentence. (R. 44:16.)

Trial counsel advocated for a 10-year sentence, bifurcated into three years of initial confinement and seven years of extended supervision. (R. 44:20.) The circuit court interrupted trial counsel to comment that it "ha[dn't] seen someone more brutally honest than your client." (R. 44:17.) The circuit court praised Sprague for "acknowledg[ing] things about his past and what has brought him to this point in his life that very few people, in this Court's experience, are willing to do or are able to do." (R. 44:17.)

In articulating its sentence, the circuit court recounted the three distinct recommendations it received from the PSI, the State, and the defense. (R. 44:33–34.) The court imposed

a 15-year sentence, comprised of 10 years of initial confinement and five years of extended supervision. (R. 44:34.)

C. Postconviction Proceedings

Sprague subsequently filed a motion for postconviction relief, raising claims of ineffective assistance of counsel. (R. 102.) He formally appeals the denial of only one claim of trial counsel error—whether trial counsel was ineffective for not advising him to seek sentencing before a different judge. (R. 102:10–11.) However, his related claim that trial counsel was ineffective for advising him that there would be no point to seek substitution also bears on this appeal. (R. 102:8–9.)[2] As will be seen, the facts elicited in regard to that claim establish that Sprague was not prejudiced by his counsel's failure to mention sentencing before a different judge.

The same judge who sentenced Sprague handled his postconviction motion. The court ordered a *Machner*[3] hearing at which trial counsel and Sprague testified.

Trial counsel testified that he discussed judge substitution with Sprague, but that Sprague decided against it. (R. 114:8, 10.) He informed Sprague that he had no familiarity with the circuit court or the two other possible judges. (R. 114:8–9.) He noted that one of the two potential substitutions was a woman and opined that a female judge would not be "the best case scenario." (R. 114:9.) Sprague eventually determined that, based on information he had gathered, the circuit court "was probably the most

[2] Although listed in separate bullet points in Sprague's postconviction motion, this is essentially a single, unified claim, i.e., that trial counsel was ineffective for advising him not to seek substitution of the sentencing judge after the prosecutor's plea breach.

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

reasonable" of the judges. (R. 114:9.) He never requested substitution. (R. 114:10, 28.)

Trial counsel also recounted talking to Sprague about whether to proceed with sentencing after the State's breach. He told Sprague that they could schedule sentencing for a different day or continue with sentencing. (R. 114:22.) He also told Sprague that he could "steer it back on course with what our agreement was." (R. 114:22.) With that assurance, Sprague agreed to proceed. (R. 114:22.) Sprague never asked to withdraw his plea or expressed an interest in anything other than continuing with sentencing. (R. 114:27.)

Sprague recalled discussing judge substitution with trial counsel. (R. 114:32–33.) Trial counsel advised him that substitution would not improve his position at sentencing because no other judge would look at his case differently. (R. 114:33.) He never testified that he asked trial counsel to file a substitution motion.

In regard to sentencing, Sprague confirmed that he agreed to go forward with sentencing on the advice of trial counsel. (R. 114:39–40.) Trial counsel told him that PSI recommendations were not influential and that his argument would alleviate any ill-effect from the State's initial recommendation. (R. 114:37, 43.)

After the hearing, the circuit court issued a written order denying Sprague's postconviction motion. It found trial counsel's testimony more credible and compelling than Sprague's. (R. 122:1.) It found that Sprague freely chose not to substitute judges. (R. 122:2–3.)

The circuit court concluded that the prosecutor cured the breach of the plea agreement by correcting the State's sentencing recommendation. (R. 122:6–7.) Because the State cured the breach, Sprague was not entitled to the remedy of sentencing before a different judge, and trial counsel was not deficient for not mentioning it. (R. 122:6–8.)

Sprague now appeals, arguing that the State did not cure the breach and that trial counsel, therefore, was ineffective for not informing him that he could be sentenced by a different judge.

STANDARD OF REVIEW

An ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364. This Court upholds the circuit court's findings of fact and credibility determinations unless they are clearly erroneous. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. Whether a defendant carried his or her burden to establish deficient performance and prejudice is an issue of law reviewed de novo. *Id.*

ARGUMENT

Sprague failed to prove that trial counsel was ineffective for not advising him that he could seek to be sentenced by a different judge.

Sprague claims that trial counsel performed ineffectively by failing to advise him that he could seek sentencing by a different judge in response to the State's breach of the plea agreement. (Sprague's Br. 11–13.)

To establish the ineffectiveness of counsel, a defendant must prove both: (1) "that counsel's performance was deficient"; and (2) "that such performance prejudiced the defense." *State v. Roberson*, 2006 WI 80, ¶ 24, 292 Wis. 2d 280, 717 N.W.2d 111 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Failure on one prong dooms the entire claim. *State v. Savage*, 2020 WI 93, ¶ 25, 395 Wis. 2d 1, 951 N.W.2d 838.

Sprague's claim fails on both prongs. The State cured its initial breach of the plea agreement. As a result, Sprague was not entitled to be sentenced by a different judge, and trial counsel cannot have performed deficiently by not mentioning it. Sprague also failed to show that he would have opted for that (unavailable) remedy had he known of it, as required to prove prejudice.

A. The State cured the breach by correcting its sentencing recommendation, eliminating the basis for sentencing before a different judge.

"To demonstrate deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness considering all the circumstances." *State v. Ruffin*, 2022 WI 34, ¶ 30, 401 Wis. 2d 619, 974 N.W.2d 432. Counsel's decisions receive "great deference" and are presumed to be "within the wide range of reasonable professional assistance." *Savage*, 395 Wis. 2d 1, ¶ 28 (citation omitted). "[I]n analyzing whether performance was deficient, 'every effort [should] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate [the conduct] from counsel's perspective at the time.'" *Id.* (second alteration in original) (quoting *Strickland*, 466 U.S. at 689). "Counsel does not render deficient performance for failing to bring a . . . motion that would have been denied." *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583.

A defendant has a due process 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. Only a "material and substantial breach" of the plea agreement—one "that defeats the benefit for which the accused bargained"—violates that right. *Id.* ¶ 38. The State commits such a breach by failing to present the negotiated sentencing recommendation. *State v.*

Smith, 207 Wis. 2d 258, 272–73, 558 N.W.2d 379 (1997). In the event of a substantial and material plea breach, a defendant may be entitled to resentencing or the more extreme remedy of plea withdrawal. *See State v. Weigel*, 2022 WI App 48, ¶ 35, 404 Wis. 2d 488, 979 N.W.2d 646.

"An initial breach, however, even if material and substantial, does not end the mater. Some breaches may be cured." *State v. Nietzold*, 2023 WI 22, ¶ 9, 406 Wis. 2d 349, 986 N.W.2d 795. For example, when "the prosecution simply forgot its commitment and is willing to adhere to the agreement," the State can cure the breach. *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 140 (2009)). Generally, "a material breach of a plea agreement may be cured if the prosecutor unequivocally retracts the error." *Id.* ¶ 11 (collecting cases).

In this case, it is undisputed that the prosecutor's initial sentencing recommendation breached the plea agreement. (R. 117:6.) The plea agreement capped the State's recommendation at 10 years, but the prosecutor recommended 20. (R. 44:11; 66:2.)

However, undisputed facts also show that the State cured this breach. The prosecutor made the erroneous sentencing recommendation at the very end of his sentencing argument, and trial counsel objected immediately at the very beginning of his responsive argument. (R. 44:11–12.) Due to trial counsel's timely objection, the prosecutor promptly reviewed his file, recognized his error, and modified the State's recommendation, stating, "I would stand with the recommendation of ten years, five years in, five years out." (R. 44:12.) He then apologized. (R. 44:13.) The prosecutor did not express any reservations about the plea agreement or the recommendation.

The circuit court's ensuing comments attest to the effectiveness of the cure. Before sending Sprague to confer with his attorney about this turn of events, it told Sprague that it now knew that the State recommended a 10-year sentence split into five years of initial confinement and five years of extended supervision. (R. 44:14.) Prior to pronouncing sentence, it correctly recited the State's recommendation and noted its distinction from the PSI's recommendation. (R. 44:33–34.) Thus, the prosecutor clearly conveyed to the court that the State recommended the 10-year sentence contemplated by the plea agreement, curing the initial breach.

The consistency between these circumstances and *Nietzold* compels the conclusion that the State cured its breach. In *Nietzold*, "[m]oments after" the prosecutor breached the plea agreement by recommending a specific term of imprisonment, defense counsel objected. 406 Wis. 2d 349, ¶ 14. In response, "[t]he prosecutor immediately acknowledged the blunder and modified the State's recommendation to an undefined prison term—exactly what Nietzold agreed to." *Id.* When the circuit court mistakenly referred to the PSI's sentence recommendation as "the State's," the prosecutor interrupted to correct the court. *Id.* The Supreme Court concluded that "the prosecutor's immediate and unequivocal retraction of [the] error . . . transform[ed] the material and substantial breach into a nonmaterial breach." *Id.*

Here, the only factual difference with *Nietzold* is the circuit court's lack of confusion or imprecision. Unlike in *Nietzold*, the circuit court here never misattributed the PSI's recommendation to the State, obviating the need for the prosecutor to make a clarifying interruption. Otherwise, the prosecutor engaged in the same conduct. He made an error, acknowledged it, and modified the State's recommendation to comply with the plea agreement. (R. 44:12–13.) "After an

initial error, [Sprague] received what he bargained for"—a sentence recommendation capped at 10 years. *Nietzold*, 406 Wis. 2d 349, ¶ 14. The State therefore cured its breach. *Id.*

Sprague contends that the State's breach was incurable because the prosecutor argued so forcefully in favor of the improper sentencing recommendation and cited several aggravating factors. (Sprague's Br. 16.) This argument lacks merit.

A plea agreement cannot bar the prosecutor from "discuss[ing] 'pertinent factors relating to the defendant's character and behavioral pattern.'" *State v. Naydihor*, 2004 WI 43, ¶ 25, 270 Wis. 2d 585, 678 N.W.2d 220. Indeed, the prosecutor has an affirmative duty to provide the sentencing court with relevant sentencing information. *Id.* Relevant sentencing information concerns the three primary sentencing factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *Id.* ¶ 26; *see Gallion*, 270 Wis. 2d 535, ¶¶ 23, 44, 59–61.

Moreover, "nothing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such characterizations, viewed in isolation, might appear inconsistent with the agreed-on sentencing recommendation." *State v. Bokenyi*, 2014 WI 61, ¶ 73, 355 Wis. 2d 28, 848 N.W.2d 759 (citation omitted) (emphasis omitted). The prosecutor must refrain only "from making 'comments that suggest the prosecutor now believes the disposition he or she is recommending pursuant to the agreement is insufficient.'" *Id.* (citation omitted).

The prosecutor used his sentencing argument only for the proper purpose of disclosing relevant sentencing information without suggesting that the State believed a 10-year sentence was insufficient. He reasonably characterized Sprague's three years of sexually abusing his daughter as

highly serious. (R. 44:7–8.) He pointed to Sprague's 2006 child pornography charge, addiction to sex and pornography, and candid inability to stop himself from sexually assaulting his daughter as illustrative of his longstanding inability to regulate his sexual behavior. (R. 44:8–10.) He reasoned that Sprague's criminal conduct and character made him a significant danger to the public. (R. 44:10.)

The prosecutor did not fixate on Sprague's unfavorable characteristics. He also credited Sprague for pleading guilty rather than putting his daughter through a trial and found Sprague's expressions of remorse to be genuine. (R. 44:8.) The circuit court agreed, interrupting trial counsel to praise Sprague for being "brutally honest" and his rare ability to "acknowledg[e] things about his past and what has brought him to this point in his life." (R. 44:17.)

Thus, the prosecutor offered an evenhanded sentencing argument directed at the sentencing factors and based on the record. He erred only by initially recommending a sentence that exceeded the cap. (R. 44:11.) However, "even errors in an initial sentencing recommendation can be remedied." *Nietzold*, 406 Wis. 2d 349, ¶ 17. The prosecutor adequately remedied the breach, rendering it nonmaterial. *See id.* ¶ 14; *State v. Bowers*, 2005 WI App 72, ¶ 13, 280 Wis. 2d 534, 696 N.W.2d 255 (concluding that State did not commit material and substantial breach based on "an inadvertent misstatement" of the agreed-on sentence recommendation "that was acknowledged and rectified shortly thereafter").

The prosecutor made his erroneous recommendation only at the very end of his initial remarks. (R. 44:11.) Trial counsel immediately noted his objection at the beginning of his own remarks, on the same page of the transcript. (R. 44:11.) The prosecutor immediately checked his notes and admitted the error. (R. 44:12.) The unequivocalness and immediacy of this cure is not materially distinguishable from that in *Nietzold*.

Sprague also suggests that the breach could not be cured because the circuit court "could not plausibly believe" that the State supported the sentence contemplated by the plea agreement. (Sprague's Br. 16.) However, *Nietzold* already explained that whether the circuit court was "affected by the breach" is irrelevant to whether the breach is curable. 406 Wis. 2d 349, ¶ 15. The analysis "focuses on the *prosecutor's* conduct, not the court's." *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Sprague "received what he bargained for: the State recommended" a 10-year sentence split into five years of initial confinement and five years of extended supervision. *Id.* ¶ 14. The analysis ends there.

Sprague argues in the alternative that even if the breach was curable, the State inadequately cured it. (Sprague's Br. 16–17.) He claims that the prosecutor only superficially retracted the initial sentencing recommendation like the prosecutor in *Williams*, leaving the impression that the State still implicitly recommended a sentence with 16 years of initial confinement. (Sprague's Br. 17.)

In *Williams*, the prosecutor "undercut the essence of the plea agreement," 249 Wis. 2d 492, ¶ 46, by "covertly impl[ying] to the sentencing court that the additional information available from the presentence investigation report and from a conversation with the defendant's ex-wife raised doubts regarding the wisdom of the terms of the plea agreement" *id.* ¶ 50. *Williams* held that this conduct amounted to a material and substantial breach. *Id.* ¶ 46. "The State cannot cast doubt on or distance itself from its own sentence recommendation." *Id.* ¶ 50.

Sprague does not cite any conduct by the prosecutor that undermined the plea agreement. He faults the prosecutor only for not retracting the erroneous recommendation with more enthusiasm and for not affirmatively arguing that five years of initial confinement was more appropriate than 16 years. (Sprague's Br. 17.)

However, "[t]here is no requirement that the State correct a misstated sentence recommendation forcefully or enthusiastically. . . . [I]t is sufficient for the State to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." *Bowers*, 280 Wis. 2d 534, ¶ 12. The prosecutor in this case complied with that directive. He promptly acknowledged the mistake, corrected it, and apologized. (R. 44:12–13.) He never "raised doubts regarding the wisdom of the terms of the plea agreement." *Williams*, 249 Wis. 2d 492, ¶ 50. He had no further obligations to cure the breach.

Accordingly, the State cured its initial breach of the plea agreement. Because there was no breach to remedy, Sprague could not have obtained a new sentencing before a different judge. *See Weigel*, 404 Wis. 2d 488, ¶¶ 33–35. Trial counsel therefore did not perform deficiently by failing to apprise Sprague of an unavailable remedy. *See Maloney*, 281 Wis. 2d 595, ¶ 37. On this basis alone, the circuit court properly rejected Sprague's claim of ineffectiveness.

B. Trial counsel did not prejudice Sprague by not discussing sentencing by a different judge because Sprague did not want it.

As the circuit court noted, Sprague's ineffectiveness claim also fails for lack of prejudice. (R. 122:8–9.) To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Carter*, 324 Wis. 2d 640, ¶ 37 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Although that is not as difficult a standard to meet as "more likely than not," the difference matters "only in the rarest case." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697).

Sprague contends that he was prejudiced because he would have sought sentencing before a different judge had he been informed of that option during his meeting with trial counsel in the middle of sentencing. (Sprague's Br. 18.)[4] The record defeats Sprague's claim of prejudice.

The circuit court already decided that Sprague opted not to be sentenced by a different judge when it ruled that trial counsel was not ineffective for not proceeding with a judge-substitution motion. (R. 122:2–3.) Based on the record, the circuit court found that Sprague affirmatively declined to be sentenced by one of the two other possible judges after considering it on his own and in light of his attorney's advice. (R. 122:2–3.)

Both trial counsel and Sprague recalled talking about substitution. (R. 114:8, 32–33.) Trial counsel testified that Sprague never requested substitution. (R. 114:10, 28.) Sprague did not testify otherwise, and the circuit court found trial counsel more credible and compelling. (R. 114:32–33; 122:1.) Sprague's decision not to seek substitution came after trial counsel advised him that he was not familiar with any of the three judges and that it would likely not serve Sprague's interests to be sentenced by a woman (in a case where he had sexually abused his own daughter)—one of the two substitution options. (R. 114:8–9.) Sprague also determined based on his own investigation that the circuit court "was probably the most reasonable" of the judges. (R. 114:9.)

The circuit court reasonably found from this evidence and trial counsel's more credible testimony that Sprague decided not to pursue substitution. The finding is therefore

[4] The State assumes, *arguendo*, that Sprague correctly identifies the relevant outcome for the prejudice analysis. (Sprague's Br. 18.) Since trial counsel did object to the plea breach, Sprague cannot claim that he was automatically prejudiced pursuant to *State v. Smith*, 207 Wis. 2d 258, 282, 558 N.W.2d 379 (1997).

not clearly erroneous and applies on appeal. *See Carter*, 324 Wis. 2d 640, ¶ 19.

This finding is dispositive for whether trial counsel prejudiced Sprague by not telling him he could be sentenced before another judge. Sprague had already considered switching judges and declined. Had he been asked again, he would have provided the same answer.

The record does not provide a basis to conclude that Sprague changed his mind at sentencing. Before Sprague conferred with his attorney, the circuit court clearly instructed Sprague about what options to consider. The court mentioned plea withdrawal. (R. 44:14.) It told Sprague to consider whether he thought he could still receive a fair sentencing or whether the "cat's out of the bag, it can't be stuffed back in it." (R. 44:14.) It directed him to decide whether to proceed with sentencing, "withdraw [his] plea[,] or some other option in between." (R. 44:15.)

In other words, the circuit court tasked Sprague with considering a host of options, including the more extreme remedy of plea withdrawal. *See Weigel*, 404 Wis. 2d 488, ¶ 35. Although it did not specifically mention sentencing by a different judge, it did ask Sprague to consider whether a fair sentencing had become impossible. (R. 44:14.) It also left the possible relief open-ended, allowing for options more drastic than proceeding with sentencing but less extreme than plea withdrawal. (R. 44:15.)[5]

After being so instructed, Sprague decided to continue with sentencing. He did not express an interest in plea withdrawal or any other option. He affirmed his choice

[5] Under *Nietzold*, the sentencing judge could have simply continued with the hearing after the prosecutor admitted error and changed his recommendation, without offering the defendant a break to consult with trial counsel about his options, because the breach had been cured.

personally before the circuit court, acknowledged that he risked waiving certain rights by proceeding, and reiterated his understanding that the circuit court held ultimate authority over his sentence. (R. 44:16.)

In sum, Sprague had no interest in any remedy other than proceeding with sentencing. He had already decided that the circuit court was his best option for sentencing. Had he been expressly told that he could be sentenced by a different judge, he would have declined. Accordingly, trial counsel's failure to mention that option did not prejudice him.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated: May 31, 2023

Respectfully submitted,

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FORM AND LENGTH 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 4597 words.

Dated: May 31, 2023.

Electronically signed by:

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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

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