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01-06-2023
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY JOSEPH HAMILTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Motion, Entered in the Sheboygan County Circuit Court, the Honorable Daniel J. Borowski, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State breached the plea agreement by undercutting its agreed-upon sentencing recommendation.

The State committed a material and substantial breach of the plea agreement when it proclaimed that the "landscape had changed," since it entered into the plea agreement, and then stated that it was standing by the agreement because it was "ethically bound" to do so. (R.122:8; A-App.58). The State's comments plainly signaled to the court that the State was only giving the agreed-upon sentencing recommendation as a required formality. This defeated the benefit for which Mr. Hamilton bargained. *See State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733.

Although the State told the court it would "stand by" its recommendation, the taint of improper comments is not removed by the State's bare endorsement of the agreed-upon recommendation. *See Williams*, 249 Wis. 2d 492, ¶51 ("[t]he prosecutor's affirmation of the plea agreement was not adequate to overcome the prosecutor's covert message to the circuit court that a more severe sentence was warranted than that which had been recommended"). After the State told the court that the landscape had changed, but that it was ethically bound to stand by its agreement, the prosecutor said it would make "no further arguments." (R.122:11; App.61). Having just cast what the circuit court regarded as a "cloud" over the proceeding, the State essentially abandoned its role in the sentencing hearing. (*See* R.122:17; A-App.67).

A prominent theme in the State's brief is defending the prosecutor's integrity. The State characterizes Mr. Hamilton's claim as an accusation of "nefarious" bad will. (*See* Respondent's Brief at 16). Mr. Hamilton does not need to show that the prosecutor made "an attempt to subvert the plea agreement." (*Id*. at 19). Nor does he need to show that the State was "intentionally trying to mislead" the court. (*Id*. at 22). Instead, "the State's conduct need not be based on bad motive or intent to violate a plea agreement." *State v. Howland*, 2003 WI App 104, ¶31, 264 Wis. 2d 279, 663 N.W.2d 340 (citing *Santobello v. New York*, 404 U.S. 247, 262-63 (1971)). The fact that a breach was inadvertent "does not lessen its impact." *Id.* (quoting *Williams*, 249 Wis. 2d 492, ¶52).

Contrary to the State's assertion, Mr. Hamilton does not argue that the State breached the plea agreement by providing the court with negative information about him. (Respondent's Brief at 15-19). Instead, he has always argued that the breach occurred when the State asserted that the landscape had changed and then stated that it was making its recommendation out of ethical obligation. That said, the entire record is important context, and it is relevant that the State's original justification for the sentencing recommendation was that, despite its belief in Mr. Hamilton's guilt and opinion that Mr. Hamilton was dangerous, it could not prove its case at trial. (*See* R.95:2). Inability to prove a case may reasonably support a reduction in charges, but it has no obvious bearing on the appropriate *sentence*, and the State did not justify why probation would be an appropriate disposition. When the State backed away from its recommendation at the sentencing hearing,

this resulted in a gutting of the State's already poorly-supported recommendation.

The State argues that it was in "quite a predicament" and a "quandary" regarding the new charge. (Response Brief at 25). To the contrary, this was a problem of the State's own making. If the State found it necessary to advise the court of the charge, it could have done so in a matter-of-fact way without adding unnecessary and improper commentary.

The State incorrectly represents that Mr. Hamilton has argued that the State's use of the plural "felonies" instead of singular "felony" was a breach. (Respondent's Brief at 18). He has never made that argument. He simply pointed out in a footnote that there was one charge pending, not two, and that this fact was subsequently clarified on the record. (Appellant's Brief at 10, n.3). Mr. Hamilton is not splitting hairs with technicalities.

The State attempts to distinguish *State v. Liukonen*, 2004 WI App 157, 276 Wis. 2d 64, 686 N.W.2d 680, where the State breached the plea agreement by making comments during the sentencing hearing that implied that the defendant should receive a harsher sentence than what the State had agreed to recommend. The State asserts that the prosecutor in *Liukonen* argued that the defendant got a "break" with the plea deal, whereas the State in Mr. Hamilton's case did not use that word. (Respondent's Brief at 21). The State may not have used that specific word, but it clearly implied that Mr. Hamilton received an undeserved windfall through its repeated assertions that the reason for the plea agreement was that Mr. Hamilton engaged in

"cowardly" meddling, which, according to the State, caused the victim to recant, thus undermining its case. (R.140:37; A-App.39).

Ultimately, what occurred in Mr. Hamilton's case is materially the same as what happened in *State v. Poole*, 131 Wis. 2d 359, 394 N.W.2d 909 (Ct. App. 1986). In *Poole*, "[a]t sentencing, the prosecutor recommended the fine, but noted that this recommendation was agreed to 'before we knew of the other instances. But that is our agreement.'" *Id.* at 360. This Court held that this was a plea breach because, "the prosecutor's comments implied that circumstances had changed since the plea bargain, and that had the state known of the other instances of defendant's misconduct, they would not have made the agreement they did." *Id.* at 364. The Court affirmed that the State need not "enthusiastically" give its recommendation. *Id.* at 362. However, "a halfhearted sentence recommendation—that is, one that is something less than a neutral recitation of the product of the bargain—is a breach of the plea agreement." *Id.*

The State's attempt to distinguish *Poole* is unpersuasive. The State argues that Mr. Hamilton's case is distinguishable "for a number of reasons." (Respondent's Brief at 20). First, the State argues that the prosecutor in Mr. Hamilton's case stated that he "stood by" his recommendation. (*Id.*). Yet, in *Poole*, the prosecutor also endorsed the plea agreement when it affirmed, "that's our agreement." *Poole* 131 Wis. 2d at 360. The State also argues that the prosecutor in Mr. Hamilton's case "aggressively argued" for probation during his initial sentencing remarks. (*Id.*). For reasons already stated, the prosecutor's initial argument for probation was paltry. The decision in

Poole does not detail the prosecutor's comments at length. However, it is clear that the prosecutor *did* affirm the agreed-upon recommendation, and yet, this was not enough to countenance the undercutting of the agreement.

The State's reliance on *State v. Hanson*, 2000 WI App 10, 232 Wis. 2d 291, 606 N.W.2d 278, is misplaced. (Respondent's Brief at 23-26). In *Hanson*, the defendant argued that two breaches occurred—first, when the prosecutor failed to "recite the express terms" of the recommendation, and second, when the prosecutor rendered a "less than neutral statement" of the recommendation. *Id.*, ¶1. As to the first alleged breach, the plea agreement required the State to cap its recommendation at ten years. The State informed the court of this specific agreement at the plea hearing. However, the prosecutor did not utter the phrase "ten years" during the sentencing hearing. This Court held that the failure to use "magic words" was not a breach. *Id.*, ¶22.

Hanson's second argument was that the State undercut the agreement when it emphasized numerous negative facts about the crime, following up its recommendation with the comment, "having said that, this is an extremely violent case…" *Id.*, ¶25. This Court held that this was not a breach because the State made a "strong affirmation" of the plea agreement in its opening comments. *Id.*, ¶26. Of note, prior to the sentencing hearing, the defendant had filed a motion arguing that the State breached the plea agreement by serving as a conduit for the victim's impact statement. In response to the motion, at the sentencing hearing, the prosecutor "vigorously" argued its allegiance to the plea agreement. *Id.*, ¶21.

Mr. Hamilton does not argue that the State failed to utter the correct magic words; nor does he argue that the State's presentation of negative facts amounted to a breach. Instead, as in *Poole*, the breach occurred when the State implied that information it became aware of after the plea agreement altered its view of the plea agreement, and implied that it was only making its recommendation because it was bound to. The *Hanson* court distinguished *Poole* based on this difference in circumstances. *Hanson*, 232 Wis. 2d 291, ¶29.

In sum, the State breached the plea agreement in Mr. Hamilton's case, and he should be granted a new sentencing hearing.

II. Trial counsel rendered ineffective assistance of counsel by not objecting to the plea breach.

Whether trial counsel's failure to object to the State's plea breach was deficient turns on whether counsel told the defendant he could object, and whether the defendant personally decided against it. *State v. Sprang*, 2004 WI App 121, ¶28, 274 Wis. 2d 784, 683 N.W.2d 522. If the defendant did not personally waive an objection, prejudice is presumed. *State v. Howard*, 2001 WI App 137, ¶25, 246 Wis. 2d 475, 630 N.W.2d 244.

In his postconviction motion, Mr. Hamilton alleged that his attorney did not advise him that there had been a breach or consult with him about whether or not to object. The State's only argument on this claim is that there was no breach, and therefore there was no ineffective assistance of counsel for not objecting to the breach. (Respondent's Brief at 28).

Mr. Hamilton, of course, disagrees. If this Court agrees with Mr. Hamilton that a breach occurred, remand for a *Machner*[1] hearing may not be necessary. The transcript of the hearing confirms that there was no break taken during which a consultation between trial counsel and Mr. Hamilton could have occurred. The State does not contest his assertion that no consultation took place. This Court should therefore reverse and remand for resentencing. Alternatively, the Court should at least remand for a *Machner* hearing. If the testimony at that hearing confirms that there was no consultation between trial counsel and Mr. Hamilton about whether to object to the breach, resentencing before a new judge is required.

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

CONCLUSION

For the foregoing reasons and the reasons stated in his Appellant's Brief, Mr. Hamilton asks the Court to reverse the circuit court's denial of his postconviction motion. Mr. Hamilton requests that the Court remand the case with directions to hold a resentencing hearing in front of a new judge—or, if the Court deems it necessary to first have a *Machner* hearing, with directions to hold a *Machner* hearing.

Dated this 6th day of January, 2023.

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 1,794 words.

Dated this 6th day of January, 2023.

Signed:
Electronically signed by Colleen Marion
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