COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2809-CR **Cir. Ct. No. 2002CF886**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. STEPHENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD T. HASSIN and J. MAC DAVIS, Judges. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Mark Stephens appeals from a judgment of conviction of armed burglary and from an order denying his postconviction motion alleging a breach of the plea agreement and ineffective assistance of

counsel. He argues that his custodial statement to police should have been suppressed because he invoked his right to terminate the interrogation and that the plea agreement was breached when the prosecutor made reference to the presentence investigation report's (PSI) recommendation that the sentence be made consecutive to another sentence Stephens was then serving. We affirm the circuit court's rulings and the judgment and order.

¶2 Stephens entered his neighbor's home under false pretenses and scuffled with the female homeowner when she caught him looking for money. Stephens pulled a knife during the scuffle and struck the victim. Stephens fled the house and was discovered by police hiding under a camper in his mother's yard.

¶3 Stephens was transported to the police station and had one hand cuffed to the table in the interrogation room when Officer Robert Kraemer read Stephens his Miranda rights. Stephens acknowledged understanding each of his rights and agreed to answer questions. He denied any wrongdoing and told Officer Kraemer he had been at home all day. Detective David Funkhouser entered the room and took over the interrogation. Detective Funkhouser employed a more aggressive approach and confronted Stephens with indicators of Stephens' guilt. Stephens slammed his hand on the table and declared he did not want to talk to Detective Funkhouser anymore and referred to the detective as a "punk." Detective Funkhouser twice asked Stephens if he was invoking his constitutional right to representation or cease questioning. Stephens indicated that he would continue to speak but was not happy about having to talk to Detective Funkhouser. Thereafter Stephens was confronted with the discovery of the knife in his car. Stephens then admitted his criminal conduct to Detective Funkhouser. The police wrote a statement in question and answer form and Stephens signed it.

¶4 Stephens moved to suppress his oral and written admissions. The motion was denied. Stephens then entered a guilty plea to the armed burglary charge. The plea agreement called for charges of kidnapping and substantial battery while armed to be dismissed and read in at sentencing. The prosecution agreed to argue for substantial prison time but take no position on whether the sentence should be consecutive or concurrent to a previous sentence.

¶5 In a revised sentencing recommendation, the PSI recommended that the sentence be made consecutive. At sentencing, the prosecution pointed out that its recommendation was for substantial prison time. It noted that Stephens was serving time after the revocation of parole until October 30, 2009, and "[t]hat's the sentence to which the presentence writer indicates their recommendation should be consecutive." The prosecution emphasized the need to give the victim a sense of security by imposing a substantial prison term. The prosecution then explained how it had alerted the PSI author to a mistake in the maximum available and that the maximum is sixty years. The prosecution commented next:

> If the Court were to adopt the recommendation of the presentence and make this a period of initial confinement of 20 years consecutive to what he's currently serving, he would be released in the year 2029; and he would be 67 years old. He's currently 44, would be 47 when the sentence in 2006 ends.

¶6 A motion for postconviction relief alleged that the prosecution had breached the plea agreement by not stating that it took no position on the imposition of a consecutive or concurrent sentence and by comments that essentially adopted the PSI recommendation that the sentence be consecutive. Because no objection was made to the prosecution's sentencing argument, the postconviction motion alleged trial counsel was ineffective for not objecting. The motion was heard by a judge different than the sentencing judge. The court heard

an offer of proof that trial counsel would testify that he had no strategic reason for failing to object to comments allegedly breaching the plea agreement; trial counsel did not testify. The court found that the prosecution's first reference to the consecutive recommendation in the PSI was a point of clarification on the sentencing court's invitation to explain why there was a revised PSI recommendation. It concluded there was not a substantial and material breach of the plea agreement. Stephens appeals.

¶7 When reviewing a decision on a motion to suppress statements we sustain the trial court's historical findings of fact unless they are clearly erroneous. *See* ***State v. Ross***, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996). Whether the defendant's constitutional rights were violated is a "constitutional fact" determined without deference to the trial court. ***Id.***

¶8 A defendant's Fifth Amendment right to remain silent includes the right to cut off an interrogation and must be "scrupulously honored." ***Michigan v. Mosely***, 423 U.S. 96, 104 (1975); ***Ross***, 203 Wis. 2d at 74. The defendant must unambiguously terminate the interrogation. ***Ross***, 203 Wis. 2d at 74-75. "A suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." ***Id.*** at 78. The articulation must be sufficiently clear "'that a reasonable police officer in the circumstances would understand the statement to be' an invocation of the right to remain silent." ***Id.*** (citation omitted). It is not necessary for the interrogation to cease if the suspect does not unambiguously invoke his or her right to remain silent. ***Id.*** Of greater importance here is the recognition that given an equivocal or ambiguous request to remain silent, the police need not ask the suspect clarifying questions on that request but that it is good police practice to do so. ***Id.***

¶9 In the wake of Stephens's assertion that he did not want to talk "to you, punk," Detective Funkhouser sought to clarify whether Stephens was invoking his constitutional right to remain silent. The clarifying questions were not unreasonable because Stephens directed his words to the detective as demonstrated by calling the detective a punk.[1] The declaration that a suspect does not wish to speak to a specific officer is not the invocation of his right to remain silent. *See* ***State v. Owen***, 202 Wis. 2d 620, 641, 551 N.W.2d 50 (Ct. App. 1996). Stephens did not make a clear articulation that he wanted to terminate the interrogation and the detective was not required to immediately walk away.[2] In asking two separate clarifying questions—whether Stephens was invoking his right to representation and whether Stephens was invoking his right to remain silent—Detective Funkhouser was doing good police work in an attempt to determine whether Stephens was invoking a right. Nothing suggests that the clarifying questions themselves were coercive or threatening. Stephens had been fully advised of his ***Miranda*** rights and when asked to clarify if he wanted to terminate the interrogation, he indicated he did not. His constitutional right to remain silent was not violated.

¶10 An actionable breach of the plea agreement must be a material and substantial breach such that it "defeats the benefit for which the accused bargained." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d

[1] We recognize, as Stephens points out in his reply brief, that the trial court did not make a finding on the exact language Stephens used. Implicitly the court found the officers' testimony to be more credible. It was undisputed that Stephens called Detective Funkhouser a punk when indicating he didn't want to speak.

[2] Because Stephens did not invoke his right to remain silent, we need not consider the five factor test set forth in ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985), for determining whether police scrupulously honored the invocation.

733. Whether the prosecution has breached the plea agreement in a material and substantial way is a question of law that we review independent of the trial court. ***Id.***, ¶20. When the issue is presented to this court under an ineffective assistance of counsel claim because counsel failed to object to the alleged breach of the plea agreement, we first determine whether there was, in fact, a material and substantial breach of the plea agreement. ***State v. Sprang***, 2004 WI App 121, ¶13, 274 Wis. 2d 784, 683 N.W.2d 522.

> While a prosecutor need not enthusiastically recommend a plea agreement, the court of appeals has stated that he or she "may not render less than a neutral recitation of the terms of the plea agreement." "End runs" around a plea agreement are prohibited. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended."

Williams, 249 Wis. 2d 492, ¶42 (footnotes omitted).

¶11 Stephens argues that the plea agreement was breached because the prosecution did not restate the entire agreement in its initial sentencing argument. Stephens cites no support for his proposition that it was the prosecutor's obligation to fully restate the agreement at the time of sentencing. We are not persuaded that the prosecution was required to restate the plea agreement restrictions. As the postconviction court aptly noted, the prosecution did not agree to restate the entire plea agreement at sentencing or explicitly inform the sentencing court that it had no position on whether the sentence be concurrent or consecutive. Although the prosecution made reference to the plea agreement in first stating its recommendation for substantial prison time, it did not in fact make any

recommendation on whether the sentence be concurrent or consecutive.[3] It was not, as Stephens suggests, a misrepresentation by omission to not highlight the prosecution's promise not to make a recommendation on whether the sentence be concurrent or consecutive. The reference to the PSI's recommendation of a consecutive sentence immediately after stating the recommendation for substantial prison was simply an explanation of the PSI.

¶12 We reject Stephens's suggestion that the plea agreement was breached by the emphasis the prosecution gave to the victim's statement. The victim indicated to the sentencing court her fear that Stephens, if released in the next forty years, would return to harm her and her family. The prosecution referred to her remarks at the start of its sentencing argument.[4] The sentencing court is permitted to consider the comments and wishes of the victim. ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990). The prosecution's discussion of how the crime impacts the victim is relevant to the nature of the crime. ***State v. Naydihor***, 2004 WI 43, ¶27, 270 Wis. 2d 585, 678

[3] The prosecution stated:

> My recommendation, as the Court's aware, was represented at the time of the plea, is that you impose a substantial prison sentence. Mr. Stephens is currently, Judge, serving time, after having been revoked from parole, until October 30th, I believe, of 2009. That's the sentence to which the presentence writer indicates their recommendation should be consecutive.

[4] The prosecution stated:

> [T]his sentencing should not be about Mr. Stephens. It should be about the victim, Judge. Your sentence here today perhaps can give back some sense of safety. It will never totally come back for this victim, Judge. It's gone. Mr. Stephens has destroyed that, as she indicated. But this Court can perhaps give her some small feeling of safety in her home again.

N.W.2d 220. It also bears on the need to protect the public. The prosecution's comments on the victim's wishes supported the recommendation for substantial prison. We reject Stephens's contention that the prosecution implicitly recommended a consecutive sentence because, in Stephens's opinion, the forty-year sentence the victim wanted could only be accomplished by a consecutive sentence.[5] The prosecution's emphasis on the victim's wishes did not make an end run around the plea agreement.

¶13 Stephens argues that the prosecution's reference, not once, but twice, to the PSI's recommendation of a consecutive sentence breached the plea agreement by implicitly adopting the PSI recommendation. As we have already stated, the first reference to the PSI consecutive recommendation was to explain the PSI. The PSI did not indicate what the sentence should be made consecutive to. Moreover, that reference was followed by a discussion of discrepancies in the PSI of Stephens's prior record. It was part of a larger discussion of the sentences previously imposed on Stephens to help the court understand the errors in the PSI on Stephens's prior record.

¶14 The second reference to the PSI's consecutive recommendation came at the conclusion of the prosecution's argument. The reference to Stephens's age at the completion of the PSI recommended sentence was factual only and didn't suggest that one age was better than the other. Age is an appropriate sentencing consideration so it was not inappropriate for the prosecution to provide that information. "A prosecutor may convey information to

[5] Stephens faced a maximum prison term of sixty years with the possibility of forty years' initial confinement.

the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement." ***Williams***, 249 Wis. 2d 492, ¶44. We are not persuaded that the references to the PSI's consecutive recommendation was an implicit adoption of the PSI recommendation or a breach of the plea agreement.

¶15 Even if we considered the comment to be an end run around the prosecution's promise not to take a position on whether the sentence should be concurrent or consecutive, it was not a substantial and material breach of the agreement. Stephens cites ***Sprang***, 274 Wis. 2d 784, and ***Williams***, 249 Wis. 2d 492, as illustrative of the circumstances in which the prosecution's reference to the PSI constituted a breach of plea agreements. In both ***Sprang***, 274 Wis. 2d 784, ¶24, and ***Williams***, 249 Wis. 2d 492, ¶¶48-50, the plea agreement was undercut by the prosecution's adoption of information in the PSI to cast doubt on the wisdom of the plea agreement. *See also* ***State v. Wills***, 187 Wis. 2d 529, 538, 523 N.W.2d 569 (Ct. App. 1994), *aff'd.*, 193 Wis. 2d 273, 533 N.W.2d 165 (1995) (finding a breach the court concluded that "the prosecutor was required to argue to the trial court that the agreement was consistent with the appropriate sentencing criteria. If the prosecutor could not support the agreement, she should not have committed the State to it.").

¶16 Here, at no point did the prosecution cast doubt on the plea agreement. This case is closer to ***Naydihor***, 270 Wis. 2d 585, ¶¶27, 30, where there was no breach of the plea agreement because the prosecution did not imply to the sentencing court that it believed a more severe sentence than that recommended was appropriate and the information the prosecution discussed was relevant to appropriate sentencing factors. The agreement for "substantial prison" permitted leeway to the prosecution in how to justify that recommendation. The

prosecution continued to support the plea agreement by recommending substantial prison and providing information that supported substantial prison time. In short, Stephens was not deprived of the benefit of the agreement not to have the prosecution make a recommendation on whether the sentence was to be consecutive or concurrent. Thus, references to the PSI's consecutive recommendation were not substantial or material breaches. Trial counsel was not constitutionally deficient for not objecting at sentencing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06)