COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2761-CR **Cir. Ct. No. 2007CF2815**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Christopher Jones appeals the amended judgment convicting him of arson to a building, contrary to WIS. STAT. § 943.02(1)(a) (2007-08).[1] He argues that his attorney was ineffective because the State

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

"materially and substantially breached the plea agreement" and his attorney failed to object. He argues that this entitles him to a ***Machner*** hearing.[2] Jones contends that if at the ***Machner*** hearing his attorney is unable to prove that his failure to object was a strategic decision or that he failed to object after consulting with Jones, then he is entitled to a resentencing. Because the State did not breach the plea agreement, we affirm.

I. BACKGROUND.

¶2 On June 6, 2007, a criminal complaint was issued charging Jones with two counts of disorderly conduct and one count of arson to a building. According to the complaint, the charges stemmed from two incidents that occurred on June 1, 2007, at the apartment of Jones's former girlfriend, Shirley Moffett. At around 11:00 a.m., Jones came to the apartment where he had been staying with Moffett to collect his belongings. Once in the apartment, he asked Moffett: "Why are you doing this to me?" Moffett told him: "Go on man, I don't want to hear it." Jones then became upset and poured a bottle of rubbing alcohol on Moffett's body, stating: "I'm gonna burn you up." Jones also pulled the telephone cord out of the wall. After a brief angry conversation with Moffett, Jones left.

¶3 That evening Jones returned to the apartment and again pulled the telephone cord out of the jack. He then approached Moffett and grabbed her by the neck, telling her: "I'm going to kill you and set your ass on fire." Moffett

[2] "Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. At the hearing, trial counsel testifies as to his or her reasoning on [the] challenged action or inaction." ***State v. Thiel***, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305.

managed to break free, run out of the apartment, and go to a neighbor's apartment where she called 911. Moffett stated that she saw Jones leave the apartment. Some time later she saw smoke coming out of her apartment.

¶4 The complaint also details the statement of a fire department official who responded to the fire in the apartment. The fire department official stated that the damages to the apartment and building were estimated at $22,000. A fire investigator concluded that the fire was intentionally started.

¶5 After Jones was charged and waived his preliminary hearing, he eventually entered into a plea agreement with the State. Jones agreed to plead guilty to the arson of a building charge in exchange for the State recommending a sentence of ten years in the Wisconsin State Prison System on the arson charge and dismissing the two misdemeanor disorderly conduct charges, which would be read into the record for sentencing purposes. The State also agreed to leave the configuration of initial confinement and extended supervision up to the court's discretion. At the time of the guilty plea, the State advised the court that because not all of Jones's criminal record had been uncovered, as he had out-of-state convictions, the State was recommending a presentence investigation. The trial court accepted Jones's plea and ordered a presentence investigation.

¶6 On the date originally scheduled for sentencing, the owner of the building testified and told the court that he thought Jones should receive a twenty-five-year sentence. The trial court then adjourned the sentencing because Moffett was not present. Months later, another sentencing hearing was held, at which the State recommended to the trial court that Jones receive a ten-year sentence. In its sentencing remarks, the State read a statement from the presentence investigation report, which said: "Mr. Jones impresses me as an extremely dangerous

individual." According to the State, this statement summed up the case. The presentence investigation report writer recommended a sentence of ten years of initial confinement and eight years of extended supervision. Jones's attorney advocated for a ten-year sentence comprised of five years of initial confinement and five years of extended supervision. The trial court sentenced Jones to fifteen years of initial confinement and ten years of extended supervision. The trial court also ordered Jones to pay a $250 DNA surcharge. Jones brought a postconviction motion seeking sentence modification on the grounds that the State breached the plea agreement, and he also sought vacation of the DNA surcharge. The trial court denied the motion for sentence modification, but did vacate the DNA surcharge. This appeal follows.

II. ANALYSIS.

¶7 Because Jones's trial attorney did not object to the State's recommendation at the sentencing hearing, Jones has forfeited his right to direct review of the alleged plea agreement breach.[3] *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Therefore, we must review the case in the context of a claim for ineffective assistance of counsel. ***Id.*** First, we "consider whether the State breached the plea agreement." ***Id.*** "If there was a material and substantial breach, the next issues are whether [Jones's] counsel provided ineffective assistance and which remedy is appropriate." *See* ***id.*** Whether the prosecutor's conduct constituted a material and substantial breach of

[3] We use the word "forfeiture" rather than the word "waiver" to be consistent with the terminology adopted by ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and citation omitted).

the plea agreement is a question of law that we review *de novo*. *See* ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220.

¶8 "[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 ("[O]nce [a defendant] agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the [defendant]'s due process rights demand fulfillment of the bargain."). A plea agreement is breached when a prosecutor fails to present the negotiated sentencing recommendation to the trial court. ***Id.***, ¶38. An actionable breach, however, "must not be merely a technical breach; it must be a material and substantial breach." ***Id.*** "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the [defendant] bargained." ***Id.*** While a prosecutor need not enthusiastically recommend a plea agreement, ***State v. Poole***, 131 Wis. 2d 359, 362, 394 N.W.2d 909 (Ct. App. 1986), this court has stated that he or she "may not render less than a neutral recitation of the terms of the plea agreement," ***id.*** at 364. "'End runs'" around a plea agreement are prohibited. ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278 (one set of internal quotation marks and citation omitted). "[T]he State may not accomplish through 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." ***Id.***; *see also* ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991). Here, the question is whether the prosecutor's comments deprived Jones of the benefit he bargained for—a specific prison term recommendation of ten years.

¶9 The Wisconsin Supreme Court has stated that a prosecutor has a duty to give the court relevant sentencing information but must do it in a way that honors the plea agreement: "[T]he State must walk 'a fine line' at a sentencing

hearing. A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to [a defendant]," but must do so while also abiding by the terms of its agreement with the defendant. ***Williams***, 249 Wis. 2d 492, ¶44 (footnote omitted). "The State must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." ***Id.***

¶10 Jones complains that remarks made by the State at the sentencing hearing "implied reservations about the agreement." Specifically, Jones submits that the State backed away from its original recommendation when it asserted at the sentencing hearing that the "whole matter" was "aggravated by the defendant's record" and then added: "The State was aware of his record prior to reading the pre-sentence investigation. However, there was an awful lot of it that we weren't aware of." Further, Jones argues that when the State, in response to the trial court's questions, revealed that it was only aware of eight of the sixteen convictions listed in the presentence investigation report at the time of the plea negotiation, it was again signaling to the court that it may have not entered into the plea agreement if it had known the additional information. It is at this point that Jones argues the breach actually occurred.

¶11 Jones also finds other of the State's arguments to the court troublesome. For instance, the State commented on Jones's difficulties with females, remarking that "this is not the first time that trouble with women has gotten him in trouble and in very hot water." In addition, as previously set forth, the State also read a statement from the presentence report claiming that it summed up the case. The statement read: "Mr. Jones impresses me as an extremely dangerous individual." This remark, according to Jones, was further evidence that the State was advocating for a stiffer sentence than what was agreed

upon. In addition, Jones complains that the State's recommendation of "a fairly lengthy prison sentence *such as* ten years" was "less than neutral." (Emphasis in Jones's brief; internal quotation marks omitted.)

¶12 Jones submits that these arguments, coupled with the State's suggestion that the "whole matter" was "aggravated by the defendant's record," a record not known to the State at the time of the plea negotiation, created circumstances like those in ***Poole*** and ***Williams***, cases where a material and substantial breach of the plea agreement was found.

¶13 In ***Poole***, the defendant pled guilty to a burglary charge pursuant to a plea agreement, with the understanding that the State would be recommending a $1500 fine. ***Id.***, 131 Wis. 2d at 360. The prosecutor recommended the agreed upon fine, but also told the trial court that the agreement was reached "'before we knew of the other instances.'" ***Id.*** The "'other instance'" was the fact that the defendant's probation had been revoked in another case. ***Id.*** Rather than being sentenced to a fine, the defendant received a five-year prison sentence. ***Id.*** This court reversed and remanded for resentencing, concluding that:

> [A] prosecutor may not render less than a neutral recitation of the terms of the plea agreement. The recommendation in the case at hand fell below that standard. The prosecutor's comments implied that circumstances had changed since the plea bargain, and that had the [S]tate known of the other instances of defendant's misconduct, they would not have made the agreement they did.

Id. at 364.

¶14 In ***Williams***, the defendant agreed to plead guilty to one count of failure to pay child support, to pay all arrearages and to pay current support, in exchange for the State promising to dismiss an additional count and to recommend

a sentence of three years' probation with sixty days in jail. ***Id.***, 249 Wis. 2d 492, ¶24. The trial court accepted the plea and ordered a presentence investigation. ***Id.***, ¶25. The presentence investigation report recommended "'a medium term of imprisonment.'" ***Id.*** The State began its sentencing recommendation by making the following argument:

> After reading through the presentence, it appears that I think I can best describe my impression of this defendant as manipulative and unwilling to take responsibility. I have had occasion to speak with [the defendant's ex-wife]. And she has indicated things that she will be presenting to the Court. But it was quite a contrast, speaking with her and reading and learning about [the defendant].

Id., ¶26 (emphasis omitted; bracketing in ***Williams***).

¶15 The State then spoke at length about the defendant's shortcomings as a father, including his refusal to have a relationship with his daughter, to support her, or to provide available health insurance for her, while at the same time blocking an attempt by the stepfather to adopt her. ***Id.*** Additionally, the State told the court that the presentence writer believed that the defendant should go to prison. ***Id.***

¶16 The defendant's attorney objected to the State's argument, arguing that the State was undercutting its sentencing recommendation. ***Id.***, ¶27. The State responded that it was simply offering information from the presentence report because the author was not present and reiterated that it was standing by its recommendation. ***Id.***, ¶29. Eventually, the defendant's ex-wife addressed the court, telling the court how hard it was to raise a child without financial support from the defendant, but the defendant's ex-wife never made a sentencing recommendation. ***Id.***, ¶30. The defendant received an eighteen-month prison sentence. ***Id.***, ¶25.

¶17 After being sentenced, the defendant brought a postconviction motion, which was denied. ***Id.***, ¶1. This court reversed the trial court and a petition for review was accepted by the supreme court. ***Id.*** In its decision, the supreme court stated "that the State stepped over the fine line between relaying information to the [trial] court on the one hand and undercutting the plea agreement on the other hand." ***Id.***, ¶46. In agreeing with the court of appeals, the supreme court quoted from the court of appeals opinion: "'[W]hat the prosecutor may not do is personalize the information, adopt the same negative impressions as [the author of the presentence investigation report] and then remind the court that the [author] had recommended a harsher sentence than recommended.'" ***Id.***, ¶48 (bracketed material in ***Williams***). The court then went on to state:

> The State did not merely recite the unfavorable facts about the defendant to inform the [trial] court fully. Rather, the State covertly implied 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.

¶18 We conclude both cases are distinguishable. We are not persuaded that here the State crossed the line in its sentencing arguments. We first observe that the State and the trial court were well aware of Jones's extensive criminal history and the fact that there was an outstanding federal probation hold at the time of the guilty plea. When requesting the presentence investigation, the State told the court: "The defendant has [a] substantial out-of-state record that spans a couple of different jurisdictions." Consequently, the State knew the general outline of Jones's "substantial out-of-state record" when the plea agreement was negotiated, but lacked sufficient details about all of the criminal charges.

¶19 As to the additional charges that the State was unaware of at the time of the negotiation, the State told the trial court at sentencing: "The [criminal convictions] we were not aware of were like the fifth-degree domestic assault misdemeanor from Minneapolis, we weren't aware of those; and the disorderly conduct, the retail theft, and *some of the other more minor matters*." (Emphasis added.) Thus, it appears that the State believed the crimes unknown to the State were not significant and conveyed that opinion to the trial court. Unlike the circumstances in ***Poole***, here all the parties knew at the time of the guilty plea that additional negative information would be gathered.

¶20 Nor do we believe that the circumstances here mimic those found in ***Williams***. The State's first statement to the court was to recommend the ten-year sentence. It then elaborated on its recommendation in its argument to the court, but it did not raise doubts about the wisdom of the terms of the plea agreement. We note, too, that the State never mentioned the presentence investigation report's recommendation that Jones receive a greater sentence than that advocated by the State. The State's arguments did not reveal a desire, either explicit or implicit, to alter the terms of the plea agreement. After its recitation of the facts and comments on Jones's past criminal record, the State reiterated that Jones deserved "a frankly long prison sentence. We are recommending ten years." As the State notes, and we agree, ten years is a long sentence. Thus, there is nothing improper in couching the recommendation in those terms. Consequently, arguing for a ten-year sentence in this manner did not suggest the plea agreement was inappropriate.

¶21 Also, unlike ***Williams***, here the State never personalized the feelings or hardships of the victim. Rather, the State presented the facts in a straight-forward manner. A reading of the record does not lead to the conclusion found in

the ***Williams*** case that "the State's comments affirming the plea agreement were too little, too late." *See* ***id.***, 249 Wis. 2d 492, ¶52.

¶22 At sentencing, the State was true to the original plea agreement, stating:

> Well, Your Honor, the State is recommending a ten-year prison sentence.
>
> Obviously, we're not making any specific recommendation in regards to initial confinement or extended supervision but I think it's pretty clear that a fairly lengthy prison sentence such as ten years is warranted based upon the facts of the case and also based upon the defendant's prior records—something which is included in the pre-sentence investigation reports.

Jones complains that the wording of the argument "fairly lengthy sentence such as ten years" was less than neutral. As noted, ten years is a "fairly lengthy prison sentence," stating so is not a recommendation that is less than neutral. In addition, the State repeated its ten-year sentence recommendation three times. As to the State's reference to a comment found in the presentence investigation report that Jones was an extremely dangerous person, the facts bear out that opinion. Jones threatened to kill Moffett by burning her. He did not carry out his threat. Instead, he destroyed her apartment and caused $22,000 worth of damage by setting it on fire. Given these facts and his prior criminal history, he was an extremely dangerous person.

¶23 We have reviewed the record and we conclude that the sentencing remarks, when read in the proper context, do not imply that the State, having learned additional information about Jones, was backing away from the plea agreement. Moreover, a plea agreement

> [may] not prohibit the [prosecutor] from informing the trial court of aggravating sentencing factors.... At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot "be immunized by a plea agreement between the defendant and the [S]tate." A plea agreement which does not allow the sentencing court to be appraised of relevant information is void [as] against public policy.

Naydihor, 270 Wis. 2d 585, ¶21 (quoting ***Ferguson***, 166 Wis. 2d at 324).

¶24 Thus, because there is no breach of the plea agreement, we need not address whether Jones's attorney was ineffective for failing to object to the State's sentencing arguments.

¶25 For the reasons stated, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.