COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 1997

NOTICE

No. 96-3343-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS F. BALL II,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Thomas Ball II appeals from a judgment of conviction of armed robbery with a concealed identity and from an order denying his motion to vacate his sentence based on trial counsel's failure to object to an alleged breach of the plea agreement. We conclude that the prosecutor's open-

ended sentencing recommendation breached the plea agreement and that Ball is entitled to resentencing. We reverse the judgment and the order and remand for a new sentencing hearing.

Ball entered a guilty plea to armed robbery while concealing his identity with the understanding that two other charges[1] would be dismissed but be read in at sentencing. His plea and waiver of rights questionnaire indicated: "State to recommend not more than 7 years." At the plea hearing the prosecutor represented that the plea agreement was that his "ultimate recommendation would not exceed seven years."

At sentencing the prosecutor acknowledged that "a sentence of around five years was what [he] had contemplated at the time that the pleas were entered." The prosecutor expressed "serious concerns" about that initial thought because Ball had denied involvement in the read in offenses.[2] In his remarks, the prosecutor questioned "whether or not five years is still the appropriate—an appropriate period of time, *or if it should be somewhat more than that.... In any event, I clearly feel that a prison sentence of a substantial length is necessary here to protect the public.*" (Emphasis added.)

Ball argues that his trial counsel was deficient for not objecting when the prosecution breached the plea agreement by not making the agreed upon sentencing recommendation. We first look to whether there was a breach of the

[1] Ball was charged with two additional armed and masked robberies.

[2] When interviewed by the presentence investigator, Ball denied any involvement in the read in offenses. At sentencing, Ball admitted his involvement in those offenses. He explained that he had been less than truthful with the presentence investigator because he was afraid of what would happen if he admitted to the offenses.

plea agreement. *See* ***State v. Smith***, 207 Wis.2d 259, 273, 558 N.W.2d 379, 385 (1997). A plea agreement is violated when the defendant is deprived of a material and substantial benefit for which he or she bargained. *See* ***id.***

Here the facts regarding how the plea agreement was recited on the waiver of rights form and how the prosecutor stated the agreement at the plea hearing are undisputed. Where the facts are undisputed, whether the prosecution violated the terms of a plea agreement is a question of law which we address de novo. *See* ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). The trial court found that the terms of the plea agreement were "not that the prosecutor advocate for a seven year sentence but only that the prosecutor not recommend more than seven years." Regardless of whether the trial court correctly interpreted the meaning of the plea agreement,[3] we conclude that the prosecution violated the prohibition against making an "end-run" around the plea agreement. *See* ***State v. Ferguson***, 166 Wis.2d 317, 322, 479 N.W.2d 241, 243 (Ct. App. 1991); ***State v. Poole***, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986).

A prosecutor may not "convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended." ***Ferguson***, 166 Wis.2d at 322, 479 N.W.2d at 243. Here, the prosecutor made no recommendation in terms of years, something Ball bargained for with an agreement for a recommendation of not more than seven years. Rather than a specific recommendation under the agreed-upon cap, the prosecutor recommended a sentence of a "substantial length." This open-ended recommendation is even

[3] The parties disagree about whether the plea agreement required the prosecutor to literally recommend a sentence of "not more than seven years" in prison.

more egregious as the prosecutor disavowed his previous impression that a five-year term was appropriate and Ball faced a potential maximum sentence of forty-five years. Recommending a substantial term in excess of five years is suggestive of a sentence in excess of seven years. The prosecutor violated the spirit of the plea agreement.[4]

Having concluded that the plea agreement was breached, trial counsel's failure to object is deficient performance[5] which is presumed to prejudice the defendant. *See* ***Smith***, 207 Wis.2d at 282, 558 N.W.2d at 388.

[4] We have considered whether Ball's denial of the read in offenses could be deemed a repudiation of the plea agreement. We conclude it cannot. No matter what Ball said about those offenses, they remained read in offenses according to the plea agreement and the trial court was to consider them. Indeed, as the prosecutor argued at sentencing, Ball's failure to admit those offenses could be considered an aggravating factor at sentencing.

[5] We acknowledge that defense counsel testified at the ***Machner*** hearing that he believed the prosecutor had complied with the plea agreement. Having concluded that in fact the agreement was breached, we need not consider whether counsel's failure to object was reasonable performance in light of the potentially ambiguous nature of the plea agreement. As is often the case, a claim of ineffective counsel is merely a vehicle to obtain review of a claim of error which has been waived. *See* ***State v. Smith,*** 170 Wis.2d 701, 714 n.5, 490 N.W.2d 40, 46 (Ct. App. 1992). Trial counsel did not invoke a strategy reason for not objecting. *See* ***State v. Smith***, 207 Wis.2d 259, 282 n.13, 558 N.W.2d 379, 389 (1997).

Prejudice is not negated by the trial court's finding that at sentencing it chose to ignore the plea agreement and was not influenced by the prosecutor's recommendation. *See* ***id.*** at 281, 558 N.W.2d at 389. Ball is entitled to a new sentencing hearing conducted in accordance with the terms of the plea agreement. *See* ***id.*** at 283, 558 N.W.2d at 390.

By the Court.—Judgment and order reversed and caused remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.