

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3625-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAMON S. CLARK,

DEFENDANT-APPELLANT,

CONFUCSIOUS GOODEN,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Damon S. Clark appeals from a judgment entered after he pled guilty to attempted armed robbery, party to a crime, contrary to §§ 943.32(1)(b), 939.32(3) and 939.05, STATS. He also appeals from an order denying his postconviction motion. Clark claims the trial court erred in denying his motion seeking sentence modification. He asserts that the prosecutor breached the plea agreement and, therefore, that he is entitled to resentencing. Because the plea agreement was breached, we reverse and remand for resentencing.

I. BACKGROUND

On May 17, 1996, Clark and his co-defendant, Confucius Gooden, decided to rob Moline Jewelry in West Allis. The robbery was foiled, however, when the victim, Scott Moline, pulled out a gun and started shooting. The defendants left the store. Both were charged with one count of attempted armed robbery, party to a crime. The complaint alleged that Clark knew that the owner of the store, Scott Moline, was confined to a wheelchair and thus was an easy mark.

Clark entered into a plea agreement, where he agreed to plead guilty and, in exchange, the prosecutor would recommend a five-year sentence. At the sentencing, the prosecutor stated in pertinent part:

[PROSECUTOR]: As with the co-defendant, I'm recommending a, um, period of five years in the Wisconsin State Prison System.... I would incorporate my statements there, which the record should reflect was just the case previous to this, um, and also indicate to the Defendant and defense counsel, as the Presentence indicates, that, um, the victim, Mr. Moline, um, believes that -- has a different view of what the proper sentence should be.

The reason I make the recommendation is he has no prior criminal record, and in this incident, at least no one was injured.

But this was a situation where Damon Clark -- and I think if I had to choose, I don't know who was more culpability [sic]. Under the law, they are both just as culpable, both Gooden and Clark, but I think Damon Clark is the one who came up with the idea. And he indicates in his version in the Presentence that they heard on the streets that there was a jewelry store on the south side, and that the owner was disabled and in a wheelchair. This was a driving motivation for picking out, um, Scott Moline's store, Moline's Jewelers, to go there and rob it. And that is an extremely aggravated factor, um, that they perceived as being somewhat more vulnerable and weak, um, because he was in a wheelchair.

....

It's attempted armed robbery. As I stated before, I don't understand the distinction, especially in an armed robbery, between an attempt and the completed crime, because the harm that is caused is already done ... the victim has suffered, ah, immeasurable amounts, and ... he's the one who was faced with a weapon in a deadly situation....

Um, the Court's heard from Mr. Moline, and I just ask that if he has anything to add regarding this Defendant, otherwise I ask that you incorporate his statements from the [co-defendant's] case.

Clark's co-defendant, Gooden, was sentenced to fourteen years in prison, immediately prior to Clark's sentencing hearing.

The trial court sentenced Clark to fourteen years, three months in prison. Clark filed a postconviction motion seeking resentencing or a modification of his sentence. The trial court denied the motion. Clark now appeals.

II. DISCUSSION

Clark claims the prosecutor breached the plea agreement by undermining the agreed upon five-year sentence recommendation when he: (1) imputed greater culpability to Clark than his co-defendant, who had just received a fourteen-year sentence; (2) suggested that he concurred with the

victim's ten-year sentence recommendation; and (3) emphasized the egregiousness of the crime. The trial court rejected these assertions.

Our review of whether the prosecutor violated the terms of a plea agreement is a question of law that we review independently. *See State v. Poole*, 131 Wis.2d 359, 361, 394 N.W.2d 909, 910 (Ct. App. 1986). We conclude that the alleged violations, taken together, and in combination with the preceding sentencing of Gooden, emerge as a "less than neutral" recitation of the bargained-for recommendation. *See Poole*, 131 Wis.2d at 362-64, 394 N.W.2d at 910-11. This less than neutral recitation constitutes a material breach of the plea agreement. *See id.*

The prosecutor commented that although under the law, Clark and Gooden were equally culpable, he felt that Clark was the leader. The prosecutor emphasized the egregiousness of the crime, the suffering of the victim and the seriousness of the offense. Clark's sentencing immediately followed Gooden's before the same trial court, which had sentenced Gooden to fourteen years in prison. Although the prosecutor did, in a technical sense, comply with the bargained-for recommendation by stating that he was recommending a five-year term, the aforementioned statements constituted a "less than neutral" presentation of the recommendation for which Clark had bargained. The statements conveyed a message to the trial court that although the prosecutor was recommending a five-year sentence, he did so with substantial reservations.

In isolation, each of Clark's complaints might not cross the line in the context of an otherwise neutral recitation of the plea agreement. However, in combination, they amounted to a "comment which implies reservations about the recommendation" which "taint[s] the sentencing process" and "breaches the

agreement.” *Poole*, 131 Wis.2d at 364, 394 N.W.2d at 911 (citation omitted). We reverse and remand for resentencing in accordance with the original plea negotiation.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

