COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-2540

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL ARTHUR BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Samuel Arthur Brown appeals from an order denying his WIS. STAT. § 974.06 (1997-98)[1] motion. Brown claims that the State

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

breached the plea agreement when it did not specifically advise the trial court during sentencing about the agreed upon sentencing recommendation. Brown contends that trial counsel was ineffective for failing to object to the alleged breach, and appellate counsel was ineffective for failing to pursue a direct appeal on that issue. Because the State did not breach the plea agreement, counsel was not ineffective for failing to pursue that issue on appeal, and we affirm.

I. BACKGROUND

¶2 In November 1991, Brown was charged with two counts of unlawful delivery of cocaine (ten grams or less), as party to a crime, and one count of unlawful delivery of cocaine (more than twenty-five grams), as party to a crime. In March 1992, he entered into a plea agreement with the State. The pertinent part of the agreement provided that the State would recommend no more than ten years in prison, concurrent to any sentence Brown was then serving.

¶3 At the plea colloquy, the State did advise the trial court of the sentencing recommendation. However, sentencing did not occur until the following day. At the sentencing hearing, the plea agreement was not discussed, and the State did not recommend a ten-year sentence. Instead, the State told the court:

> Your Honor, initially the simple facts in this case don't seem terribly egregious. Over the course of ten months the defendant was involved in three deliveries of cocaine …. Were these cases given a quick view the State might recommend a period of five to six years. However, I think the specific facts in these cases require something completely different.

The trial court sentenced Brown to a total of twenty-five years in prison. No direct appeal was pursued and, although there was some discussion about filing a no merit report, Brown insisted that he did not want a no merit report filed.

¶4 In July 1996, Brown filed a *pro se* WIS. STAT. § 974.06 motion, which was summarily denied by the trial court. He never appealed from the order denying this postconviction motion. In September 1997, Brown filed another § 974.06 motion, alleging that he was denied effective assistance of counsel because no direct appeal was ever filed. He also contended that: (1) the trial court should have disqualified itself based on a conflict of interest; (2) the pleas were entered under extreme duress; and (3) the trial court erroneously exercised its sentencing discretion by giving too much weight to certain information and relying on erroneous information.[2] The trial court denied the motion. Brown appealed from the trial court's order and this court remanded the case ruling: "Because the record does not disclose whether Brown was denied the right to a direct appeal due to the acts or omissions of his original appellate counsel, this court concludes that this issue must be remanded for fact-finding." On remand, the trial court conducted an evidentiary hearing. Brown alleged for the first time that his trial counsel was ineffective for failing to object when the State allegedly breached the plea agreement. The trial court concluded that there was no breach of the plea agreement, and that Brown knowingly and voluntarily waived his right to a direct appeal, including the option of a no-merit review. Brown now appeals from that order.

[2] Brown's counsel conceded during oral argument before this court that these three issues have been abandoned.

II. DISCUSSION

¶5 The dispositive issue in this case is whether the State breached the plea agreement during the sentencing hearing. Because Brown's counsel failed to object to the alleged breach during the sentencing hearing, and because he waived his right to a direct appeal, the issue is presented to us in the context of whether he received effective assistance of counsel.[3]

¶6 When the facts are undisputed, the question of whether the prosecutor's conduct breached the terms of the plea agreement is a question of law that we review independently. *See* ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995). The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The trial court's findings of fact will not be reversed unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985); WIS. STAT. § 805.17(2). The ultimate conclusion, however, of whether counsel's conduct violated Brown's right to effective assistance of counsel is a question of law that this court decides without deference to the lower courts. *See* ***State v. Ludwig***, 124 Wis. 2d 600, 607, 369 N.W.2d 722 (1985).

¶7 In the instant case, it is undisputed that the plea colloquy complied with the dictates of ***State v. Bangert***, 131 Wis. 2d 246, 257-61, 389 N.W.2d 12

[3] We also note that we could conclude that Brown waived the alleged breach of the plea agreement issue because he did not raise it in his original WIS. STAT. § 974.06 motion. However, for the sake of completeness and in the interest of judicial economy, we elect to address the merits of this issue.

(1986) and WIS. STAT. § 971.08. The question is whether the prosecutor's failure to restate the ten-year recommended sentence during the sentencing hearing the next day, and the prosecutor's affirmative statement that this case demands a sentence "completely different" from five to six years, constituted a breach. We conclude that it did not.

¶8 During the plea colloquy, the prosecutor advised the trial court that pursuant to a plea agreement, the State would be recommending ten years' incarceration, concurrent with any other sentence Brown was then serving. Brown also referred to the ten-year recommendation of the plea agreement. Later, during the plea colloquy, the trial court referenced the ten-year recommended sentence, along with the fact that the trial court was not bound by the recommendation:

> THE COURT: Has anybody promised you anything other than the ten years in prison?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has anyone told you what sentence I'm going to give you?
>
> THE DEFENDANT: No sir.
>
> THE COURT: Do you understand that I don't have to follow anybody's recommendation?
>
> THE DEFENDANT: I understand that, sir.
>
> THE COURT: I could give you the maximum.
>
> THE DEFENDANT: Yes, sir.

¶9 After the plea was completed, the trial court asked about sentencing. The prosecutor requested that sentencing be put "over at least [until] this afternoon or tomorrow morning." The prosecutor indicated the reason for his request: "sentencing requires a different sort of argument to the Court since we're recommending substantial time." The trial court set sentencing for 8:30 a.m. the following morning.

¶10 The sentencing transcript begins with the trial court's recollection that "this was a plea of guilty to three counts of delivery of cocaine pursuant to the originally filed information." There is no reference to the recommended ten-year term of incarceration by the prosecutor, by the defense counsel, or by the trial court. Brown claims that the plea agreement required the prosecutor to state the specific ten-year sentence during the sentencing hearing. Brown argues that this failure, together with the prosecutor's statement that this case requires a sentence "completely different" from a five- or six-year sentence constituted a breach. We disagree.

¶11 As noted above, during the plea colloquy, the recommended ten-year sentence was referred to three times, including once by the trial court. The fact that the number was not specifically referred to the very next morning during the sentencing hearing does not mean that the plea agreement was breached. The facts of this case were fresh in the trial court's mind. The sentencing hearing occurred at 8:30 a.m., the day following the plea hearing. This case involved a lengthy plea colloquy and discussion with the defendant, who initially denied that the State could prove he was guilty. The plea colloquy with the trial court was almost abandoned. The trial court specifically advised Brown that it was not bound by the State's recommendation, and that it could impose the maximum, a twenty-five year sentence. Under these circumstances, including the close proximity in time between the plea hearing and the sentencing hearing, we conclude that the prosecutor's failure to restate the ten-year recommendation during the sentencing hearing did not constitute a breach of the plea agreement. The trial court was made aware of the State's recommendation and, therefore, Brown received what he was promised.

¶12 We also conclude that the prosecutor's "completely different" than five- or six-year comment did not breach the plea agreement. The recommendation was for ten years concurrent. Ten years is completely different from five or six. It is twice as much as five and almost twice as much as six. The prosecutor's belief that the ten-year sentence was completely different from five or six years is also evident in his statement at the end of the plea hearing that he was recommending "substantial time." Brown's counsel contended during oral argument that the ten-year concurrent sentence was not "completely different" from five or six years because the ten-year sentence was to be served concurrent to a five-year sentence he was then serving. We are not persuaded. There is a difference between a ten-year sentence and a five-year sentence, even if the ten-year sentence is concurrent to other sentences. If something should happen and the "other sentence" is revoked or vacated, the defendant still must serve the ten-year sentence.

¶13 In addition, there is justification in the sentencing hearing to support the trial court's decision not to follow the recommendation and impose the maximum sentence. Brown had a substantial prior criminal record, and the victim's statement documented the harm Brown caused in the community and the danger he posed to the public. The trial court seized upon the victim impact statement in deciding the sentence, and stated that this type of case requires the maximum sentence. Based on the record before us, we conclude that the State did not breach the plea agreement and, therefore, Brown's claim of ineffective assistance of counsel based on the breach must fail.

¶14 Finally, there is subsumed in the dispositive issue a significant secondary issue in this case regarding whether Brown knowingly, intelligently and voluntarily waived his right to a direct appeal. We conclude that Brown did waive

his right to a direct appeal. A criminal defendant may waive his appeal if he was advised by counsel that an appeal of the case would have no merit. *See* ***Flores***, 183 Wis. 2d at 616. For the waiver to be valid, the defendant must knowingly and intelligently participate in the decision to forego an appeal. *See* ***id.*** at 617. ***Flores*** provides that a defendant must be aware of his or her right to a direct appeal with the assistance of counsel, that counsel will be appointed if the defendant is indigent, and that the defendant must be informed about the no merit procedure. *See* ***id.*** at 616-17. "[O]nce a defendant ha[s] been informed of the right to appeal, the court w[ill] presume that a waiver of those rights was made voluntarily, knowingly, and intelligently." ***Id.*** at 617.

¶15 It is undisputed that Brown and his trial counsel discussed the right to appeal, including the no merit option, and Brown decided to forego his direct appeal. Brown contends, however, that because he was never advised about a potential "breach of plea agreement" issue, he could not have knowingly waived his right to appeal. Thus, the question becomes whether a defendant may waive his right to direct appeal when counsel fails to inform the defendant about a potential appealable issue. In other words, when one attorney opines that there are no appealable issues and a subsequent attorney disagrees, what is the appropriate course of action.

¶16 In addressing this issue, we keep in mind that a defendant is not entitled to the ideal defense, or even the best defense, but only to one that provides reasonably effective representation. *See* ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). Here, the majority of this court, the trial court, and two of the three attorneys that represented Brown, agree that the breach of the plea agreement issue was not meritorious. Attorney Carl Backus, who represented Brown during the plea hearing and the sentencing, did not perceive the State's

conduct to constitute a breach of the plea agreement. Likewise, the postconviction attorney, Charles Glynn, who was appointed to discuss appellate issues with Brown, did not perceive the State's conduct to be a breach of the plea agreement. Undoubtedly, different attorneys who review a record may reach varying conclusions as to whether one issue or another is meritorious. A difference of agreement among attorneys does not make Brown's waiver of his direct appeal invalid.

¶17 Our system of criminal jurisprudence provides two avenues of checks and balances, so to speak, to ensure that any meritorious issues are reviewed. The first option is the no merit procedure, which requires this court to conduct an independent review of the record whenever a no merit report is filed. *See* WIS. STAT. § 809.32. The second option is provided in WIS. STAT. § 974.06, which allows a defendant to raise any constitutional or jurisdictional issues that were missed. *See* ***id.*** This would include a claim of ineffective assistance of counsel. The § 974.06 procedure would allow the merits of the ineffective assistance claim to be resolved within the context of the allegedly meritorious issue. Here, Brown failed to elect either option. The record indicates that he was completely opposed to filing a no merit report. In addition, although he filed a § 974.06 motion, he failed to raise the issue of the breach of the plea agreement. In any event, we have concluded that the State did not breach the plea agreement. Therefore, counsel's failure to raise the issue in a direct appeal, in a no merit report, or in a § 974.06 motion cannot constitute ineffective assistance.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

¶18 FINE J. *(concurring).* The defendant's contention that the State breached its plea bargain with him, and the Dissent's acceptance of that argument, highlights that the criminal justice system is often a quadrille, where one missed step is fatal to the dance. *See, e.g.,* ***State v. Bond***, 2000 WI App 118, ___ Wis. 2d ___, 614 N.W.2d 552 (police officer's instinctive response to suspect's question required suppression of a suspect's further response to police officer). Herbert J. Stern experienced the plea-bargaining culture both as a United States Attorney and United States District Judge, and eloquently captured the essence of that culture:

> We have developed a system of bargain and sale. Defendants are induced to plead guilty by specific promises of benefit or threats of harm. Prosecutors, aided and abetted by judges, are permitted to elicit courtroom confessions by techniques that would turn our stomachs if they were employed in the station house.
>
> Defendants may be threatened with the possibility that more serious charges will be brought against them unless they waive their sixth amendment rights and plead guilty to lesser ones. Wives who refuse to plead may be threatened with increased penalties for their co-defendant husbands. In places like New York, defendants are permitted to plead to hypothetical crimes, to crimes which never occurred, even to "logically impossible" (pp. 41- 43) crimes, all to make the sale possible and move the docket along. We have even sunk to the level of permitting defendants to plead guilty while professing their innocence. ... The present system has the flavor of a fish market. It ought to be hosed down.

Herbert J. Stern, *Review: The Passive Judiciary by Abraham S. Goldstein*, 82 COLUM. L. REV. 1275, 1282–1283 (1982) (footnotes omitted) (internal quote from Goldstein's book). Wisconsin, too, permits defendants to accept conviction for crimes of which they claim to be innocent, *see* ***State v. Garcia***, 192 Wis. 2d 845,

532 N.W.2d 111 (1995), and also permits prosecutors to extort guilty pleas from defendants by upping the ante with additional charges or more serious charges, *see* ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846.

¶19 The excuse the system gives for permitting the fish market to stink up our courts is, pure and simple, expediency:

> Neither this court nor the United States Supreme Court accept [*sic*] plea bargaining because it purports to offer exact justice to the state and the defendant. Rather, plea bargaining is accepted pragmatically as a device to speed litigation and to give the defendant an opportunity to be afforded substantial justice at his option as the result of negotiations by his counsel with the representative of the state.

Armstrong v. State, 55 Wis. 2d 282, 287, 198 N.W.2d 357, 359 (1972). *See also* ***Drinkwater v. State***, 73 Wis. 2d 674, 681, 245 N.W.2d 664, 668 (1976) (plea bargaining "a legitimate technique in expediting criminal prosecutions"). But why should we elevate expediency over "exact justice" in a legal system whose middle name is, after all *justice*, any more than we would permit such expediency in any other important societal function? Imagine what would happen to a teacher who told students that they would get a "B" on a test, if "you don't make me read and grade it." Imagine what would happen to a superintendent of schools or college dean who permitted such an expediency, even though the education system *could save time and money* through "grade bargaining" because schools would need fewer teachers if tests and papers did not have to be graded—if students were not given the "exact justice" that their educational efforts deserved. If Lewis Carroll were alive, plea bargaining would be worthy of a new sequel to his *Alice in Wonderland* and *Through the Looking Glass*.

¶20 I fully join in the Majority Opinion, which, in my view, succinctly puts this near-frivolous appeal in its proper perspective. But the Dissent, with its seeming quadrille-view of the law, wants to reverse. The crux of the Dissent's contention turns on the prosecutor's comment the day before sentencing that "the State *would be* recommending ten years incarceration ... [c]oncurrent with any other sentence the defendant is serving." (Emphasis added.) As I read the Dissent, had the prosecutor said: "the State *is* recommending ten years incarceration ... [c]oncurrent with any other sentence the defendant is serving" (emphasis added), everything would be hunky-dory.

¶21 Imagine the following scenario. The dissenting judge is in a restaurant dining with two friends. The waiter comes to their table. He takes orders from the others and then turns to the dissenting judge:

Waiter:	And you sir?
Dissenting judge:	I think I would order steak, medium rare, with garlic mashed potatoes.
Waiter:	Thank you.

Would or would not the dissenting judge be a bit peeved if the waiter returned with two orders, and, when asked by the dissenting judge about his entree, responded: "Well, you said that you 'would' order the steak, but you did not"? I think to state the question supplies the answer; indeed, common sense supplies the answer.

¶22 But common sense has little place in our criminal-justice-system dance. Thus, in this case, the prosecutor's recommendation was for a *concurrent* sentence (of which the Dissent makes much). Only in our criminal justice system do we accept payment in concurrent currency—imagine going into an auto

dealership and asking to buy two or more cars for the price of one. Yet, we permit criminals to pay for their crimes with concurrent time, and it is that fact upon which the Dissent seizes in arguing that a sentence of "five to six years" may not be "something completely different" from a ten-year concurrent sentence: "Thus, in recommending 'something completely different' from a sentence of 'five to six years,' the prosecutor, in effect, was recommending 'something completely different' from the ten-year concurrent sentence he had agreed to recommend." Dissent at 2–3. To use a phrase that has now entered our lexicon, that is "fuzzy math." Again, Lewis Carroll, where are you when we really need you?

¶23 The Dissent also complains that by the time of the sentencing hearing, the "would be recommending ten years" statement made by the prosecutor the day before had already dispersed into the ether. Thus, the Dissent speculates: "Where, however, a sentencing comes the *next day* or at some subsequent time, the *reiteration* of the recommendation *may* be essential, particularly in a high-volume criminal court where numerous pleas and sentencings occur daily." Dissent at 2. (Emphasis added.) Initially, of course, implicit in that sentence is that, contrary to the Dissent's main point, namely that the prosecutor only promised to make a specific recommendation but did not actually do so, the prosecutor *did* recommend the ten-year concurrent sentence; the word "reiterate" means "to repeat."

¶24 But, more important, I do not see our trial judges as air heads who cannot remember a sentencing recommendation (and, of course, many judges take notes about what happens in the cases over which they preside) for some twenty-four hours. There is an old saying that a practice becomes part of the common law when, among other attributes, "the memory of man runneth not to the contrary." *See* ***Barland v. Eau Claire County***, 216 Wis. 2d 559, 600 n.4 575

N.W.2d 691, 708 n.4 (1998) (Geske, J., dissenting).[4] Under the Dissent's view here, given its assessment of the retentive powers of circuit judges in this state, a custom fashioned one day would become part of the common law the next day because no one could recall anything contrary to that newly minted practice.

¶25 In my view, the Majority Opinion has succinctly and accurately assessed this appeal and I join it.

[4] For those who have the salmon-colored paperback version of the Callahan's Official Wisconsin Reports, the reporter citation is 216 Wis. 2d 559, 600 n.4.

¶26 SCHUDSON, J. (*dissenting*). Prior to Brown's entry of his ***Alford*** pleas, the prosecutor stated that "[u]pon a plea of guilty to the offense …, the State would be recommending ten years incarceration … [c]oncurrent with any other sentence the defendant is serving." Following Brown's entry of his pleas, the prosecutor *never* made the recommendation he had said he "would be" making. Instead, at sentencing *the next day*, the prosecutor stated:

> Your Honor, initially the simple facts in this case don't seem terribly egregious. Over the course of ten months the defendant was involved in three deliveries of cocaine …. Were these cases given a quick view the State might recommend a period of five to six years. However, I think the specific facts in these cases require something completely different.

The prosecutor then, in a presentation consuming more than six transcribed pages, went on to detail "the specific facts in these cases" as well as other aggravating factors relating to Brown's background and criminal record. And the prosecutor then called a witness who detailed additional aggravating factors and concluded by advising the court that the residents of the housing project where Brown was dealing drugs "want this guy locked up and they want the key thrown away."

¶27 "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement…. '[O]nce the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled.'" ***State v. Smith***, 207 Wis. 2d 259, 271, 558 N.W.2d 379 (1997) (citations omitted).

¶28 "When a prosecutor does not make the negotiated sentencing recommendation, that conduct constitutes a breach of the plea agreement." ***Id.*** When a prosecutor presents a "less than … neutral recitation of the terms of the plea agreement," that also constitutes a breach. ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986). Here, the prosecutor breached the agreement in both ways.

¶29 First, the record establishes that the prosecutor failed to "make the negotiated sentencing recommendation." *See* ***Smith***, 207 Wis. 2d at 272. Following Brown's pleas, the prosecutor *never* made the recommendation he said he "would be recommending" if Brown would plead guilty. Where a sentencing comes right after a plea, such a breach might be deemed technical and inconsequential. After all, the trial court had just heard the prosecutor's statement of the agreement. Where, however, a sentencing comes the next day or at some subsequent time, the reiteration of the recommendation may be essential, particularly in a high-volume criminal court where numerous pleas and sentencings occur daily.

¶30 Second, instead of making the negotiated recommendation of ten years concurrent, the prosecutor recommended "something completely different" from a sentence of "five to six years," which, he explained, might more customarily be recommended in cases of this nature. But, depending on the way in which the court would structure Brown's sentences, as concurrent or consecutive, and depending on the actual time Brown would serve in conjunction with any other sentences he might be serving, "five to six years" could well have been the rough equivalent of ten years *concurrent*. Thus, in recommending "something completely different" from a sentence of "five to six years," the

prosecutor, in effect, was recommending "something completely different" from the ten-year-concurrent sentence he had agreed to recommend.

¶31 Therefore, the prosecutor not only failed to recommend, explicitly, the ten years concurrent he had said he would recommend, but he abandoned, at least implicitly, the ten-year-concurrent recommendation in favor of "something completely different." Then, quite clearly and effectively, the prosecutor provided powerful statements that were, to say the least, a "less than … neutral recitation" of a recommendation for ten years concurrent. *See* ***Poole***, 131 Wis. 2d at 364.

¶32 The majority declares, however, that "there is justification in the sentencing hearing to support the trial court's decision not to follow the recommendation and impose the maximum sentence." Majority op. at ¶13. We've traveled this road before; whether the sentence was sound is not at issue. *See* ***State v. Smith***, 198 Wis. 2d 820, 543 N.W.2d 836 (Ct. App. 1995) (Schudson, J., dissenting), *rev'd*, 207 Wis. 2d 259, 558 N.W.2d 379 (1997).

¶33 On appeal, Brown argues: "Despite all the twists and turns this matter has taken, the only relevant issue … is whether the [S]tate breached its plea agreement. If it did, trial counsel was ineffective for failing to object to the breach, and appellate counsel was ineffective for failing to appeal the issue." Brown is correct.

¶34 The breach here was blatant — as blatant as any alleged breach I have reviewed in more than eight years on this court. Given the critically important interest *the State* shares in fostering the integrity of the plea agreement/sentencing process, I am puzzled by the Attorney General's attempt to salvage this sentencing. Given the equally important role this court plays in preserving the integrity of that process, and given the lessons of ***State v. Smith***, I

am dismayed by the majority's decision to drag this sentencing ashore. Accordingly, I respectfully dissent.[5]

[5] The concurring opinion flails wildly in many directions — directions far distant from the course of this dissenting opinion. I trust that readers will recognize: (1) the merits of plea-bargaining, which the concurring opinion addresses so energetically, are not at issue in this appeal; and (2) the paraphrasing of this dissenting opinion, which the concurring opinion spins so vigorously, bears little relation to the actual words and message of this dissenting opinion.