COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2128-CR **Cir. Ct. No. 2003CF1697**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL JOSEPH COLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Samuel Joseph Cole appeals from a judgment of conviction for possession of cocaine with intent to deliver and possession of a firearm by a felon, and from an order denying his motion for resentencing. Cole contends he is entitled to resentencing because his trial counsel provided

ineffective assistance when he failed to object to the State's comments at sentencing. Cole asserts that the State breached the plea agreement when the prosecutor: (1) failed to explicitly state the plea agreement during Cole's sentencing hearing; and (2) implied that the sentence recommended by the plea agreement was too lenient. We conclude that there was no material and substantial breach of the plea agreement and, therefore, affirm the judgment and order.

BACKGROUND

¶2 Cole and the State entered into a plea agreement pursuant to which Cole pled guilty to one count of possession of cocaine with intent to deliver and one count of possession of a firearm by a felon, and Cole agreed to cooperate with the police. In exchange, the State agreed to recommend thirty-six months of initial confinement and thirty-six months of extended supervision on the drug charge, and sixteen months of initial confinement and twenty months of extended supervision on the firearm charge, to be served concurrent to the drug charge. The maximum sentences that these charges carried were fifteen years of incarceration and a $50,000 fine on the drug charge, and ten years of incarceration and a $25,000 fine on the gun charge.

¶3 At the sentencing hearing, the trial court restated the plea agreement and asked the State, trial counsel and Cole if it was correct. The State corrected an error the trial court made in reciting the agreement, then confirmed the accuracy of the trial court's recitation. Both Cole and his counsel agreed with the corrected statement.

¶4 When the trial court asked for corrections to the presentence investigation report, it became apparent that Cole's reported statements to the

presentence investigator indicated that Cole had significant factual disagreement with the facts alleged in the criminal complaint to which he had pled guilty. The presentence investigation report, for example, stated that Cole said he had pled guilty because his lawyer advised him "that due to his statement the case would not be able to be taken to trial," and further that Cole believed "that his attorney was not interested in taking the case to trial due to not seeking any more money involved." Further, the report summarized the police record of Cole's statements, and Cole's interview with the presentence investigator. There are significant differences between the two statements.

¶5 Because the facts alleged in the complaint were the facts to which Cole admitted guilt at the earlier guilty plea hearing, his position at sentencing as to the truth of the facts upon which his guilty plea was based became a matter of legitimate concern for trial counsel, the State and the trial court. The transcript of the sentencing hearing, before beginning sentencing arguments, contains sixteen pages of discussion amongst Cole, the attorneys and the trial court. This discussion focused on determining whether there was a factual basis for the guilty plea, whether Cole actually wanted to proceed with sentencing and whether he wanted to continue being represented by his attorney. Cole provided a long, rambling statement of his disagreement with the facts in the complaint, most of which had no legal significance to the elements of the crimes.[1] Cole also told the trial court that he wanted to "suppress the evidence," and trial counsel explained

[1] For example, Cole indicated that he thinks he was "set-up" when the police found a gun hidden in the basement ceiling. Cole asserts he knew nothing about the gun as it belonged to his stepson. However, Cole freely admitted purchasing a different gun "for protection," which the police also recovered in his house. Cole offered two explanations for his possession of cocaine: for his own use and to cover for someone.

that no such motion was brought because Cole was cooperating with the police and had volunteered his statements. Ultimately, Cole affirmed his wish to proceed with his attorney and with sentencing. The trial court then moved to arguments by counsel with respect to sentencing, which are detailed later in this opinion.

¶6 The trial court sentenced Cole to four years of initial confinement and four years of extended supervision on both counts, to be served concurrently. Cole filed a motion for resentencing, arguing that the prosecutor had materially and substantially breached the plea agreement by making certain statements during the sentencing argument, and that trial counsel was ineffective because he should have objected to those comments. After reviewing the parties' briefs, the trial court denied Cole's motion without a hearing. This appeal followed.

DISCUSSION

¶7 It is undisputed that Cole's trial counsel did not object to the prosecutor's comments at sentencing, upon which Cole now bases his claim of ineffective assistance of trial counsel. Cole concedes that as a result, his right to directly challenge the breach of the plea agreement was waived. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. However, Cole can raise the objection via a claim of ineffective assistance of counsel, based on trial counsel's failure to object. *See* ***id.*** We consider first whether the prosecutor materially and substantially breached the plea agreement by not restating the agreement and by making certain statements at the sentencing hearing. Because we conclude there was no such breach, we conclude, without further discussion, that there was no ineffective assistance of counsel.

A. Legal standards governing alleged breaches of plea agreements

¶8 "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***Id.***, ¶13. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." ***Santobello v. New York***, 404 U.S. 257, 262 (1971).

¶9 "A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733 (footnote omitted). Technical breaches are insufficient to warrant resentencing or vacation of the plea. ***Id.*** An actionable breach must be a material and substantial breach—"a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.*** When determining whether there has been a material and substantial breach, "it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation." ***Howard***, 246 Wis. 2d 475, ¶14. It is likewise irrelevant whether the prosecutor's breach was unintentional or inadvertent—lack of bad motive or intent to violate the plea agreement does not lessen the breach's impact. *See* ***Santobello***, 404 U.S. at 262-63.

¶10 Whether the State's conduct constitutes a breach of the plea agreement, and whether such breach was material and substantial, are questions of law that we review *de novo*. ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. Where the alleged breach is memorialized in the transcript, the interpretation of the prosecutor's words "is a question of law to be determined

independently by this court, not a question of fact to be given deference[.]" ***Williams***, 249 Wis. 2d 492, ¶35.

B. The sentencing hearing

¶11 We "must examine the entire sentencing proceeding to evaluate the prosecutor's remarks." ***Id.***, ¶46 (footnote omitted). As will be shown below, the sentencing hearing comments of both the prosecutor and trial counsel reflect their attempts to respond to rambling statements Cole made to the trial court during the hearing, and to Cole's reported statements to the presentence investigation report writer, which differ from the facts to which he pled guilty. It is in the context of these circumstances, created by Cole's comments in court and his statements reported in the presentence investigation report, that the comments of the prosecutor and trial counsel must be viewed. *See* ***State v. Richardson***, 2001 WI App 152, ¶12, 246 Wis. 2d 711, 632 N.W.2d 84 (court concluded there had been no breach of plea agreement after considering prosecutor's comments in context).

¶12 The sentencing hearing began with the trial court calling the case and immediately restating the plea agreement. The trial court asked the prosecutor if that was his understanding of the agreement; he answered yes, but clarified that the recommendation called for twenty months of extended supervision on count two, as opposed to the twenty-one months recited by the trial court. The trial court then asked trial counsel and Cole to confirm that was the agreement; both indicated that it was.

¶13 Next, the trial court asked the parties if they had any corrections or additions to the presentence investigation report. The State made some corrections as to Cole's prior record. Cole agreed with all but one of these additions. After discussing a few minor changes in other aspects of the report, Cole's trial counsel

raised the issue that the report indicated that Cole disagreed with the criminal complaint and suggested improper conduct by trial counsel. Trial counsel explained:

> [In t]he offender's interview in the first paragraph he indicates that [Cole] doesn't agree with the … Criminal Complaint, which obviously is a surprise to his lawyer when he said that; but he further indicated he [pled] on this case on the advice of his attorney who stated that due to his statement the case would not be able to be taken to trial. He believes that his attorney was not interested in taking the case to trial due to not seeking any more money involved.
>
> That's problematical because I don't know whether or not he wants me as a lawyer or not, but he continues to say that he does and he didn't say that. And I am in the position where obviously a presentence writer isn't making that up; but I believe my client at the same time that says, I didn't really say that, and I'm trying to take responsibility.

Trial counsel disagreed with the third grade reading level attributed to his client, and told the trial court that Cole "cannot read at all." Trial counsel went on to explain that Cole has some trouble communicating, and asked the trial court to clarify whether Cole wanted to proceed with sentencing.

¶14 The trial court, trial counsel and Cole then proceeded to have an extended discussion, covering fifteen pages of the transcript, that ultimately resulted in Cole indicating he wanted to proceed with sentencing. During that discussion, Cole attempted to explain why he told the presentence investigator that he disagreed with some of the facts alleged in the complaint, to which he had previously admitted by way of his guilty plea. Cole told the trial court that he wanted to "suppress the evidence," referring apparently to a detailed statement he gave police at or about the time they searched his vehicle and dwelling and to the guns, money and cocaine seized. The trial court then inquired of trial counsel

whether a suppression motion was filed, and learned that it was not. Trial counsel explained that because Cole was cooperating with police, acting as an informant, as part of the plea agreement, and because the initial search of Cole's house was done with Cole's consent, there was no basis to challenge the search or the statements by Cole during the search. A suppression motion, trial counsel explained, would have been baseless.

¶15 In response to another question by the trial court as to why Cole told the presentence writer that he was "not in his right mind" when he made the statement to police, Cole told the trial court that the search came as a shock to him because he had not been in trouble for a long time and that he was "covering up for someone else." Cole gave the trial court a rambling explanation of the circumstances surrounding the search and his arrest. Because it differs both from the statement he gave police and the report of his presentence interview, his discussion with the trial court is set out here at length:

> MR. COLE: Well, what I'm saying is I'm not saying that I didn't say that to her. I was telling her – I mean, the way she explained it, I didn't, I didn't tell her in that fashion. I was telling her like, you know, it was like, like, I wasn't, like, satisfied with the outcome or anything.
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> THE COURT: You were not satisfied?
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> MR. COLE: No, I wasn't.
>
> THE COURT: Why, Mr. Cole?
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> MR. COLE: Because the simple fact was I went along with, you know, what my lawyer wanted to do, you understand, because of the simple fact that he feel that the statement I gave to the officers or whatever, the statement I gave to them kind of messed my case up. So, you know, he's saying that, well, since, you know, we shouldn't take to the trial, or whatever, because it going to look bad for me because of the statements I gave.
>
> ….

THE COURT: And you didn't file the motion. I imagine you consulted on this with [counsel]. I imagine he told you, That's not going to go anywhere, so we're not going to do it. And so then you decide to enter a guilty plea. But then when you go talk to the Presentence Investigation Report writer, you say that when you made this statement to the police, you weren't involved, that you weren't in your right mind, rather.

MR. COLE: Yes, because it was a shock to me.

THE COURT: Pardon me?

MR. COLE: Because I haven't been in trouble in so, such a long time that, you know, it was just a shock to me at the time. When I was talking to him, I was kind of covering up for someone else not knowing that, you know, I was getting myself more and more in trouble, you know.

THE COURT: You didn't know you were getting yourself in more –

MR. COLE: Yea, as I was covering up for somebody else, you know.

THE COURT: You mean, you, you were admitting the crime, and you didn't know you were getting yourself in trouble?

MR. COLE: Well, I didn't actually admit the crime. I admitted about the drugs that, you know, that I had in the vehicle because, you know, I was a casual user or whatever. But as far as with the gun situation, I had no, I have nothing to do with that.

THE COURT: Didn't you say –

MR. COLE: But they kind of ran both of the guns together.

THE COURT: But wait a minute. Didn't I hear you say in here somewhere that you had purchased the gun and –

MR. COLE: Not me, though. I didn't say – they put that in there saying that I said I purchased the gun.

I was in shock when I seen 'em, too. It's like they went right to the guns because – okay, can I explain to you how the guns got there, please? Okay.

I moved my son from Atlanta. I had moved from Atlanta – when he came here, he had nowhere to go. This is my stepson through marriage. He had nowhere to go. He was staying with a girl, and she put him out. So me and my lady agreed that he can keep his stuff over at the house and stuff like that. So we didn't know exactly what he had down in the basement or whatever. So when the police went down there, they seen his clothes down there, and then it seemed like it was somewhat of a set-up like they knew exactly where to go to find the gun. They said they found it in the ceiling.

Right to this day I don't know where they found it in the ceiling. And so when my lady came which was two, what, two hours later, she came in, and she said, Well – and the officer asked her, Do you know anything about the gun? She said, No, I don't know nothing about the gun. So they took it like that. And they went in a huddle in the corner and said, Well, this guy over here got a felony against, I mean, he's a convicted felon.

So they automatic put the guns on me. I admitted to him, I said, Yeah, it was my drugs in the car, the van. And the van is not in my name, but I admitted to them that the drugs was mine because I was a frequent user.

But as far as the guns, they automatic put that on me, too. And I explained to them that I'm, I was aware that the person – see, one thing is that we was getting death threats on the street. Somebody was always – somebody had broken [into] our house when we went out of town. So my lady had a choice to either move back to Waukegan or get something to protect herself. As a matter of fact, in the same week they came in my house, my lady went to go take one of them little old things on Lincoln, you know. The gun range thing, she went up there to take a gun lesson whatever, a .357 as a matter of fact.

And that following week when she did that, you understand, she talked to my son about that. Me and her got into it about that, you know. I said, I don't know if you should have some kind of weapons around here, you know what I'm saying, because we frequent, we go skating a lot, right. People coming up to her and saying, Well, you need to drop that case against dude and them, because we had already picked them out the line-up, do you understand, whoever tried to break in the house.

So we get into it every time we go skating; and they talking about doing something to her and her son, her only

son. So me and her made an agreement, let's drop the case and just forget all about it, you know what I'm saying, because they already made the guys look like they was the victim. So she had a choice either to go back to Waukegan or stay here and defend herself, you understand.

So she talked to my son, which my son, you understand, he got connections to that type of stuff out there. And so me and her was getting into it. It was, as a matter of fact, the house that they came in and searched and stuff like that, I wasn't even living there at that time. You know, I go there every day for my work, my business and stuff, and go fix food for my lady and my kids and stuff. They just happen to be – when I go in there – when they come there, I was cooking food and everything, then I run back down to my store.

But in the event of cooking and stuff like that, they knocked at the door, I seen them out there, and I let them in. They said, Well, your neighbor said it was something going on in the house, or whatever, over here.

I said, Well, what do you mean? And so I said – he said, Well, we just want to come in and see if the house is livable or whatever.

They come in, looked at the house. They said, The house is nice. The next thing I know two or three policemen disappeared. And they went down in the basement no more than about three minutes. And they said, Mr. Cole, Is there any guns in here or anything that we should know about?

I said, Not to my knowledge. So they came out with a black case. And I said, What's that? And then they opened it up, and it was a gun. I never knew it was down there. First I got to thinking it was my son's.

….

MR. COLE: Well, basically what I'm saying, you know, I'm just throwing my, my case, you know, in the mercy of the courts and stuff like that.

I'm just making you try to understand my part of it. I'm saying I have been an outstanding person out in the community as far as my businesses and stuff like that. You know, I have been holding down business. I am always working somewhere, you know. I got good work ethics and stuff like that.

THE COURT: Okay. No, no, that's not what I'm asking about now. What I'm asking is: What do you want to do? Do you want to go forward to sentencing? Do you want to continue to be represented by [counsel]? Are you comfortable with him?

Some of the things you say in this P.S.I. make me a little uncomfortable; but if you want to go forward to sentencing and want to keep [counsel] as your lawyer, [counsel] seems to be quite prepared to proceed with you.

Right, [counsel]?

COUNSEL: I've always been prepared, judge. I was prepared last time, and I'm prepared now.

MR. COLE: Yeah, I want to be prepared, but I'm just saying –

THE COURT: You don't want to be prepared?

MR. COLE: No, I'm saying I rather go by what he's doing or whatever, you understand; but at the same time, you know, you know, it's a lot of things that, you know, that I have been promised, promised.

THE COURT: A lot of things you have been promised?

MR. COLE: Yeah, I'm saying all through the trial I have been, you understand –

THE COURT: What trial?

MR. COLE: I am talking about through [a police officer] or whatever, you know what I mean. I mean, he asked me things about this and that. He –

THE COURT: Mister, Mr. Cole, I am sure that at the time of the change of plea, I asked you if anyone had promised you anything other than what the state had agreed to recommend. I'm sure I asked you that.

MR. COLE: Yeah, you asked me that; but at the same time I paused, too; didn't I?

THE COURT: I don't remember if you paused. All I could do is look up at the transcript and see what the transcript says; and I'm sure the transcript said no. I'm not here to read body language –

> MR. COLE: Yes, ma'am.
>
> ….
>
> THE COURT: So what are you telling me; you weren't being straight with me back then?
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> MR. COLE: I was being straight with you. I just wasn't quite satisfied with the way the case was going. That's basically what I'm saying.
>
> THE COURT: All right. Well, what do you want to do now? Do you want to go forward to sentencing?
>
> Pardon me?
>
> MR. COLE: Yes, ma'am.
>
> THE COURT: All right.

¶16 The trial court then asked for the State's argument on sentencing. The prosecutor began by addressing an issue that had been discussed concerning Cole's involvement with and as a confidential informant. The prosecutor recognized that Cole had been willing to cooperate, and noted that it was ultimately not practical, through no fault of Cole's, due to difficulties with another informant. The prosecutor continued:

> I did give specific consideration to [Cole's willingness to cooperate] when I went down on the offer. And I wanted the court to take that into consideration, considering the sentencing factors. And I think at the time it showed good character on the defendant's part, not only that he was so cooperative with the police in terms of consenting to the search and in terms of giving a full confession at the time, but that he was willing to cooperate with authorities and try to do some good here. I think those were all things that can be good things to be said about the defendant….
>
> Unfortunately, what's happened since then, judge, is the defendant here has apparently told so many lies that it's hard to know what specifically to believe about him. He is – it's hard to know when he's telling the truth and when he's lying.

> He admits to pausing during the Guilty Plea Questionnaire. Another question that I'm sure the court asked him is: Are you pleading guilty to this crime because you are guilty? And I'm sure the defendant said, Yes. If he would have said anything other than that, the plea would not have gone through. And so I think as difficult as the position as I am in at this point making a sentencing argument, I'm sure the court is even in a more difficult position because it has been lied to at least to the point – either the defendant has lied to the P.S.I. writer, or he lied at the time of his plea when he said he was pleading guilty because he was guilty.

¶17 The prosecutor next went through the facts of the crime, noting that there was consent to search, two guns were found, and Cole confessed to possessing one of them. The prosecutor told the trial court that a "significant" amount of cocaine, some crack, and $20,000 in cash had been found in the home, and that Cole said the money was from his business and that he chose to keep it at home rather than at a bank. The prosecutor also shared with the trial court information about statements Cole gave to police, which did not seem consistent with what Cole told the trial court at the sentencing hearing. He also summarized Cole's "very lengthy criminal history." The prosecutor then summarized his recommendation, which included an exchange with the trial court:

> [PROSECUTOR]: There's $20,000 cash, and … a very large amount of cocaine combined with the guns and the drugs. [C]onsidering all of the good things that I said [about Cole's cooperation with the police], I think that a three year initial confinement term reflects that cooperation, it reflects, it reflects the big picture here.
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> THE COURT: I think it might be too generous, frankly.
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> [PROSECUTOR]: Well, I think –
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> THE COURT: He has got a criminal history. He has got a substantial amount of cash.
>
> [PROSECUTOR]: Right.

> THE COURT: Think of the sentences you've been asking of me on some of the people who have come in here who have a substantial amount of drugs [] and/or cash but no criminal histories whatsoever.
>
> [PROSECUTOR]: Well, that's kind of why I feel as the prosecutor in this case, I feel that the defendant does not understand that he did get a break for his cooperation. I think he did, and I think that what he did was worth something, but it's….

At that point, the trial court interrupted the prosecutor to turn off the microphones to discuss Cole's assistance with police. Ultimately, the prosecutor concluded his comments with the statement, "[F]or the defendant to say that he got a raw deal here, I just, I don't think that's fair to say at all." That comment concluded the prosecutor's sentencing argument.

C. Prosecutor's failure to restate the plea agreement

¶18 Cole argues that the prosecutor breached the plea agreement when he failed to explicitly state the plea agreement, relying instead on the trial court's recitation of the agreement. Cole contends that by simply agreeing to the trial court's statement, rather than restating the agreement, the State failed to formally make the recommendation called for by the plea agreement. We reject this argument.

¶19 This court addressed a similar argument in ***State v. Hanson***, 2000 WI App 10, 232 Wis. 2d 291, 606 N.W.2d 278 (Ct. App. 1999), where the prosecutor failed to "expressly recite the State's agreement to cap its sentencing recommendation at ten years." ***Id.***, ¶20. In rejecting the defendant's argument on appeal, we noted that immediately prior to Hanson's sentencing, the trial court heard argument concerning whether the State violated the plea agreement by filing a victim impact statement in which the victim asked the trial court to impose the

"maximum sentence allowed." ***Id.***, ¶¶5, 21-22. We observed that "[a]lthough the State did not expressly allude to the 'ten-year cap' during its sentencing remarks, the parties referred generally to the sentencing recommendation provision of the plea agreement a number of times." ***Id.***, 22. We concluded:

> Under these circumstances, there could be no misunderstanding as to what the parties were referring to, or what the State's sentencing recommendation was, despite the absence of the precise words. This is confirmed by the trial court's finding during the course of its sentencing remarks that the State had complied with the sentencing recommendation. It would defy logic and common sense for us to say, in light of what had just transpired moments earlier, that the State's failure to expressly recite the ten-year cap constituted a breach of the plea agreement. Under these circumstances, we agree with the trial court that the absence of the "magic words" was not fatal.

Id.

¶20 Similarly, we conclude that the prosecutor's failure to specifically state the plea agreement is not fatal in this case. Referencing its notes from the plea hearing, the trial court gave a detailed recitation of the plea agreement. At the conclusion of this recitation, the trial court asked the prosecutor if that was his understanding, and the prosecutor responded that it was, "with the exception that on Count 2 the amount of extended supervision is 20 months, two zero, not 21." Where, as here, the trial court took the initiative to restate the plea agreement and seek correction from the parties, it was not unreasonable, and may have been a waste of judicial time, for the prosecutor to restate the entire agreement again in the sentencing argument. There is no allegation that the trial court misunderstood the State's position. Indeed, the parties discussed the recommendation in various contexts throughout the hearing. Under these circumstances, "we agree with the trial court that the absence of the 'magic words' was not fatal." *See* ***id.***

D. The prosecutor's comments at sentencing

¶21 Cole contends that the prosecutor's statements, detailed above, constitute a violation of the plea agreement because the prosecutor "implicitly undermined the recommendation before the court" with his comments. Specifically, Cole objects to the prosecutor's references to Cole's lies and inconsistent statements. We reject Cole's argument because, having examined the entire sentencing proceeding to evaluate the prosecutor's remarks, *see* ***Williams***, 249 Wis. 2d 492, ¶46, we conclude that the State did not make any statements that "expressly, covertly or otherwise suggested that the State no longer adhered to the agreement," *see* ***Hanson***, 232 Wis. 2d 291, ¶29. Rather, the State provided appropriate and necessary comment in response to the trial court's questions and Cole's extensive and inconsistent statement at the sentencing hearing and in the presentence investigation report.

¶22 Cole presented one version of events to the police at the time of his arrest. He agreed to the accuracy of the summary of those events, including his admissions, when he chose to plead guilty. However, he presented significantly different details, bearing directly on his responsibility, when interviewed for the presentence report, and yet another version to the trial court at the sentencing hearing. In this unusual set of circumstances, created by Cole himself, the State did not violate Cole's rights to enforcement of the plea agreement when the prosecutor told the trial court it could not tell which of Cole's versions was true.

¶23 A prosecutor, "even under an agreement to remain silent at sentencing, is not required to remain silent when inaccurate information is conveyed to the sentencing court." ***Naydihor***, 270 Wis. 2d 585, ¶23 (citing ***State v. Jorgensen***, 137 Wis. 2d 163, 169-70, 404 N.W.2d 66 (Ct. App. 1987)). In

addition, "the State may discuss negative facts about the defendant in order to justify a recommended sentence within the parameters of the plea agreement," ***id.***, ¶24 (citing ***Hanson***, 232 Wis. 2d 291, ¶¶27-28), and to fully inform the trial court, ***id.***, ¶25 (citing ***Williams***, 249 Wis. 2d 492, ¶50).

¶24 Consistent with these standards, the prosecutor was entitled to comment on Cole's character and actions, and to address Cole's inconsistent statements. In doing so, the prosecutor tried to explain the basis for the plea agreement and Cole's previous cooperation with police. This was especially important when the trial court challenged the recommendation, asking the prosecutor to explain the reason for a plea agreement that the trial court opined "might be too generous[.]" It was only in response to the trial court's articulated concern that the recommendation was too low that the prosecutor discussed the fact that Cole was getting a good deal in exchange for his cooperation with authorities. This was a fair comment in response to Cole's statements and the trial court's questions, and did not constitute a breach of the plea agreement.

¶25 Our conclusion is consistent with the principle articulated by the United States Supreme Court in ***United States v. Robinson***, 485 U.S. 25 (1988). Against a claim of prosecutorial misconduct for comment on the defendant's failure to testify at trial, the Court held that the remarks were a fair response to remarks made in closing argument by trial counsel and, therefore, did not violate the defendant's Fifth Amendment rights. ***Id.*** at 31-32. The Court explained:

> Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* [*v. California*, 380 U.S. 609 (1965)] holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.

> ….
>
> It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one.

Id. at 32-34.

¶26 In the case before this court, as in ***Robinson***, the need for prosecutorial response was caused by the defendant's conduct during the hearing at which the response was made. We cannot hold that fair response to a situation created by the defendant constitutes a breach of the plea agreement.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.