COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2084-CR
2008AP2085-CR

Cir. Ct. Nos. 2006CF131
2006CM466

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN S. LUCAS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Ryan Lucas appeals judgments convicting him of four felonies and one misdemeanor. He also appeals an order denying his postconviction motion to withdraw his guilty pleas. Lucas argues that the

prosecutor's sentence recommendation breached the plea agreement and that his trial counsel was ineffective for failing to object to the breach. The State concedes that counsel was ineffective if the plea agreement was breached, but argues that there was no breach. Because we conclude that the prosecutor's sentence recommendation breached the plea agreement, we reverse the judgments and order and remand the matter for the circuit court to determine whether to allow Lucas to withdraw his pleas or to order resentencing before a different judge.

¶2 A plea agreement is analogous to a contract, and we draw upon contract law principles to interpret the agreement. ***State v. Toliver***, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994). Construction of a written contract is a question of law that we review *de novo*. When terms of a contract are plain and unambiguous, we will construe the contract as it stands. ***Id.*** If the State breaches the plea agreement by its sentence recommendation, it is irrelevant whether the circuit court was influenced by its recommendation. ***State v. Bowers***, 2005 WI App 72, ¶8, 280 Wis. 2d 534, 696 N.W.2d 255. The focus is on whether the State breached the agreement and, if so, whether the breach was material and substantial. ***Id.***

¶3 The terms of the plea agreement here were attached to the plea questionnaire which included the case numbers for the felony and misdemeanor charges. The agreement stated that the district attorney "will cap her argument for 10 years incarceration and 10 years of extended supervision." At the sentencing hearing, after recommending ten years of initial confinement and ten years of extended supervision on the felony counts, the prosecutor added: "The sentence in the misdemeanor case I certainly think should be consecutive as it was a completely separate act and it is just completely unacceptable on its own." By

recommending a consecutive sentence after recommending the maximum term allowed by the plea agreement, the prosecutor breached the agreement.

¶4 At the postconviction hearing, the prosecutor focused the court's attention on her recitation of the plea agreement at the plea hearing, rather than on the written agreement. In her oral description of the agreement at the plea hearing, the prosecutor indicated that the State "will cap its prison recommendation at 20 years in prison, 10 years initial confinement and 10 years extended supervision." At the postconviction hearing, the prosecutor argued that the reference to "prison" was a reference to only the felony charges because the maximum sentence for the misdemeanor would be nine months in the county jail.

¶5 If the prosecutor's recitation of the agreement were the only statement of the parties' agreement, the court could reasonably accept this argument. Even though WIS. STAT. § 973.03(2) (2007-08) provides that a misdemeanor sentence imposed along with a felony sentence is served in prison, the court could reasonably interpret the prosecutor's use of the term "prison recommendation" as a reference to the felonies only. This is true because judges and criminal attorneys commonly speak of "prison" time in reference to felonies and "jail" time in reference to misdemeanors, regardless whether the jail time will be spent in a prison. However, the existence of an unambiguous written agreement precludes reliance on the prosecutor's oral recitation of the agreement. When construing the written agreement, the focus should be on the words of the agreement and not on a party's oral summary of the agreement. *See* ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis. 2d 481, 488, 141 N.W.2d 240 (1966). The written agreement's inclusion of the misdemeanor case number and its reference to "incarceration" rather than "prison" bound the prosecutor to

recommend no more than ten years of initial confinement on the combined felony and misdemeanor cases.

¶6 Citing ***Bowers***, 280 Wis. 2d 534, the prosecutor's second argument at the postconviction hearing was that she did not breach the plea agreement because the agreement was silent as to whether the sentences would be consecutive or concurrent. In ***Bowers***, this court held that there was no breach of a plea agreement—which was silent as to concurrent/consecutive—when the prosecutor recommended that the agreed-upon sentence be served consecutive to a sentence the defendant was already serving in another case. ***Id.***, ¶¶1, 3. Here, the agreement was not silent in any respect. The cap on the State's sentence recommendation included the misdemeanor.

¶7 The prosecutor's third argument at the postconviction hearing was that the breach was not material or substantial because Lucas's prison exposure was reduced from ninety-eight and a half years of imprisonment to thirty-eight and a half years. Therefore, a recommendation that exceeded the plea agreement by nine months was not material and substantial. This argument incorrectly focuses on the sentence imposed. However, we assess whether a breach was material and substantial by looking to the breach itself. In any event, exceeding a ten-year recommendation by nine months is material.

¶8 On appeal, the State offers an additional argument not raised by the prosecutor at the postconviction hearing. The State contends that the recommended consecutive time on the misdemeanor count could be consistent with the plea agreement if it is construed as a recommendation regarding the form of the sentence, not its length. That is, the prosecutor's language could be construed as a recommendation of nine years and three months of initial

confinement on the felony counts and a consecutive nine-month sentence on the misdemeanor count. We conclude that is a strained interpretation of the prosecutor's request for a consecutive sentence. The prosecutor who made the recommendation did not construe her own language in that manner. At a minimum, the prosecutor's language at the sentencing hearing impermissibly suggested that the court should not follow the recommendation for ten years of initial confinement. *See* ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986).

¶9 Because the circuit court concluded that there was no breach of the plea agreement, it did not consider the appropriate remedy. When the State breaches the plea agreement by its sentence recommendation, the circuit court has discretion to either allow the defendant to withdraw his plea or to order resentencing by a different judge. *See* ***State v. Howard***, 2001 WI App 137, ¶¶30-37, 246 Wis. 2d 475, 630 N.W.2d 244. We remand the matter to the circuit court to exercise its discretion regarding the appropriate remedy.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).