COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3043-CR **Cir. Ct. No. 2007CF743**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. HUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. David Huck appeals a judgment of conviction for operating while intoxicated, fifth offense, and an order denying his postconviction motion. Huck argues he is entitled to be resentenced because the State breached his plea agreement. We affirm.

BACKGROUND

¶2 Huck was charged with one count of driving while intoxicated, fifth offense; one count of driving with a prohibited alcohol concentration, fifth offense; and one count of driving while his operating privileges were revoked. As a result of these charges, Huck's extended supervision for a prior conviction was revoked and he was incarcerated to serve the remainder of that sentence. In this case, Huck agreed to plead no contest to the OWI charge in exchange for, among other things, the State's agreement to recommend a particular sentence concurrent to his revocation sentence.

¶3 At Huck's sentencing hearing the State set forth the length of sentence it was recommending pursuant to the plea agreement. It neglected to mention whether the sentence should be concurrent or consecutive to Huck's revocation sentence. However, when Huck's attorney spoke, she said, "The district attorney's office is recommending—I don't think [the State] said so, but in accordance with the plea agreement, the district attorney's office is asking for concurrent time." The State did not say anything further. At the conclusion of the hearing, the court imposed a longer sentence than the State recommended and imposed it consecutive to Huck's revocation sentence.

¶4 Huck filed a postconviction motion, arguing that the State breached the plea agreement by failing to explicitly recommend a concurrent sentence and that his trial counsel was ineffective for failing to object to the breach. The court denied his motion, concluding it was clear the recommendation was for a concurrent sentence.

DISCUSSION

¶5 The primary issue presented in this appeal is whether the State breached the plea agreement by failing to explicitly specify it was recommending a concurrent sentence. However, as a threshold matter, we first address whether Huck is entitled to direct appeal of this claim or whether the issue must be evaluated within the context of an effective assistance of counsel claim.

¶6 Huck appears to agree with the State that he waived the right to directly appeal because his counsel did not object to the State's recommendation. We conclude, however, that Huck properly preserved the issue because his clarification of the State's recommendation served the same purpose as an objection. The rule that a party must timely object to preserve an issue for appeal exists to give both the parties and courts "a fair opportunity to prepare and address [objections] in a way that most efficiently uses judicial resources." ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) (citation and internal quotation omitted). Here, Huck's clarification of the State's recommendation did just that. Therefore, we address Huck's breach claim directly.

¶7 A defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). However, not all breaches entitle a defendant to relief. *See* ***State v. Bangert***, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986). Rather, a defendant who alleges the prosecutor has breached a plea agreement must show the breach is material and substantial. ***Id.*** A material and substantial breach "is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." ***State v. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. When there are no disputed facts, the

question of whether a prosecutor materially and substantially breached a plea agreement is a question of law, which we review independently. ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

¶8 Huck argues the State's promise to recommend a concurrent sentence was "critically important" to him. But he fails to explain how, under the circumstances here, he was deprived of a material and substantial benefit for which he bargained. Instead, he simply contends: "Prior precedent from this court leads to the conclusion that the breach … was substantial and material." However, in neither of the cases Huck relies on—***State v. Knox***, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), and ***Bowers***, 280 Wis. 2d 534—did we conclude the prosecutor breached the plea agreement. Rather, we concluded just the opposite.

¶9 In ***Knox***, the defendant negotiated with one prosecutor for an agreement that the state would recommend concurrent sentences. At the sentencing hearing a different prosecutor recommended consecutive sentences. The defendant immediately notified the prosecutor of the error and the state changed its recommendation. We held there was no substantial breach because the prosecutor's unintentional misstatement was promptly rectified through the efforts of both counsel. ***Knox***, 213 Wis. 2d at 323. In ***Bowers***, the state initially requested a sentence longer than the one it agreed to recommend. There too, the defendant pointed out the error and the state immediately changed its recommendation. As in ***Knox***, we held that there was no material and substantial breach because the mistake was inadvertent and promptly remedied. ***Bowers***, 280 Wis. 2d 534, ¶11.

¶10 Huck nevertheless argues the result should be different here because unlike in ***Knox*** and ***Bowers***, the prosecutor here did not explicitly respond to the clarification of the plea agreement. We disagree.

¶11 Three factors, in combination, lead us to our conclusion. First, the prosecutor's recitation of the agreement involved an omission of a term of the agreement. Every published opinion of which we are aware concerns the state affirmatively contradicting a term of a plea agreement.[1] Even in ***Knox*** and ***Bowers***, where we did not find material and substantial breaches, the state's recommendations had directly contravened the plea agreements. Here, unlike all those other cases, the State simply neglected to mention a term of the agreement.

¶12 Second, and importantly, Huck's counsel clarified the omission. After the prosecutor made his sentencing recommendation, Huck's attorney clarified that, while the State had neglected to say so, "according to the plea agreement, the district attorney's office … is asking for concurrent time." There is no requirement that a plea agreement be presented to the court in any particular way. It may be presented by the prosecutor, by the defense, or by both. Here, the

[1] *See, e.g.*, ***State v. Smith***, 207 Wis. 2d 258, 558 N.W.2d 379 (1997) (prosecutor recommended sentence of fifty-eight months in prison contrary to plea agreement not to recommend a sentence); ***State v. Quarzenski***, 2007 WI App 212, 305 Wis. 2d 525, 739 N.W.2d 844 (state sought extended supervision and probation beyond the time provided in the plea agreement); ***State v. Liukonen***, 2004 WI App 157, 276 Wis. 2d 64, 686 N.W.2d 689 (prosecutor implied defendant should receive a sentence harsher than articulated in the plea agreement); ***State v. Howland***, 2003 WI App 104, 264 Wis. 2d 279, 663 N.W.2d 340 (state agreed to make no sentencing recommendation, but contacted department of probation and parole to complain about the presentence investigation report's recommendations); and ***State v. Howard***, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244 (prosecutor recommended consecutive sentences in spite of plea agreement to recommend concurrent sentences).

agreement was primarily presented by the prosecutor and clarified by Huck's attorney.

¶13 Third, the State did not disagree with Huck's counsel's clarification. One would expect the prosecutor to speak up if the State did not agree. We can imagine no interpretation of the State's silence here other than agreement. Indeed, as the trial court found, it was clear to everyone that the agreement called for a concurrent recommendation. During the postconviction motion hearing, the court observed:

> [T]he record is clear that the court was informed that the plea agreement was five years with two years initial confinement and three years of extended supervision and that the sentence was to be concurrent.

The court then reiterated that although the State did not say, "Oh, Yes. I agree with [the clarification] … the record is clear that that's what the agreement was."

¶14 The dissent views the State's silence in a vacuum. But any complete analysis requires that facts be viewed in context. Here, as we have explained, the context of the State's silence leaves no reasonable interpretation other than its agreement with the concurrent recommendation as part of the plea agreement. The dissent does not dispute this. Hence, contrary to the dissent's claim, the State did acknowledge the concurrent recommendation. Consequently, the State met its obligation. Although the dissent would prefer that the State do more, the law does not require more.

¶15 We do not disagree with Huck that the concurrent recommendation was a material and substantial part of his plea agreement. However, the prosecutor's omission of this term was promptly rectified so that the full plea

agreement was clearly communicated to the court. As a result, the State did not materially and substantially breach the agreement.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶16 BRUNNER, J. (*dissenting*). I respectfully dissent from my colleagues' conclusion that the prosecutor's conduct in this case does not amount to a material and substantial breach of the plea agreement. Huck is entitled to relief because the prosecutor's conduct both violated the terms of the agreement and deprived Huck of a material and substantial benefit for which he bargained. *See* ***State v. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. By omitting a "material and substantial part of [the] plea agreement," Majority, ¶15, the prosecutor clearly deviated from the plea agreement's terms. "'When a defendant pleads guilty to a crime pursuant to a plea agreement and the prosecutor fails to perform his [or her] part of the bargain, the defendant is entitled to relief.'" ***State v. Poole***, 131 Wis. 2d 359, 361, 394 N.W.2d 909 (Ct. App. 1986) (quoting ***State v. Beckes***, 100 Wis. 2d 1, 3-4, 300 N.W.2d 871 (Ct. App. 1980)).

¶17 Despite the prosecutor's omission, the court fails to see why the State's promise to recommend a concurrent sentence would be important to Huck. Huck expected the district attorney to place the power and influence of his office behind the sentencing recommendation. "The prosecutor is cloaked with the authority of [the sovereign]; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a [state] official duty-bound to see that justice is done." ***United States v. Modica***, 663 F.2d 1173, 1178 (2d Cir. 1981). As such, a prosecutor wields substantial persuasive force. *See* ***Berger v. United States***, 295 U.S. 78, 88-89 (1935). It was natural for Huck to view the prosecutor's oral support for the plea agreement's

sentencing recommendation as a beneficial and essential component of the bargain.

¶18 My view is supported by other content in the plea agreement. In addition to the State's recommendation with respect to sentence length, Huck also secured the State's agreement to "stand mute on whether to order [a] PSI." If Huck had been bargaining for the State's silence, one would expect the sentencing recommendation to have similar limiting language. It does not. In my view, Huck has established that the prosecutor deviated from the terms of the plea agreement and deprived Huck of a material and substantial benefit for which he bargained. Huck is therefore entitled to resentencing.

¶19 I am not persuaded by the three factors the court recites in concluding that the State's omission was harmless. First, the court states that no published opinion has considered whether a recommending prosecutor's omission at sentencing can be a material and substantial breach. This may be true, but the absence merely indicates that the matter is an open question of law. Second, the court considers it important that Huck's attorney clarified the sentencing recommendation. But there would be no need for a plea agreement if Huck was bargaining for the endorsement of his own attorney. Finally, the court notes that the State did not disagree with Huck's clarification of the sentence recommendation. My reading of our case law requires the prosecutor to acknowledge or clarify the recommendation, not the defendant's attorney.

¶20 The court is correct that ***State v. Knox***, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), and ***Bowers*** are distinguishable, but the distinction favors Huck. In both ***Knox*** and ***Bowers***, the prosecutor spoke up and remedied the error. Further, ***Bowers*** makes explicit that the state must be the one to clarify the

recommendation: "***Knox*** teaches us that it is sufficient for *the State* to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." ***Bowers***, 280 Wis. 2d 534, ¶12 (emphasis added). Indeed, we have gone so far as to say that "even an oblique variance will entitle the defendant to a remedy if it 'taints' the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for." ***Id.***, ¶9 (quoting ***Knox***, 213 Wis. 2d at 321; and citing ***Poole***, 131 Wis. 2d at 362-64).

¶21 The record reveals that the district attorney in no way clarified or acknowledged his omission during the sentencing hearing. Acknowledgement requires "a word or act [showing that] one has knowledge of and agrees to (a fact or truth)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 17 (unabr. 1993). When Huck clarified that the State's recommendation was for a concurrent sentence, the prosecutor sat on his hands. Under these circumstances, I have no trouble concluding that Huck was deprived of a material and substantial benefit for which he bargained.

¶22 The court believes that "it was clear to everyone that the agreement called for a concurrent recommendation." Majority, ¶13. This conclusion is not supported by the sentencing hearing transcript. Instead, the court bases its conclusion on the circuit court's assurances during the postconviction hearing. But sentencing is an act of discretion, and our "review of a circuit court's exercise of discretion depends on [our ability] to access a circuit court's acts of discretion from the record." ***State v. Grady***, 2007 WI 81, ¶33, 302 Wis. 2d 80, 734 N.W.2d 364. The record establishes that at the time the sentence was rendered, the prosecutor neither acknowledged nor clarified the breach as required by ***Knox*** and ***Bowers***.

¶23 While I agree with the court that the recommendation for concurrent sentences was a material and substantial part of Huck's plea agreement, I cannot agree that the district attorney's failure to endorse the recommendation, or even mention it, was harmless. While prosecutors need not make a sentence recommendation "forcefully or enthusiastically," they still must make it. *See* ***Poole***, 131 Wis. 2d at 362. In my view, Huck has established that the prosecutor materially and substantially breached the plea agreement. For that reason, I would remand for resentencing.