

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2380-CR

Cir. Ct. No. 2014CF241

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LYLE A. LAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Lyle A. Lay appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the State breached his plea agreement by failing to return certain property taken from him. We disagree and affirm.

¶2 In October 2014, Lay pled no contest to being a felon in possession of a firearm. Pursuant to a plea agreement, the State agreed to release certain property taken from him in the course of its investigation. As the prosecutor explained to the circuit court:

[T]he defendant has been asking for release of property. He specified today that he needs keys to the front door of the north building at 225 North Commerce Street, keys to his shop in Batavia, keys to another building or storage area, some Direct TV boxes as well as a television. He has further asked for release for titles, specific two vehicles on the property, and I have no objection to authorizing release of those items at defense request....

¶3 The prosecutor signed two release forms. One form, which was signed on the day of the plea hearing, authorized police to release specified property, including keys to various buildings, the Direct TV boxes, and a television. The other form, which was signed shortly after sentencing, authorized police to release all property taken from Lay with the exception of any firearms.

¶4 Lay subsequently filed a motion for postconviction relief seeking either plea withdrawal or resentencing. In it, he accused the State of breaching the plea agreement by failing to return all of the seized property. The circuit court denied the motion after a hearing, concluding that Lay had not shown a material and substantial breach of the agreement. This appeal follows.

¶5 On appeal, Lay renews his argument that the State breached the plea agreement by failing to return all of the seized property. Specifically, he complains that he never received two vehicle titles and keys to an apartment building.

¶6 A defendant has a constitutional right to enforcement of a negotiated plea agreement. *See State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637

N.W.2d 733. However, not all breaches are actionable; only a material and substantial breach merits a remedy. *See id.*, ¶38. “A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained.” *Id.*

¶7 Whether the State breached a plea agreement presents a mixed question of fact and law. *State v. Naydihor*, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. The terms of the plea agreement and the circumstances of the alleged breach are questions of fact reviewed under the clearly erroneous standard. *Id.* However, whether the State’s conduct constituted a material and substantial breach of the agreement is a question of law that this court reviews de novo. *Id.*

¶8 Here, we are not persuaded that the State’s conduct constituted a material and substantial breach of the plea agreement. As noted, the State agreed to release certain property taken from Lay, and the prosecutor effectuated that agreement by signing two release forms. It appears that most of the requested property has since been turned over.¹ What was not turned over does not defeat the benefit of the bargain and could have been easily handled by bringing a motion in the circuit court. Alternatively, in the case of the missing vehicle titles, Lay could have simply obtained duplicates from the department of motor vehicles. In any event, we are satisfied that the circuit court properly denied Lay’s postconviction request for either plea withdrawal or resentencing.

¹ According to a police report found in the record, a detective met with Lay and turned over the Direct TV boxes and television. The detective also attempted to use the seized keys to unlock the door to the building on Commerce Street; however, he was unsuccessful. Lay later told the detective that he no longer needed the keys to the shop in Batavia.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2013-14).

