Circuit Court for Queen Anne's County
Case No. 17-K-06-006533

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 875

September Term, 2017

JAMES ANTHONY WISE

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 20, 2018

In 2007 appellant James Wise agreed to plead guilty to two counts of possession with the intent to distribute cocaine. One count arose from charges filed in Queen Anne's County, the other from charges filed in Talbot County.

On May 4, 2007, Wise entered his pleas to both charges in the Circuit Court for Queen Anne's County. The court imposed the maximum sentence of 20 years' imprisonment (Md. Code (2002, 2007 Supp.), § 5-608(a) of the Criminal Law Article), with all but seven years suspended, in the Queen Anne's County case. In the Talbot County case, the court also imposed the maximum sentence of 20 years' imprisonment, with all but five years suspended. In addition, the court imposed five years of probation.

After his release from incarceration, Wise violated his probation. Consequently, on May 13, 2014, the Circuit Court for Queen Anne's County imposed two consecutive sentences of 10 years' imprisonment.

On November 16, 2015, Wise filed a petition for post-conviction relief. His amended petition alleged that he had not received the effective assistance of counsel, because his defense attorney had not objected to the State's alleged breach of the plea agreements. The Circuit Court for Queen Anne's County denied the petition.

Wise filed a timely application for leave to appeal, which this Court granted.

QUESTIONS PRESENTED

Wise presents the following questions, which we have restated for brevity and clarity:

1. Did the post-conviction court err in finding that the State did not breach the plea agreements?

2. Did the post-conviction court err in finding that Wise was not denied his right to effective assistance of counsel when his attorney failed to challenge the State's breach of the plea agreements?

For the following reasons, we affirm in part and reverse in part.

BACKGROUND

In exchange for Wise's agreement to plead guilty to charges of possession with intent to distribute cocaine in Queen Anne's County, the State agreed (1) to enter a *nolle prosequi* as to the other charges against Wise in that case, and (2) to recommend "a sentence within the guidelines," which had been calculated to be between three and seven years.[1] In exchange for Wise's agreement to plead guilty to charges of possession with intent to distribute cocaine in Talbot County, the State agreed (1) to enter a *nolle prosequi* as to the other charges against Wise in that case, and (2) to "make no specific recommendation at sentencing as to a period of incarceration." The terms of the agreements were reduced to writing on a form that was signed by Wise, his attorney, and the judge who presided over the guilty plea proceedings.

The State's recommendations were not binding on the court. Md. Rule 4-243(b) (2007). Under the agreements, Wise was free to argue for any sentence. It was beneficial to Wise to enter simultaneous pleas in both cases, because the guidelines computation in the Talbot County case would not include his conviction in the Queen Anne's County case, and vice versa.

[1] The term "guidelines" refers to the Maryland Sentencing Guidelines, which are a voluntary and advisory system of matrices that trial judges may use in setting sentences for criminal offenses. *See Guidelines*, MD. ST. COMMISSION ON CRIM. SENT'G POL'Y, http://msccsp.org/Guidelines/Default.aspx (last visited Apr. 9, 2018).

Before accepting Wise's guilty pleas, the circuit court confirmed with him, on the record, the terms of the plea agreement, as they were stated in the document that he had signed. In addition, the court explained to Wise that it was not bound by the plea agreement and, hence, that it could impose any lawful sentence, including a sentence in excess of the guidelines. On the record at the sentencing hearing, neither the court nor counsel informed Wise that, in the Queen Anne's County case, the State could recommend a sentence above the guidelines limit of seven years, as long as the court suspended any time above the guidelines.

After finding that Wise had knowingly, intelligently, and voluntarily entered his pleas and that there was an adequate factual basis to support the pleas, the court found him guilty of both counts of possession with intent to distribute cocaine.

During the sentencing hearing, the Assistant State's Attorney for Queen Anne's County recommended "a sentence of twenty years, suspend all but the seven." Wise's counsel did not object.

The Assistant State's Attorney for Talbot County recommended no specific period of incarceration, but asked "the court to treat the Talbot County case as a separate case for purposes of disposition." Again, Wise's counsel did not object.

As previously stated, the court sentenced Wise to a term of 20 years' imprisonment, with all but seven years suspended, in the Queen Anne's County case; to a consecutive term of 20 years' imprisonment, with all by five years suspended, in the Talbot County case; and to five years of probation following his release from imprisonment.

After being released from prison, Wise violated his probation. As a result, the circuit court sentenced him to two consecutive terms of 10 years' imprisonment.

Wise petitioned for post-conviction relief. He contended that the State had breached the plea agreements by recommending suspended time above the guidelines in the Queen Anne's County case and by allegedly suggesting that the court should impose a consecutive sentence in the Talbot County case.

The court convened a hearing, at which Wise's trial counsel testified. According to trial counsel, "[t]here's case law to the effect" that if the State agrees to recommend a sentence within the guidelines, the agreement pertains only to "active" or executed time and that the State may recommend an additional, suspended sentence above the guidelines. *But see Cuffley v. State*, 416 Md. 568, 573 (2010) (when court accepted binding plea agreement that called for sentence within guidelines, it was illegal for court to impose sentence that exceeded guidelines, but to suspend all but part of sentence that fell within guidelines); *Baines v. State*, 416 Md. 604, 620 (2010) (court breached binding plea agreement when it agreed to commit itself to guidelines, imposed sentences of active incarceration that fell within guidelines, but also imposed suspended sentences that exceeded guidelines); *Matthews v. State*, 424 Md. 503, 523-26 (2012) (court imposed illegal sentence when plea agreement required cap of 43 years' incarceration, but court sentenced defendant to life imprisonment, with all but 43 years suspended); *compare Ray v. State*, 454 Md. 563, 578 (2017) (when plea agreement expressly called for a cap of four years on any *executed* incarceration, court did not impose illegal sentence in sentencing defendant to 10 years' incarceration, with all but four years suspended).

In addition, counsel testified that she "would have" informed Wise that, in drug cases in Queen Anne's County, an agreement to recommend a sentence within the guidelines applied only to the "active portion" and did preclude the State from recommending a suspended sentence in excess of the guidelines.

In a written opinion, the post-conviction court rejected Wise's contentions. In concluding that the State did not breach Wise's plea agreement in the Queen Anne's County case, the court reasoned that the recommendation (a 20-year sentence with all but seven years suspended) fell within the sentencing guidelines. In concluding that Wise did not receive ineffective assistance of counsel because of his attorney's failure to take action in response to the alleged breach, the court reasoned that "[t]he recommendation of a sentence at the heightened end of the guidelines does not breach an agreement to recommend a sentence within the guidelines." In regard to the Talbot County case, the court reasoned that the State "suggested nothing about the sentence" when it asked the court to treat that case separately for purposes of disposition.[2]

We granted Wise's application for leave to appeal.

BACKGROUND

I. Are the Issues Properly Before Us?

As a preliminary matter, the State contends that the issues of breach and of ineffective assistance of counsel are not properly before us. We disagree.

[2] Wise had also claimed that he was denied effective assistance of counsel when his counsel did not file a motion for modification or reduction of his sentence after he was found to have violated his probation. The post-conviction court granted Wise relief on this ground.

Citing Md. Code (2008), § 7-106(b) of the Criminal Procedure Article, the State asserts that Wise waived the claims of breach because he failed to file an application for leave to appeal the convictions that resulted from his pleas. The issue of breach is before us nonetheless, because it is embedded in the issue of ineffective assistance of counsel: if the State breached one or both of the plea agreements, counsel's failure to object may create grounds for a finding of ineffective assistance.

The State goes on to assert that the issue of ineffective assistance "was not presented" in Wise's application for leave to appeal. To the contrary, in his application, Wise raised the issue of ineffective assistance of counsel, albeit not in a separately captioned section. Furthermore, even if Wise had not mentioned the issue in his application, "nothing in Rule 8-204," governing applications for leave to appeal, "states that, if an application is granted, only the points specified in the application may be argued on appeal." *Harding v. State*, 235 Md. App. 287, 294 (2017). In any event, this Court clearly understood Wise to have raised the issue, because we issued an order directing the State to address "[w]hether [his] right to effective assistance of counsel was denied when his trial counsel failed to object when the State breached the guilty plea agreement by recommending a sentence in excess of that which it had agreed to recommend."

In short, the issues in Wise's appeal are properly before us.

II. Ineffective Assistance of Counsel

A. General Principles

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights, guarantee a defendant the right to counsel in a criminal proceeding. To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "'effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

For Wise to make out a claim of ineffective assistance of counsel in violation of his constitutional rights, he must satisfy the two-prong test articulated in *Strickland*. The first prong requires Wise to show that his counsel's performance was deficient because she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to Wise] by the Sixth Amendment." *Id.* at 687. The second prong requires Wise show that counsel's performance was so deficient that he was prejudiced by it. *Id.*

To show that counsel's performance was deficient, Wise must show that the "representation fell below an objective standard of reasonableness" (*id.* at 688) and must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To show prejudice, Wise "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. Maryland Law Concerning the Breach of Plea Agreements

Wise's claim of ineffective assistance turns on the premise that his trial counsel precluded him from moving to withdraw his pleas or challenging his sentences in an application for leave to appeal, because she failed to object to the State's breach of one or both plea agreements. Consequently, we need to examine whether the State breached the plea agreements.

Under Md. Rule 4-243(a)(1)(E), a criminal defendant may agree to plead guilty on the condition that the State "will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action." "The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(1)(E) of this Rule is not binding on the court." Md. Rule 4-243(b).

By contrast, under Md. Rule 4-243(a)(1)(F), the State and a criminal defendant may agree to "submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration[.]" "The judge may then accept or reject the plea[.]" Md. Rule 4-243(c).

Wise pleaded guilty under Rule 4-243(a)(1)(E). Hence, the State's recommendation was "not binding on the court." Md. Rule 4-243(b). Still, the agreement about what the State would or would not recommend was binding on the State itself.

"[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); *accord Cuffley v. State*, 416 Md. at 580; *Miller v. State*, 272 Md. 249, 252 (1974). Consequently, "[w]hen a defendant's guilty plea rests in part on a promise concerning disposition, and the State or the court violates that promise, 'the accused may obtain redress by electing either to have his guilty plea vacated or to leave it standing and have the agreement enforced at resentencing.'" *Cuffley v. State*, 416 Md. at 580-81 (quoting *State v. Brockman*, 277 Md. 687, 694 (1976)); *accord Solorzano v. State*, 397 Md. 661, 668 (2007) ("the general remedy . . . is to permit the defendant to choose either specific performance or withdrawal of the plea"). The defendant is "entitled to relief regardless of whether the breach of the agreement was inadvertent or whether the sentencing judge was influenced by the prosecutor's recommendation." *Miller v. State*, 272 Md. at 253.

"Plea bargains are similar to contracts." *Ray v. State*, 454 Md. at 576. "Thus, when interpreting plea agreements, courts draw upon contract law as a guide to ensure that each party receives the benefit of the bargain." *Id.* Nonetheless, "because '[d]ue process concerns for fairness and adequacy of procedural safeguards guide any interpretation of a court approved plea agreement'" (*id.*) (alteration in original) (quoting *Solorzano v. State*, 397 Md. at 668)), the "exclusive application of contract law is inappropriate[.]" *Id.*

The Court of Appeals recently set out to clarify the relationship between contract law and the interpretation of plea agreements:

> First, we must determine whether the plain language of the agreement is clear and unambiguous as a matter of law. If the plain language of the agreement is clear and unambiguous, then further

> interpretive tools are unnecessary, and we enforce the agreement accordingly. Second, if the plain language of the agreement is ambiguous, we must determine what a reasonable lay person in the defendant's position would understand the agreed-upon sentence to be, based on the record developed at the plea proceeding. "[I]f examination of the terms of the plea agreement itself, by reference to what was presented on the record at the plea proceeding before the defendant pleads guilty, reveals what the defendant reasonably understood to be the terms of the agreement, then that determination governs the agreement." Third, if, after we have examined the agreement and plea proceeding record, we still find ambiguity regarding what the defendant reasonably understood to be the terms of the agreement, then the ambiguity should be construed in favor of the defendant.

Ray v. State, 454 Md. at 577-78 (alteration in original) (footnote and citations omitted) (quoting *Baines v. State*, 416 Md. at 615).

The "[i]nterpretation of an agreement as to sentencing, including the question of whether the agreement's language is ambiguous, is a question of law, subject to *de novo* review." *Id.* at 573. "Whether a plea agreement has been violated is a question of law," which this Court "reviews *de novo*." *Hartman v. State*, 452 Md. 279, 289 (2017).

Rule 4-243, governing plea agreements, "requires strict compliance with its provisions." *Cuffley v. State*, 416 Md. at 582. "[A]s the natural consequence of requiring strict compliance with the Rule," "any question that later arises concerning the meaning of the sentencing term of a binding plea agreement must be resolved by resort *solely* to the record established at the Rule 4-243 plea proceeding." *Id.* (emphasis in original).

> The record of that proceeding must be examined to ascertain precisely what was presented to the court, in the defendant's presence and before the court accepts the agreement, to determine what the defendant reasonably understood to be the sentence the parties negotiated and the court agreed to impose. The test for determining what the defendant reasonably understood at the time of the plea is an objective one. It depends not on what the defendant actually understood the agreement to mean, but rather, on what a reasonable lay person in the defendant's position and unaware of

> the niceties of sentencing law would have understood the agreement to mean, based on the record developed at the plea proceeding.

Id.

For that reason, "extrinsic evidence of what the defendant's actual understanding might have been is irrelevant to the inquiry." *Id.*

"If the record of the plea proceeding clearly discloses what the defendant reasonably understood to be the terms of the agreement, then the defendant is entitled to the benefit of the bargain, which, at the defendant's option, is either specific enforcement of the agreement or withdrawal of the plea." *Id.* at 583.[3] "If examination of the record leaves ambiguous the sentence agreed upon by the parties, then the ambiguity must be resolved in the defendant's favor." *Id.*

Although the Court of Appeals has discussed these principles most frequently in cases involving a court's violation of a binding plea agreement, the Court has also employed them when a criminal defendant alleges that the State breached an agreement to recommend a specific sentence. *Hartman v. State*, 452 Md. at 289-90.

C. Breach of the Queen Anne's County Agreement

In the Queen Anne's County case against Wise, the State agreed to recommend a sentence within the guidelines, which was estimated to be between three and seven years. In its agreement, the State did not reserve the right to recommend an additional suspended sentence above and beyond the guidelines. Nor did the State specify that it

[3] If the defendant withdraws the plea, he or she "will have to plead anew to all of the original charges, including those which the State had nol prossed." *Miller v. State*, 272 Md. at 255-56.

considered itself bound to recommend a sentence of only "active" or "executed" time within the guidelines. At sentencing, however, the State recommended that the court impose a sentence well in excess of the guidelines, but require a period of active incarceration only for the maximum period envisioned by the guidelines. The question becomes whether the State thereby violated the agreement.

In light of several recent decisions by the Court of Appeals, the question answers itself. In *Cuffley v. State*, 416 Md. at 586, the Court of Appeals held that a trial court breached a binding plea agreement and imposed an illegal sentence when the agreement called for a sentence within the guidelines of four to eight years, but the court sentenced the defendant to 15 years, with all but six years suspended. In *Baines v. State*, 416 Md. at 607, the Court held that a trial court violated a binding plea agreement to impose a sentence "within the guidelines" of seven to 13 years, when it sentenced the defendant to 40 years, with all but 13 years suspended. Finally, in *Matthews v. State*, 424 Md. at 524-26, the Court held that a trial court imposed an illegal sentence when a binding plea agreement called for "incarceration within the guidelines" and required the court to cap any sentence at 43 years, but the court imposed a sentence of life imprisonment, with all but 43 years suspended.

In view of those authorities, it is beyond any serious dispute that a reasonable person in Wise's position would have understood the State's agreement to recommend a "sentence within the guidelines" to mean that the State could not do what it did in the Queen Anne's County case – recommend a sentence above the guidelines, but ask the court to suspend any time beyond the upper limits of the guidelines. The agreement was

"'ambiguous by definition'" (*Ray v. State*, 454 Md. at 579 (quoting *Ray v. State*, 230 Md. App. 157, 186 (2016)), because it did not expressly state whether the seven-year cap applied to the entire sentence or only to the active or executed portion of the sentence. *Id.* Because the record of the sentencing proceeding does not establish that Wise was informed that the State could recommend a suspended sentence in excess of the guidelines, the State violated the agreement by making that recommendation.

It makes no difference that Wise's trial counsel "would have" informed her client that an agreement to recommend a sentence within the guidelines did not preclude the State from recommending a suspended sentence in excess of the guidelines. Any question concerning the meaning of the plea agreement "must be resolved by resort *solely* to the record established at the Rule 4-243 plea proceeding." *Cuffley v. State*, 416 Md. at 582 (emphasis in original). "[E]xtrinsic evidence," such as counsel's testimony of what she "would have" said, "is irrelevant to the inquiry." *Id.* Because the record establishes that a reasonable lay defendant would have understood the State to have agreed not to recommend any sentence in excess of the guidelines of three to seven years, the State breached the agreement by recommending a 20-year sentence, with all but seven years suspended.[4]

[4] The State cites *State v. Smith*, 443 Md. 572, 654-55 (2015), for the proposition that, in a coram nobis action (to attack a conviction after a person has been released from incarceration), trial counsel's testimony is strong evidence that a defendant knowingly and voluntarily entered a guilty plea. But this case does not strictly concern whether Wise knowingly and voluntarily entered into a plea; it concerns whether a reasonable lay defendant in Wise's position would have understood that the State could recommend a suspended sentence in excess of the guidelines despite its agreement to recommend a (continued)

In concluding that the State did not breach its agreement, the post-conviction court appears to have misapprehended Wise's arguments. Wise did not contend that the State breached the Queen Anne's County agreement by recommending a sentence at the upper end of the guidelines, as the post-conviction court stated; he contended that the State breached that agreement by recommending that the trial court impose a sentence in excess of the guidelines, but suspend all of the time in excess of the guidelines. The court erroneously rejected Wise's contentions when it did not engage with his central argument.

In summary, in the Queen Anne's County case, the State agreed to recommend a sentence within the guidelines of three to seven years. A reasonable lay defendant would have understood that agreement to preclude the State from recommending an active or executed sentence of more than seven years and a suspended sentence in excess of the guidelines. The State, therefore, breached the agreement by recommending a sentence of 20 years, with all but seven years suspended.

D. Breach of the Talbot County Agreement

Whether the State breached the Talbot County agreement is less clear than whether it breached the Queen Anne's County agreement. In the Talbot County agreement, the State agreed to "make no specific recommendation at sentencing as to a period of incarceration." At sentencing, the Assistant State's Attorney for Talbot County

sentence "within the guidelines." *Cuffley* establishes that counsel's testimony is "irrelevant" to that inquiry. *Cuffley v. State*, 416 Md. at 582. *Smith* therefore is completely inapposite.

recommended no specific period of incarceration, but asked "the court to treat the Talbot County case as a separate case for purposes of disposition."

Wise contends that, in asking "the court to treat the Talbot County case as a separate case for purposes of disposition," the State could only have meant to imply that the trial court should impose a consecutive sentence. The post-conviction court, by contrast, reasoned that the State "suggested nothing about the sentence" when it asked the court to treat that case separately for purposes of disposition.

Although it is difficult to accept that the State "suggested nothing about the sentence" when it made a comment about how the case should be "treat[ed]" for the purpose of "disposition," we agree that the State did not violate its obligation to "make no *specific* recommendation as to a period of incarceration." Even if the State's vague suggestion might be interpreted as some kind of recommendation, it was certainly not the kind "*specific* recommendation as to a period of incarceration" that the State agreed not to make. (Emphasis added.) It was not, for example, a recommendation to impose a sentence for a *specific* term of years, such as the 20-year consecutive sentence that the court eventually imposed. Nor was it a *specific* recommendation as to whether the sentence should be concurrent or consecutive, or whether all or any part of it should be active or suspended. It was an unspecific statement that made no specific

recommendation about anything. For those reasons, we conclude that the State did not breach the Talbot County agreement.[5]

E. Ineffective Assistance in Connection with the Queen Anne's County Agreement

Having concluded that the State breached the Queen Anne's County agreement, we must decide whether Wise received ineffective assistance of counsel because of his counsel's failure to object to the breach. To decide that question, we must first determine whether trial counsel "made errors so serious that [she] was not functioning as the 'counsel' guaranteed [to Wise] by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687.

In support of his contention that he received ineffective assistance, Wise points to counsel's testimony, at the post-conviction hearing in 2016, that the State did not breach its agreement to recommend a sentence within the guidelines when it asked the court to impose a sentence in excess of the guidelines, but to suspend any time above the guidelines. Wise correctly observes that counsel's testimony evidences an unawareness of the principles in cases such as *Cuffley*, *Baines*, and *Matthews*, which establish that a

[5] To the extent that the State's unspecific statement can fairly be characterized as a recommendation to impose a consecutive sentence, it is largely because of our ability to read (and re-read, and re-re-read) the ambiguous words on the printed page and to consider, in hindsight, the sentence that the trial judge actually imposed. It would be inappropriate to fault trial counsel for not spotting an issue such as this in the brief amount of time that she had. *See Commonwealth v. Spotz*, 870 A.2d 822, 832 (Pa. 2005) ("[r]eview of the reasonableness of counsel's trial performance is not measured by an exercise in 'spot the objection,' as might occur in a law school evidence examination"). Counsel did not provide ineffective assistance when she failed to object to the State's unspecific statement.

reasonable lay defendant would have understood the agreement to prohibit the State from recommending any period of incarceration, suspended or otherwise, in excess of the guidelines. He argues, persuasively, that by not noticing or objecting to the State's breach, counsel prohibited him from rescinding the agreement, requesting that the agreement be specifically enforced, or filing an application for leave to appeal the conviction.

Perhaps because of defense counsel's misapprehension of the law, the State did not attempt to persuade the post-conviction court that counsel acted reasonably in not objecting to the State's breach. The State certainly could not argue that the failure to object represented a strategic choice if it resulted from a misunderstanding of the law. *See, e.g., Coleman v. State*, 434 Md. 320, 338 (2013); *State v. Peterson*, 158 Md. App. 558, 597 (2004). Instead, the State relied solely on the contention that no breach had occurred (and, hence, that counsel had no obligation to object). Accordingly, on the subject of the reasonableness of counsel's conduct, the post-conviction court made no factual findings to which we might be obligated to defer. *See State v. Sanmartin Prado*, 448 Md. 664, 679 (2016).

On appeal, the State does not argue that until the Court of Appeals decided *Cuffley*, more than three years after Wise pleaded guilty, a competent defense attorney would not have understood that an agreement to recommend a sentence within the guidelines ordinarily prevents the State from recommending a suspended sentence in excess of the guidelines. *See Strickland v. Washington*, 466 U.S. at 689 ("[a] fair assessment of attorney performance requires that every effort be made . . . to evaluate the

conduct from counsel's perspective at the time"); *State v. Gross*, 134 Md. App. 528, 588 (2000) ("[t]he effective assistance of counsel does not demand a crystal ball"), *aff'd*, 371 Md. 334 (2002). In particular, the State does not argue that at the time of Wise's sentencing, the Sentencing Guidelines Manual said that "[s]uspended time *is not* considered in determining whether the sentence falls within the recommended guidelines." *See Solorzano v. State*, 397 Md. at 674 n.2 (citation and quotation marks omitted). Nor does the State argue that at the time of the 4-3 decision in *Cuffley* itself the Sentencing Guidelines Manual said that "the sentencing 'range represents only non-suspended' time." *Cuffley v. State*, 416 Md. at 582 n.5 (citation and quotation marks omitted). We cannot evaluate the reasonableness of counsel's conduct in light of arguments that the State did not make.[6]

On this record, it is essentially conceded that, if the State breached the Queen Anne's County agreement, defense counsel's performance was constitutionally deficient because she failed to object. Therefore, because we have concluded that the State did breach that agreement, we turn to the next step of the analysis, which is to ascertain whether counsel's performance was so deficient that Wise was prejudiced by it. *Strickland v. Washington*, 466 U.S. at 687.

[6] In any event, on March 19, 2007, six weeks before Wise pleaded guilty and received his sentences, the Court of Appeals suggested that if the State was relying on the guidelines provision that said that "[s]uspended time is not considered in determining whether the sentence falls within the recommended guidelines," "the State must make [it] absolutely clear, on the record, that it is doing so, and the defendant must be fully advised as such." *Solorzano v. State*, 397 Md. at 674 n.2; *see also Cuffley v. State*, 416 Md. at 582 n.5 (interpreting *Solorzano*). This appears not to have occurred at Wise's sentencing.

To demonstrate prejudice, Wise must show a reasonable probability that, but for counsel's failure to object to the State's breach, "the result of the proceeding would have been different." *Id.* at 694. This standard does not require Wise to show that, had counsel objected to the State's breach, he would have received a different sentence. *See, e.g.*, *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999); *accord State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015); *State v. Fannon*, 799 N.W.2d 515, 523 (Iowa 2011); *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008); *State v. Horness*, 600 N.W.2d 294, 301 (Iowa 1999). "Instead, the focus is on whether counsel's deficient performance sacrificed [Wise's] ability to protect the bargain he had struck with the State[.]" *State v. Gonzalez-Faguaga*, 266 Neb. 72, 79, 662 N.W.2d 581, 589 (2003).

"A proper objection by counsel would have led to a 'different outcome' in the sense that [Wise] would either have been allowed to withdraw his plea, or he would have been entitled to a resentencing in proceedings not tainted by the State's recommendation." *State v. Carrillo*, 597 N.W.2d at 501; *accord State v. Fannon*, 799 N.W.2d at 523 ("defense counsel's failure to object to the State's breach prevented Fannon from having an opportunity to either demand specific performance of the agreement before a new sentencing judge or withdraw the guilty pleas"); *State v. Horness*, 600 N.W.2d at 301 (had defense counsel "alerted the sentencing court to the prosecutor's breach," "the court would have allowed the defendant to withdraw his guilty pleas, or would have scheduled a new sentencing hearing at which time the prosecutor

could make the promised recommendations"). Therefore, Wise has established that he suffered prejudice as a result of counsel's failure to object to the breach.[7]

It does not matter that the State's recommendation was not binding on the trial court and that the court could have imposed the same sentence even if the State had complied with the plea agreement. In *Santobello v. New York*, 404 U.S. at 259, the prosecution breached an agreement to make no recommendation at sentencing. But even though the trial judge expressly said that he was "not at all influenced" by what the prosecution had said and that the recommendation "d[id]n't make a particle of difference" (*id.*), the Supreme Court, on direct appeal, reversed the conviction and remanded the case to the state court to determine whether to order specific performance of the agreement or to allow the defendant to withdraw his plea. *Id.* at 262-63. In other words, even though the trial judge expressly said that he would have imposed the same, exact sentence had the prosecution fully complied with the plea agreement, the Supreme Court held that a remand was required. *Id.*; *accord Miller v. State*, 272 Md. at 253 (citing *Santobello* for the proposition that the defendant is "entitled to relief regardless of whether . . . the sentencing judge was influenced by the prosecutor's recommendation"); *State v. Gonzalez-Faguaga*, 266 Neb. at 79, 662 N.W.2d at 590 (defendant has the option

[7] Citing *State v. Smith*, 207 Wis.2d 258, 558 N.W.2d 379 (1997), and *State v. Lopez*, 872 N.W.2d 159 (Iowa 2015), Wise argues that we should presume prejudice when a defense attorney fails to object to the breach of a plea agreement. The State does not respond to that argument. In fact, the State says nothing at all on the issue of prejudice. Nonetheless, in view of our conclusion that, had counsel objected, the outcome of the proceeding would have been different (because Wise would have had the opportunity to withdraw his plea or to ask to be resentenced in accordance with the agreement), we need not decide whether prejudice should be presumed.

of withdrawing the plea or having the agreement specifically enforced "even if the sentencing judge has stated on the record that he or she would have given the defendant the same sentence had the prosecutor complied with the plea agreement").

Because of his counsel's failure to object to the State's breach of the Queen Anne's County agreement, Wise has a similar right to withdraw his plea or to have the agreement specifically enforced. He has that right notwithstanding that the plea agreement itself was not binding on the court. Accordingly, we reverse the post-conviction court's conclusion about that agreement and remand the case to the circuit Court for Queen Anne's County for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED TO THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE EVENLY DIVIDED BETWEEN APPELLANT AND QUEEN ANNE'S COUNTY.