COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3253-CR **Cir. Ct. No. 01CF000685**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY J. OLMSTED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JOHN B. MURPHY and TERENCE T. BOURKE, Judges. *Judgment affirmed in part and reversed in part, order reversed, and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Troy J. Olmsted appeals from a judgment of conviction for attempted first-degree homicide and substantial battery, as a party to the crime, and from an order denying his postconviction motion.[1] He argues that his no contest plea was involuntary and unknowing because it was based on misinformation from the attorney representing his co-defendant. He also asserts that his trial counsel was ineffective for failing to object to the prosecutor's sentencing recommendation as a breach of the plea agreement. We affirm the trial court's ruling that Olmsted is not entitled to withdraw his plea. The State concedes that the prosecutor violated the plea agreement at sentencing and, upon that concession, we reverse in part and remand the matter for a new sentencing hearing before a different sentencing judge.

¶2 Olmsted and his girlfriend, Melissa McDaniel, were charged with the attempted homicide, substantial battery, and false imprisonment of Lorel Schober. Olmsted, McDaniel, and Renata Neuaone confronted Schober at Neuaone's residence and accused her of stealing drugs from them. When Schober repeatedly denied any knowledge of the drugs, the trio engaged in severely abusive acts designed to extract the truth. At one point, they tried to force Schober to overdose. When that failed, Schober was taken to a railroad trestle and a noose was placed around her neck and the other end of the rope tied to the trestle. She was pushed or forced to jump. The rope broke. Olmsted ran after Schober and choked her until she passed out. He left her thinking she was dead, but Schober survived.

[1] The sentence was imposed by Judge John B. Murphy. The postconviction motion was heard and decided by Judge Terence T. Bourke.

¶3 On March 8, 2002, Olmsted and McDaniel entered no contest pleas to the attempted first-degree homicide and substantial battery charges. The false imprisonment charge was dismissed and read-in pursuant to plea agreements. Olmsted's plea agreement required the State to cap its sentencing recommendation at thirty years, with twelve years' initial confinement and eighteen years' extended supervision.

¶4 Prior to sentencing, Olmsted moved to withdraw his plea. He alleged that McDaniel's attorney told his attorney that McDaniel was going to take the plea offer before McDaniel had in fact decided to accept the offer. Based on McDaniel's intent to enter a plea, Olmsted decided to do so as well. He claimed that in fact McDaniel accepted the plea offer only after being informed that Olmsted was taking the offer. After an evidentiary hearing, the trial court denied Olmsted's motion to withdraw his plea.

¶5 At sentencing the prosecutor recommended the agreed upon thirty-year sentence on the attempted homicide conviction. On the substantial battery conviction, the prosecutor recommended that sentence be withheld and Olmsted be placed on five years' consecutive probation.[2] Olmsted filed a postconviction motion seeking resentencing because the prosecutor violated the plea agreement in recommending consecutive probation on the substantial battery conviction. He argued that it was a recommendation for a longer period of status as a prisoner or probationer than he had bargained for. Because trial counsel did not object to the prosecutor's sentencing recommendation, Olmsted argued that trial counsel was constitutionally deficient. Trial counsel testified that she did not object because

[2] The sentence imposed was that recommended by the prosecutor.

she believed that in discussions off the record at the start of the sentencing hearing Olmsted agreed to modify the plea agreement to allow the consecutive probation recommendation. The trial court found that the plea agreement was violated but that it was not a material breach. It denied Olmsted's motion for resentencing.

¶6 To withdraw a plea before sentencing a defendant must show that there is a fair and just reason for doing so. ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999).

> As for the practical application of the test, this court has held that a "'fair and just reason'" contemplates the "'mere showing of some adequate reason for defendant's change of heart.'" Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the circuit court. A circuit court's decision with respect to this discretionary ruling will not be upset on review unless it was erroneously exercised. A reviewing court will uphold a discretionary decision on appeal if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts.

Id. at 284 (citations omitted).

¶7 Olmsted's reason for withdrawing his plea was that he was misled to believe that McDaniel had accepted the plea offer. Even if it is true that McDaniel's counsel conveyed the acceptance before McDaniel had actually decided, it makes no difference. It was Olmsted's intent to take the plea agreement if McDaniel did. McDaniel entered her no contest plea before Olmsted, and Olmsted watched her do it during the joint plea hearing. The timing of when McDaniel decided to take the plea offer is of no consequence to Olmsted's plea

when in fact he knew she had entered her plea before him.[3] The trial court did not erroneously exercise its discretion in determining that Olmsted had not demonstrated an adequate reason for withdrawing his plea.

¶8 A claim of ineffective assistance of counsel requires proof of both deficient performance by counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984). If counsel's performance was deficient for failing to object to a material and substantial breach of the plea agreement, prejudice will be presumed. ***State v. Howard***, 2001 WI App 137, ¶¶25-26, 246 Wis. 2d 475, 630 N.W.2d 244.

¶9 The State concedes that trial counsel did not have a strategy reason for not objecting to the prosecutor's breach of the plea agreement. Counsel testified that she believed Olmsted agreed to modify the plea agreement to include a recommendation for consecutive probation on the substantial battery conviction as long as it did not result in more "in" time. Counsel also explained that the modification was proposed as a benefit to Olmsted in terms of the availability of programming in prison if he was only serving one prison term rather than two. In fact, the modification conferred no benefit. Counsel also failed to object because she did not think it was possible to object during sentencing and that the only recourse was to file a postconviction motion to enforce the plea. She was not aware that the failure to object would waive Olmsted's right to directly challenge the alleged breach of the plea agreement. *See* ***Grant v. State***, 73 Wis. 2d 441, 447, 243 N.W.2d 186 (1976). We agree with the State's concession that the record

[3] Olmsted's claim is more that McDaniel was manipulated into taking the plea agreement by "a calculated deception by [McDaniel's attorney] of his own client." Olmsted lacks standing to challenge McDaniel's plea.

establishes that trial counsel performed deficiently with respect to the breach of the plea agreement.

¶10 The plea agreement required the prosecution to cap its recommendation at thirty years. It was an agreement to recommend concurrent sentences. "[W]here a plea agreement undisputedly indicates that a recommendation is to be for concurrent sentences, an undisputed recommendation of consecutive sentences that is not corrected at the sentencing hearing constitutes a material and substantial breach of the plea agreement as a matter of law." ***Howard***, 246 Wis. 2d 475, ¶19.

¶11 Olmsted was denied the effective assistance of counsel at sentencing. On appeal Olmsted argues that the case should be remanded for the sentencing court to determine the appropriate remedy for the breach of the plea agreement. *See* ***id.***, ¶36. Olmsted's postconviction motion asked for resentencing. Specific performance of the plea agreement by resentencing is the preferred remedy. ***Id.***, ¶37. Since this court makes the determination that Olmsted should be afforded relief, we remand for resentencing by a different sentencing judge. ***Id.***, n.9.

By the Court.—Judgment affirmed in part and reversed in part, order reversed, and cause remanded with directions.

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