

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 16, 2007**

David R. Schanker  
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 Nos. 2006AP256-CR  
2006AP257-CR  
2006AP258-CR  
2006AP259-CR**

**Cir. Ct. Nos. 2003CF43  
2004CF4  
2004CF5  
2004CF6**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALAN R. WARD,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Alan Ward, *pro se*, appeals judgments convicting him of two counts of felony theft by contractor and three counts of felony bail

jumping. He also appeals an order denying his motion for postconviction relief. Ward argues that: (1) the State breached the plea agreement because the prosecutor stated to the court that Ward was going to plead guilty to a Class D felony, but he pled guilty to a Class C felony; (2) the plea agreement was breached because no restitution hearing was held; (3) the victims exaggerated their damages, resulting in a flawed restitution order; (4) he received ineffective assistance of counsel; (5) there was judicial misconduct; and (6) the prosecutor violated due process by requesting restitution for cases in which the victims had obtained civil judgments. We affirm.

¶2 Ward first argues that the State breached the plea agreement. “A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement.” *State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. “Whether the State’s conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo.” *State v. Naydihor*, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. “A breach is material and substantial when it ‘defeats the benefit for which the accused bargained.’” *Id.* (citation omitted).

¶3 Ward’s claim that the State breached the plea agreement is based on the fact that the prosecutor incorrectly told the court that Ward was going to plead guilty to a Class D felony, when he actually pled guilty to a Class C felony. The prosecutor’s comment was nothing more than an obvious misstatement, not a breach of the plea agreement. Even if we considered it to be a minor technical breach of the agreement, it was not a substantial material breach because the prosecutor properly recited the crime and penalties, as did the circuit court during the plea colloquy. Since Ward knew what the crime and penalties were—accurate

felony classification aside—and entered his plea accordingly, he got what he bargained for; that is, he entered his plea to felony theft by contractor and, in return, the prosecutor dismissed other charges against him. We reject Ward’s assertions.

¶4 Ward next argues that the State breached the plea agreement because no restitution hearing was held. According to the plea agreement, Ward’s attorney was supposed to notify the court and the State what restitution claims Ward was contesting within two weeks of the plea hearing so that a restitution hearing could be held regarding those claims. No hearing was held because Ward absented himself from proceedings. Even so, Ward was afforded an opportunity to have a restitution hearing, which is what he bargained for, even though he did not avail himself of that opportunity. Therefore, we reject this claim.

¶5 Ward next argues that the victims exaggerated their damages, resulting in a flawed restitution order. Restitution is allowed for “any victim of a crime considered at sentencing.” WIS. STAT. § 973.20(1r) (2005-06).<sup>1</sup> Ward was given an opportunity to contest specific amounts listed in the restitution proposed by the State, but he did not do so, despite being told that the amount would be ordered as restitution if he did not request a hearing within thirty days. We reject this claim.

¶6 Ward next argues that he received ineffective assistance of counsel. To substantiate a claim of ineffective assistance of trial counsel, a defendant must

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ward contends that his two trial attorneys, Roger Klopp and Gerald Opgenorth, provided ineffective assistance of counsel because they failed to request a restitution hearing. We reject this claim because, among other things, Ward did not adequately plead it in his postconviction motion. See *State v. Bentley*, 201 Wis. 2d 303, 310-11, 318, 548 N.W.2d 50 (1996).

¶7 Ward next alleges judicial misconduct. “Whether [the judge] was a neutral and detached magistrate as mandated by the United States and Wisconsin Constitutions is a question of constitutional fact that we review de novo without deference to the trial court.” *State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). “Furthermore, we note there is a presumption that a judge is free of bias and prejudice.” *Id.* “To overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence.” *Id.* at 415.

¶8 Ward contends that the judge acted improperly in referring at sentencing to the fact that Ward had torn up the PSI author's notes, an act Ward denies. We reject this claim because the judge was permitted to rely on the PSI author's statement that Ward tore up his notes. Ward also claims that the judge improperly sat on civil small claims cases between Ward and some of the victims. We reject this claim because the fact that the circuit court judge presided in other cases involving Ward, as judges often do, does not in any way suggest that the judge was not capable of acting in an impartial manner.

¶9 Finally, Ward argues that the prosecutor improperly sought restitution in cases where his victims had obtained civil judgments against him. The statutes are designed “to make victims whole without allowing them to receive double recoveries.” *Huml v. Vlazny*, 2006 WI 87, ¶22, 293 Wis. 2d 169, 716 N.W.2d 807. Ward may prove that his victims have already recovered their damages from him pursuant to their civil judgments against him before his restitution order is reduced by the court to a civil judgment. *See* WIS. STAT. § 973.09(3)(b). Conversely, any restitution payments Ward makes will be set off against civil action judgments “arising out of the facts or events which were the basis for the restitution.” WIS. STAT. § 973.20(8). We reject this claim.

*By the Court.*—Judgments and order affirmed.

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

