COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1902-CR **Cir. Ct. No. 2004CF1350**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO B. CORONADO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roberto Coronado appeals a judgment resentencing him and an order denying his motion for postconviction relief. He argues: (1) that the prosecutor breached the plea agreement; and (2) that the circuit court lacked authority to order restitution. We conclude that the prosecutor

did not breach the plea agreement and that the circuit court had the authority to order restitution. We affirm.

¶2 Roberto Coronado entered pleas of no contest to several charges pursuant to a plea agreement in which the State promised that it would not make a "specific sentencing recommendation at the time of the sentencing hearing." On Count 3, the charge pertinent to this appeal, Coronado received a sentence of eight years of imprisonment, with three years of initial confinement and five years of extended supervision, to be served consecutively. After sentencing, the Department of Corrections notified the circuit court that the charge was not subject to the new truth-in-sentencing laws, but rather was subject to the indeterminate sentencing laws that existed prior to enactment of truth-in-sentencing. A resentencing hearing was held to correct this error. Prior to the hearing, the prosecutor sent a letter to the court suggesting that it impose a twelve-year consecutive sentence on the charge. The circuit court imposed a consecutive twelve-year sentence.

¶3 Where, as here, the facts are undisputed, whether the State's conduct constituted a material and substantial breach of a plea agreement is a question of law. ***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).

¶4 Coronado contends that the prosecutor violated the plea agreement by recommending a twelve-year sentence. This, according to Coronado, violated the agreement that the prosecutor not make a recommendation, and the violation was particularly egregious because the recommendation was for a longer sentence than Coronado had previously received. The prosecutor's letter said:

> I will not make a sentencing recommendation on the resentencing on count three, pursuant to the settlement agreement in this case. As an officer of the court I suggest for the court's consideration, should the court wish to impose a sentence on resentencing that advances the intent of the court at the time of the sentencing on August 5, 2005, the court could impose a sentence of 12 years, consecutive to count one. The defendant would be parole eligible after serving 36 months, the length of actual confinement ordered by the court when it imposed the original sentence.

¶5 We conclude that this letter did not constitute a material and substantial breach of the plea agreement. Based on the assumption that the circuit court on resentencing would want to impose a sentence that was consistent with the goals of the sentence that was originally imposed, the prosecutor suggested what he believed to be an equivalent sentence. The prosecutor was not advocating for a particular sentence, and expressly stated both in his letter and at the sentencing hearing that he was not making a sentencing recommendation.[1] We think it apparent that the primary goal of the court at the original sentencing was that Coronado serve at least three years in prison. This is apparent because the court imposed three years of initial incarceration under the belief that truth-in-sentencing applied. It follows that the prosecutor's suggestion that the court impose a twelve-year indeterminate sentence, which would make Coronado eligible for parole in three years, was intended to assist the court in imposing a sentence that achieved the primary goal of the first illegal sentence. This is true even though the recommendation significantly extended Coronado's total prison

[1] There is no sentence that would be fully equivalent under both the truth-in-sentencing and the indeterminate sentencing laws because a defendant could become eligible for parole under the indeterminate sentencing laws but not be granted parole for an extended period of time. In that sense, the twelve-year sentence is potentially much harsher.

exposure.[2] We conclude that the prosecutor's comments were merely directed at assisting the court in achieving a comparable sentence on resentencing. Under the unusual circumstances of this case, we conclude that the prosecutor did not violate the agreement not to recommend a particular sentence.

¶6 Coronado next argues that the circuit court did not have authority to order restitution at the resentencing hearing. At the first sentencing hearing held in August 2005, the circuit court did not address the issue of restitution, apparently because the prosecutor informed the court that the victims and their families did not seek financial compensation from the defendant in response to the defendant's sentencing statements that he wanted to contribute financially to the victims' recovery efforts. About three months later, the State asked the court to hold a restitution hearing. Coronado objected because no restitution had been imposed at the first sentencing. The circuit court concluded that it had overlooked the issue of restitution at the first sentencing hearing and that restitution should have been ordered by statute. *See* WIS. STAT. § 973.20(1r) (2005-06).[3] Consequently, the court ordered Coronado to make $544.50 in restitution payments.

¶7 Coronado argues that the circuit court should not have ordered restitution at resentencing because the original sentencing resulted in a final judgment as to restitution that could not later be amended. He contends that the

[2] The circuit court stated at the resentencing hearing that it was already aware of the different sentencing laws and their effects before it received the prosecutor's letter. The court also stated that the prosecutor's letter was nothing more than "a statement of fact regarding how parole functions compared to how [truth-in-sentencing] functions."

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

circuit court erred in relying on ***State v. Borst***, 181 Wis. 2d 118, 510 N.W.2d 739 (Ct. App. 1993), when it imposed the restitution.

¶8 We conclude that the circuit court properly ordered restitution under ***Borst***. In ***Borst***, we held that WIS. STAT. § 973.20(1) (1991-92)[4] imposed on the circuit court "a mandatory duty … to provide for restitution" and that "[t]he original sentence was unlawful, in the sense that the court failed in its mandatory duty to order restitution or to give its reasons on the record for not doing so." ***Borst***, 181 Wis. 2d at 122, 123. Here, the circuit court neither ordered restitution nor gave its reasons on the record for not doing so at the original sentencing. In fact, the court did not address the issue of restitution at all. Though Coronado claims that we should infer from this silence that the court made an affirmative decision not to order restitution, the court itself explained that its failure to take up restitution at the first sentencing was an oversight and was not an intentional decision to not order restitution. Under these circumstances, the circuit court not only had the authority, but also had a duty, to consider the issue of restitution under WIS. STAT. § 973.20(1r).

By the Court.—Judgment and order affirmed.

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

[4] This statute has been renumbered as WIS. STAT. § 973.20(1r). *See* 1995 Wis. Act 141, § 2.