COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1233-CR **Cir. Ct. No. 2009CF1852**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVAN J. LENSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and REBECCA F. DALLET, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Evan J. Lenski appeals from a judgment of conviction, entered upon his guilty plea, on one count of endangering safety by

use of a dangerous weapon, contrary to WIS. STAT. § 941.20(2)(a) (2009-10).[1] Lenski also appeals from an order denying his postconviction motion for resentencing.[2] Lenski contends that the State breached the plea agreement to stand silent on the length of his sentence when it referred to his co-defendant's sentence. We reject Lenski's argument and affirm the judgment and order.

¶2 A complaint charged both Lenski and LaMika Evans with endangering safety, alleging that Lenski fired a gun into a home after Evans had an altercation with its occupants. Although the pair was charged as co-defendants in the same complaint, Evans' case proceeded separately; she was also convicted.

¶3 In exchange for Lenski's guilty plea, the State agreed to stand silent on the sentence length and leave the sentence up to the circuit court. At the outset of the sentencing hearing, the State properly recited the parties' agreement. The last comment the State made at the close of its sentencing remarks was, "I would tell the Court by way of reference, the co[-]defendant, Miss Evans, was sentenced by this Court to a 38-month prison sentence, bifurcated 14 months initial confinement followed by 24 months extended supervision. Thank you." Lenski did not object at that time. The circuit court sentenced him to three years' initial confinement and three years' extended supervision.

¶4 Lenski filed a postconviction motion for resentencing. He asserted that the State breached the plea agreement and that trial counsel was ineffective

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Patricia D. McMahon imposed sentence and entered the judgment of conviction. The Honorable Rebecca F. Dallet entered the order denying the postconviction motion.

for failing to object. The only basis for the alleged breach is the reference to the co-defendant's sentence. The circuit court denied the motion, ruling that the comment "does not rise to the level of a material breach" so "trial counsel was not ineffective for failing to raise an objection." Lenski appeals.

¶5 Because Lenski's trial attorney did not contemporaneously object to the State's comment at the sentencing hearing, direct review is forfeited and we must review the matter in the context of ineffective assistance of counsel. *See* ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522; ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. The well-known standard for an ineffective-assistance claim requires the defendant to show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***State v. Gordon***, 2003 WI 69, ¶22, 262 Wis. 2d 380, 663 N.W.2d 765. Thus, the threshold question is whether the State's action constituted an actionable breach of the plea agreement; if not, then trial counsel's failure to object was not deficient performance. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220.

¶6 "[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. The plea agreement has been breached when the State "does not present the negotiated sentencing recommendation to the circuit court[.]" ***Id.***, ¶38. "An actionable breach, however, 'must not be merely a technical breach; it must be a material and substantial breach.'" ***Duckett***, 324 Wis. 2d 244, ¶8 (quoting ***Williams***, 249 Wis. 2d 492, ¶38). A material and substantial breach is one that defeats the benefit for which the defendant has bargained. *See* ***id.*** Whether the State's conduct constitutes a material breach is a question of law we review *de novo*. ***Naydihor***, 270 Wis. 2d 585, ¶11.

¶7 We have no difficulty concluding that the State's comment was not a breach of the plea agreement, much less a material and substantial breach. The State "'may not render less than a neutral recitation of the terms of the plea agreement.'" ***Williams***, 249 Wis. 2d 492, ¶42 (citation omitted). However, the State also has a duty, which it cannot bargain away, to give the sentencing court relevant sentencing information. *See* ***id.***, ¶43; *see also* ***Duckett***, 324 Wis. 2d 244, ¶9. The sentence of a similarly situated co-defendant is relevant information. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995).

¶8 Here, the State properly set out the terms of the plea agreement at the beginning of the sentencing hearing. It recited various factors it wanted the court to consider while making no recommendation as to length. The State then asked the court "to consider all those things when imposing a sentence." After that request, then, and only then, did the State offer the co-defendant's sentence "by way of reference."

¶9 Unlike ***Williams***, where the State "covertly implied to the sentencing court that the additional information available from the presentence investigation … raised doubts regarding the wisdom of the terms of the plea agreement[,]" *see* ***id.***, 249 Wis. 2d 492, ¶50, the State's comment here was no such folly. Offering the co-defendant's sentence as reference after asking the circuit court to consider other factors was nothing more than the State "giving the background information that [it] was duty-bound to provide[.]" *See* ***Duckett***, 324 Wis. 2d 244, ¶10.

By the Court.—Judgment and order affirmed.

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