COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-0657-CR
00-0658-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES F. EMERICH,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Jackson County: DANE F. MOREY, Judge. *Affirmed.*

Before Eich, Roggensack and Dillon, JJ.[1]

[1] Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. James Emerich appeals judgments convicting him of two counts of delivery of a controlled substance and sentencing him to concurrent three-year prison terms. He claims the prosecutor breached the plea agreement when she qualified the State's recommendation for probation with a statement that she had not known at the time the plea agreement was made that Emerich had other charges pending against him. We affirm on the grounds of waiver.

¶2 Emerich was charged with multiple counts of delivering valium and THC within 1,000 feet of a school. In exchange for Emerich's promise to plead guilty to two of the counts, to obtain drug and alcohol treatment, and to pay restitution and other fees, the State agreed to dismiss the penalty enhancer and other charges and to recommend probation. Emerich entered his pleas, and the State ultimately dismissed the other charges and recommended probation. However, the prosecutor also told the court:

> Just for the record, [the plea agreement] was made not knowing about the Wood County possession of THC charge, which doesn't show up on his criminal record, or the pending charge of possession as a habitual offender in Racine County. That, also, doesn't show up.

The court then asked whether the prosecutor felt honor bound to stick with the plea agreement, and she replied:

> I feel I do, Your Honor, even though I indicated that there was information contained in the Pre-sentence of those other charges that we weren't aware of.
>
> However, after reading my letter, it didn't specifically say that our recommendation was based on not knowing or having new information come out. And I feel, if I don't follow the plea agreement, they may have a reason to appeal at a later time.

¶3 Emerich was afforded an opportunity to address the trial court after the State had made its recommendation and made no objection to the prosecutor's statement. The trial court proceeded to sentence Emerich to prison rather than following the probation recommendation.

¶4 This court has consistently applied the contemporaneous objection rule to alleged breaches of plea agreements. As we recently reiterated, "a defendant waives the right to object to an alleged breach of a plea agreement when he or she fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant." ***State v. Merryfield***, 229 Wis. 2d 52, 64-65, 598 N.W.2d 251 (Ct. App. 1999) (citation omitted). The contemporaneous objection rule prevents a defendant who has decided to pursue a plea strategy — notwithstanding knowledge of an arguable basis for withdrawing the plea — from selectively attempting to use the alleged error to obtain a new sentence if the initial sentence turns out to be unfavorable. *See* ***State v. Boshcka***, 178 Wis. 2d 628, 643, 496 N.W.2d 627 (Ct. App. 1992); ***Farrar v. State***, 52 Wis. 2d 651, 660, 191 N.W.2d 214 (1971).

¶5 Emerich cites ***State v. Smith***, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), to support his argument that we should review the prosecutor's alleged breach regardless of his failure to object. His reliance on ***Smith*** is misplaced, however. It is true that defense counsel in ***Smith*** offered no objection when the prosecutor recommended a substantial prison sentence after agreeing to make no sentence recommendation. However, Smith proceeded to challenge his attorney's omission by alleging ineffective assistance of counsel in a postconviction hearing. The State conceded in that case that the prosecutor's recommendation materially breached the plea agreement and that counsel's performance was deficient, and the

supreme court ruled that prejudice could be assumed from a material breach of the plea agreement.

¶6 Here, the State has not conceded that the prosecutor's statement constituted a material breach; it instead argued that no more than a neutral recitation of the plea agreement was required. Moreover, even if we were to decide as a matter of law that the prosecutor's statement constituted a breach, we could not determine whether counsel's failure to object constituted a strategic decision or deficient performance without a hearing or a concession such as that made in ***Smith***. It is the defendant's burden to secure counsel's testimony at a postconviction hearing when alleging ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Emerich has not done so here. Thus, Emerich has preserved neither the issue of whether the plea agreement was breached nor the question of whether counsel was ineffective.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (1997-98).