COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP979-CR **Cir. Ct. No. 2008CF4214**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO E. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Mario E. Smith appeals from a judgment of conviction entered upon his guilty plea to leaving the scene of a motor vehicle accident resulting in death. He also appeals from an order denying his motion for postconviction relief. Smith contends that the State breached the parties' plea

bargain and that his trial lawyer was ineffective by failing to object. Because we conclude that the State did not breach the plea bargain, we affirm.

I.

¶2 On August 10, 2008, Smith drove a Buick LeSabre into the intersection of 35th and Locust Streets in Milwaukee, Wisconsin, and collided with a car driven by Leslie Stamps. Stamps suffered great bodily injury and his passenger, Ernest Liddell, was killed. Smith abandoned the Buick and left the scene of the accident before the police arrived. Fingerprints and documents that police found in the Buick, however, eventually led to Smith's arrest on August 20, 2008. Police interviewed Smith, and he said that he had been playing "a drinking game" at a party shortly before he drove into the intersection, that he drank "several shots of Gin, Vodka and E & J Brandy, and that he might have been drunk at the time of this accident." The State determined that it would not be able to prove at trial that he drove drunk, and the State charged him with one count of leaving the scene of an accident resulting in death and one count of leaving the scene of an accident resulting in great bodily harm.

¶3 Smith resolved the charges with a plea bargain. He agreed to plead guilty to leaving the scene of an accident resulting in death, which exposed him to maximum penalties of twenty-five years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 346.67(1), 346.74(5)(d). The State agreed to recommend a six-year term of imprisonment, bifurcated as three years of initial confinement and three years of extended supervision. Smith could argue for a different sentence, and the parties acknowledged that Liddell's family members were also free to recommend any sentence that they felt was appropriate. Finally, the State agreed

to move to dismiss and read in the charge of leaving the scene of an accident resulting in great bodily harm.

¶4 After pleading guilty, Smith met with a presentence investigator. He reported that he could not recall exactly how much alcohol he consumed while at a party before the accident on August 10, 2008, but he "indicated that he was in agreement with all of the information contained in the criminal complaint." He also admitted drinking "a pint of alcohol" before he arrived at the party. He told the presentence investigator that he "drove drunk" that night.

¶5 At sentencing, the prosecutor made the promised recommendation of a six-year sentence bifurcated as three years each of initial confinement and extended supervision. During his sentencing remarks, the prosecutor expressed frustration that he could not prove a charge involving intoxicated driving even though Smith admitted to the presentence investigator "that he was driving drunk," and his admission appears "in black and white" in the presentence investigation report. Stating that Smith's admission "leads now to the fact of whether or not [Smith] had been drinking at the time of the offense," the prosecutor told the circuit court that "if the evidence [of intoxicated driving] could have been shown," Smith "should have" faced a more serious charge. The prosecutor noted that Smith admitted when arrested that he had been drinking on the night of the accident. The prosecutor then reviewed the additional information that Smith gave to the presentence investigator about the quantity of alcohol he had consumed, but, the prosecutor explained: "I have no way of proving that [Smith] was under the influence at the time ... or that he had a prohibited [B]lood [A]lcohol [C]ontent because we didn't have those test results at the time of this accident." The prosecutor added that his frustration with his inability to pursue a charge involving

intoxicated driving "certainly pales" in comparison to the frustration felt by Liddell's family regarding the charging decision.

¶6 Members of Liddell's family spoke at sentencing and variously asked the circuit court to sentence Smith to "more than six years," "at least fifteen years," and "twenty-five years" in prison. Smith asked the circuit court to impose no more than the six-year sentence recommended by the prosecutor and to consider a time-served disposition of nine months in jail. The circuit court imposed a fourteen-year sentence, bifurcated as eight years of initial confinement and six years of extended supervision.

¶7 Smith moved for postconviction relief, alleging that the prosecutor breached the plea bargain. Smith acknowledged that the prosecutor recommended the six-year prison sentence promised, but Smith claimed that the prosecutor improperly undermined the recommendation "by repeatedly complaining that Smith should be facing the penalty for the more serious offense of homicide by intoxicated use of a motor vehicle." Smith further claimed that his trial lawyer performed ineffectively by failing to object to the alleged breach. The circuit court rejected Smith's arguments, and he appeals.[1]

II.

¶8 Although Smith contends that the State breached the plea bargain, he recognizes that he forfeited the right to raise that claim directly because his trial lawyer did not object to the prosecutor's remarks during the sentencing hearing.

[1] On appeal, Smith expressly abandons a challenge to the circuit court's exercise of sentencing discretion that he raised in his postconviction motion.

See ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 248, 781 N.W.2d 522, 524. Therefore, he presents his claim on appeal under the rubric of ineffective assistance of counsel. *See* ***id.***, 2010 WI App 44, ¶6, 324 Wis. 2d at 249, 781 N.W.2d at 524.

¶9 We assess ineffective assistance of counsel claims using the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test requires a defendant to prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. ***Ibid.*** To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that "were outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. ***Id.*** at 697.

¶10 We begin our analysis by considering whether the prosecutor breached the plea bargain. If the prosecutor did not breach the plea bargain, Smith's trial lawyer was not constitutionally deficient in not objecting to the prosecutor's sentencing remarks. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 594, 678 N.W.2d 220, 225.

¶11 "The determination of law whether a breach occurred and whether the breach was substantial and material requires a careful examination of the facts." ***State v. Williams***, 2002 WI 1, ¶53, 249 Wis. 2d 492, 523, 637 N.W.2d 733, 747. Further, we must consider the prosecutor's remarks in the context of the sentencing proceeding in its entirety. *See* ***id.***, 2002 WI 1, ¶46, 249 Wis. 2d at 520, 637 N.W.2d at 745–746.

¶12 In this case, the prosecutor made the promised recommendation. Smith argues on appeal that the prosecutor nonetheless committed a breach by implying that: (1) Smith withheld evidence until after his guilty plea, thus preventing the prosecutor from charging Smith with homicide by intoxicated use of a motor vehicle; and (2) the prosecutor would have pursued that charge if Smith had been as forthright about his drinking at the time of his arrest as he was during the presentence investigation. Smith also argues that the prosecutor undercut the recommendation by dwelling excessively on his frustration that he could not charge Smith with a more serious crime than leaving the scene of an accident. We disagree with Smith's characterization of the prosecutor's remarks.

¶13 The prosecutor explained that the charging decision turned on his assessment of the evidence. Members of the victim's family attended the sentencing proceeding. The prosecutor acknowledged their frustration with the charging decision, and the prosecutor discussed his own frustration with that decision and the "troubling" problem of explaining to the family "what [he] could and what [he] could not charge." The prosecutor never wavered, however, in his position that he "could not legally prove" Smith's intoxicated driving and therefore could not properly charge Smith with an offense requiring such proof.

¶14 Indisputably, the prosecutor emphasized Smith's admission to the presentence investigator that he "drove drunk." The prosecutor also highlighted information that Smith first disclosed to the presentence investigator about the extent of his alcohol consumption before he went to a party and played a drinking game. The prosecutor did not breach the plea bargain by doing so. The State may provide the sentencing court with negative information about a defendant that came to light after the parties made a plea bargain. ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 74, 686 N.W.2d 689, 694.

¶15 Moreover, the prosecutor's sentencing remarks constituted a more balanced presentation than a mere recitation of negative information about Smith. The prosecutor reminded the circuit court that Smith "wasn't out driving trying to harm Leslie Stamps and trying to kill Ernest Liddell.... I certainly believe and would state that Mr. Smith never intended to kill" Liddell. The prosecutor also acknowledged information suggesting that Stamps drove his car into the intersection against the light. Perhaps most importantly, the prosecutor explained at some length a key weakness in the State's case, namely, that Smith hit his head with such force during the collision as to raise a question about his responsibility for the actions that he took immediately afterwards. The prosecutor acknowledged that Smith "[c]ertainly was injured by the accident himself, and he could have probably pursued that type of defense. So I give Smith credit that rather than push this case to trial, he did resolve it." Thus, the prosecutor squarely placed before the circuit court his reasons for recommending a relatively modest sentence of less than one-quarter of the available prison time in a case involving both the death of one person and great bodily harm to another.

¶16 As the State aptly points out, however, the prosecutor was entitled to explain why his recommendation was not only the harshest appropriate penalty but also the most lenient sentence warranted. *See* ***State v. Hanson***, 2000 WI App 10, ¶¶27–28, 232 Wis. 2d 291, 302, 606 N.W.2d 278, 283. Notwithstanding the mitigating factors and the weaknesses identified in the State's case, the prosecutor wanted the circuit court to understand why he believed that "Smith needs to go to prison." The prosecutor was entitled to offer information that would convince the circuit court to impose the prison sentence he recommended rather than the time-served disposition that Smith proposed. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 241, 244 (Ct. App. 1991).

¶17 Accordingly, the prosecutor reviewed both Smith's reckless driving on the night of the accident and Smith's history of antisocial conduct. "At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot 'be immunized by a plea agreement between the defendant and the [S]tate.' A plea agreement which does not allow the sentencing court to be apprised of relevant information is void as against public policy." ***Ibid.*** (citation omitted, brackets added). The prosecutor discussed reports that Smith was weaving in and out of traffic and that he entered the intersection of 35th and Locust Streets at more than twice the legal speed limit of thirty miles an hour. The prosecutor reminded the circuit court that Smith had a prior conviction for fleeing and that Smith's previous term of extended supervision was revoked. Smith's history of involvement with illegal drugs also concerned the prosecutor, particularly because Smith admitted that he sold cocaine for "three or four years." Within this context, the prosecutor told the circuit court that he believed "prison is appropriate because ... when you drive drunk—by [Smith's] own words—I think you need to suffer the consequences. It may have been something I could not prove as a charge but certainly it's something before this court to consider." The prosecutor concluded by asking the circuit court to impose the recommended sentence of three years of confinement and three years of extended supervision.

¶18 In sum, the prosecutor explained that Smith's admissions were insufficient to allow the State to prove intoxicated driving, although the prosecutor would have charged Smith with an offense involving intoxicated driving if the prosecutor could have proved such a charge. The prosecutor acknowledged his frustration with the limits imposed on him by the available evidence, and the prosecutor further acknowledged the greater frustration with the charging decision felt by Liddell's family. The prosecutor then recommended the promised six-year

term of imprisonment in light of the totality of the circumstances, including the facts that could be proved, the admissions that Smith made, the recklessness of his behavior, his criminal history, and the strength of his potential defense. The prosecutor did not breach the plea bargain.

By the Court.—Judgment and order affirmed.

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