COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP375-CR **Cir. Ct. No. 2009CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVON G. ECHOLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Javon Echols appeals a judgment of conviction and an order denying his motion for postconviction relief. Echols argues the State breached the plea agreement during the sentencing hearing by arguing for a harsher sentence than it agreed to recommend. Echols also contends his trial

attorney was ineffective by failing to object to the State's sentencing remarks. We reject Echols' arguments and affirm.

BACKGROUND

¶2 According to a criminal complaint, Echols was the driver of a car used in a controlled drug buy organized by the Lake Winnebago Area Metropolitan Enforcement Group's drug unit. The initial target of the drug investigation was Elizabeth Gertz.[1] On February 19, 2009, undercover police officer Mike Wissink and a confidential informant arranged to meet Gertz in the parking lot of a Perkins restaurant in Grand Chute to purchase crack cocaine. Shortly after Wissink and the confidential informant arrived at the Perkins parking lot, a white car with a male driver and a female passenger parked nearby. The female, whom police identified as Gertz, exited the white car, got into the back seat of Wissink's vehicle, and gave Wissink three baggies of crack cocaine in exchange for $150.

¶3 After Gertz exited Wissink's vehicle, Wissink gave other on-scene police officers the signal to arrest her. At that point, a police car pulled up behind the white car to prevent it from driving away. The white car backed up anyway, though, striking the police car and pushing it out of the way. On its way out of the parking lot, the white car struck two other parked vehicles. One police officer had to jump out of the way to avoid being hit. The complaint alleges the white car was "being driven without any regard for individuals' safety …." After the white car left the Perkins parking lot, a chase ensued onto College Avenue in Appleton.

[1] Throughout the record, Elizabeth Gertz's last name is spelled both "Gertz" and "Geurtz." For consistency, we use "Gertz" throughout this opinion.

Police were unable to apprehend the white car at that time, but later that day they identified Echols as the driver of the white car and arrested him.

¶4 Echols was charged with first-degree reckless endangerment; delivery of cocaine, as party to a crime; attempting to flee or elude a traffic officer; three counts of misdemeanor bail jumping; and five counts of criminal damage to property. Echols pled no contest to the reckless endangerment charge, the drug delivery charge, the eluding charge, and the criminal damage to property charges. In exchange for his no contest pleas, the bail jumping charges were dismissed. The State agreed to recommend concurrent sentences of two years' initial confinement and three years' extended supervision on the reckless endangerment and drug delivery charges. The State also agreed to recommend that the court withhold sentence on the other charges and impose three years' probation, consecutive to Echols' prison sentence.

¶5 A presentence investigation (PSI) was ordered, which recommended concurrent sentences of five to seven-and-one-half years' initial confinement and three to four years' extended supervision on the reckless endangerment and drug delivery charges, consecutive to a three-year probation term on the other charges. Echols told the PSI author that he had driven Gertz to Perkins on February 19 so that she could collect some money from one of her prostitution customers. Echols stated that, after Gertz returned to his car, he "saw a man wearing a hoodie and a skull cap, who had a gun." Echols believed he was being robbed and "took off." Echols stated the officers in the Perkins parking lot never identified themselves as police.

¶6 At sentencing, the State began by reciting the terms of the plea agreement, stating:

> Your Honor, the agreement that exists between the parties today requires that I ask you to impose a prison sentence a total of five years for Count[s] 1 and 3, two years initial confinement, three years extended supervision on each, concurrent to each other, and a consecutive term of three years of probation on Counts 5, [and] 7 through 11[.]

The State then stated, "Here's why[,]" and went on to make its sentencing argument.

¶7 Specifically, the State emphasized that Echols had "a juvenile history of violence" and "periods of incarceration in the state of Illinois." The State argued that Echols had exhibited predatory behavior "for more than a decade[,]" up until his arrest on February 19, 2009. The State told the court that Echols was "a predator" and had taken advantage of Gertz, who was really "a victim as well as a perpetrator in this process."

¶8 The State conceded that, to some extent, Echols should be given credit for pleading no contest. However, the State then argued that the version of events Echols had relayed to the PSI author contradicted his no contest plea and was not credible:

> [T]o say what he said in this presentence interview belies the real intent of his actions. He tried to strike as good a deal as he could, that's not improper, but then feigns innocence. I don't believe him. I don't believe him because the facts are inconsistent. I don't believe him because I know [Ms. Gertz.]

¶9 The State next argued that Echols was "[d]angerous to the community[,]" stating, "This is only the second time in my 14 years as a prosecutor for the state of Wisconsin and drug related cases that we've had this level of violence." Therefore, the State argued:

> Prison is necessary. There are a multitude of reasons for considering that as the appropriate sentence as to the more serious charges that are here today.
>
> As indicated, a need to protect the community. There hasn't been any violence emanating from Mr. Echols, there hasn't been any predatory behavior emanating from Mr. Echols since he's been in custody. So be it. If that's what's necessary at this stage in his life to protect the Elizabeth [Gertz] of our community, then that's what needs to be done and that's what I'm asking for you to do today.

¶10 During its sentencing argument, the State also noted that Echols was entitled to 320 days of sentence credit. Echols' trial attorney did not object to any of the State's sentencing remarks. During his own sentencing argument, Echols' counsel joined in the State's sentence recommendation.

¶11 The circuit court did not follow the joint recommendation. Instead, the court imposed concurrent sentences of seven years' initial confinement and four years' extended supervision on the reckless endangerment and drug delivery charges. On the other counts, the court withheld sentence and placed Echols on probation for three years, consecutive to any other sentence.

¶12 Echols moved for postconviction relief, arguing that the State's sentencing remarks breached the plea agreement and that his trial attorney was ineffective by failing to object. The circuit court held a hearing on Echols' motion and determined the State had not breached the plea agreement. Accordingly, the court did not consider whether Echols' trial attorney was ineffective by failing to object to the breach.

DISCUSSION

I. Breach of the plea agreement

¶13 A defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). A defendant who alleges the State has breached a plea agreement must show, by clear and convincing evidence, that a breach occurred and that the breach was material and substantial. ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. A breach is material and substantial if it "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." ***State v. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. Because the facts of this case are undisputed, whether the State materially and substantially breached the plea agreement is a question of law that we review independently. *See* ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

¶14 Echols does not argue that the State failed to make the sentence recommendation required by the plea agreement. Instead, he contends that the State's sentencing argument undermined the State's recommendation by implying that Echols deserved a harsher sentence. A prosecutor need not enthusiastically recommend a plea agreement, but he or she "may not render less than a neutral recitation" of the plea agreement's terms. ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986). In other words, "the State may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278.

¶15 Echols argues that the State breached the plea agreement by stating that: (1) Echols was a predator with a history of violent behavior; (2) Echols had feigned innocence when speaking to the PSI author; (3) Echols' crimes were particularly violent; (4) prison time was necessary to protect the public from Echols; and (5) the community had been protected from Echols' predatory behavior while Echols was in custody. We do not agree with Echols that these comments constitute a material and substantial breach of the State's agreement to recommend two years' initial confinement and three years' extended supervision, followed by a three-year probation term.

¶16 We have previously explained:

> Plea agreements in which a prosecutor agrees to cap his or her sentencing recommendation and hopes the court will impose the full recommendation "represent a fine line for the State to walk." When making sentencing arguments in these situations, nothing prevents prosecutors from supplying information that supports a harsher sentence than the one recommended by the prosecutor.

State v. Liukonen, 2004 WI App 157, ¶10, 276 Wis. 2d 64, 686 N.W.2d 689 (citation omitted). Moreover, a plea agreement may not

> prohibit the state from informing the trial court of aggravating sentencing factors …. 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 state." A plea agreement which does not allow the sentencing court to be appraised of relevant information is void against public policy.

State v. Ferguson, 166 Wis. 2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991) (citations omitted).

¶17 In ***Liukonen***, we stated that "nothing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such

characterizations, *viewed in isolation*, might appear inconsistent with the agreed-on sentencing recommendation." ***Liukonen***, 276 Wis. 2d 64, ¶10. Accordingly, "[p]rosecutors may provide negative information and, in particular, may provide negative information that has come to light after a plea agreement has been reached." ***Id.***, ¶11. However, the line is crossed when a prosecutor "make[s] comments that suggest the prosecutor now believes the disposition he or she is recommending pursuant to the agreement is insufficient." ***Id.***

¶18 The State did not cross the line in Echols' case. Although the State's sentencing remarks emphasized negative aspects of Echols' character, the State's remarks overall were consistent with its recommendation of five years' incarceration and three years' probation. At the postconviction hearing, the State explained that its sentencing remarks were designed to distinguish between Echols and Gertz, who had only received probation for her role in the controlled drug buy. The State also explained:

> This is a $300 crack deal. If it had simply been a $300 crack deal, I doubt I would have been able to convince [the court] to send him to prison. My hope was that the violence that occurred with the damage to the vehicles, the high-speed chase, the accident that followed would; but even then, fleeings don't—Fleeing convictions don't automatically result in imprisonment here in this county. So while I have a combination or had a combination of convictions, neither one of them on their own necessarily end up in prison sentences. I know that. I practice here. It was necessary to emphasize the negative to justify a prison recommendation.

In light of the State's concern that the court would not sentence Echols to any prison time, the State's sentencing remarks were appropriate to justify its recommendation of two years' initial confinement and three years' extended supervision. Nothing in the State's remarks suggested that the State no longer agreed with the sentence recommendation it had agreed to make.

¶19 Echols argues this case is comparable to ***State v. Sprang***, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522. There, we held that a prosecutor's sentencing remarks violated a plea agreement by suggesting that the defendant deserved a harsher sentence than the State had agreed to recommend. ***Id.***, ¶¶2, 24. Specifically, we took issue with the prosecutor's comment that it was "'troubling' that Sprang's version of the offense in the PSI report contradicted his guilty plea." ***Id.***, ¶23. Echols compares the prosecutor's statement in ***Sprang*** to the State's statement that Echols "tried to strike as good a deal as he could … but then feign[ed] innocence[]" when speaking to the PSI author. Echols also notes that the ***Sprang*** prosecutor commented on the seriousness of Sprang's offense, ***id.***, ¶9, while here the State commented that Echols' conduct was particularly violent.

¶20 Admittedly, the State's remarks about Echols were similar to those in ***Sprang***. However, there are important differences between the two cases. Significantly, the plea agreement in ***Sprang*** required the prosecutor to recommend probation, ***id.***, ¶4, but Echols' plea agreement required the State to recommend five years' incarceration. While arguments about the seriousness of the offense and the credibility of the defendant's version of events may be inconsistent with a probation recommendation, as in ***Sprang***, they are not inconsistent with a recommendation of five years' incarceration.

¶21 Moreover, in ***Sprang***, the prosecutor made several other objectionable remarks. He noted that a sex offender evaluation had characterized the defendant as "high risk." ***Id.***, ¶23. He also stated he was "'concerned' that the PSI report and sex offender assessment did not agree with the plea agreement and made a recommendation of initial confinement in the three- to five-year range." ***Id.*** We concluded the prosecutor's comments, "including a recitation of the PSI recommendation for confinement, constituted a breach of the plea agreement by

'insinuat[ing] that [the State] was distancing itself from its recommendation,' and 'cast[ing] doubt on ... its own sentence recommendation.'" ***Id.***, ¶24 (citations omitted). Here, the State did not make any reference to the sentence recommendation from the PSI, nor did the State suggest that the PSI was inconsistent with the State's recommendation. Unlike in ***Sprang***, the State did not distance itself from or cast doubt on its own sentence recommendation.

¶22 Echols also argues that the "most salient fact in considering whether or not the [S]tate breached the plea agreement is that the [S]tate was supposed to be arguing for two years of initial [confinement] where Echols already had 320 days of sentence credit." Essentially, Echols contends the State's sentencing remarks were inappropriate because, after Echols' sentence credit was taken into account, the State only needed to convince the court to "give Echols one year and forty-five more days of incarceration."

¶23 However, as a general rule, sentence credit "should not be a factor in the exercise of sentencing discretion because such credit is a constitutional right of the defendant which exists independently of what the trial judge determines to be an appropriate punishment for a given offense." ***State v. Walker***, 117 Wis. 2d 579, 586, 345 N.W.2d 413 (1984). A sentencing court should first determine an appropriate sentence independent of any sentence credit, and only afterwards should sentence credit be applied to the sentence imposed. ***Id.***[2] Thus, Echols is

[2] There is an exception to this rule if consideration of the defendant's sentence credit is necessary to accomplish a specific incarceration goal. ***State v. Fenz***, 2002 WI App 244, ¶¶10-11, 258 Wis. 2d 281, 653 N.W.2d 280. For instance, in ***Fenz***, the sentencing court properly considered the amount of sentence credit after it determined that the defendant needed to receive institutional sex offender treatment and that completion of that program required at least six years' incarceration. ***Id.*** Echols does not argue, and the record does not indicate, that the circuit court did consider or should have considered Echols' sentence credit to accomplish a specific incarceration goal. The ***Fenz*** exception is not applicable here.

not correct that the State should have been arguing for only one year and forty-five days of initial confinement. Instead, the State correctly recommended two years' initial confinement, three years' extended supervision, and three years' probation, and its sentencing remarks were consistent with that recommendation. The State did not breach the plea agreement.

II. Ineffective assistance

¶24 Echols next contends that his trial attorney was ineffective by failing to object to the State's sentencing remarks. To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). If a defendant fails to establish one prong of the ineffective assistance test, we need not address the other. ***State v. Evans***, 187 Wis. 2d 66, 93, 522 N.W.2d 554 (Ct. App. 1994).

¶25 When a defendant alleges that his or her trial attorney was ineffective by failing to object to a breach of the plea agreement, the "threshold inquiry" is whether the State's actions actually constituted a breach. ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. If the State did not breach the plea agreement, then counsel's failure to object was not deficient performance. ***Id.*** Here, we have concluded that the State's sentencing remarks did not breach the plea agreement. Consequently, Echols' counsel did not perform deficiently by failing to object.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).