

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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.

**Appeal No. 2013AP657-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF1300

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMON G. MUELLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Damon Mueller appeals a judgment convicting him of seventh-offense operating a vehicle while intoxicated (OWI). He also appeals an order denying his postconviction motion for resentencing in which he alleged the State violated the plea agreement by recommending a consecutive sentence

and argued his trial counsel was ineffective for failing to object to the State's recommendation. We affirm the judgment and order.

¶2 The complaint charged Mueller with sixth offense OWI and operating after revocation of his driver's license. Mueller waived his right to a preliminary hearing. At the waiver hearing, his counsel stated she anticipated the State would amend the complaint to allege seventh-offense OWI. His counsel indicated the State offered a plea agreement contingent upon Mueller waiving the preliminary hearing and filing no pretrial motions. Mueller agreed to waive the preliminary hearing to preserve the State's offer. The State offered to recommend what the parties believed to be the minimum sentence for seventh-offense OWI, three years' initial confinement and three years' extended supervision. The offer did not indicate whether the recommended sentence would be concurrent or consecutive to other sentences.

¶3 The charges were amended several times before the plea hearing. The State added a penalty enhancer, alleging seventh-offense OWI with a minor child in the vehicle. It also added a charge of seventh-offense operating a vehicle with prohibited blood alcohol content with a child in the vehicle. Finally, the State added a charge of child neglect. The parties then reached an agreement that Mueller would plead no contest to OWI seventh, the child neglect charge would be dismissed and read in, and the remaining charges and the penalty enhancer would be dismissed. The State agreed to recommend three years' initial confinement and three years' extended supervision, again with no indication of whether the recommendation would be for concurrent or consecutive time. However, on the plea questionnaire and waiver of rights form, Mueller initialed his attorney's

handwritten notation describing the plea agreement, “free argue concurrent.”¹ The court accepted the no-contest plea and sentenced Mueller to three years’ initial confinement and three years’ extended supervision, consecutive to any other sentences he was then serving.

¶4 Mueller filed a postconviction motion for resentencing, claiming the State was bound to recommend a concurrent sentence under the terms of the plea agreement. At the postconviction hearing, Mueller’s trial counsel testified she discussed with Mueller before he entered the plea that the State would recommend a consecutive sentence. The court denied the motion, noting it made no sense to add the words “free argue concurrent” unless the State would be arguing for a consecutive sentence. The court found Mueller knew the State would be arguing for a consecutive sentence at the time he entered the no contest plea.

¶5 Mueller forfeited his right to direct review of the alleged breach of the plea agreement because he did not object to the prosecutor’s recommendation. *See State v. Duckett*, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522. Therefore, the issue must be reviewed under the rubric of ineffective assistance of trial counsel. *State v. Naydihor*, 2004 WI 43, ¶¶7-8, 270 Wis. 2d 585, 678 N.W.2d 220. To establish ineffective assistance of counsel, Mueller must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is not constitutionally ineffective for failing to pursue a

¹ In Mueller’s brief, counsel misquotes the hand-written notation, omitting the word “concurrent.” Inclusion of that word was the primary basis for the circuit court’s finding that Mueller knew the State would recommend a consecutive sentence. Omitting that word was an egregious omission, and had the State asked for sanctions against counsel, the request would likely have been granted.

meritless objection or motion. *State v. Maloney*, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

¶6 Whether the State breached the plea agreement is a mixed question of fact and law. The terms of the agreement and the historical and evidentiary facts surrounding the alleged breach are questions of fact to which we give deference to the circuit court. *Naydihor*, 270 Wis. 2d 585, ¶11. Whether the State’s recommendation constituted a material and substantial breach of the agreement is a question of law that we decide de novo. *Id.* The threshold inquiry is whether the State breached the plea agreement. *Id.*, ¶9. If not, Mueller’s counsel did not provide inadequate representation.

¶7 Mueller’s contention that the State was bound to recommend a concurrent sentence fails for three reasons. First, at the time Mueller waived the preliminary hearing, the State’s offer was wholly executory. See *State v. Scott*, 230 Wis. 2d 643, 652, 602 N.W.2d 296 (Ct. App. 1999). The offer was neither accepted nor finalized. Therefore, it cannot be the basis for Mueller’s claim that the State breached the agreement. Second, the State’s offer did not specify whether the recommended sentence would be concurrent or consecutive. An agreement that does not specify whether a sentence recommendation would be concurrent or consecutive is not breached by recommending a consecutive sentence.² *State v. Bowers*, 2005 WI App 72, ¶18, 280 Wis. 2d 534, 696 N.W.2d 255. The State’s offer to recommend the “mandatory minimums” does not

² Mueller cites *In re McDonald*, 170 Wis. 167, 171, 189 N.W. 1029 (1922), for the proposition that there is a presumption of concurrent sentences when the sentencing court does not specify whether a sentence is concurrent or consecutive. That rule of lenity applies to a judicial declaration, not to the State’s plea offer.

constitute an agreement to recommend concurrent minimum sentences. Third, the circumstances substantially changed after the State's initial offer and before the plea hearing. The additional charges and penalty enhancers created a new bargaining position, allowing the State to renegotiate the agreement. *See State v. Paske*, 121 Wis. 2d 471, 473-75, 360 N.W.2d 695 (Ct. App. 1984). For these reasons, the State did not violate its offer when it recommended consecutive sentences, and Mueller's attorney was not ineffective for failing to raise that meritless objection.

¶8 Mueller presented no evidence that, at the time he entered his no-contest plea, the State agreed to recommend concurrent sentences. His attorney testified she informed Mueller of the State's offer to recommend consecutive sentences. Her testimony is entirely consistent with the hand-written notation on the plea questionnaire, "free argue concurrent." A defendant who persists in entering a plea despite knowledge that the State's recommendation will not comply with a previously negotiated agreement forfeits his or her right to challenge the State's recommendation. *Farrar v. State*, 52 Wis. 2d 651, 660, 191 N.W.2d 214 (1971).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

