COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1930-CR
2013AP1931-CR
2013AP1932-CR
2013AP1933-CR

Cir. Ct. Nos. 2009CF586
2011CF1276
2011CF1291
2011CF1292

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE E. PERZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kyle Perz appeals judgments convicting him of four counts of sexual assault of a child, repeated sexual assault of a child, two counts of possession of THC and bail jumping. He also appeals an order denying his

postconviction motion in which he alleged the State violated the terms of the plea agreement by "subtly suggesting that the facts justified a longer sentence." Because Perz's trial counsel did not object to the assistant district attorney's statements, the alleged breach of the plea agreement must be reviewed under ineffective assistance of trial counsel rubric. *See* ***State v. Naydihor***, 2004 WI 43, ¶¶7-9, 270 Wis. 2d 585, 678 N.W.2d 220. To establish ineffective assistance of counsel, Perz must show deficient performance and prejudice to his defense. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). We conclude that counsel's performance was not deficient for failing to object to the prosecutor's remarks because the remarks did not violate the plea agreement.

¶2 The facts in this case are undisputed. Therefore, whether the prosecutor's remarks breached the plea agreement is a question of law that we decide without deference to the circuit court. ***Naydihor***, 270 Wis. 2d 585,¶11. The plea agreement required the State to recommend sentences totaling fifteen years' imprisonment, consisting of five years' initial confinement and ten years' extended supervision, consecutive to another sentence Perz was already serving. The assistant district attorney made that recommendation after making remarks that Perz contends suggested a longer sentence. The presentence investigation report (PSI) recommended concurrent sentences of nine to ten years' initial confinement and seven to eight years' extended supervision, consecutive to Perz's other sentence. The court imposed concurrent and consecutive sentences totaling seventeen years' initial confinement and seventeen years' extended supervision, consecutive to Perz's other sentence.

¶3 Perz first contends the State pointed out negative information from the PSI about his character, behavior patterns and the harm he caused to the victims and their families. The State is not required to make positive comments about the defendant in order to avoid breaching the plea agreement. ***State v. Wood***, 2013 WI App. 88, ¶12, 349 Wis. 2d 397, 835 N.W.2d 257. While the prosecutor may not covertly convey to the court a desire for a more severe sentence than that recommended, *see* ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733, the State may present negative information about the defendant that justifies the recommended sentence. ***Naydihor***, 270 Wis. 2d, ¶24. The prosecutor's remarks were appropriate to show why the State recommended prison rather than probation or a lesser sentence, and to justify imposing a sentence consecutive to the sentence Perz was already serving. The comments were also appropriate to support the conditions of extended supervision called for in the plea agreement. The prosecutor did not mention or subtly endorse the greater sentence recommended in the PSI.

¶4 Citing ***State v. Sprang***, 2004 WI App. 121, ¶23, 274 Wis. 2d 784, 683 N.W.2d 522, Perz also faults the prosecutor for "personalizing" the arguments by placing himself in the shoes of the victims' fathers:

> I can't think, at least if I was the father of this vulnerable population, that we have these type of girls that have reached sexual maturity but they haven't reached mentally or emotionally or in terms of their sophistication. I don't know what we can do to protect these young people from guys like that. That's why we have laws.

The language in ***Sprang*** derives from ***Williams***, 249 Wis. 2d 492, ¶48. The "personalizing" described in ***Williams*** consisted of the assistant district attorney's declaration of her personal opinion which "created the impression that the prosecutor was arguing against the negotiated terms of the plea agreement." The

court concluded the prosecutor may not "personalize the information, adopt the same negative impressions as [the author of the presentence investigation report] and then remind the court that the [author] had recommended a harsher sentence than recommended." In this case, the prosecutor's "personalization," consisting of putting himself in the victims' fathers' shoes, does not have the same meaning as the prohibited "personalization" described in ***Williams*** and ***Sprang***. Here, the prosecutor's comments were similar to those approved in ***Naydihor***, and provided no basis for Perz's counsel to object.

By the Court.—Judgments and order affirmed.

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