COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1270-CR **Cir. Ct. No. 2013CF19**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM JOHNATHAN WILKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. William Wilke appeals a criminal judgment convicting him of two felony charges. He also appeals an order denying his postconviction motion. Wilke contends that he is entitled to resentencing based

upon a breach of the plea agreement. For the reasons explained below, we agree. Accordingly, we reverse the judgment of conviction and the postconviction order, and remand with directions that Wilke be resentenced before a different judge.

BACKGROUND

¶2 The parties do not dispute the terms of the plea agreement, as set forth in a written plea questionnaire and stated on the record at the plea hearing. In exchange for Wilke's pleas on two felony charges as a habitual offender, the State entered an amended information that reduced a count of armed burglary to burglary; dismissed and read in one of two theft counts, as well as a count of possession of a firearm by a felon; agreed to cap its recommendation on the burglary count to five years of initial confinement and five years of extended supervision; agreed to cap its recommendation on the theft count to a consecutive three-year term of probation with a withheld sentence; and agreed to jointly recommend with the defense that the burglary sentence be imposed concurrent to any other sentence that Wilke was already serving.

¶3 At sentencing, the State recommended a sentence of five years of initial confinement and four years of extended supervision on the burglary count with a consecutive two-year term of probation on the theft count, but was silent on the parties' contemplated joint recommendation that the prison sentence and term of probation be served concurrent to a revocation sentence that Wilke was already serving at that time. Defense counsel not only failed to object to the State's omission, but also himself failed to recommend that the sentence and term of probation be served concurrent to Wilke's revocation sentence.

¶4 The circuit court imposed sentences of five years of initial confinement and five years of extended supervision on each of the two felony

counts, and ordered that they be served concurrent to one another but consecutive to any other sentence Wilke was already serving.

¶5 Wilke filed a postconviction motion, alleging that the State had breached the plea agreement and that defense counsel had provided ineffective assistance by not objecting. Following a ***Machner*** hearing, the circuit court denied the motion on the ground that the court would have designated the new sentences to be served consecutive to the previously imposed revocation sentence regardless of the parties' recommendations.

STANDARD OF REVIEW

¶6 As a threshold matter, we agree with the State that Wilke's claim must be analyzed in the framework of ineffective assistance of counsel because Wilke failed to preserve a direct challenge to the State's alleged breach of the plea agreement.

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶8 As noted above, there is no factual dispute here that the parties had agreed at the plea hearing to make a joint recommendation for a sentence that was concurrent to a revocation sentence that Wilke was already serving, but that both the prosecutor and defense counsel failed to follow through and actually make that

recommendation at the sentencing hearing. We are therefore presented with an issue of law as to whether counsel's actions constituted deficient performance and whether Wilke was prejudiced by any such deficiency. *See generally* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

DISCUSSION

¶9 Whether or not counsel performed deficiently when counsel failed to object to the State's silence on whether the burglary sentence should be made concurrent or consecutive to any prior sentence hinges upon whether that silence constituted an actionable breach of the plea agreement. *See* ***State v. Naydihor***, 2002 WI App 272, ¶16, 258 Wis. 2d 746, 654 N.W.2d 479.

¶10 When a defendant agrees to enter a plea in reliance upon a prosecutor's promise to perform a future act, the defendant has a due process right to fulfillment of the bargain. *See* ***State v. Williams***, 2002 WI 1, ¶15, 249 Wis. 2d 492, 637 N.W.2d 733. However, not all conduct that deviates from the precise terms of a plea agreement warrants relief. The State's deviation from a plea agreement constitutes an actionable breach only when the deviation both "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. If a defendant is able to establish that an actionable breach occurred, prejudice is assumed and the defendant is entitled to resentencing, regardless of what sentence was imposed or whether the breach affected the circuit court's decision. *See* ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997).

¶11 A prosecutor's failure to accurately present a negotiated sentencing recommendation to the circuit court constitutes a violation of the plea agreement.

Williams, 249 Wis. 2d 492, ¶38. Such a violation is material when it relates to whether a sentence should be concurrent or consecutive because that determination affects the defendant's actual incarceration time, which is arguably the most important aspect of a sentence. *See* ***State v. Howard***, 2001 WI App 137, ¶¶16-19, 246 Wis. 2d 475, 630 N.W.2d 244.

¶12 A prosecutor's misstatement or omission of a term of the plea agreement may not rise to a substantial violation of the plea agreement, however, if the court is ultimately made aware of the recommendation that was agreed upon, *see* ***State v. Campbell***, 2011 WI App 18, ¶11, 331 Wis. 2d 91, 794 N.W.2d 276, and the prosecutor does not "[imply] to the court that the defendant deserves more punishment than was bargained for," ***Bowers***, 280 Wis. 2d 534, ¶9. Thus, for example, no actionable breach of the plea agreement occurred when the State inadvertently omitted at a resentencing hearing a term of the plea agreement that had been previously stated at the original sentencing hearing and of which the court was already aware, *see* ***Campbell***, 331 Wis. 2d 91, ¶¶2-4, 9-13, or when a prosecutor made an initial misstatement of the plea agreement that was promptly corrected following an objection by defense counsel, *see* ***State v. Knox***, 213 Wis. 2d 318, 322-23, 570 N.W.2d 599 (Ct. App. 1997).

¶13 Here, the State offers several theories for why its failure to recommend a concurrent sentence did not constitute an actionable breach of the plea agreement. None are persuasive.

¶14 First, the State contends that it did not violate the plea agreement because it had already stated the terms of the agreement at the plea hearing. We reject the contention that stating the terms of the plea agreement on the record at the plea hearing held on an earlier date is the same as providing the court with the

State's recommendation at sentencing. As noted above, a plea agreement calls for future action on the State's part that must be fulfilled. That is particularly clear here, where the plea agreement included caps, rather than specific numbers, for the State's recommendation.

¶15 Second, the State argues that its silence regarding a recommendation for a concurrent sentence was not a violation of the plea agreement because the prosecutor did not ask for a consecutive sentence or make any other affirmative statement that could be viewed as contradicting or undermining the parties' bargain. However, the plea agreement required the State to make an affirmative recommendation for a concurrent sentence and, thus, the State's failure to make that recommendation did violate the plea agreement.

¶16 The State makes a third, related argument that its silence should be construed as the equivalent of a recommendation for a concurrent sentence—rendering any violation of the plea agreement insubstantial and immaterial—because when a judgment is silent as to whether a sentence is to be consecutive or concurrent, it is assumed to be concurrent. The State then reasons that a court could reasonably assume that, if the State is not asking for a consecutive sentence, it means that the State is recommending a concurrent sentence. We note, however, that it is not uncommon for defendants to bargain for the State's silence as to whether a sentence should be consecutive or concurrent. The premise for such bargains is that silence or neutrality from the State is more favorable than a recommendation for a consecutive sentence, though less favorable than a recommendation for a concurrent sentence. We therefore reject the State's assertion that its silence was the equivalent of a recommendation for a concurrent sentence. The defendant here bargained for more than silence.

¶17 Having rejected each of the State's arguments, we conclude that the State's failure to make a recommendation for a concurrent sentence as the State had promised to do constituted an actionable breach of the plea agreement. It follows that counsel performed deficiently by failing to object to the breach.

¶18 The State makes a final argument that any deficient performance on counsel's part did not prejudice Wilke because the court independently considered and rejected the possibility of a concurrent sentence and would not have followed the proposed joint recommendation even if it had been made. However, this argument is at odds with the State's concession that, under ***Smith***, when a prosecutor materially breaches a plea agreement, prejudice is presumed. *See* ***Smith***, 207 Wis. 2d at 280-81. If we were writing on a clean slate, we might give weight to the circuit court's statement at the postconviction hearing that its sentencing decision was unaffected by the prosecutor's failure. However, in ***Smith*** our supreme court declared such "[r]etrospective testimony by the [sentencing] judge" to be "inappropriate and irrelevant." ***Id.*** at 280. Thus, as we understand ***Smith***, we are precluded from relying on the circuit court's lack of prejudice analysis.

¶19 In sum, counsel's failure to object to the State's breach resulted in Wilke being sentenced without the bargained-for benefit of having the parties present a joint recommendation for a concurrent sentence. Accordingly, we reverse the sentencing portion of the judgment of conviction and the order denying Wilke postconviction relief, and remand with directions that Wilke be resentenced before a different judge.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).