

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-0444-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY M. BELISLE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washburn County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Bradley Belisle seeks resentencing from a sentence on a conviction for burglary and from the subsequent denial of his motion for postconviction relief. Belisle argues that the prosecutor's statements at sentencing violated the parties' plea agreement. In the alternative, he argues that his trial counsel's representation was deficient. The State contends that Belisle has waived his objections to the alleged breach of the plea agreement and that he was not prejudiced by the prosecutor's conduct in any event. We agree with the arguments presented by the State and affirm.

The relevant facts are not in dispute. Belisle was charged with being party to the crimes of burglary and two counts of auto theft. Belisle and the State entered into a plea agreement where Belisle would plead no contest to one count of being party to the crime of burglary, contrary to §§ 939.05 and 943.10(1)(a), STATS. In exchange, the prosecutor agreed to drop the auto theft charges (although the charges would be used as read-ins at sentencing) and to "cap" his recommendation at sentencing to conform to the Department of Corrections' recommendation in the presentence investigation report (PSI).

Belisle was released on a \$200 cash bond with the condition that he be confined to his home and return for sentencing on April 11, 1995. However, Belisle apparently did not fulfill either of these conditions. At the rescheduled sentencing hearing, the prosecutor argued as follows:

Your honor, pursuant to the plea agreement that was struck with the defendant, I have agreed to cap my recommendation with whatever is recommended by the Department of Corrections.

And I'm not asking that the court deviate from that, but I do feel somewhat hamstrung because I don't think that takes into consideration what has transpired in the interim from the time the court took Mr. Belisle's plea until we arrived at sentencing today.

And as the court may recall, I asked that Mr. Belisle be incarcerated to keep him from being -- getting into trouble again, further complicating the situation.

If my recollection is correct, Your Honor said that you were going to try to give him an opportunity to prove to the court that he could change his life around and maybe start by doing it right then and there. Which I believe was a few months back.

And unfortunately, Mr. Belisle did apparently run away from home after he was ordered to stay at home, and was alleged to have hooked up with some of his old colleagues again in Sawyer County where they had

taken another car. And I think that should be considered by the court as an aggravating circumstance in passing sentence upon Bradley today.

I feel bad that we have a person of this tender age before the court on a felony, although in fairness to the people that have tried to help Bradley, it looks like there's been an awful lot expended to try to rehabilitate this young man by way of social services, contacts, foster homes, group homes, Lincoln Hills.

I think there have been a lot of people who tried to help Bradley, but the phrase that comes to mind is I don't think anybody can help you if you don't want to help yourself. And I'm not sure if Bradley's at that point yet where he really wants to make a change in his life. Certainly his actions haven't demonstrated that, that I have been aware of, Your Honor.

So I think there's a genuine need to protect the public from someone like Bradley, the kind to reoffend, and I would ask the court to take that into consideration. Thank you.

Defense counsel did not object to any of the prosecutor's argument but proceeded to argue for a lesser sentence than that contained in the PSI. The court announced a sentence somewhat more stringent than that contained in the PSI.

Belisle, with new counsel, filed a motion for postconviction relief alleging that the State breached the parties' plea agreement and that trial counsel was ineffective for failing to preserve the plea breach issue for appeal. After hearing, the trial court denied Belisle's motions, finding that the prosecutor did not breach the plea agreement and that the failure to object to the prosecutor's argument did not constitute ineffective assistance of counsel because the court did not rely on or consider the allegedly improper remarks. Belisle now appeals his sentence and the denial of his motions.

Belisle argues that this court must vacate his sentence and remand to the trial court for resentencing under the rationale of *Santobello v. New York*, 404 U.S. 257 (1971), and *State v. Poole*, 131 Wis.2d 359, 394 N.W.2d 909 (Ct. App. 1986). Those cases discussed the appropriate relief when a prosecutor breaches a plea agreement. The State argues that because defense counsel failed to object to the prosecutor's statements, Belisle has waived any objection. It also argues that defense counsel's representation was not deficient under *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Smith*, 198 Wis.2d 820, 543 N.W.2d 836 (Ct. App. 1995), *review granted*, 546 N.W.2d 468 (1996).

We first address whether Belisle has waived the right to object to the State's alleged breach of the plea agreement. The trial court concluded that the prosecutor did not breach the plea agreement, so it did not consider the waiver issue. Because of our disposition below, we find it necessary to address that issue now. We conclude that he has waived the right to object to the prosecutor's conduct. A defendant waives his right to object to an alleged breach of the plea agreement when he "fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant." *State v. Smith*, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). It is undisputed that defense counsel did not object to the State's sentencing argument. Further, defense counsel was aware of a basis for objecting during those arguments. At the postconviction motion hearing, Belisle's trial counsel testified that he was aware at the time that the State's argument was arguably a violation of the plea agreement, but that he did not know he needed to object to preserve the issue for appeal. Trial counsel's testimony shows that he proceeded to sentencing despite knowing that a possible claim of error existed, the breach of the plea agreement. In such a situation, that claim of error cannot be raised on appeal. *Id.*

We next decide whether trial counsel's performance was constitutionally deficient under the two-prong analysis described in *Strickland*, 466 U.S. at 687. The first prong of *Strickland* requires that the defendant show that counsel's performance was deficient. *Id.* This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). The second prong of *Strickland* requires that the defendant show that counsel's errors resulted in prejudice to the defendant. *Id.* at 687. We determine whether counsel's performance was deficient and prejudicial without deference to the trial court. *Johnson*, 153 Wis.2d at 127-28, 449 N.W.2d at 848.

If the defendant has failed to show prejudice, this court may decline to undertake deficient performance analysis. *State v. Wirts*, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993). We therefore proceed directly to the issue whether Belisle was prejudiced by trial counsel's performance. We conclude that he was not. To prove prejudice under *Strickland*, the 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. Counsel's alleged error was his failure to object to the prosecutor's argument, which Belisle now contends constituted a breach of the parties' plea agreement. However, the record reveals that the sentencing court did not consider the prosecutor's remarks when imposing sentence.

Immediately after the prosecutor's comments, the court asked the parties about Belisle's alleged conduct since the plea bargain was struck. The court agreed with the parties that it could not consider conduct for which Belisle had not yet been convicted in announcing a sentence. Furthermore, at the postconviction motion hearing of November 30, 1995, the court stated explicitly that it did not consider the prosecutor's comments regarding Belisle's post-plea conduct. To the contrary, the court clarified its independent grounds for the sentence imposed. Finally, at the postconviction motion hearing of January 16, 1996, the court again stated that the prosecutor's arguments did not influence its sentence. The record demonstrates that defense counsel's failure to object did not affect Belisle's sentence. For this reason, Belisle has not shown prejudice, and his ineffective assistance of counsel claim must fail.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.