COURT OF APPEALS
DECISION
DATED AND RELEASED

January 9, 1997

NOTICE

No. 96-1100-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES R. WINCEK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. Charles Wincek appeals from a judgment convicting him of one count of failing to obey a Department of Agriculture, Trade and Consumer Protection order, contrary to § 100.26(3), STATS., and three counts of theft, contrary to § 943.20(1)(b), STATS., and an order denying his motion for postconviction relief. He contends that (1) the State breached a plea bargain it had made with him, and (2) he was deprived of competent counsel,

contrary to the Sixth Amendment to the United States Constitution. We conclude that Wincek has waived the first issue and that he has not shown that he was prejudiced by his attorney's failure to object to the asserted breach of the plea bargain. Accordingly, we affirm.

Wincek was a contractor. He was prosecuted in several counties for theft and for violating § 100.26(3), STATS., which criminalizes the failure to obey some consumer protection orders. The charges were consolidated in Jackson County. By the time Wincek decided to plead guilty to the consolidated charges, he had been found guilty of unrelated charges elsewhere and had been sentenced to seven and one-half years in prison.

Wincek's attorney and the district attorney entered into a plea bargain. Wincek would enter guilty pleas to two misdemeanors and two felonies, and the district attorney would recommend a sentence of ninety days in jail consecutive to the sentence Wincek was then serving and probation consecutive to his prison terms. Wincek and the State knew that the ninety-day term would be served in prison.

At sentencing, the district attorney told the court that he agreed with Wincek's parole agent that Wincek should be sentenced to five years' probation to commence when he is released from prison. But he later said: "As far as additional prison time I would leave that up to the discretion of the court. He's serving at this time seven years, six months." The court sentenced Wincek to two years in prison on one of the felony counts, consecutive to the sentences he was already serving, a concurrent sentence and probation.

Citing ***State v. Poole***, 131 Wis.2d 359, 361-62, 394 N.W.2d 909, 910 (Ct. App. 1986), Wincek asserts that he is entitled to withdraw his guilty plea. However, we do not consider this assertion because Wincek failed to object to what he considers a breach of his plea bargain. His attorney conceded that she did not object because she felt that the district attorney's non-recommendation of jail or prison time was more beneficial to Wincek than a recommendation of ninety-days in jail.

Wincek has waived the argument that the State violated the plea agreement by not recommending a ninety-day jail sentence. In ***State v. Dugan***, 193 Wis.2d 610, 624-25, 534 N.W.2d 897, 902 (Ct. App. 1995), we concluded that failure to object to a breached plea agreement at the sentencing hearing waives this issue on appeal. And in ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989), we said: "The supreme court has held that the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant." Wincek concedes as much, for he fails to respond to the State's assertion that he has waived this issue. Failure to respond to an opposing proposition concedes the issue. ***State ex rel. Sahagian v. Young***, 141 Wis.2d 495, 501, 415 N.W.2d 568, 571 (Ct. App. 1987). Wincek has thus failed to show that he is entitled to withdraw his plea because of a breached plea agreement.

Next, Wincek argues that his attorney was ineffective because she failed to object to the State's asserted breach of the plea bargain. Wincek recognizes that in ***State v. Smith***, 198 Wis.2d 820, 543 N.W.2d 836 (Ct. App. 1995), *review granted*, 546 N.W.2d 468 (1996), we concluded that when an issue of plea bargain breach is brought in the context of an ineffective assistance of counsel claim, the defendant must prove prejudice, a requirement initially found in ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Wincek concedes that he cannot prove that his sentence would have been different had the State recommended ninety-days' incarceration rather than the non-recommendation it made.

Wincek asks us to apply what he terms the "automatic prejudice" rule of ***Santobello v. New York***, 404 U.S. 257, 262-63 (1971). That, however, is the position of the dissent in ***Smith***, 198 Wis.2d at 835-36, 543 N.W.2d at 843. The concurrence in ***Smith*** attempts to reconcile the possible competing positions of ***Santobello*** and ***Strickland***. Whether we are convinced by the reasoning of the concurrence and the lead opinion in ***Smith*** is not relevant. We are at present bound by our published opinions. ***Ranft v. Lyons***, 163 Wis.2d 282, 300 n.7, 471 N.W.2d 254, 261 (Ct. App. 1991).[1] ***Smith*** is clear. Wincek must show prejudice.

[1] The issue of whether the court of appeals can overrule its own opinions is presently

As we concluded in ***Smith***, there is evidence which shows that the sentencing court relied upon Wincek's previous criminal record, which included three battery convictions and a disorderly conduct charge while he was in jail. As the sentencing court did in ***Smith***, the sentencing court here warned Wincek that it was not bound by any plea agreement or recommendation, and might very well impose the maximum penalty provided for each offense. The court commented at length on what could be described as Wincek's one-man crime spree. The court said:

> While that happened you apparently were having an affair with your girlfriend, you beat her up, were in jail for battery. You were released on Huber and you told her or assisted her or whatever to write a bunch of checks on a closed account so you could go to Texas.
>
> And what I see here, Mr. Wincek, is basically you don't show respect at all for other people's property or their money. If you can get their money one way or another, why that was your intent, and that's what you have done all over the Western part of the State of Wisconsin starting in Pierce County over to Polk County down to Trempealeau County, Clark County, Jackson County.

The court concluded that the chances of Wincek ever paying the required restitution were probably slim or none.

We are convinced that the sentencing court relied upon its assessment of the appropriate sentence for Wincek, not the prosecutor's statement that the court should use its discretion to determine jail time.[2] Wincek has not shown that, but for his counsel's failure to object to the asserted

(..continued)

before the supreme court in ***Cook v. Cook***, 201 Wis.2d 435, 549 N.W.2d 732 (1996) (petition for review granted).

[2] We repeat the suggestion found in ***Smith*** that a sentencing court's explicit reference to whether it is relying upon a prosecutor's sentencing recommendation would assist us in handling future appeals involving assertions of breached plea agreements.

breach of plea bargain, the "result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Accordingly, we affirm Wincek's judgment of conviction.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.