

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2006

Cornelia G. Clark
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. 2005AP2208-CR

Cir. Ct. No. 2003CF1147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER J. GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Walter Griffin appeals from a judgment convicting him as a party to the crime of check forgery, WIS. STAT. § 943.38(2) (2003-04),¹ and an order denying postconviction relief. The dispositive issue is whether the trial court erred in its determination that the State did not breach a plea agreement with Griffin. We affirm.

¶2 Griffin waived his preliminary hearing, stating that a substantial factor in his waiver decision was the State’s promise to recommend no prison time if he subsequently entered a plea.

¶3 Griffin did later enter a plea, but not before committing other crimes, resulting in several other criminal charges. At the plea hearing on three consolidated prosecutions, the prosecutor informed the court that the parties did not have a sentencing agreement in this case. The court responded by asking the prosecutor whether the State was limited in any way in its sentencing recommendation, and the prosecutor responded that there was no ceiling on what the State could recommend. The court then asked defense counsel if that was his understanding of the plea bargain, and counsel responded that it was. Later in the plea hearing the court asked Griffin if anybody had made any promises or considerations to induce his plea, other than a promise to dismiss some counts and an agreement to have a presentence investigation report prepared. Griffin answered “no” to that question.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 At sentencing the prosecutor argued for a prison sentence, and the trial court imposed a two-year prison sentence. Trial counsel did not object to the prosecutor's recommendation for prison.

¶5 After conviction Griffin moved for postconviction relief, alleging that the State breached the plea agreement, and that trial counsel provided ineffective assistance by failing to object to the breach when it occurred. The trial court denied relief, finding that the plea bargain did not include a promise to recommend no prison time, and counsel's failure to object at sentencing was therefore not prejudicial.

¶6 When a defendant's plea depends to any significant degree on a prosecutor's promise or agreement, due process and fundamental fairness require that the promise be fulfilled. *See State v. Castillo*, 205 Wis. 2d 599, 607, 556 N.W.2d 425 (Ct. App. 1996). Whether the plea agreement contained the promise in question, and whether the State breached it, are factual determinations that we review under the clearly erroneous standard of review. *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733.

¶7 The record supports the trial court's finding of no breach in this case. The prosecutor unequivocally stated at the beginning of the plea hearing that the agreement did not contain a cap on the State's sentencing recommendation. Defense counsel stated on the record that he agreed. Additionally, Griffin agreed on the record that no other promises beyond those stated at the plea hearing induced his plea. We will reverse a circuit court's finding of fact, under the clearly erroneous standard, only if it is against the great weight and clear preponderance of the evidence. *Noll v. Dimiceli's Inc.*, 115 Wis. 2d 641, 643, 340

N.W.2d 575 (Ct. App. 1983). Given the evidence described above, Griffin cannot reasonably challenge the circuit court's finding under this standard.

¶8 Griffin might arguably contend that a due process violation occurred at an earlier stage of the proceeding, when the State's initial sentencing promise contributed to his preliminary hearing waiver. See *State v. Bond*, 139 Wis. 2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987) (violation of a prosecutorial promise triggers considerations of fundamental fairness and is a deprivation of due process, even if it occurs outside of the plea bargain context). However, a knowing, intelligent and voluntary plea, entered with benefit of counsel, waives the right to claim error at the preliminary hearing stage. See *State v. Strickland*, 27 Wis. 2d 623, 633, 135 N.W.2d 295 (1965). In any event, Griffin does not claim prejudice from his preliminary hearing waiver.

¶9 By upholding the trial court's finding that the prosecutor did not breach the plea bargain, we also resolve the claim of ineffective counsel, because in the absence of a breach trial counsel had no basis to object to the State's sentencing recommendation.

By the Court.—Judgment and order affirmed.

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

