COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1304-CR **Cir. Ct. No. 2004CF1251**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY C. REED-DANIELS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Cory C. Reed-Daniels appeals from a judgment entered after he pled guilty to one count of theft by fraud contrary to WIS. STAT.

§ 943.20(1)(d) & (3)(c) (2003-04).[1] He also appeals from an order denying his postconviction motion. He claims that the prosecutor's remarks at sentencing breached the plea agreement and therefore, he should be resentenced. Because the challenged remarks did not constitute a breach, we affirm the judgment and order.

BACKGROUND

¶2 On March 8, 2004, Reed-Daniels was charged with one count of theft by fraud. He entered into a plea agreement with the State, which was summarized by the prosecutor at the plea hearing. In exchange for a guilty plea, the State would recommend a sentence comprised of fifteen months of initial confinement, and thirty months of extended supervision, stayed, placing Reed-Daniels on four years of probation with ninety days in the House of Correction. The agreement was premised upon the condition that Reed-Daniels was to pay significant up-front restitution.

¶3 At the sentencing hearing, the prosecutor accurately recited the terms of the plea agreement. Then, in response to some remarks Reed-Daniels made to the local media, the prosecutor stated:

> I want to say this is a completely supportable, provable case. The State was generous with Mr. Reed-Daniels. I could have issued several felonies. The victim could have been demanding more charges or a higher recommendation. They're not. So I don't think it's appropriate for Mr. Reed-Daniels to aggrandize himself and put down the merits of the State's case. This is a legitimate case.

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

¶4 Defense counsel requested that the trial court follow the State's sentencing recommendation. The trial court did not, instead imposing a six-year sentence, consisting of two years of initial incarceration and four years of extended supervision. Judgment was entered.

¶5 Reed-Daniels filed a postconviction motion seeking resentencing on the basis that the prosecutor's remarks breached the terms of the plea agreement. The trial court denied the motion. Reed-Daniels now appeals.

DISCUSSION

¶6 The issue in this case is whether the proffered remarks delineated above constituted a breach of the plea agreement. Reed-Daniels contends that the term "generous," in essence, sent a message to the trial court that a more severe sentence should be imposed. He argues that this constitutes an "end run" around the plea agreement and necessitates resentencing before a different judge. We reject his contentions.

¶7 Because there was no objection at the time the comments were made, this case must be reviewed within the framework of whether counsel provided ineffective assistance. *See* ***State v. Liukonon***, 2004 WI App 157, ¶6, 276 Wis. 2d 64, 686 N.W.2d 689. Under this framework, Reed-Daniels must show both that there was a material and substantial breach of the agreement and that his counsel provided ineffective assistance. ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244.

¶8 Thus, we first address whether the prosecutor's comments constituted a material and substantial breach. This issue presents a question of

law, which we review independently. ***State v. Williams***, 2002 WI 1, ¶2, 249 Wis. 2d 492, 637 N.W.2d 733.

¶9 We agree with the trial court that the challenged comments here do not constitute a substantial and material breach of the plea agreement. Reed-Daniels's challenge is to the prosecutor's reference to other, uncharged offenses and the comment that the State's decision not to charge more offenses was "generous." In the context of the prosecutor's entire presentation at sentencing, these comments did not constitute a material and substantial breach.

¶10 First, a prosecutor is permitted to mention the existence of uncharged offenses at the sentencing hearing. *See* ***State v. Grindemann***, 2002 WI App 106, ¶26, 255 Wis. 2d 632, 648 N.W.2d 507 (no breach where State had not specifically agreed not to discuss uncharged offenses).

¶11 Second, it is clear from the context of the entire sentencing proceeding that these brief remarks were in no way an attempt to undercut the sentencing recommendation. Rather, the remarks were made in response to statements Reed-Daniels made to the local media, wherein he denied any criminal behavior and alleged that there was some kind of conspiracy against him.

¶12 Third, the word "generous" does not refer to the sentencing term in the plea agreement, but to the State's decision not to charge Reed-Daniels with more counts. The challenged remarks do not reflect an intent to suggest to the trial court that it should impose a longer sentence. Rather, the comments show an intent to demonstrate that the State had not been vindictive or conspiratorial in its treatment of Reed-Daniels.

¶13 Based on the foregoing, it is clear that the prosecutor did not breach the plea agreement during the sentencing hearing. The prosecutor made it clear that it was sticking to the sentencing terms of the agreement and wanted the trial court to follow its recommendation. Because we have concluded that the comments did not constitute a substantial and material breach of the plea agreement, it follows that his trial counsel did not provide ineffective assistance in failing to object to the comments. *See* ***State v. Sprang***, 2004 WI App 121, ¶13, 274 Wis. 2d 784, 683 N.W.2d 522.

By the Court.—Judgment and order affirmed.

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