COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1813-CR **Cir. Ct. No. 2001CF685**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY J. OLMSTED,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Reserve Judge, and TERENCE T. BOURKE, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. Troy J. Olmsted appeals from a judgment of conviction for party to the crime of attempted first-degree intentional homicide and a judgment of conviction for party to the crime of substantial battery contrary to WIS. STAT. §§ 939.05, 940.01 and 940.19(2) (2005-06).[1] Olmsted also appeals from an order denying postconviction relief.

¶2 This is the second appeal spawned by this case. In the first appeal, based on the State's concession of error, we held that Olmsted's trial counsel was ineffective for failing to object to the State's sentencing recommendation that breached the parties' plea agreement. ***State v. Olmsted***, No. 2003AP3253-CR, unpublished slip op. at ¶¶8-11 (WI App July 21, 2004) (per curiam). We reversed and remanded the matter for specific performance of the plea agreement at a new sentencing hearing. ***Id.***, ¶11.

¶3 On this appeal, Olmsted contends that the trial court failed to follow our mandate by resentencing him on only the substantial battery charge instead of on both charges. Olmsted also argues that the State again breached the plea agreement and that his trial counsel was again ineffective for failing to object to the breach.

¶4 We hold that the trial court did not err by resentencing Olmsted on only the substantial battery charge. We also hold that the State did not breach the plea agreement. From that, it follows that trial counsel was not ineffective. We affirm both judgments of conviction and the order denying postconviction relief.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

PROCEDURAL HISTORY

¶5 The procedural history of this case, while somewhat protracted, is not in dispute. The State charged Olmsted with party to the crimes of attempted first-degree intentional homicide, substantial battery, and false imprisonment pursuant to WIS. STAT. §§ 939.05, 940.01(1), 940.19(2) and 940.30. By plea agreement, Olmsted pled no contest to the attempted homicide and substantial battery charges. In exchange, the State dismissed and read in the false imprisonment charge.[2] Relevant to this appeal, the State also agreed to cap its sentencing recommendation at thirty years, consisting of twelve years of confinement followed by eighteen years of extended supervision. However, the sentencing agreement did not discriminate between the attempted homicide charge and the substantial battery charge.

¶6 At the sentencing hearing, the State made its sentencing recommendation per the plea agreement but limited that recommendation to the attempted homicide charge. The State made a separate recommendation of *consecutive* probation on the substantial battery charge. The trial court, Judge John B. Murphy, followed the State's sentencing recommendation. Olmsted's trial counsel did not object on grounds that the State's recommendation breached the plea agreement.

¶7 By postconviction motion, Olmsted, represented by new counsel, contended that the State's sentencing recommendation breached the plea agreement. The trial court, Judge Terence T. Bourke, ruled that the State had

[2] The State also agreed to not issue forgery charges. However, these matters were also treated as read-ins.

breached the plea agreement, but further held that the breach did not "materially deprive Mr. Olmsted of the benefit of his bargain." Therefore, Judge Bourke denied the motion and Olmsted appealed. On appeal, the State conceded error. ***Olmsted***, No. 2003AP3253-CR, ¶9. We agreed, and reversed and remanded for a new sentencing hearing. ***Id.***, ¶11.

¶8 At the remand proceeding, the State first argued that only a resentencing on the substantial battery charge was necessary to comply with our mandate. However, the State's ultimate sentencing recommendation was in accord with the plea agreement and further recited that the recommendation was "for the whole amounts as Counts 1 and 2." Judge Bourke agreed that resentencing on only the substantial battery charge would comply with our mandate. The judge imposed a sentence of five years on the substantial battery charge, consisting of three years' confinement followed by two years of extended supervision. However, unlike the previous consecutive sentence imposed by Judge Murphy, Judge Bourke ordered that the new sentence be served *concurrent* with the existing sentence on the attempted homicide conviction.

¶9 Represented yet again by new counsel, Olmsted responded with a postconviction motion contending that Judge Bourke had failed to fully comply with our remand directive. In addition, Olmsted argued that the State had once again breached the plea agreement and that his counsel was ineffective for failing to object to the breach. Judge Bourke denied the motion, and Olmsted again appeals.

DISCUSSION

¶10 As noted, the facts and procedural history of this case are undisputed. Thus, the issues before us present questions of law. *See* ***State v. Howard***, 2001 WI App 137, ¶15, 246 Wis. 2d 475, 630 N.W.2d 244.

¶11 Olmsted argues that the State once again breached the plea agreement. We disagree. The State's promise under the plea agreement represented a "global cap" of thirty years, consisting of twelve years' confinement followed by eighteen years of extended supervision. However, the agreement did not discriminate between the two charges. The State breached this agreement at the first sentencing by requesting an additional five years of *consecutive* probation, a recommendation that went beyond the bounds of the thirty-year global cap. On appeal, the State conceded error. We agreed and remanded the matter for the State to specifically perform under the plea agreement. ***Olmsted***, No. 2003AP3253-CR, ¶11.

¶12 At the remand proceeding, the State again made a sentencing recommendation in keeping with the thirty-year global cap. However, unlike the first sentencing when the State breached the plea agreement by recommending a consecutive period of probation on the substantial battery charge, this time the State's recommendation was for concurrent probation. Importantly, the State also capped its sentencing recommendation at thirty years "for the whole amounts as Counts 1 and 2." The State did not seek any disposition, whether for confinement, extended supervision or probation, that extended beyond the thirty-year global cap. The State did not breach the plea agreement.

¶13 Olmsted next argues that Judge Bourke failed to follow our mandate by sentencing him only the substantial battery charge. But, as noted, the plea

agreement provided for a global cap on the State's sentencing recommendation. Judge Murphy had previously imposed a sentence in accord with the plea agreement as it pertained to the attempted homicide charge. Judge Bourke left that sentence intact, and Olmsted does not challenge that sentence. Thus, Judge Bourke's obligation was to assure that the substantial battery portion of the sentence was in accord with the global cap agreed to by the parties. And the judge did so by changing Judge Murphy's original sentence of consecutive probation to a concurrent sentence. Thus, the ultimate sentence was within the confines of the plea agreement.

¶14 Olmsted argues that our mandate did not limit the resentencing to just the substantial battery. While that is technically correct, Olmsted overlooks the core basis for our reversal and remand. We held that the State had breached the plea agreement by making a recommendation for consecutive probation on the substantial battery charge. The remedy we ordered was for the State to specifically perform under the agreement. And, as we have indicated, the State complied with our mandate by making a sentencing recommendation in keeping with the plea agreement as to Counts 1 and 2. Although we did not expressly limit the resentencing to just the substantial battery, neither did we direct as to how the new sentence was to be allocated between the two charges. We deem that question as having been addressed to Judge Bourke's sentencing discretion and we see no error.

¶15 Judge Bourke's obligation under our mandate was to assure that the State complied with our directive of specific performance and then to sentence in

accord with that recommendation. The judge did both. We affirm the judgments of conviction and the order denying postconviction relief.[3]

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

[3] Because we hold that there was no error in the remand proceedings, we reject Olmsted's related argument that his trial counsel was ineffective for failing to object on grounds that the State had yet again breached the plea agreement.