COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3050-CR **Cir. Ct. No. 2004CF1366**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO MCDADE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON and DENNIS P. MORONEY, Judges. *Affirmed*.

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

¶1 PER CURIAM. Antonio McDade appeals from an amended judgment of conviction imposing a previously withheld sentence-after-revocation, and from a postconviction order denying his motion for resentencing. The issue is

whether the original plea bargain had been completely fulfilled at the original sentencing hearing, despite the withholding of sentence, or whether the State's obligation extended to McDade's sentencing-after-revocation hearing. We conclude that the scope of the plea bargain was limited to McDade's guilty plea in exchange for the State's recommendation at the original sentencing hearing; the plea bargain was no longer in effect when McDade returned for sentencing after revocation for violating the conditions of his probation. Therefore, we affirm.

¶2 The facts and procedural chronology are undisputed. McDade was charged with fleeing from an officer, in violation of WIS. STAT. §§ 346.04(3) (2003-04) and 346.17(3)(a) (amended Feb. 1, 2003). Incident to a plea bargain, McDade agreed to plead guilty to the flight charge in exchange for the State's recommendation of a nine-month consecutive sentence.[1] McDade pled guilty, and the prosecutor recommended a nine-month consecutive sentence, as contemplated by the plea bargain. McDade's counsel recommended probation. The trial court withheld sentence and placed McDade on probation "because there [we]re so many things [the trial court] d[id]n't know about [McDade]."

¶3 About one year later, McDade's probation was revoked for probation violations (as opposed to being charged with a new offense). At the sentencing-after-revocation hearing, the prosecutor recommended a thirty-month sentence divided equally between initial confinement and extended supervision. McDade's counsel did not object that the prosecutor's recommendation breached the parties' previous plea bargain. The trial court imposed a thirty-month

[1] McDade was a juvenile at that time and was adjudged delinquent for another offense, which accounted for the consecutive nature of the sentencing recommendation. The flight charge was proceeding in the adult division of the Milwaukee County Circuit Court.

sentence, comprised of two fifteen-month periods of initial confinement and extended supervision.

¶4 McDade moved for resentencing, alleging that the State breached the plea bargain when it more than tripled its sentencing recommendation at the sentencing-after-revocation hearing.[2] The trial court denied the motion, ruling that the State was no longer bound to follow the original plea agreement after McDade's probation was revoked. McDade appeals.

¶5 Preliminarily, trial counsel did not object to the State's recommendation at the sentencing-after-revocation hearing. Consequently, McDade waived his claim that the State breached the plea bargain. *See* ***State v. Howard***, 2001 WI App 137, ¶¶12, 21, 246 Wis. 2d 475, 630 N.W.2d 244. McDade, however, has not sought a ***Machner*** hearing to determine whether trial counsel was ineffective for failing to object to the prosecutor's alleged breach of the plea bargain.[3] McDade contends that a ***Machner*** hearing is unnecessary because when the prosecutor recommended over three times the negotiated sentencing recommendation, he materially and substantially breached the plea bargain, constituting automatic prejudice, entitling McDade to resentencing according to the plea bargain pursuant to ***State v. Smith***, 207 Wis. 2d 258, 281-82, 558 N.W.2d 379 (1997). There was no automatic prejudice here because the issue

[2] In that postconviction motion, McDade also sought additional sentence credit and resentencing on another basis, that the thirty-month sentence was unduly harsh. In a separate postconviction order, the trial court awarded the additional sentence credit and denied McDade's unduly harsh challenge; it ordered briefing on the breach of the plea bargain issue that is the basis of this appeal.

[3] An evidentiary hearing to determine trial counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

is whether the plea bargain remained effective following the original sentencing hearing and continued to bind the State at the sentencing-after-revocation hearing. To avoid additional proceedings on a prospective ineffective assistance claim that can be resolved without any further facts that would ordinarily be developed during a ***Machner*** hearing, we review this issue despite McDade's failure to seek a ***Machner*** hearing.

¶6 To maintain an ineffective assistance of counsel claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶7 We first review this issue incident to the prejudice requisite because that analysis will most effectively resolve this issue. *See* ***id.*** Considering the undisputed facts and procedural chronology of this case, we independently determine the scope of the plea bargain, namely whether it extended beyond the original sentencing hearing and continued to bind the State at the sentencing-after-

revocation hearing. *See* ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733.

¶8 The parties had not addressed the scope of their plea bargain; there was no mention of any factual or procedural circumstances beyond the original sentencing hearing. McDade fulfilled his part of the bargain by pleading guilty to the flight charge; the prosecutor fulfilled the State's part of the bargain by recommending a nine-month consecutive sentence. The trial court withheld sentence and placed McDade on probation, as he had requested. It explained its reasons for withholding sentence and placing him on probation.[4] The trial court concluded its sentencing remarks by telling McDade that if he violated the conditions of his probation it wanted the trial court presiding over the sentencing-after-revocation hearing to impose sentence, after examining the circumstances of what happened, McDade's needs, and his adjustments to supervision. The trial court thoughtfully withheld sentence; if sentence were later imposed for McDade's inability to successfully complete probation, the trial court preferred a current assessment of McDade at that time, rather than imposing a sentence now that may not be appropriate at a later time.

¶9 The plea bargain did not extend beyond the original sentencing hearing. The State fulfilled its part of the bargain by recommending a nine-month consecutive sentence. Once the trial court withheld sentence and placed McDade on probation, the plea bargain expired. *See* ***State v. Windom***, 169 Wis. 2d 341,

[4] The trial court considered the circumstances of McDade's juvenile dispositions in conjunction with the prospective flight sentence and trial counsel's concern for McDade's continued supervision in the community when it explained that it decided to "withhold[] sentence … because there are so many things [it] do[es]n't know about [McDade.]"

351-52, 485 N.W.2d 832 (Ct. App. 1992). Even if it had not, McDade's violating the conditions of his probation constituted a new factor not contemplated at the time of the plea bargain, entitling the State to modify its sentencing recommendation. *See* ***id.*** at 350-51. "A consummated plea bargain does not insulate a defendant from the consequences of his future misconduct. A defendant gets the benefit of his bargain only once. Like time, a plea bargain once spent is gone forever." ***Id.*** at 354 (Fine, J., concurring) (citation omitted).

¶10 McDade distinguishes ***Windom***, contending that ***State v. Zuniga***, 2002 WI App 233, 257 Wis. 2d 625, 652 N.W.2d 423, supports his position and his interpretation of ***Windom***. McDade contends that ***Zuniga*** requires a judicial determination of whether the defendant's post-plea pre-sentencing misconduct is a valid basis to release the State from its previously negotiated, but not yet given, sentencing recommendation incident to the plea bargain that preceded the defendant's alleged commission of the new crime. *See* ***Zuniga***, 257 Wis. 2d 625, ¶12. McDade also relies on ***Zuniga***'s dicta in which we commented that ***Windom*** does not "permit[] a prosecutor to unilaterally retreat from a plea agreement whenever a defendant engages in criminal misconduct after pleading." ***Id.***, ¶11.

¶11 ***Zuniga*** is inapt for several reasons. First, one of the limited issues in ***Zuniga*** was whether Zuniga's post-plea pre-sentencing criminal misconduct excused the State from its part of the plea bargain as a matter of law, hence the reason for the judicial determination. *See* ***id.***, ¶17. Second, unlike McDade's post-sentencing misconduct, Zuniga's criminal misconduct occurred before sentencing. *See* ***id.***, ¶5. Third, the ***Zuniga*** trial court found that the plea bargain had been amended by the parties during the bond hearing on the intervening offenses. *See* ***id.***, ¶17.

¶12 McDade also misinterprets ***Windom*** to require the commission of a new offense to arguably relieve the State from fulfilling its part of the plea bargain. McDade emphasizes that, unlike Windom, he had not been charged with committing a new crime. We do not view the reason for the probation revocation as significant to ***Windom***. In ***Windom***, the issue was whether the plea bargain extended to the sentencing-after-revocation recommendation (or whether the defendant's post-plea and sentencing misconduct constituted a new factor to relieve the State from its original obligations pursuant to the plea bargain). *See* ***Windom***, 169 Wis. 2d at 350-51. We reject McDade's interpretations.

¶13 McDade also contends that the trial court's placing him on probation suspended his sentence pursuant to ***Prue v. State***, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974). He consequently reasons that he was not sentenced until after the revocation of his probation; therefore, the prosecutor was obliged to abide by the negotiated recommendation of a nine-month consecutive sentence. ***Prue*** held that good-time benefits are not available to probationers. *See* ***id.*** at 112. ***Prue*** had nothing to do with plea bargains.

¶14 There was no prejudice from trial counsel's failure to object to the prosecutor's recommendation for McDade's sentence-after-revocation because the prosecutor had completely fulfilled the State's obligation pursuant to the negotiated plea bargain at the original sentencing hearing. There was no breach and consequently, no resulting ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).