COURT OF APPEALS DECISION DATED AND FILED

July 7, 2009

David R. Schanker
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. 2008AP2210-CR **Cir. Ct. No. 2006CF79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA P. BRUST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joshua Brust appeals a judgment of conviction for second-degree sexual assault of a child. Brust argues his revoked deferred guilty plea agreement should be reinstated because the State failed to sufficiently prove a material breach. Alternatively, Brust argues he is entitled to withdraw his guilty

plea because his attorney provided ineffective assistance and Brust's plea was not entered knowingly, voluntarily, and intelligently. Brust further argues his sentence was unduly harsh. We reject Brust's arguments and affirm.

BACKGROUND

¶2 Pursuant to a plea agreement and written deferred guilty plea agreement (DGPA), Brust pled guilty to fourth-degree sexual assault, misdemeanor bail jumping, and second-degree sexual assault of a child under the age of sixteen. Brust was immediately sentenced on the two misdemeanors, but judgment of conviction was deferred on the second-degree child sexual assault for two years. The DGPA included the conditions that "[d]efendant shall not commit any further violations of the law during the term of this contract" and that he comply with all conditions of an imposed bond that, among other things, precluded Brust from committing any crimes.

¶3 Following Brust's arrest for disorderly conduct fifteen days after the plea hearing, the State moved to vacate the DGPA. Three high school teachers testified at the evidentiary hearing on the motion. They testified Brust was cursing in the hallway and then outside in the parking lot while classes were in session. Brust then yelled profanities to the teachers and students who, prompted by Brust's conduct, were looking out the classroom windows. After a teacher told Brust to quit swearing and disrupting his class, Brust looked up at him and stated, "I'm fucking coming up there right now[,]" and "started marching right towards the door." The circuit court vacated the DGPA, concluding the State demonstrated a material breach by proving Brust committed the crime of disorderly conduct. The court sentenced Brust to eight years' initial confinement followed by eight

years' extended supervision. The court subsequently denied Brust's postconviction motion, following a ***Machner*** hearing.[1]

DISCUSSION

I. INEFFECTIVE ASSISTANCE AT DGPA WITHDRAWAL HEARING

¶4 Brust first argues he was denied the effective assistance of counsel at the DGPA withdrawal hearing because his attorney was unprepared to present a defense. To demonstrate ineffective assistance, Brust must show both that counsel's performance was deficient and that he was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Prejudice exists if there is a reasonable probability that the outcome would have been different absent counsel's errors. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶5 Brust fails to demonstrate deficient performance or prejudice. He merely asserts he was "clearly prejudiced" because counsel failed to prepare a defense to the disorderly conduct allegation and the court then found he committed the crime. Brust does not, however, explain what his attorney should have done that might have made a difference in the outcome. A defendant who alleges counsel was ineffective for failing to take certain steps needs to show with specificity what actions the attorney should have taken, what those actions would have revealed, and how those revelations would have altered the outcome. ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272. Thus, Brust

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

needed to call those witnesses at the ***Machner*** hearing that he believes should have been called at the revocation hearing to rebut the State's evidence. Because he does not identify any defense to the disorderly conduct, Brust has not established a reasonable probability of a different result.[2]

II. DUE PROCESS

¶6 Brust next argues he was denied his constitutional due process rights because the DGPA was vacated in the absence of a criminal conviction. "[T]he constitutional due process requirements of 'decency and fairness' are satisfied where the burden is placed upon the party seeking to vacate the agreement to establish both the breach, and that the breach is sufficiently material to warrant releasing the party from its promises ...." ***State v. Rivest***, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982). "[T]he terms of the plea agreement and the historical facts of the … conduct that allegedly constitute a breach of a plea agreement are questions of fact." ***State v. Williams***, 2002 WI 1, ¶2, 249 Wis. 2d 492, 637 N.W.2d 733 (2002). "[W]hether the … conduct constitutes a breach of a plea agreement and whether the breach is material and substantial are questions of law." ***Id.***

¶7 Brust's due process challenges are meritless. First, the agreement is not violated only upon a new criminal conviction. Rather, the plain language, "commits," sets forth what will constitute a violation of the agreement. Commits is not synonymous with convicted. *See* ***Layton School of Art & Design v. WERC***,

[2] Brust seeks to withdraw his plea based on counsel's performance at the deferred guilty plea agreement (DGPA) withdrawal hearing. If Brust had demonstrated ineffective assistance, however, the remedy would simply be a new withdrawal hearing to allow Brust to defend against the disorderly conduct allegation.

82 Wis. 2d 324, 336-37, 262 N.W.2d 218 (1978); ***State v. Hauk***, 2002 WI App 226, ¶¶14-19, 257 Wis. 2d 579, 652 N.W.2d 393; ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶¶1, 6 n.1, 239 Wis. 2d 443, 620 N.W.2d 414.

¶8 Second, Brust does not explain why the violation of an explicit requirement in the contract would not constitute a material breach.[3] The commission of a new crime deprived the State of its bargained benefits of protecting the public and meeting Brust's rehabilitative needs. The commission of a new offense is not a relatively innocuous violation of the terms of a plea agreement. *Cf.* ***Black v. Romano***, 471 U.S. 606, 616 (1985) (state may revoke probation based on commission of an offense that is unrelated to and of a different nature than the original offense).

¶9 Third, withdrawal of the DGPA based on the commission, rather than the conviction, of a crime does not deprive Brust of any constitutional protections because he is not being prosecuted for the new crime. He is merely being held responsible for the original crime he pled guilty to, for violating the contractual terms he agreed to.

III. PLEA WITHDRAWAL

¶10 Brust next argues he is entitled to withdraw his guilty plea because it was not entered knowingly, voluntarily, and intelligently. He first claims he was unaware of the consequences of his plea because his attorney misunderstood the

[3] In fact, the circuit court concluded Brust violated two terms of the DGPA because he committed a law violation and, separately, because he violated the similar condition of his bond. We agree.

DGPA and, therefore, so did he. He asserts he was told the DGPA condition only applied if he was convicted of a crime.

¶11 This a ***Nelson/Bentley*** claim because Brust argues something extrinsic to the plea colloquy rendered his plea unknowing and unintelligent.[4] Thus, Brust has the burden of proving all elements of the alleged error, such as deficient performance and prejudice, and the linkage between his plea and the purported defect. ***State v. Hampton***, 2004 WI 107, ¶63, 274 Wis. 2d 379, 683 N.W.2d 14. Brust must prove by clear and convincing evidence that his plea was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Straszkowski***, 2008 WI 65, ¶55 n.32, 310 Wis. 2d 259, 750 N.W.2d 835.

¶12 Brust failed to demonstrate deficient performance because he did not prove his attorney had an inaccurate understanding of the "commit" provision or that she misadvised Brust as to its meaning. Counsel testified unequivocally that she knew the DGPA did not require a conviction and that she told Brust he could not engage in criminal behavior. Because Brust did not testify, there is no evidence he was misinformed or unaware that the agreement could be revoked if he committed another crime. Further, he did not testify that, but for his counsel's error, he would not have pled guilty.

¶13 Brust also argues the plea was invalid under ***State v. Bangert***, 131 Wis. 2d 246, 261, 389 N.W.2d (1986), because the court did not properly inquire into Brust's education and general comprehension. The record belies Brust's

[4] ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

assertion. The court ascertained Brust was in regular classes, could read and write, was about to graduate from high school, and understood what he was doing.

¶14 Regardless, at the motion hearing the State demonstrated Brust's plea was knowingly, voluntarily, and intelligently entered. Brust's mother testified his learning disability did not prevent him from getting his high school diploma, holding jobs, completing job applications, or obtaining his driver's license. She also testified he attended regular classes from the ninth grade on. Trial counsel testified she never had any indication Brust was unable to grasp the information provided. Because Brust did not testify at the hearing, there is no evidence he did not understand the plea proceeding or any information necessary for a valid plea.

¶15 Brust also contends the circuit court failed to ensure he understood the nature of each of the constitutional rights he waived. The court, however, went over each right with Brust. Whenever Brust expressed difficulty, the court either provided further explanation or took a recess for Brust to discuss the issue with his attorney. The court would then confirm Brust's understanding. Brust also fails to show how reading the beyond a reasonable doubt jury instruction to him, explaining it, breaking it down into smaller parts, and then asking whether Brust understood each part was inadequate to establish that Brust understood the right.

¶16 Brust further claims the court erred by not informing him of the maximum penalties he faced. At the postconviction hearing, Brust's counsel testified she informed Brust of the maximum sentence and told him the court was not bound by the plea agreement and could impose the maximum. The maximum sentence was also set forth on the plea questionnaire form. Because Brust did not

testify, there is no contradictory evidence or any evidence Brust did not understand what his attorney told him.[5] Thus, the State proved by clear and convincing evidence that Brust's plea was knowing, voluntary, and intelligent.

¶17 Brust further argues the circuit court impermissibly interfered with the plea negotiations after the plea was taken. He contends the interference rendered his plea involuntary. The record conclusively shows the court did not participate in plea negotiations. Rather, the court merely informed the parties it would not accept the negotiated DGPA unless its duration was modified from one to two years. The court then offered Brust the opportunity to withdraw his guilty plea. This situation does not constitute impermissible interference. *See* ***State v. Marinez***, 2008 WI App 105, ¶¶1, 9-12, 313 Wis. 2d 490, 756 N.W.2d 570.

¶18 Brust also fails to demonstrate the court's comments coerced his guilty plea. The court stated, "[T]he agreement is not acceptable for [12] months to the Court. If he doesn't accept 24 months, we're going to go back and start over." After conferring with Brust, his attorney informed the court the change was acceptable. An option does not constitute coercion.

IV. UNDULY HARSH SENTENCE

¶19 Finally, Brust argues he received an unduly harsh sentence because the court relied on inaccurate information. We may conclude the sentence is

---

[5] Brust claims he is entitled to withdraw his plea because he made a prima facie case that the court failed to comply with WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d (1986). A prima facie case, if made, however, does not alone entitle a defendant to plea withdrawal. *See* ***id.*** at 274.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

unduly harsh if it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Brust claims the court improperly sentenced him for committing a forcible rape, even though he denied the use of force and only admitted to sexual contact with a girl under the age of sixteen.

¶20 The court's characterization of the assault as a forcible rape is supported by both the allegations in the complaint and preliminary hearing testimony. There was also physical evidence consistent with the use of force, and Brust at one point admitted the crime was brutal. Further, the court did not impermissibly punish Brust for the wrong crime because it properly considered the victim's version as indicators of both Brust's character and amenability to rehabilitation. *See* ***State v. Arredondo***, 2004 WI App 7, ¶¶53-55, 269 Wis. 2d 369, 674 N.W.2d 647.

¶21 Brust also complains the court relied on erroneous information that he gave the victim alcohol before the sexual assault. Brust waived this complaint because he did not object to the allegedly incorrect information at the sentencing hearing. *See* ***State v. Groth***, 2002 WI App 299, ¶¶23-26, 258 Wis. 2d 889, 655 N.W.2d 163. He also criticizes comments the court made at the first sentencing hearing. Those comments are irrelevant because they were not repeated at the resentencing hearing.[6]

---

[6] The circuit court granted Brust's motion for resentencing based on its failure to consider the sentencing guidelines at the initial sentencing. The court's calculated guideline sentence, however, would have been harsher than the sentence Brust received.

¶22 Brust also notes the Wisconsin Sentencing Commission recognized the statutory maximum penalty was geared toward adults assaulting young children, which was not the case here. Brust does not explain how this is relevant given that he did not receive the maximum sentence. Brust also compares his sentence to the sentence given in another case. There is no requirement, however, that similar crimes must receive similar sentences. ***State v. Lechner***, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). Finally, there is nothing shocking or unfair about the circuit court's imposition of a substantial prison sentence after it had originally permitted a DGPA that would result in no felony conviction. Brust had a chance to prove himself and he failed in less than three weeks.

By the Court.—Judgment affirmed.

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