COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1065-CR **Cir. Ct. No. 2007CF6165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELBERT J. HUGHES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Elbert J. Hughes appeals a judgment of conviction and an order denying his postconviction motion. Hughes argues that the prosecutor's remarks during sentencing breached the parties' plea agreement and that his trial counsel was ineffective for failing to object to the alleged breach. He

also contends that his trial counsel rendered ineffective assistance by failing to seek an amended plea agreement or plea withdrawal. We disagree with Hughes and affirm the circuit court.

BACKGROUND

¶2 On December 21, 2007, a criminal complaint was filed charging Hughes with failing to maintain his registration as a sex offender, contrary to WIS. STAT. § 301.45(2)-(4), (6) (2007-08).[1] Hughes agreed to plead guilty as charged; in exchange, the State agreed to recommend that the court impose and stay a sentence of two years of initial confinement and two years of extended supervision and place Hughes on probation for two years, with the condition that he remain compliant with the sex-offender registry. As an additional incentive for Hughes to comply with registry, the State recommended that the court impose and stay sixty days of jail as a condition of probation. The circuit court accepted Hughes's guilty plea and the case proceeded to sentencing.

¶3 During the sentencing portion of the hearing, the prosecutor described Hughes's prior convictions and the parties expressed confusion as to how much time in custody Hughes faced on an impending revocation in another case. The prosecutor advised that the plea agreement was silent as to whether the State's probation recommendation was concurrent or consecutive to the revocation sentence and that she would leave that determination to the court once the details of the amount of time Hughes faced on revocation were made clear. The circuit

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

court adjourned the hearing so that the defense could confirm how much time Hughes faced.

¶4 At the adjourned sentencing hearing, Hughes's trial counsel relayed that Hughes's probation in another case had been revoked and after application of credits against his three-year term of initial confinement, he faced two years. The prosecutor then reiterated the plea agreement.

¶5 The prosecutor acknowledged Hughes would be commencing a three-year term of initial confinement in the revocation case with a significant amount of credit. Upon summarizing Hughes's prior record and his periods of compliance and noncompliance with the sex-offender registry, the prosecutor concluded: "The agreement is as I indicated. I didn't know about the revocation effort at that point, but I'm satisfied to stick with that recommendation and confident the Court will make a wise decision." Defense counsel asked the court to follow the probation recommendation but to impose and stay a shorter sentence.

¶6 The circuit court rejected probation, finding that it would "unduly depreciate the seriousness of this offense" and that Hughes was not a "good candidate" for it because he had previously shown he was unable to follow the rules. The court imposed a consecutive sentence consisting of eighteen months of initial confinement and eighteen months of extended supervision.

¶7 Hughes filed a postconviction motion requesting a ***Machner***[2] hearing based on his contention that the prosecutor breached the plea agreement and his trial counsel was ineffective for failing to object to the breach or consult

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Hughes about it. According to Hughes, the prosecutor breached the plea agreement by suggesting that "a wise decision" required the court to reject the "recommendation." Hughes also argued that the prosecutor breached the plea agreement when she claimed she entered it without knowledge of the revocation. He claimed that other statements made by the prosecutor reflected that she was clearly aware of the revocation but not the amount of incarceration that would result from it, and in any event, the only purpose of the remarks was to diminish the recommendation and invite the court to ignore it. Finally, Hughes asserted that his trial counsel was ineffective for failing to seek to amend the plea agreement or withdraw Hughes's plea.

¶8 The circuit court denied Hughes's motion without holding an evidentiary hearing. The court found that no breach occurred and that, as a result, Hughes's trial counsel was not ineffective for failing to object to a breach or to discuss a breach with Hughes. Hughes now appeals.

ANALYSIS

¶9 On appeal, Hughes argues that he received the ineffective assistance of trial counsel in two regards. First, trial counsel rendered ineffective assistance when he failed to object to the prosecutor's breach of the plea agreement. Second, trial counsel rendered ineffective assistance by failing to seek an amended plea agreement or plea withdrawal. We address each argument in turn.

A. Plea Agreement

¶10 Hughes asserts that the prosecutor breached the plea agreement when she made the following statement during the adjourned sentencing hearing: "The agreement is as I indicated. I didn't know about the revocation effort at that

point, but I'm satisfied to stick with that recommendation and confident the Court will make a wise decision." Hughes argues that this statement evidenced the prosecutor's intent to move away from the original sentencing recommendation and to suggest to the circuit court that another sentence would be more appropriate. Hughes seeks to withdraw his plea based on his contention that his attorney was ineffective for failing to object to or consult him about the alleged breach.

¶11 Hughes forfeited his right to direct review of the alleged plea agreement breach when his trial counsel did not object to the prosecutor's statement during the sentencing hearing. *See* ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522. As such, we review this case in the context of an ineffective assistance of counsel claim. ***Id.*** At the outset, we "'consider whether the State breached the plea agreement.'" ***Id.*** (citation omitted). "'If there was a material and substantial breach, the next issues are whether [Hughes's] counsel provided ineffective assistance and which remedy is appropriate.'" *See* ***id.*** (citation omitted).

¶12 A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for which the defendant bargained. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. When, as here, the terms of the plea agreement and the historical facts surrounding the prosecutor's alleged breach are not in dispute, whether the prosecutor's conduct constituted a material and substantial breach of the plea agreement is a question of law that this court reviews *de novo*. *See* ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220.

¶13 When a prosecutor has agreed to make a certain sentence recommendation, he or she may not render less than a neutral recitation of the terms of the agreement and may not make an "end run" around the agreement. ***Williams***, 249 Wis. 2d 492, ¶42. "'The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the [circuit] court that a more severe sentence is warranted than that recommended.'" ***Id.*** (citation omitted). It is Hughes's burden, as the party arguing a breach, "to show, by clear and convincing evidence, that a breach occurred and that the breach is material and substantial." *See* ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945.

¶14 We first consider whether the prosecutor breached the plea agreement when she claimed she entered it without knowledge of "the revocation effort." At the initial sentencing hearing—and, therefore, prior to the adjourned sentencing hearing where the prosecutor made the statement at issue—the following exchange took place:

> [THE PROSECUTOR]: [Hughes's trial counsel] has advised me that he anticipates revocation, although apparently that revocation order hasn't quite come down; and he also had advised me that he thinks he's looking at about 18 months on that revocation time. Our agreement—
>
> THE COURT: Wait. Now, I'm confused because he's on—he was on probation with a stayed sentence, three and three. He's looking at three years?
>
> [THE PROSECUTOR]: Well, that's a good point. He should be looking at three years. I don't know why. I guess I'll defer.
>
> THE COURT: Or was he on extended supervision because the probation had already been revoked?
>
> [THE PROSECUTOR]: Yeah. I guess I'm gonna have to defer to [Hughes's trial counsel] to clarify that aspect of it. The judgment roll clearly shows the sentence

> was three plus three and probation, so depending on—so I'll ask him to clarify that.
>
> In any case, our agreement didn't include whether the probation which we are recommending run concurrent or consecutive. I'm prepared to leave that to the Court depending on the information that the defense provides about the details of what he's facing on that revocation.

¶15 When reviewed in context, it is clear that the prosecutor was aware of Hughes's revocation proceedings; the confusion centered on the amount of time Hughes faced following revocation. We agree with the State:

> [A]lthough there was some confusion as to how much incarceration Hughes was facing on the unrelated and still incomplete revocation effort, the prosecutor clearly knew about that effort during the plea hearing … and did not evince any intent to alter or renege on the agreed upon plea deal as a result. This conflicts with Hughes'[s] contention on appeal that the prosecutor subtly tried to persuade the circuit court at the later sentencing hearing that the prosecutor would not have agreed to the deal as offered if the prosecutor had been aware of the pending revocation effort.

(Footnote and citation to Hughes's appellate brief omitted.)

¶16 Hughes asserts the prosecutor breached the plea agreement by stating that she was "confident the Court [would] make a wise decision." He contends that in making this statement, the prosecutor implied that if she had known Hughes would be incarcerated following revocation in another case, she would not have recommended probation. We are not convinced.

¶17 The prosecutor told the court at the adjourned sentencing hearing that despite not "know[ing] about the revocation effort," she was "satisfied" to stand by her agreement. This does not amount to making an "end run" around the agreement. *See* ***Williams***, 249 Wis. 2d 492, ¶42. To the contrary, we conclude that the prosecutor held fast to the plea agreement. Because Hughes has not

shown "by clear and convincing evidence, that a breach occurred and that the breach is material and substantial,"[3] *see* ***Deilke***, 274 Wis. 2d 595, ¶13, we conclude that Hughes's trial counsel was not ineffective for failing to object on the basis of this statement, *see* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (Counsel is not ineffective for failing to make meritless arguments.).

B. Amended Plea Agreement and Plea Withdrawal

¶18 Hughes submits that comments made by the circuit court reflected "that the agreed-upon recommendation had encountered the court's major skepticism" and that consequently, his trial counsel was ineffective for not seeking an amended plea agreement or presentencing plea withdrawal. This argument is based on the circuit court's statement to the parties—prior to adjourning sentencing—that unless it knew how much time Hughes was facing in the revocation case, it would be "really flying blind." We find Hughes's argument problematic in two regards.

¶19 First, Hughes's interpretation of the circuit court's comments as revealing "major skepticism" is not the only plausible interpretation. It is equally as plausible that the circuit court simply wished to be apprised of all the facts available prior to making its sentencing determination. Notwithstanding, Hughes asks this court to conclude that his trial counsel was ineffective because counsel

[3] We also take this opportunity to note that the sentencing transcript reveals that the circuit court rejected the prosecutor's probation recommendation based on Hughes's prior record of failing to cooperate with supervision, which in its estimation made probation an inappropriate disposition—not based on the revocation sentence Hughes received.

failed to predict that the circuit court would reject the recommended sentence. We are not persuaded that trial counsel should be deemed ineffective on this basis.

¶20 Second, and more importantly, Hughes's claim that his trial counsel was ineffective for failing to seek an amended plea agreement or an opportunity for Hughes to withdraw his plea fails because he cannot show prejudice. "'To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice.'" ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (internal quotation marks and citation omitted).

¶21 Here, even if Hughes's trial counsel had predicted that the circuit court would reject the plea agreement and had sought an amended plea agreement or plea withdrawal, Hughes has not shown that there is a reasonable probability that the result in this matter would have been different. He cites ***State v. Zuniga***, 2002 WI App 233, 257 Wis. 2d 625, 652 N.W.2d 423, and ***State v. Marinez***, 2008 WI App 105, 313 Wis. 2d 490, 756 N.W.2d 570. In ***Zuniga***, we held that parties may consent to an amended plea agreement at the suggestion of the circuit court without raising a fundamental fairness question. ***Id.***, 257 Wis. 2d 625, ¶16. In ***Marinez***, we held that a trial judge may inform a defendant that the judge intends to exceed a sentencing recommendation in a plea agreement and offer the opportunity of plea withdrawal. ***Id.***, 313 Wis. 2d 490, ¶1. The fact that there is case law stating that parties may consent to an amended plea agreement or that a trial court may offer a defendant the opportunity of plea withdrawal does not establish that either would have occurred here. As such, Hughes's trial counsel

was not ineffective for failing to seek an amended plea agreement or plea withdrawal.

¶22 For the forgoing reasons, the circuit court properly denied his motion for postconviction relief without holding a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 ("[I]f the [postconviction] motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.").

By the Court.—Judgment and order affirmed.

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