COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP839-CR **Cir. Ct. No. 2007CF1569**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTIAN R. COLON,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Christian R. Colon appeals a decision and order of the circuit court denying his motion for postconviction relief. Colon argues that: (1) the State breached a plea agreement by unilaterally withdrawing it when Colon refused to testify against a co-defendant because the State played a direct role in

Colon's decision not to testify and thereby violated his right to due process; (2) he was entitled to a hearing on the issue; (3) his trial counsel was ineffective for not objecting to the State's withdrawal and sentence recommendation and for not advising Colon that he could seek to withdraw his plea; and (4) he was entitled to a ***Machner***[1] hearing on his ineffective assistance of counsel claim. We affirm.

BACKGROUND

¶2 According to the criminal complaint, on January 7, 2007, three armed and masked suspects entered Marty's Party Bar in the City of Milwaukee. One of the suspects, later identified as Joel Rivera, confronted the bar patrons and demanded money. One of the patrons, Nicholas Knutowski, approached the masked men with a paint scraper and was shot twice and killed by Rivera. The group left without taking anything.

¶3 Colon was arrested in connection with the armed robbery. He admitted to participating in the robbery, but said that he shouted "don't shoot" right before Knutowski approached the group, and that he fled the bar as Rivera was shooting. Colon also confessed to participating in three other armed robberies of businesses that took place on December 22, 2006.

¶4 Colon was charged with one count of felony murder, attempted armed robbery, as party to a crime, and six counts of armed robbery with the threat of force, as party to a crime. Pursuant to a plea agreement, Colon pled guilty to felony murder and two counts of armed robbery with the threat of force, party to a crime, and agreed to testify against Rivera. In exchange for the pleas and Colon's promise to testify, the State agreed to dismiss and read-in the remaining four

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

charges and agreed not to make a specific recommendation about Colon's sentence. The agreement also stated that if Colon materially breached any of the terms of the agreement, the State would be relieved of the negotiation and that the State had the sole authority to determine what constituted a material breach. Colon indicated that he understood the terms and conditions of the agreement at his plea hearing.

¶5 Colon was to testify against Rivera at Rivera's preliminary hearing on February 5, 2009. The night before the hearing, Colon and Rivera were placed in the same cell by a deputy sheriff. Colon was produced for the hearing, however declined to testify. He indicated that he had concerns for his safety, though he did not reveal what, if anything, was said to him while he and Rivera were in the same cell. The State advised Colon and his trial counsel that Colon's refusal to testify violated the terms of the plea agreement and that the State would not be bound by the agreement if Colon did not testify. Colon conferred with his trial counsel and indicated that he still would not testify. The State subsequently dismissed the charges against Rivera.

¶6 At Colon's sentencing hearing, the State informed the circuit court that Colon had breached the plea agreement. When the circuit court asked Colon's trial counsel whether Colon had breached the agreement, trial counsel responded, "[u]nfortunately I think that [the State] is correct." Colon's trial counsel later explained that he thought Colon's placement in the same cell as Rivera led Colon to fear for his family's safety, though counsel did not state that Colon was actually threatened. The State did not reinstate the read-in charges, but it proceeded to make a sentencing recommendation, which was followed by the circuit court. Colon was sentenced to twenty-eight years for the felony murder charge, comprised of twenty-two years of initial confinement and six years of extended

supervision. He was sentenced to sixteen years for each of the armed robbery charges, comprised of twelve years of initial confinement for each charge and four years of extended supervision for each charge, to be served consecutively.

¶7 Colon filed a postconviction motion on December 23, 2009, alleging that the State unilaterally and unfairly withdrew from the plea agreement because the deputy sheriff, as an agent of the State, negligently placed Rivera and Colon in the same cell despite an order to keep the two separate. Colon also alleged that his counsel was ineffective for various reasons. The circuit court denied Colon's motion. This appeal follows.

DISCUSSION

¶8 Colon argues on appeal that the State breached the plea agreement when it unilaterally withdrew from the agreement and that Colon would have fulfilled the requirements of the agreement had the State not negligently placed Colon and Rivera in the same holding cell the night before Rivera's preliminary hearing. He contends that he was entitled to an evidentiary hearing to determine whether a breach occurred. Colon also argues that his trial counsel was ineffective for failing to object to the State's withdrawal from the plea agreement and its subsequent sentencing recommendation and for failing to inform Colon that he could seek to withdraw his plea. Colon further contends that the circuit court erred when it denied his motion without holding a ***Machner*** hearing. We conclude that: (1) Colon breached the terms of the plea agreement when he refused to testify against Rivera; (2) the circuit court did not err when it denied Colon's motion without a hearing; (3) Colon's trial counsel was not ineffective; and (4) Colon did not allege sufficient facts in his motion that would entitle him to a ***Machner*** hearing. We affirm.

A. Breach of the Plea Agreement.

¶9 Colon argues that because he and Rivera were placed in the same holding cell contrary to an order to keep the two separate,[2] the State's "hands were unclean" and the State was therefore unable to withdraw from the agreement without an evidentiary hearing. Colon contends that because a deputy sheriff is an arm of the State, the State played a direct role in Colon's decision not to testify because it gave Rivera the opportunity to threaten Colon. Because we find that no evidence in the record suggests that Colon was threatened, we disagree.

¶10 We have previously stated that "a plea agreement is analogous to a contract and, therefore, we draw upon contract law principles to interpret a plea agreement." ***State v. Toliver***, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994). The construction of a written contract is a question of law that we review *de novo*. ***Id.*** We will construe a contract as it stands if the language is plain and unambiguous. ***Id.*** "The analogy to contract law, however, is not entirely dispositive because a plea agreement also implicates a defendant's due process rights." ***Id.***

¶11 "[A] prosecutor is relieved from the terms of a plea agreement where it is judicially determined that the defendant has materially breached the conditions of the agreement." ***State v. Rivest***, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982). "[A] material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party." ***State v. Bowers***, 2005 WI App 72, ¶15, 280 Wis. 2d 534, 696 N.W.2d 255.

[2] The order does not appear to be a part of the record; however, neither party disputes that the order was in place.

¶12 The language of the plea agreement in the case at bar clearly and unambiguously states that Colon's refusal to testify against Rivera would constitute a material and substantial breach and that the State possessed sole discretion to determine whether a breach is material and substantial. Specifically, the agreement states:

> Should the defendant agree to testify and for whatever reason fails to cooperate fully and answer all questions put to him at the trial or any other hearing regarding the co-defendants the State would consider that a material breach to these negotiations.
>
> ….
>
> A further condition precedent to this offer is that the defendant must agree that should he violate any of the terms and conditions of this negotiation including after pleading guilty and before sentencing, that the defendant should the State, at the State's sole discretion, believe that the defendant has violated any of these negotiations that the defendant does know and agree that any material breach by the defendant of these negotiations or violation of the conditions precedent set forth above will be considered as a material breach to the negotiations which would relieve the State of its promised negotiation as set forth above and would allow the State, at sentencing, to make whatever recommendation it felt to be appropriate.

¶13 Colon agreed to these provisions. He contends, however, that he decided not to testify against Rivera because he feared for his family's safety after erroneously being placed in the same holding cell as Rivera. Nothing in the record supports Colon's insinuation that he was threatened. Prior to the start of Colon's sentencing hearing, the State introduced a memorandum prepared by Assistant District Attorney David Robles, the prosecutor handing Rivera's case, in which the assistant district attorney discusses the decision to dismiss the charges against Rivera based on Colon's refusal to testify. The memorandum states that Colon indicated safety concerns for his family after being placed in the same cell as

Rivera, but that Colon did not divulge any information about any conversation he may have had with Rivera. The State also called Detective Katherine Hein, one of the detectives who investigated the Knutowski murder, to testify about the contents of the memo. Detective Hein, who was present when Colon indicated his decision not to testify, confirmed that the contents of the memo were correct.

¶14 Colon's counsel also attempted to explain Colon's decision at the sentencing hearing, however he did not state anything definitively pointing to a threat made by Rivera. Colon's counsel stated:

> I'm not sure what all happened … but apparently the jailers at the County Jail for some reason put Mr. Colon and Mr. Rivera in the same cell even though there was an order to keep separate and I think at that point I think Mr. Colon did get scared and did get concerned.
>
> ….
>
> I think what occurred, and I was told by [Colon] about that, I was also told by his mother … and his aunt and his brother … that Mr. Colon was utterly concerned about the safety of his family because unfortunately the Riveras and the Colons live essentially in the same geographic area. And Mr. Colon felt he would sacrifice himself so-to-speak in regard to making the deal for less time to cooperate because he didn't want the Rivera people to then take revenge on the family. That's I think … the situation.

¶15 Colon's assertion that his cell placement led him to fear for his family fails also because Colon must have been aware of the fact that his family and Rivera's family lived in the same vicinity prior to Colon's acceptance of the plea. Further, had Colon fulfilled his obligation to testify, he would have been in Rivera's presence at the preliminary sentencing hearing. Presumably, Colon would have been fearful for his family at that point as well.

¶16 Colon's argument that his due process rights were violated by the State's withdrawal from the agreement is also without merit. "The supreme court stated … that the constitutional due process requirements of 'decency and fairness' are satisfied if the party seeking to vacate a plea agreement establishes that there is a material and substantial breach of the agreement." ***Toliver***, 187 Wis. 2d at 357 (citation omitted). The language of the agreement is clear that a refusal to testify constitutes a material breach and that the sole authority to make such a determination belongs to the State. Colon affirmed that he reviewed the terms of the agreement with his counsel prior to accepting it. The record supports nothing more than a conclusion that Colon changed his mind about testifying against Rivera and therefore breached the plea agreement. That Rivera may have had the opportunity to threaten Colon is not the same as actually threatening Colon. No evidence of a threat exists in the record.[3]

B. Evidentiary Hearing on the Breach.

¶17 Colon contends that the State did not have sole authority to determine whether to withdraw from the plea agreement after Colon had already entered his plea. He argues that under ***Rivest***, only the circuit court had the authority to make that determination because the State played a direct role in Colon's decision not to testify. We disagree.

¶18 Our supreme court in ***Rivest*** explained that when the State seeks release from its obligations under a plea agreement on the basis of an alleged breach by the defendant, an evidentiary hearing should be held to determine if the

[3] Because we have determined that no evidence in the record supports Colon's implication that he was threatened, we do not address whether the Sheriff's Department (a separate department from the District Attorney's office) contributed to Colon's decision.

alleged breach was sufficiently material to release the State from the agreement. ***Id.***, 106 Wis. 2d at 411. However, in the present case, it cannot seriously be argued that Colon's refusal to testify against Rivera was not material to the agreement. The State's case against Rivera obviously depended on Colon's testimony, otherwise such serious charges would not have been dismissed by the State when Colon breached the agreement. The clear language of the agreement authorized the State to withdraw in the event of a breach by Colon. *See* ***Toliver***, 187 Wis. 2d at 358 (where the agreement to testify against a co-defendant is an essential part of the plea agreement, a refusal to testify is a material breach that does not necessarily warrant an evidentiary hearing). The "State did not seek release from the agreement but in reality was merely enforcing the sanctions of [the agreement]." *See* ***id.***

C. Ineffective Assistance of Counsel.

¶19 Colon asserts on appeal that he was denied the effective assistance of counsel when his trial counsel did not object to the State's withdrawal of the plea agreement, did not object to the State's sentence recommendation and did not advise him that he could seek to withdraw his plea. He also asserts that the circuit court erred when it denied his ineffective assistance of counsel claim without holding a ***Machner*** hearing. We disagree.

¶20 "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***Id.*** If the motion alleges such facts, the

defendant is entitled to a hearing. ***Id.*** However, if the motion does not allege such facts, presents only conclusory allegations, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has the discretion to deny the motion without a hearing. ***Id.***

¶21 Colon's motion does not allege sufficient facts to succeed on such a claim. To succeed on a claim for ineffective assistance of counsel under the Sixth Amendment, a defendant must make sufficient showings under the two-part test put forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first part of the test requires a defendant to show that counsel's performance was deficient. ***Id.*** at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The second part of the test requires a showing that the deficient performance prejudiced the defendant. ***Id.***

¶22 In denying Colon's ineffective assistance of counsel claim, the circuit court noted that it was Colon who materially breached the agreement and stated that the court would not have allowed him to withdraw his guilty plea. Colon's breach, under the clear terms of the agreement, gave the State the right to withdraw the agreement and make a sentencing recommendation. Colon was aware of the conditions of his plea agreement as well as the consequences for not complying with the agreement, as was made clear by his trial counsel at the change of plea hearing. The court confirmed with trial counsel that Colon "[understood] the nature of the charges and the effects of his pleas." Further, the circuit court confirmed with trial counsel and the defendant that the defendant read the plea and reviewed the terms with trial counsel. Colon's contention that a hearing would have revealed the State's direct role in his decision not to testify also fails because, as discussed, no evidence exists in the record as to what, if any,

threats were made by Rivera. Therefore, Colon's counsel was not ineffective for failing to object to the State's enforcement of its rights under the terms of the agreement. This also includes the State's right to make a sentence recommendation. Colon also fails to acknowledge that had a court allowed him to withdraw his guilty plea, he could have been subjected to four additional charges of armed robbery and possibly could have dramatically increased his sentence. "[T]rial counsel [is] not ineffective for failing or refusing to pursue feckless arguments." ***Toliver***, 187 Wis. 2d at 360. Colon's claims are conclusory and do not, on their face, allege sufficient facts that would require a hearing.

By the Court.—Order affirmed.

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