

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2005

Cornelia G. Clark
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. 04-0289-CR

Cir. Ct. No. 99CF000815

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. HEUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Edward J. Heuer has appealed from a judgment convicting him of operating a motor vehicle while intoxicated, fifth offense, and from an order denying his motion for postconviction relief. Heuer contends that the prosecutor breached the plea agreement when he inquired whether the sentence being imposed by the trial court was consecutive. Heuer also contends that his

trial attorneys rendered ineffective assistance to him, causing a violation of his rights under WIS. STAT. § 976.05(3)(a) (2003-04),¹ the Interstate Act on Detainers (IAD). Because the trial court correctly determined that both of these issues lack merit, we affirm the judgment and order.

¶2 When a defendant claims that his or her plea agreement was breached, the trial court's findings of historical fact will not be set aside unless they are clearly erroneous. *State v. Deilke*, 2004 WI 104, ¶10, 274 Wis. 2d 595, 682 N.W.2d 945. Whether the State's conduct constitutes a substantial and material breach of the plea agreement presents a question of law which we review de novo. *Id.* A material and substantial breach is one which violates the terms of the plea agreement and defeats a benefit for the nonbreaching party. *Id.*, ¶14.

¶3 The historical facts underlying Heuer's claim are undisputed. Heuer entered a no contest plea pursuant to a plea agreement which permitted him to argue for a particular sentence, but provided that "the State would remain silent." At the sentencing hearing, the trial court gave each side an opportunity to point out any errors in the presentence report, heard sentencing argument from Heuer's counsel, and gave Heuer an opportunity to speak, which he declined. The trial court then imposed a sentence of four years with 250 days of sentence credit. After the trial court advised Heuer that he had postconviction rights and directed that he be sent to the Dodge Correctional Institution for prison reception, the prosecutor inquired: "Is that sentence consecutive to what he's currently serving?" Defense counsel did not object to the question. The trial court then asked what sentence Heuer was currently serving, and counsel engaged in a short

¹ All references to the Wisconsin Statutes are to the 2003-04 version.

discussion of the matter. At the conclusion of the discussion, the trial court stated that the sentence it was imposing would be consecutive to the sentence Heuer was serving in Illinois.

¶4 Heuer contends that the prosecutor breached his agreement to remain silent when he asked whether the four-year sentence was consecutive to what Heuer was currently serving. He contends that his trial attorney rendered ineffective assistance when he failed to object to the breach.

¶5 Initially, we note that the plea agreement contained no provision dealing with whether the sentence would be consecutive or concurrent. The agreement required only that the State remain silent at sentencing. An agreement to remain silent precludes that State from recommending or commenting upon the particular sentence which the trial court should impose. *State v. Jorgensen*, 137 Wis. 2d 163, 170, 404 N.W.2d 66 (Ct. App. 1987).

¶6 The prosecutor made no sentencing argument and no recommendation as to what sentence the trial court should impose. At the conclusion of the proceedings, the prosecutor merely asked whether the sentence was consecutive. Whether a sentence is concurrent or consecutive is a matter to be resolved at sentencing. The prosecutor did not argue or advocate that the sentence should be consecutive. His question was neutral, and neither implied nor stated a preference. As correctly determined by the trial court at the postconviction hearing, the prosecutor's question pertained to a "housekeeping matter." It did not constitute a material and substantial breach of the plea

agreement.² It follows that defense counsel was not ineffective when he failed to object to the prosecutor's question.

¶7 The trial court also properly rejected Heuer's claim that his trial attorneys' ineffectiveness led to a violation of his rights under the IAD. The two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to challenges to no contest pleas alleging ineffective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Id.* at 312. No basis exists to conclude that counsels' performance was deficient.

¶8 Evidence at the postconviction hearing indicated that Heuer's request for final disposition of the complaint in this action was filed on November 20, 2000. A prisoner who files such a request is required to be brought to trial within 180 days, unless a continuance is granted for good cause. WIS. STAT. § 976.05(3)(a). However, a defendant may waive the 180-day time limit by his or her conduct. *State v. Aukes*, 192 Wis. 2d 338, 345, 531 N.W.2d 382 (Ct. App. 1995).

¶9 Based upon a filing date of November 20, 2000, the 180-day time limit would have expired on May 19, 2001. However, the trial court reasonably

² Heuer contends that a breach occurred because if the State had not spoken, the sentence automatically would have been concurrent, as provided in *Application of McDonald*, 178 Wis. 167, 171, 189 N.W. 1029 (1922). However, this presumes that the trial court would not have considered whether the sentence should be concurrent or consecutive absent a question from the prosecutor. In any event, the fact that the four-year sentence would have been concurrent to Heuer's Illinois sentence if the trial court had not addressed the matter and decided to make it consecutive does not render the prosecutor's neutral, housekeeping question a breach of the plea agreement.

determined that Heuer waived this time limit by his conduct in discharging and changing trial counsel.

¶10 Trial was originally scheduled in this case for April 2, 2001, well within the 180-day time limit. However, on March 30, 2001, Attorney Valerie Karls, appointed counsel for Heuer, filed a motion to withdraw, stating that Heuer wanted a different attorney. A hearing was held on the motion on April 2, 2001. Heuer informed the trial court that he wished to have another attorney, but stated that he was unsure whether he would hire private counsel or wanted a second attorney to be appointed by the state public defender. An Illinois attorney named Tommy Long was also present at the hearing, and although he was unlicensed in Wisconsin, the trial court was informed that he might help Heuer find a Wisconsin attorney.

¶11 Based upon Heuer's representation that he wanted new counsel, the trial court permitted Attorney Karls to withdraw, and rescheduled trial for May 16, 2001. Because Heuer was uncertain whether he wanted to privately retain counsel or have new counsel appointed, Attorney Karls informed the trial court that the state public defender would appoint new counsel, who would then withdraw if Heuer retained counsel.

¶12 The next hearing was a status conference on May 1, 2001. Heuer appeared pro se. Comments by the prosecutor and Heuer which are set forth in the transcript of that hearing indicate that Attorney Long had contacted the prosecutor's office, but it remained unclear whether Heuer would privately retain counsel. The trial court noted that the state public defender had not yet appointed a second attorney for Heuer, but stated that the public defender would be

appointing someone, and if Heuer did not want that attorney, he could hire someone on his own. Trial remained scheduled for May 16, 2001.

¶13 Heuer appeared with appointed counsel, Attorney Gregory Bates, on May 16, 2001. Attorney Bates indicated that he had been appointed only a week earlier and was not prepared for trial. Trial was then rescheduled for May 29, 2001. On May 29, 2001, Heuer appeared by privately retained counsel, James Martin, who stated that he had been retained to represent Heuer during the last week. Attorney Martin was substituted for Attorney Bates at Heuer's request. Subsequently, Attorney Martin filed a motion to dismiss on behalf of Heuer, claiming that his rights under the IAD had been violated. After that motion was denied, Heuer entered a no contest plea to the charge of operating a motor vehicle while intoxicated, fifth offense.

¶14 Heuer contends that he was deprived of effective assistance of counsel when the state public defender failed to appoint an attorney for him in a timely manner so that he could go to trial within the 180-day time limit of the IAD. He also contends that Attorney Bates rendered ineffective assistance when he accepted the appointment but was unprepared for trial on May 16, 2001. Heuer contends that these deficiencies deprived him of his rights under the IAD. He further contends that Attorney Martin rendered ineffective assistance when he failed to advise Heuer that entering a no contest plea would constitute a waiver of his right to appeal the denial of his IAD claim.

¶15 All of Heuer's ineffective assistance arguments fail for the same reason; namely, that he waived the 180-day time limit set forth in WIS. STAT. § 976.05(3)(a) by his conduct. Trial was originally scheduled for April 2, 2001, well within the 180-day time limit, but was adjourned because Heuer discharged

Attorney Karls. While Attorney Karls indicated that the state public defender would appoint another attorney for Heuer, the transcripts of the hearings of April 2, 2001, and May 1, 2001, establish that Heuer was unsure whether he wanted to have new counsel appointed and was investigating retaining counsel.

¶16 The delay of trial between April 2, 2001, and the rescheduled date of May 29, 2001, is attributable to Heuer's discharge of Attorney Karls. While the state public defender possibly could have appointed new counsel more quickly, the need for the appointment of new counsel was directly attributable to Heuer's discharge of Attorney Karls. In addition, rather than clearly requesting the appointment of new counsel by the state public defender, Heuer repeatedly expressed uncertainty as to whether he wanted appointed counsel, indicating that he might retain counsel, which is ultimately what he did.

¶17 Because Heuer elected to discharge Attorney Karls and did not act expeditiously in either retaining counsel or pursuing the appointment of new counsel by the state public defender, he waived his right to demand trial within the 180-day time limit of WIS. STAT. § 976.05(3)(a). Moreover, Attorney Bates cannot be deemed deficient for being unprepared for trial on May 16, 2001, when he was appointed to represent Heuer only one week earlier.

¶18 Heuer thus had no meritorious basis for alleging that he was deprived of his rights under the IAD by deficient acts of counsel rather than his own acts. Because no meritorious IAD issue existed for appeal, Heuer was not deprived of effective assistance of counsel when Attorney Martin failed to advise him that entering a no contest plea would constitute waiver of an IAD claim for purposes of appeal.

By the Court.—Judgment and order affirmed.

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

