COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 1996

No. 95-2530-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PIERRE DAVIS,

Defendant-Appellant.

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

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Pierre Davis appeals from a judgment convicting him as a repeat offender of being a party to the crime of robbery and operating a motor vehicle without the owner's consent (OMVWOC). He also appeals from an order denying his motion for postconviction relief. The sole issue is whether the prosecution violated the plea agreement by making a less than neutral recitation of its sentencing recommendation. We conclude that the prosecution's remarks did not violate the plea agreement. We affirm the judgment and the order.

Davis was charged in the brutal beating of a man who had stopped to render assistance to Davis and two companions. Davis entered a guilty plea to the charges of robbery and OMVWOC. As part of the plea agreement, a charge of aggravated battery while armed was dismissed and read-in at sentencing. The agreement was that the prosecution was free to argue any sentence on the robbery conviction and would recommend consecutive probation on the OMVWOC conviction.

At sentencing, the prosecution argued:

> I recommend that the court sentence this defendant to 16 years on the charge of robbery, and I then recommend you sentence him to 11 years consecutive probation on the charge of operating a motor vehicle without owner's consent. I'm not recommending probation, Your Honor, because he's earned it or because he deserves it, because neither of those things are true; and I guess I'm not even recommending probation because I believe he can be rehabilitated.

Davis was sentenced to consecutive sixteen- and eleven-year prison terms for the robbery and OMVWOC convictions respectively.

Davis argues that the prosecution breached its agreement to recommend probation on the OMVWOC conviction. He claims that by stating that Davis neither earned nor deserved probation, the prosecutor made clear to the court the prosecutor's belief that probation was not really appropriate.

We note that there was no contemporaneous objection to the prosecution's recommendation. That would constitute a waiver of any claim that the plea agreement was breached. ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). However, Davis's postconviction motion alleged ineffective assistance of trial counsel in failing to object. We may reach the merits of the issue under the ineffective assistance claim because only if there was actual error could counsel's performance be deemed deficient or

prejudicial.[1] *See* ***State v. Smith***, 170 Wis.2d 701, 714 n. 5, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993).

Where the facts are undisputed,[2] whether the prosecution violated the terms of a plea agreement is a question of law which we address de novo. ***State v. Willis***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). At first blush it appears that the prosecution violated the prohibition against making an "end-run" around the plea agreement by a less than neutral recitation of the terms of the plea agreement. *See* ***State v. Ferguson***, 166 Wis.2d 317, 322, 479 N.W.2d 241, 243 (Ct. App. 1991); ***State v. Poole***, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986). However, as much as a defendant has the right to exacting compliance with the plea agreement, he or she also has a right to have the prosecutor make the recommendation in a manner that generates support for the recommendation. *See* ***Ferguson***, 166 Wis.2d at 325, 479 N.W.2d at 245 (recognizing prosecutor's task to attempt to convince court of the appropriateness of the recommendation). *See also* ***United States v. Brown***, 500 F.2d 375, 377 (4th Cir. 1974) (the defendant has an expectation that the prosecutor's recommendation be "expressed with some degree of advocacy" and with statements that are more than halfhearted support for the recommendation).

Viewing the prosecutor's comments in full context, we conclude that the prosecution stayed within the plea agreement in making the probation recommendation on the OMVWOC conviction. After the comment about Davis not earning or deserving probation, the prosecutor went on to explain why probation should be given consideration based on Davis's age and the prospect of having Davis under control for a substantial period by probation.[3] The

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[1] The trial court did not conduct a ***Machner*** hearing on Davis's claim of ineffective assistance of counsel because it concluded that there was no prejudice from the failure to object. A ***Machner*** hearing serves to preserve trial counsel's testimony when a defendant claims ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] Here, there is no dispute as to the terms of the plea agreement or the conduct of the prosecution.

[3] The prosecutor's comments continued:

> The fact of the matter is there's no reason to think that this defendant is going to be rehabilitated by sending him to prison. However, that sentence

prosecution was trying to place the recommendation for probation in the best light in view of the aggravating circumstances of the crime and its recommendation of the maximum term on the robbery conviction. In this respect, the case is more similar to ***Ferguson***, 166 Wis.2d at 325, 479 N.W.2d at 245, where the prosecutor was allowed latitude in explaining reasons for apparent incongruity in its recommendation, than to ***Poole***, 131 Wis.2d at 364, 394 N.W.2d at 911, where the prosecution breached the plea agreement by comments which implied reservations about the recommendation.

Yet despite similarity to ***Ferguson***, every case stands on its own circumstances. Here, in light of Davis's record on prior probation, the prosecutor would have strained believability to recommend probation without a plausible explanation. The prosecutor did not express any disdain for the recommendation of probation and attempted to "sell" the idea to the court. The prosecutor's remarks were reasonable in light of the circumstances and within the bounds of the plea agreement.

Having determined that there was no breach of the plea agreement, it follows that trial counsel was not deficient in failing to object during the prosecutor's remarks. The trial court correctly denied the postconviction motion without conducting a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

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

(..continued)

> will keep him under the control of the Department of Corrections for the next 27 years. Through a —during a portion of that 27 years he'll be out on the street and he can still pose a danger and risk to the community, and I take that risk very seriously, and I recognize that by recommending consecutive probation to a 16 year prison term I'm running this risk that he's going to harm some other citizen; but in light of his young age, I—I feel that society has to take a chance that Pierre Davis is going to turn his young life around, despite the absolute and total lack of evidence to support that.