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DISTRICT I/IV

October 9, 2013

To:

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2365	State of Wisconsin v. Mark Russell Weinert (L.C. # 2010CF4345)
2012AP2366	State of Wisconsin v. Mark Russell Weinert (L.C. # 2010CF5197)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Mark Weinert appeals orders denying his postconviction motion to withdraw his pleas in two burglary cases that were jointly handled in the circuit court. Weinert contends that the prosecutor breached the plea agreement by failing to personally state the parties' joint sentencing recommendation at the sentencing hearing, and that defense counsel provided ineffective assistance by failing to object to the prosecutor's omission. After reviewing the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

The record shows that, after a lengthy discussion of restitution, the prosecutor noted that the defendant had committed fourteen burglaries, including the read-ins, but on the upside, most of them were commercial rather than residential, and many of them had been cleared solely based upon Weinert’s cooperation—which at least gave the victims a little peace of mind. The court then asked, “Is that it?” to which the prosecutor replied, “That’s it,” without having made any actual recommendation as to sentence. The court then observed that it had not yet heard any recommendation, at which time defense counsel stated the parties’ joint recommendation as being two years of initial confinement and three years of extended supervision, to be served consecutive to another sentence Weinert was already serving.

The court ultimately rejected the joint recommendation as “grossly unduly depreciative based on the volume of burglaries,” explaining that it could not “contemplate a resolution here that calls for less than two months per burglary.” It instead imposed terms of four years of initial confinement and four years of extended supervision on each of the four counts of conviction. One of the counts was to be served consecutive to any other sentence, while the remaining three were to be served concurrent to one another but consecutive to any other sentences. The court noted that it had considered imposing more time, but was giving Weinert credit for his cooperation and the number of cases he had assisted police in clearing.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In order to withdraw a plea based upon a violation of the plea agreement, a defendant must show that there was a “material and substantial breach” that “defeats the benefit for which the accused bargained.” *State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. Weinert has not provided any authority holding that a prosecutor breaches the plea agreement merely by allowing defense counsel to state the parties’ joint sentencing recommendation. Moreover, even if the prosecutor’s omission could be deemed a technical breach, we are not persuaded that any such breach was “material and substantial” here, where the court’s discussion demonstrated that the court understood what the joint recommendation was, and the court explained why it did not consider the recommendation to be appropriate. We are persuaded that Weinert received the benefit that he bargained for. For example, the court noted that it was imposing a lesser sentence than it had contemplated based upon information provided by the State as to Weinert’s cooperation.

IT IS ORDERED that the orders denying Weinert’s request for plea withdrawal are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals