OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 16, 2014

To:

Hon. Patrick C. Haughney
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brad Schimel
District Attorney
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

Christopher R. Robertson, #511921
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2013AP1884 State of Wisconsin v. Christopher R. Robertson
(L.C. #2007CF1200)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Christopher R. Robertson appeals pro se from an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief alleging that the State breached the parties' plea agreement. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order.

In 2008, Robertson was convicted after pleading guilty to armed robbery as party to a crime and to burglary of a dwelling, both as a repeater. In exchange for his guilty pleas, the State

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

agreed to recommend: (1) fifteen years' initial confinement and ten years' extended supervision on the armed robbery charge, (2) five years each of confinement and supervision on the burglary charge, consecutive to the armed robbery charge, and (3) a stay of the burglary sentence with five years' probation consecutive to the armed robbery sentence. The State made the agreed-upon recommendation.

In 2009, Robertson filed a postconviction motion alleging that the trial court failed to consider sentencing guidelines; the motion was denied. In 2010, appellate counsel filed a no-merit appeal; Robertson did not exercise his right to file a response or file a petition for review of this court's decision affirming his conviction.

In 2012, Robertson filed this WIS. STAT. § 974.06 motion alleging that the State breached the plea agreement by implying in its sentencing comments that a change in circumstances and the discovery of other bad acts since striking the deal warranted a harsher sentence than it had agreed to recommend.[2] The trial court denied the motion without a hearing. Robertson appeals.

A prosecutor may not "render a less than neutral recitation of the plea agreement," ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278 (1999), or "impl[y] that circumstances had changed since the plea bargain, and that had the [S]tate known of the other instances of defendant's misconduct, [it] would not have made the agreement [it] did," ***State v.***

[2] As the State observes, Robertson forfeited a direct challenge to the alleged breach by not objecting to it at sentencing, making ineffective assistance of counsel the proper analytic framework. *See* ***State v. Liukonen***, 2004 WI App 157, ¶6, 276 Wis. 2d 64, 686 N.W.2d 689. Robertson did so in his WIS. STAT. § 974.06 motion, asserting that counsel's alleged error was the "sufficient reason" for not raising the claim in a prior filing. *See* ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. While on appeal he does not structure the issue as one of counsel's effectiveness, it does not matter because his claim fails on the merits. Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

Poole, 131 Wis. 2d 359, 364, 389 N.W.2d 40 (Ct. App. 1986). Whether the State's conduct constituted a material and substantial breach is a question of law we review de novo. ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220.

Robertson points out three instances where he contends the State implied that it would have sought a harsher penalty had it known in the bargaining stages what it knew at sentencing. In the first, the prosecutor noted that "what aggravates this is certainly the fact that Mr. Robertson picked up three cases," including an uncharged burglary allegedly involving him and one of his current co-defendants. In the second, the prosecutor confessed her prior unawareness of Robertson's juvenile record of disorderly conduct, fourth-degree sexual assault, and theft, and the burglary and third-degree larceny for which he spent two years in a Florida prison. In the third, the State explained its sentencing recommendation:

> I don't make a recommendation of fifteen years[']initial[-]term confinement lightly when I'm talking about a young man who's twenty-two years old. I think that's a pretty poor commentary on Mr. Robertson's life and the decisions that he's made. But I think to protect the community, I think that that is an appropriate amount of incarceration necessary to make sure that next time when he gets out he's not the one with the gun under the influence of drugs and ends up hurting someone or potentially killing them.
>
> So, your Honor, for all those reasons the state does believe its recommendation is appropriate. We have complied with the victim rights notification, and that's all I would have, your Honor.

We conclude that none of these comments suggest that the State tried to impermissibly undermine a bargain it now thought unwise, *see* ***Poole***, 131 Wis. 2d at 360, 364, or convey a belief that its sentence recommendation was insufficient, *see* ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689. The State could not have agreed to keep relevant aggravating sentencing information from the court. *See* ***id.***, ¶10. What the comments illustrate is

the State's belief that the bargain it did make for a lengthy sentence recommendation was justified by Robertson's ongoing conduct and choices. The comments thus were proper and did not breach the deal. *See* ***Hanson***, 232 Wis. 2d 291, ¶¶27-28 (State may discuss negative facts about defendant so as to justify recommended sentence within parameters of plea agreement).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals