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DISTRICT IV

October 14, 2015

To:

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Circuit Court Judge
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Madison, WI 53703

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

2014AP371-CR

State of Wisconsin v. Gregory S. Handel (L.C. # 2011CF82)

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

Gregory Handel appeals a judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Handel first argues that the State breached their agreement on a joint recommendation for his sentence after revocation of probation. He argues that certain comments made by the prosecutor had the effect of undermining the numerical recommendation, which the prosecutor correctly stated.

Handel provides no legal authority for the proposition that post-revocation sentencing agreements are enforceable. Unlike a plea agreement, where the State's sentencing recommendation is made in exchange for the defendant's plea, it is not clear what exchange occurs in a post-revocation agreement. However, the State provides no authority to show that they are *not* enforceable. For purposes of this order, we assume that a post-revocation sentencing agreement can be enforced in the same manner as one connected with a plea agreement, that is, by resentencing.

The State argues that it complied with the sentencing agreement because the prosecutor stated the correct numerical recommendation. However, that argument is not responsive because Handel's argument is based on *other* things the prosecutor said. The State is silent about whether those other comments constitute a breach of the agreement, and the State makes no effort to apply relevant law to those comments.

Nonetheless, we conclude that the prosecutor's comments did not breach the agreement. Despite a sentencing agreement, a prosecutor is permitted to make comments to the court that relate to appropriate sentencing factors, such as the seriousness of the offense, the need to protect the public, and the defendant's character. *See State v. Bokenyi*, 2014 WI 61, ¶¶55, 68, 72-73, 355 Wis. 2d 28, 848 N.W.2d 759.

In Handel's case, the parties' joint recommendation was higher than the recommendation from the Department of Corrections. Accordingly, it was appropriate for the prosecutor to explain to the circuit court why a higher recommendation was justified, and the prosecutor's other comments served that purpose and related to appropriate sentencing factors. Handel argues that it was not necessary for the State to say these things, because both parties wanted Handel to be under supervision long enough to receive sex offender treatment, after sentence credit was applied, which should be a sufficient explanation for the court to adopt their recommendation. However, we do not see how the fact that the court was given that explanation necessarily required the prosecutor to refrain from other comments that might apply to the relevant sentencing factors and persuade the court that the joint recommendation was appropriate.

Handel's second argument is that he was sentenced based on inaccurate information. Specifically, he argues that the circuit court sentenced him based in part on unproven allegations, described by the prosecutor, that he disputes. We conclude that Handel has not shown that the court actually relied on that information. Handel asserts that reliance is shown by the fact that the court referred to "crimes" and "victims" while imposing sentence, even though there is only one victim and one count in this case. However, when Handel pointed this out at sentencing, the court stated that it misspoke when it said "victims," and that even though there was only one count, the complaint described multiple acts. We are satisfied that the sentencing court understood, when imposing sentence, that there was only one victim and one count.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals