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DISTRICT III

April 26, 2016

To:

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

2015AP1077-CR State of Wisconsin v. Michael Earl Hawkins (L. C. #2012CF160)

Before Stark, P.J., Hruz and Seidl, JJ.

Michael Earl Hawkins, pro se, appeals a judgment convicting him of two counts of manufacture/delivery of heroin and one count of manufacture/delivery of cocaine. He also appeals an order denying postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2013-14).

Hawkins was charged with a total of ten counts, each relating to the manufacture or delivery of heroin or cocaine. Pursuant to a plea agreement, Hawkins pleaded guilty to two

counts of manufacture/delivery of heroin and one count of manufacture/delivery of cocaine, and the remaining counts were dismissed and read in. The parties agreed to jointly recommend concurrent sentences of four years' initial confinement and three years' extended supervision on each count. However, the circuit court ultimately imposed consecutive sentences totaling fifteen years' initial confinement and fifteen years' extended supervision.

Hawkins, pro se, filed a postconviction motion seeking resentencing, arguing the State's sentencing remarks breached the plea agreement and Hawkins' trial attorney was ineffective by failing to object to the alleged breach. The circuit court denied Hawkins' motion without a hearing, and this appeal follows.

A defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). A defendant who alleges the State has breached a plea agreement must show, by clear and convincing evidence, that a breach occurred and that the breach was material and substantial. ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. When a defendant asserts his or her trial attorney was ineffective by failing to object to an alleged breach of a plea agreement, we first determine whether a material and substantial breach of the agreement occurred, which is a question of law for our independent review. ***State v. Liukonen***, 2004 WI App 157, ¶¶6, 9, 276 Wis. 2d 64, 686 N.W.2d 689. If so, we then consider whether the defendant's attorney provided ineffective assistance by failing to object. ***Id.***, ¶6.

Hawkins does not argue the State failed to make the sentence recommendation required by the plea agreement. Instead, he contends the State undermined the plea agreement by covertly suggesting the circuit court should impose a harsher sentence than the parties' joint

recommendation. *See* ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278 (1999) ("[T]he State may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended."). In support of this argument, Hawkins cites the prosecutor's comment, made near the beginning of his sentencing remarks, that "there could be a substantial deterrence impact on this sentence." The prosecutor made this comment while arguing that Hawkins' sentence could deter both Hawkins and others from transporting drugs from Chicago to sell in the Superior area.

Hawkins' argument that the State materially and substantially breached the plea agreement fails for three reasons. First, we reject Hawkins' contention that the prosecutor's challenged statement called into question the State's commitment to the joint sentence recommendation. Hawkins argues the statement "was a suggestion to the Court that the sentence should be substantial for the purpose of deterrence." However, that is not what the prosecutor said. The prosecutor merely stated Hawkins' sentence could have a substantial deterrence impact. The prosecutor never indicated he did not believe the joint recommendation would provide a substantial deterrent effect, and Hawkins does not explain why the recommended sentence of seven years could not be considered to have that effect.

Second, a prosecutor can assert a recommended sentence is appropriate under the circumstances and, at the same time, argue the court should not impose a lesser sentence. *See* ***Liukonen***, 276 Wis. 2d 64, ¶16. While the prosecutor did not explicitly make such an argument in this case, his remarks, when considered in their entirety, clearly conveyed that message.

Third, a prosecutor's sentencing remarks do not breach a plea agreement when the prosecutor "effectively communicate[s]" to the sentencing court that he or she stands by the agreed-upon sentence recommendation. *See* ***id.*** Here, the prosecutor expressly stated at the close of his sentencing remarks that, even taking into account his earlier comments, he stood by the joint sentence recommendation. Although the prosecutor did not go as far as the prosecutor in ***Hanson***, who expressly stated none of her remarks were meant to contravene the plea agreement, *see* ***Hanson***, 232 Wis. 2d 291, ¶26, nothing in the prosecutor's remarks suggested he had second thoughts about the joint recommendation or believed the plea agreement had granted Hawkins an undeserved "break," *cf.* ***Liukonen***, 276 Wis. 2d 64, ¶15. Under these circumstances, the prosecutor's single-sentence comment about the deterrent effect of Hawkins' sentence was not a material and substantial breach of the plea agreement.

Because Hawkins has failed to demonstrate a material and substantial breach of the plea agreement, his trial attorney was not ineffective by failing to object to the alleged breach. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals