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DISTRICT II

December 6, 2017

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

2017AP615-CR State of Wisconsin v. Marshall T. Andrews (L.C. #2015CF159)

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

Marshall T. Andrews appeals from a judgment convicting him of felony possession with intent to manufacture, distribute or deliver cocaine and heroin, both as second or subsequent offenses as party to a crime. Andrews also appeals from an order denying his motion for postconviction relief, arguing that his trial counsel was prejudicially ineffective for failing to object to the State's material breach of the plea agreement at sentencing and that his guilty plea

was not voluntarily, intelligently, and knowingly made. We conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

After executing a search warrant on Andrews' residence, officers recovered quantities of cocaine, heroin, and marijuana, along with evidence that the substances were being held for sale. Andrews was charged with four offenses: possession with intent to deliver the recovered substances as well as maintaining a drug trafficking place. Andrews agreed to plead guilty to the cocaine and heroin charges, the remaining charges were dismissed and read in, and the State agreed to recommend a three-year prison sentence, consisting of eighteen months' initial confinement and eighteen months' extended supervision to run consecutive to Andrews' existing revocation sentence.

At sentencing, the State argued that its "recommendation is for a period of prison" but did not specify the time period, explaining instead that it was "leaving that up to the discretion of the Court." In response, trial counsel indicated that she was "a little confused, because I thought the offer was eighteen and eighteen on each count to be consecutive to the revocation." The court attempted to clarifying, noting on the record that

> I want to address with both of you, because initially what I'm hearing from [trial counsel] is that there was an agreement for three years in the state prison bifurcated as year and a half and year and a half, running consecutive to any sentence, and indeed, that was attached to your voluntary plea agreement at the time that the change of plea was done. However, when I looked at the minutes … the state was recommending Wisconsin prison sentence of an undisclosed amount at that time. I want to make sure that there is

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> not an allegation here that either the state or the defense is breaching the plea agreement.

Trial counsel responded that the plea agreement was recited in court, and that what the State was recommending was not "off at all from the recommendation, so I do not believe that the plea agreement has been violated at all." The State did not respond.

The circuit court sentenced Andrews to six years on each charge, bifurcated as four years' initial confinement and two years' extended supervision, concurrent to each other and consecutive to any other charge. Andrews filed a postconviction motion seeking to withdraw his plea and set the matter for trial, arguing that trial counsel provided ineffective assistance and that his plea was not knowingly, intelligently, and voluntarily entered as he was under a misapprehension as to the State's recommendation.[2] After a hearing, the court denied Andrews' motion, reasoning that while the State's discussion at sentencing may have been a technical breach of the plea agreement, it was not material and substantial.

The right to enforcement of a negotiated plea agreement is a constitutionally protected right. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). However, "[n]ot all conduct that deviates from the precise terms of a plea agreement constitutes a breach that warrants a remedy." ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. A defendant alleging breach of a plea agreement must demonstrate by clear and convincing evidence that a breach occurred and that the breach was material and substantial. ***Id.***; *see also*

[2] As Andrews failed to object to the State's breach of the plea agreement at sentencing, he waived his right to directly challenge it on appeal. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Andrews may challenge his trial counsel's failure to object to the State's breach, however, on the ground of ineffective assistance of counsel. *See* ***State v. Sprang***, 2004 WI App 121, ¶¶12-13, 25, 274 Wis. 2d 784, 683 N.W.2d 522.

State v. Bowers, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255 ("A defendant is not entitled to relief when the breach is merely a technical one rather than a substantial and material breach of the agreement."). "A breach is material and substantial if it 'violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained.'" ***State v. Campbell***, 2011 WI App 18, ¶7, 331 Wis. 2d 91, 794 N.W.2d 276 (quoting ***Bowers***, 280 Wis. 2d 534, ¶9).

We conclude that the State committed a technical breach; however, the breach was not material and substantial and, therefore, counsel was not ineffective. We consider the State's technical breach, recommending court discretion instead of eighteen months' initial confinement and extended supervision, to be akin to a "inadvertent and insubstantial" misstatement of the plea agreement that was promptly rectified by both trial counsel and the court. *See* ***State v. Knox***, 213 Wis. 2d 318, 320, 323, 570 N.W.2d 599 (Ct. App. 1997) ("[W]e conclude that the unintentional misstatement of the plea agreement, promptly rectified through the efforts of both counsel, did not violate Knox's due process right to have the full benefit of the plea bargain upon which he relied."); *see also* ***Campbell***, 331 Wis. 2d 91, ¶11; ***Bowers***, 280 Wis. 2d 534, ¶13. Trial counsel clarified the terms of the plea agreement, and the court acknowledged that it was aware of the terms, which had been articulated at the time of the plea hearing and also at sentencing.

Andrews argues that unlike in ***Knox*** and ***Bowers***, the State did not actually correct itself at sentencing and change its recommendation. We concur that the record on appeal indicates that the State did not amend its recommendation at any point, and we are bound by the record before us. Our review, however, also suggests that the State was not given the opportunity to make a statement to correct the error. Instead, the court appears to have accepted trial counsel's correction without seeking affirmation from the State as the court was well aware of the terms of

the plea agreement. In the future, best practices require that the prosecutor affirmatively speak up to correct or clarify any alleged misstatement of the plea agreement. Under the facts of this case, however, the record suggests that the State's recommendation was an inadvertent misstatement.

We hold that while the State committed a technical breach, the misstatement was promptly corrected and did not materially or substantially breach the parties' plea agreement. As we conclude that there was no breach of the plea agreement, trial counsel's failure to object or to confer with Andrews did not fall below an objective standard of reasonableness under the circumstances. *See* ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984). Further, there was no prejudice to Andrews as all involved recognized the misstatement as an error. ***Id.*** We therefore affirm the judgment of conviction and order denying postconviction relief.[3]

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Andrews also argues that because the terms of his plea agreement were changed, his plea was not intelligently, knowingly, and voluntarily made and he should be entitled to withdraw his plea based on a manifest injustice. As we find no substantial or material breach of the plea agreement, meaning that the terms of the plea agreement were not altered, and no ineffective assistance of counsel, we also conclude that Andrews is not entitled to withdraw his plea based on a manifest injustice.