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June 27, 2018

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

2017AP1460-CR State of Wisconsin v. Marcus A. McFarland (L.C. #2015CF1637)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marcus A. McFarland appeals from a judgment convicting him of possession with intent to deliver cocaine (>15-40g) and maintaining a drug trafficking place and from an order denying his motion for postconviction relief. McFarland seeks resentencing, arguing that his trial counsel was prejudicially ineffective for failing to object to the State's material breach of the plea agreement. 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 (2015-16).[1] We summarily reverse and remand with directions.

McFarland was charged after officers recovered quantities of cocaine from his home pursuant to a search warrant in an ongoing drug investigation. According to the Plea Questionnaire/Waiver of Rights Form, McFarland agreed to plead guilty to both counts as charged, and in exchange the State would "recommend prison" but would be "silent on amount" of time recommended. During the plea hearing, the State explained on the record that it was "asking that [McFarland] go to prison. He's free to argue." At sentencing, however, the State declared: "I'm asking the Court to sentence [McFarland] to what I quantified as prison for a long period of time." Defense counsel made no objection to the State's recommendation.

The circuit court sentenced McFarland to five years' initial confinement (IC) and five years' extended supervision (ES) on count one, and one and one-half years' IC and two years' ES on count two, served concurrently. McFarland filed a postconviction motion, arguing that the State breached the plea agreement by failing to remain silent on the length of prison time. The court denied McFarland's motion, reasoning that the plea agreement stated in court contained no limitations on the State recommending an amount of prison time. McFarland appeals.

A "defendant has a constitutional right to the enforcement of a negotiated plea agreement," and "once the defendant has given up [his or her] bargaining chip by pleading guilty, due process requires that the defendant's expectation be fulfilled." ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997) (citation omitted). The State breaches a plea

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

agreement when the prosecutor does not follow the sentencing recommendation as negotiated. ***Id.*** at 272. In order to be actionable, the breach must be material and substantial and not merely technical. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.*** Whether the State breached the plea agreement and whether the breach was material and substantial are questions of law that we review de novo. ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

In this case, the State disputes the terms of the plea agreement. The State argues that no breach occurred as "[t]he prosecutor promised to request prison sentences for McFarland. She did not promise to forego a request that called for sentences of a particular length, expressed either as a specific number [of] years or more generally." We disagree. The State's argument that the plea agreement did not specify that it would refrain from making a recommendation on the length of the sentence is essentially a suggestion that we must read into the agreement that the State was "free to argue," when those words, or any similar statement, are not found in either the record or the Plea Questionnaire/Waiver of Rights Form. The plea questionnaire as signed by McFarland, filed with the circuit court, and relied on by the court to conduct the plea colloquy, clearly states, "[S]tate will recommend prison, silent on amount (PSI)." When the court questioned the terms of the agreement on the record, the State responded that "I'm asking that he go to prison." The State further explained, "*He*'s free to argue." (Emphasis added.) The State was clear that McFarland was free to argue, not that both parties were free to argue at sentencing. Any differences between the quick, oral summary of the plea agreement on the record and the agreement included on the plea questionnaire are not so distinct and contradictory that we conclude that there was a true dispute as to the terms of the agreement. We conclude that

McFarland bargained for the State's silence on the length of the sentence, not that the State could make any recommendation concerning the length of time in prison that it wanted. As the State asked the court to sentence McFarland to "prison for a long period of time," we conclude that the State committed a material and substantial breach of the plea agreement.

As McFarland's counsel did not object to the State's breach of the plea agreement, McFarland was required to argue his postconviction motion from an ineffective assistance of counsel posture. To succeed on an ineffective assistance of counsel claim, McFarland must establish both (1) that counsel's representation was deficient and (2) that McFarland suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If McFarland can establish that counsel performed deficiently by failing to object to a substantial and material breach of the plea agreement, then prejudice will be presumed. *See* ***State v. Howard***, 2001 WI App 137, ¶26, 246 Wis. 2d 475, 630 N.W.2d 244.

Prior to appellate review of an ineffective assistance of counsel claim, the challenged attorney must explain his or her actions at a ***Machner***[2] hearing. Here, the circuit court denied McFarland's motion without a hearing. By denying the postconviction motion without a hearing, McFarland was deprived of the opportunity to prove his trial counsel was deficient. Therefore, based on this court's decisions in ***State v. Liukonen***, 2004 WI App 157, ¶19, 276

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The circuit court must hold a ***Machner*** hearing if the defendant's "motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Wis. 2d 64, 686 N.W.2d 689, and ***Howard***, 246 Wis. 2d 475, ¶29, we reverse and remand to the circuit court for a ***Machner*** hearing.

We emphasize, however, the court's discussion in ***Liukonen***:

> Even if [the defendant's] trial counsel had a sufficient strategic reason for failing to object to the breach and, thus, did not perform deficiently, [the defendant] may nonetheless be entitled to resentencing if his counsel did not consult with him about foregoing an objection. *See* [***State v. Sprang***, 2004 WI App 121, ¶¶27-29, 274 Wis. 2d 784, 683 N.W.2d 522].
>
> In ***Sprang***, we explained that when a prosecutor breaches a plea agreement by arguing for a harsher sentence than the one the prosecutor agreed to recommend, the agreement has "morphed" into a new agreement. Thus, defense counsel must consult with the defendant and receive verification that the defendant wishes to proceed with the "new" plea agreement. *See* ***id.***, ¶28. The ***Sprang*** decision teaches that even a strategically sound decision by defense counsel to forgo an objection to a prosecutor's breach without consulting with the defendant constitutes deficient performance because it is "tantamount to entering a renegotiated plea agreement without [the defendant's] knowledge or consent." ***Id.***, ¶29.

Liukonen, 276 Wis. 2d 64, ¶¶20-21 (emphasis omitted; fourth alteration in original).

As in ***Liukonen***, the record in this case does not indicate whether defense counsel consulted with McFarland regarding the breach during the sentencing hearing. The circuit court should determine whether any discussion occurred and, if so, whether McFarland agreed to continue despite the breach. If neither communication occurred, then McFarland is "entitled to resentencing before a new judge regardless whether his counsel had a valid strategic reason for failing to object to the breach." ***Id.***, ¶22.

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

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

Sheila T. Reiff
Clerk of Court of Appeals