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DISTRICT II

July 3, 2018

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

2017AP1204-CR State of Wisconsin v. Melissa M. Johnson (L.C. #2013CF1184)
2017AP1205-CR State of Wisconsin v. Melissa M. Johnson (L.C. #2015CF447)

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

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).

Melissa M. Johnson appeals from two judgments convicting her of two counts of throwing or discharging bodily fluids—saliva—at a public safety worker. Johnson also appeals from an order denying her motion for postconviction relief, arguing that her defense counsel was prejudicially ineffective for failing to properly object to the State's breach of the plea agreement at sentencing when it undermined the recommendation. 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 affirm.

Johnson was charged with resisting an officer, as a repeater; two counts of throwing or discharging bodily fluids at a public safety worker, one as a repeater; battery of a peace officer, as a repeater; two counts of felony bail jumping; obstructing an officer; and disorderly conduct. Johnson agreed to plead guilty to two counts of throwing or discharging bodily fluids at a public safety officer, and in exchange the repeater enhancer was dismissed and the remaining charges were dismissed and read in. The State agreed to recommend one-year initial confinement (IC) and one-year extended supervision (ES) on each count concurrent to a two-year revocation sentence she was currently serving and each other. The State informed the court during a motion hearing that, although Johnson had pending cases in front of the court, she was a victim of a "very brutal sexual assault" that "caused her a lot of problems in her life," and, therefore, the State was going "to treat her as a victim."

At sentencing, however, the State told the court how Johnson was "just really a horrible human-being," and that there is not "any excuse for her behavior, whether she's a rape victim, whether she had a horrible upbringing." The State argued that "ultimately it is the recommendation of the State from our supervisors that she receive one year [IC] followed by one year of [ES] on each of these two files concurrent to each other and concurrent to her revocation." In response, defense counsel immediately requested a sidebar conference. The court indicated on the record that the sidebar had to do "primarily with [the State's] statement

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

that supervisors have concurred in this recommendation. And I informed the parties that I give that no consideration."

The circuit court sentenced Johnson to three and one-half years on the first charge, bifurcated as one and one-half-years' IC followed by two-years' ES, consecutive to any other sentence. The sentence for the second charge was stayed, and the court ordered probation for three years, consecutive to all other sentences. Johnson filed a postconviction motion seeking resentencing before a different judge, arguing that the State undermined and distanced itself from the recommendation by noting that the recommendation came from its supervisors and through indirect means conveyed to the court that it did not agree with the recommendation. Johnson further argued that the State's recommendation was not neutral and that she was "automatically prejudiced" as a result of her counsel's failure to properly object to the State's breach. The court denied Johnson's motion, reasoning that the State "was entitled to make statements supporting its prison recommendation."

A criminal defendant's right to the 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. Rather, the question of material and substantial breach is one of law determined by the historical facts, such as the terms of the plea agreement and the State's conduct that allegedly constitutes a breach of the plea agreement. ***State v. Williams***, 2002 WI 1, ¶5, 249 Wis. 2d 492, 637 N.W.2d 733. A breach of a plea agreement 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. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255.

"The State may not accomplish by 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." ***Williams***, 249 Wis. 2d 492, ¶42 (citation omitted). However, the State may not "agree to keep relevant information from the sentencing judge." ***Id.***, ¶43 "At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the State." ***Id.*** Information communicated to the court regarding such pertinent factors need not be enthusiastically supportive of the plea agreement. ***State v. Liukonen***, 2004 WI App 157, ¶15, 276 Wis. 2d 64, 686 N.W.2d 689. Thus, while the State must walk "a fine line" at a sentencing hearing, the State "may convey information to the sentencing court that is both favorable and unfavorable to [the defendant], so long as the State abides by the plea agreement." ***Williams***, 249 Wis. 2d 492, ¶44. "Furthermore, nothing prevents [the State] from characterizing a defendant's conduct in harsh terms, even when such characterizations, *viewed in isolation*, might appear inconsistent with the agreed-on sentencing recommendation." ***Liukonen***, 276 Wis. 2d 64, ¶10.

We conclude that the State did not breach the plea agreement, and, therefore, counsel was not ineffective. We consider the State's comments about Johnson during sentencing, referring to Johnson as "just really a horrible human-being" who does not have "any excuse for her behavior, whether she's a rape victim, whether she had a horrible upbringing," while unnecessarily inflammatory, to be unfavorable information about pertinent factors relating to Johnson's character and behavioral pattern that cannot be immunized by a plea agreement. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 319-20, 325, 479 N.W.2d 241 (Ct. App. 1991) (finding no breach of plea agreement where prosecutor characterized the offenses as "the most … perverted sex acts" and stated that "this is the sickest case that I have seen or read about. If I refer to this defendant

as 'sleaze,' I think that would be giving him a compliment"); *but see* ***Liukonen***, 276 Wis. 2d 64, ¶14 ("[T]he prosecutor's remarks constituted fair comment on the seriousness of [the defendant's] conduct, criminal history, and character, even when the prosecutor employed strong language," but crossed the "fine line" when the prosecutor "used language suggesting he now thought the agreement was too lenient.").

We hold that while the State made denigrating comments about Johnson during sentencing, the commentary did not step over the "fine line" and did not materially or substantially breach the parties' plea agreement. As we conclude that there was no breach of the plea agreement, defense counsel's failure to object or her failure to confer with Johnson did not fall below an objective standard of reasonableness under the circumstances. *See* ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984). We therefore affirm the judgments of conviction and order denying postconviction relief.

IT IS ORDERED that the judgments 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.

Sheila T. Reiff
Clerk of Court of Appeals