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September 23, 2020

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

2019AP1371-CR State of Wisconsin v. Jacob D. Krull (L.C. #2017CF1445)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Jacob D. Krull appeals from a judgment convicting him with one count of possession with intent to deliver THC and one count of possession with intent to deliver psilocin and from an order denying his postconviction motion. Krull asserts that the State breached their plea agreement by recommending unspecified prison on each of the two counts to run consecutively to one another. He contends that the alleged breach entitles him to resentencing and that he

received ineffective assistance of counsel when his lawyer did not object. Based on 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 (2017-18).[1] We affirm.

In addition to the charges for which Krull was convicted, he was charged with possession with intent to deliver dimethyltryptamine and with possession of drug paraphernalia. The parties reached a plea agreement, and, pursuant to the plea questionnaire, the State agreed to recommend "'unspecified prison,' consecutive to any other sentence."

At the plea hearing, the circuit court asked the State to recite the plea offer. The State responded: Krull will plead guilty to the THC and psilocin charges, while the State will move to dismiss and read in the remaining charges, request a presentence investigation report (PSI), "and recommend unspecified prison on each count." The State soon repeated its recommendation for "prison [to] be consecutive on each count to any other sentence." When the court inquired on what counts a PSI would be requested, the State's response included reiterating that it was "asking for unspecified prison on each count consecutive to any other sentence." After further discussion among court and counsel, a brief recess was taken to allow defense counsel to confirm the two specific charges to which Krull was pleading guilty and that the State's "request will be unspecified prison consecutive to any other sentence." The State agreed.

At sentencing, the State initially stated its recommendation as "an unspecified period of incarceration in the State prison system consecutive to any other sentence." Shortly afterwards, and noting the two counts to which Krull pled guilty, the State requested "prison on each count

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

consecutive to one another." The court sentenced Krull to two years of initial confinement and then three years of extended supervision on each of the charges, and the sentences would run consecutively to each other, which would also run consecutive to any other sentence Krull was serving.

In his postconviction motion, Krull argued the State breached the plea agreement when it changed the "unspecified prison" terminology from the plea questionnaire to prison on each count consecutive to one another. Krull contended that this effectively increased the minimum sentence recommendation from one year to two, because concurrent sentences would permit a one year term, whereas consecutive sentences would effectively require a minimum confinement of two years, as a term of confinement in prison for a count cannot be less than one year. Krull argued that his counsel's failure to object to the alleged breach, or to consult with Krull about the breach, constituted ineffective assistance of counsel.

The circuit court held a ***Machner***[2] hearing. Krull's trial counsel testified that he did not recall talking about how the two counts would interact with each other, and he did not object at sentencing because he did not consider the State's explanation of the agreement as a breach. The court denied Krull's motion, concluding that the State's sentencing recommendation was not a breach, much less a material and substantial one. The court also rejected the ineffective counsel claim as there was no breach.

The United States Constitution protects the right to enforce a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "[O]nce the defendant has given

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

up his [or her] bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." ***Id.*** (citation omitted).

Because Krull's trial attorney failed to object to the State's alleged breach of the plea deal, Krull waived the right to directly raise his breached plea argument. *See* ***State v. Sprang***, 2004 WI App 121, ¶12, 274 Wis. 2d 784, 683 N.W.2d 522; ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Because of his counsel's alleged failure, however, Krull is able to present the issue, and we may review it, as an ineffective assistance of counsel claim. *See* ***State v. Bowers***, 2005 WI App 72, ¶6, 280 Wis. 2d 534, 696 N.W.2d 255; ***Howard***, 246 Wis. 2d 475, ¶12.

Before we analyze Krull's ineffective assistance of counsel claim using the well-established framework of ***Strickland v. Washington***, 466 U.S. 668 (1984), we must first determine whether the State "materially and substantially" breached the plea agreement. *See* ***Bowers***, 280 Wis. 2d 534, ¶¶6, 13, 20; ***Howard***, 246 Wis. 2d 475, ¶12. If there was no breach for trial counsel to object to, there was no deficient legal assistance. *See* ***State v. Naydihor***, 2004 WI 43, ¶¶7, 9, 270 Wis. 2d 585, 678 N.W.2d 220; ***State v. Campbell***, 2011 WI App 18, ¶8, 331 Wis. 2d 91, 794 N.W.2d 276 (2010) (failing to prove occurrence of a material and substantial breach dismantles an ineffective assistance of counsel claim). Likewise, if there was no breach, an ineffective assistance claim based on the failure to consult with Krull would also fail. *See* ***State v. Knox***, 213 Wis. 2d 318, 323, 570 N.W.2d 599 (Ct. App. 1997) (rejecting defendant's argument that his trial counsel should have advised him of his right to seek sentencing in front of a different judge, explaining: "[W]e need not address Knox's proposition; because the breach [to the plea agreement] was not material, there was nothing to remedy").

The pertinent facts here are undisputed, as they are set forth in the plea questionnaire and hearing transcripts. With no disputed factual issues, the question whether the State breached the terms of the agreement is one of law that we review de novo. *See* ***Howard***, 246 Wis. 2d 475, ¶15.

No relief is available for a breach that is merely technical—minor deviations from the precise terms of the agreement are insufficient; the breach must be material and substantial, meaning one that "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." *See* ***Campbell***, 331 Wis. 2d 91, ¶7; ***Bowers***, 280 Wis. 2d 534, ¶9. The defendant must meet this burden with clear and convincing evidence. *See* ***Campbell***, 331 Wis. 2d 91, ¶7.

To determine whether a breach occurred, we must examine the terms and scope of the plea agreement, which requires us to look at the record as a whole. *See* ***State v. Williams***, 2002 WI 1, ¶¶20, 26, 46, 249 Wis. 2d 492, 637 N.W.2d 733; *see also* ***Naydihor***, 270 Wis. 2d 585, ¶¶13-14, 31 (determining that there was no breach "[h]aving reviewed the prosecutor's statements in their entirety;" the court quoted the prosecutor's lengthy comments and recommendation at resentencing in full).

Krull points to the written plea questionnaire and the State's recommendation for "'unspecified prison,' consecutive to any other sentence." Krull contends the State agreed to refrain from taking a position on whether the sentences should run concurrently or consecutively. Based on the record as a whole, we conclude that Krull has failed show by clear and convincing evidence that the State changed agreed-upon terms.

As the plea and sentencing transcripts make clear, the State repeated its recommendation for unspecified prison on each count multiple times and also stated that the counts were to run consecutively. In fact, we count the State reiterating prison time of unspecified length, "on each count," at least four times in the two hearings, starting with the very first time the State announced the deal at the plea hearing. The emphasis on a prison term for each count would be largely meaningless if the sentences on each count were to run concurrently. Those repeated statements prior to and at the sentencing hearing clearly indicated that the agreement was a recommendation "on each count," and the State also stated at the plea colloquy that it recommended "prison [to] be consecutive on each count to any other sentence."

Even if the State's recitation at the plea colloquy as permitting a consecutive recommendation was less than clear, we are unpersuaded by Krull's fundamental contention that "unspecified prison" unambiguously precluded such a recommendation. Recognizing that the State made clear at the plea colloquy that the agreement permitted it to address "each count," we fail to see how the "unspecified prison" clearly means a recommended minimum sentence of one year (i.e., concurrent sentences on each count), as compared to a minimum sentence of two years (i.e., consecutive sentences on each count). This phrase does not unequivocally mean one or rule out the other, and "unspecified prison" could simply refer to the length of the term. At best, the agreement is silent as to one or the other. Our caselaw makes clear that such silence permits the State to recommend consecutive sentences on the two counts. *See* ***Bowers***, 280 Wis. 2d 534, ¶16 ("[I]n the absence of any indication that the parties expected the State to either remain silent or recommend concurrent sentences, we are reluctant to engraft these conditions into a fully integrated plea agreement."); ***State v. Tourville***, 2016 WI 17, ¶¶33, 36, 367 Wis. 2d 285, 876

N.W.2d 735 (no breach where the plea agreement was silent as to whether the sentences would be concurrent or consecutive; the parties had not reached an agreement).

In short, there is no indication that the parties agreed the State would remain silent or could not recommend the terms should run consecutively. To the contrary, the State repeatedly set forth its understanding that its recommendation was for unspecified prison for each count (and consecutively), and there is no indication of an agreement to the contrary. Defense counsel neither objected nor considered the recommendation to be a breach, stating that he had no recollection of any discussion as to how the two counts would interact with one another. This testimony clearly undercuts any suggestion that the parties *mutually agreed* the State would remain silent. ***Bowers***, 280 Wis. 2d 534, ¶16 (basic contract law applies to plea negotiations). That there were instances in the plea and sentencing hearings that the State used a shortened form, does not clearly and convincingly prove that a material and substantial breach of the agreement occurred.

Because no material and substantial breach occurred, the alleged failure of Krull's counsel to object or to explain an alleged breach to Krull was no failure and his omission did not constitute deficient performance under the ineffective assistance of counsel criteria. *See* ***Naydihor***, 270 Wis. 2d 585, ¶9; ***Bowers***, 280 Wis. 2d 534, ¶¶13, 20.

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.

Sheila T. Reiff
Clerk of Court of Appeals