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DISTRICT IV

September 24, 2020

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

2019AP1789

State of Wisconsin v. Marcus S. Johnson, Jr. (L.C. # 2017CF9)

Before Kloppenburg, Graham, and Nashold, 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 Johnson appeals an order denying his motion for postconviction relief. 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 (2017-18).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Johnson was convicted in 2018 of second-degree reckless homicide and was sentenced to ten years of initial confinement and ten years of extended supervision. In 2019, Johnson filed his current postconviction motion under WIS. STAT. § 974.06. The motion alleged that the plea agreement called for a joint sentence recommendation of five years of initial confinement and ten years of extended supervision. Johnson argued that the circuit court breached the plea agreement by imposing a longer term of initial confinement than provided in the plea agreement, and that his trial counsel was ineffective by not objecting to the breach. The circuit court denied the motion without an evidentiary hearing.

On appeal, Johnson argues that the circuit court breached the plea agreement by not following the sentence recommendation in the plea agreement. This argument fails because a circuit court is not a party to a plea agreement, and is not bound by the sentence recommendation the parties agree to. *State v. Williams*, 2002 WI 1, ¶24, 249 Wis. 2d 492, 637 N.W.2d 733. In other words, the court does not breach a plea agreement by imposing a different sentence than the parties agreed to recommend. In the cases that Johnson relies on, it was the prosecution, not the court, that breached the plea agreement by recommending something other than what was agreed to.

As a result, Johnson's ineffective assistance claim also fails. Johnson's motion does not allege facts that, if true, would entitle him to relief. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (defendant entitled to hearing if motion alleges facts that, if true, would entitle defendant to relief). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because there was no legal basis to argue

that the circuit court breached the plea agreement, counsel's performance could not be deficient, and Johnson could not suffer prejudice by the absence of an objection.

IT IS ORDERED that the order appealed is summarily affirmed under 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