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DISTRICT II

June 23, 2021

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

2020AP563-CR State of Wisconsin v. Kyle J. Zink (L.C. #2017CF109)

Before Neubauer, C.J., Gundrum and Davis, 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).

Kyle J. Zink appeals from the judgment of conviction and the order denying his postconviction motion. 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 (2019-20).[1] For the following reasons, we affirm.

Zink was charged with thirteen counts of possession of child pornography. Pursuant to a plea agreement, he pled to all counts; he was concurrently sentenced on each to six years of initial confinement followed by ten years of extended supervision. Zink subsequently moved for postconviction relief, arguing that the State breached the plea agreement at sentencing and his trial counsel performed ineffectively by not objecting to the breach. Following an evidentiary hearing, the circuit court denied the motion. Zink appeals.

Whether the State violated the terms of a plea agreement is a question of law we review de novo. ***State v. Jackson***, 2004 WI App 132, ¶9, 274 Wis. 2d 692, 685 N.W.2d 839. When the facts are undisputed, as in this case, whether trial counsel performed deficiently is also a question of law we review independently. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

At Zink's plea hearing, the parties put on the record the limitations the State would place upon itself at sentencing in exchange for Zink's plea to all counts[2]:

> [Prosecutor]: [U]pon [Mr. Zink's] plea to the charges in the information, … [b]oth sides are free to argue, although the State is not making any specific recommendation as to the length of prison. It is a mandatory minimum. So prison is a must.

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

[2] In exchange for Zink's pleas, "the State also agree[d] that any additional charges for the other images that were found on the computer will not be charged."

> The Court: So the State can give the Court any relevant information if they wish to. They just won't make a recommendation for the consequences; is that correct?
>
> [Prosecutor]: Yes.
>
> The Court: [Defense counsel], is that your understanding?
>
> [Defense Counsel]: That's how we've discussed it.
>
> The Court: Okay. Mr. Zink, is that your understanding?
>
> Mr. Zink: Yes, Your Honor.

At the start of the sentencing hearing, the circuit court reiterated its "understanding that the State is free to make comments about the case but will not make any specific recommendations." The prosecutor agreed that this understanding was correct; neither Zink nor his counsel said anything to the contrary.

Zink contends that the State breached the plea agreement because at sentencing the prosecutor made arguments encouraging the circuit court to not consider an actuarial assessment that was noted in the presentence investigation report (PSI) which suggested Zink was a low risk to reoffend. Specifically, Zink complains that the prosecutor urged the court to "disregard," "not place any weight in," and "not be fooled by" the assessment. He asserts that such comments "implicitly argued that the tools upon which the PSI recommendation was based were flawed and that the court should sentence Mr. Zink to longer than the 4-5 years recommended in the PSI." We see no breach.

Zink and his counsel both clearly indicated at the plea hearing their understanding that the prosecutor was "free to argue" at sentencing, but just could not "mak[e] any specific recommendation as to the length of prison." They both verbally agreed that the State was free to "give the Court any relevant information if [it] wish[es] to. They just won't make a

recommendation for the consequences," and they further raised no concerns with these understandings when at the start of the sentencing hearing, the court reiterated that the State was "free to make comments about the case but will not make any specific recommendations." The State did not stray from its limits.

At sentencing, the prosecutor noted both aggravating and mitigating factors related to Zink and his crimes. Then, related to the actuarial assessment referred to in the PSI, the prosecutor stated:

> [The actuarial tool] said that his risk of recidivism is low. It is a one, and I want to put in perspective what that means.
>
> That does not mean he has a low risk of reoffending. What that one means is that some studies look at five years after release from whatever sort of confinement, and obviously there's a mandatory minimum here….
>
> Some of these tools look at five years after that release. Some look at ten years, but what one means is factoring the criteria that that tool uses is that within whatever time frame that tool used, he has a low risk of being caught, charged, and convicted.
>
> Whether or not he reoffends is not measured by that tool, and we cannot say that because he has a one, he's a very low risk to reoffend.
>
> When we look at the presentence report, the actuarial tool was even criticized to a certain extent by the agent. Dr. [Anna] Salter[3] tells us that the Static-99R should not be used in a case where

[3] The prosecutor identified "Dr. Salter" earlier in her sentencing comments:

> I've had the opportunity to go through some training sessions with other persons in the legal community. Dr. Anna Salter, I believe this Court is familiar with Dr. Salter, she is … a nationally respected and recognized expert working with sex offenders, high risk sex offenders….
>
> [S]he had made it very clear that anyone who looks at child pornography is sexually attracted to children….

> there's only a possession of child pornography count as is the case here.
>
> She tells us that those tools are meant for hands on sex offenders. So the goal that I am marking for today is that this Court should not place any weight in that actuarial tool.
>
> When we look at this defendant's history, his own conduct and statements epitomize why these actuarial tests are troublesome. He said, and I'm looking at page five for this, during the early 2000s, he stumbled upon child pornography. He fantasized about the girls on the internet as someone he could teach.
>
> Had this actuarial tool been applied to him then, he would have had that low score, but yet there was a one hundred percent chance of him reoffending.
>
> Page twenty-two of the pre-sentence report, he said that by 2008 to 2009, he had a very heavy and consistent interest in viewing child pornography.
>
> His actuarial score then again would likely have been one. The PSI tells us at page six. Sometime around 2014, it might have been between 2012 to 2014, he made statements that began getting interested in child porn all over again, and he became deeply involved in viewing child porn.
>
> He admitted that he downloaded as much of it as he could. He felt guilty about it and he was afraid of being found out but yet he still would have just had the one.
>
> So … [e]very time he decided again to commit this crime, that actuarial tool would have given the same result.

The prosecutor then highlighted some of the most egregious child porn videos Zink possessed, including a video involving a young child in bestiality, before concluding:

> So the State is not making any specific recommendation to this Court, but I'm asking this Court to disregard that actuarial tool and to sentence this defendant the way this Court and lawyers have been taught; use discretion, use training and years of experience in the criminal justice system, apply the ***Gallion***[4] factors, use common sense; and I ask that this Court not be fooled by some

[4] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

> theoretical actuarial table that should not have been used in a case where solely the criminal behavior is that of child pornography.
>
> And with those facts in mind, the State trusts that this Court will render a fair and just sentence to protect the public. Thank you.

As we have stated: "[T]he State should be held only to those promises it actually made to the defendant" and "will not be bound to those it did not make." ***State v. Bowers***, 2005 WI App 72, ¶16, 280 Wis. 2d 534, 696 N.W.2d 255 (citation omitted). Here, the State promised only that it would "not mak[e] any specific recommendation as to the length of prison," "won't make a recommendation for the consequences," and, as the circuit court restated it at the sentencing hearing without objection or correction from anyone, "will not make any specific recommendations." Other than that, the State was free to "argue," "give the Court any relevant information if [it] wish[es] to," and "make comments about the case." The prosecutor precisely held to this agreement and in no way breached it.

Because it is well settled that trial counsel is not ineffective where he/she fails to raise a meritless objection, ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441—which a breach-of-plea-agreement objection would have been in this case—we also conclude that counsel did not perform ineffectively by failing to object to the State's comments at sentencing as being a breach of the plea agreement.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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