COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2550-CR **Cir. Ct. No. 2011CF280**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUANITO RIVERA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Juanito Rivera, Jr. appeals from a judgment convicting him of substantial battery (domestic abuse) and from a circuit court order denying his postconviction motion seeking resentencing on the grounds that

the prosecutor's sentencing remarks breached the plea agreement. Because the prosecutor's sentencing remarks did not breach the plea agreement, we affirm.

¶2 At the plea hearing, the parties announced their agreement that Rivera would plead no contest to substantial battery; the other offenses[1] would be dismissed and read in. The State agreed "to cap with no prison time, free to argue." The prosecutor explained that the victim did not want Rivera incarcerated, and "[t]he State has not agreed to no jail but we did agree to keep prison off the table based on her request."

¶3 During the plea hearing, the circuit court informed Rivera that it was not bound by any sentence recommendation and confirmed that the State had agreed not to argue for prison time. The court asked the prosecutor for photographs of the victim's injuries and inquired about Rivera's prior record from Illinois. The prosecutor advised the court that Rivera had numerous Illinois charges (larceny, public peace offense, multiple assaults, traffic offense, drug offenses, obstructing, health and safety crimes, and invasion of privacy), but only two convictions (a drug offense and a health and safety crime).

¶4 At the sentencing hearing, the circuit court confirmed that the State would not recommend prison and that both sides were free to argue the sentence. The court acknowledged that the presentence investigation report recommended a sentence of three and one-half years (eighteen months of initial confinement and two years of extended supervision).

[1] The other offenses were strangulation and suffocation, disorderly conduct and criminal damage to property in a domestic abuse situation, and felony intimidation of a victim.

¶5 Rivera's Illinois record became a focus at sentencing because the presentence investigation report's recitation of Rivera's prior offenses was more extensive than the information provided by the prosecutor at the plea hearing. The circuit court asked the prosecutor to comment, without violating the plea agreement, why probation was appropriate in light of the new information about Rivera's Illinois record. While she acknowledged that she could not breach the plea agreement, the prosecutor confirmed that she was not aware of all of Rivera's Illinois offenses when she entered into the plea agreement. The prosecutor then urged the court to impose the maximum amount of probation and conditional jail time. In support of her recommendation, the prosecutor characterized Rivera's battery offense as part of a pattern of escalating and serious behavior, including prior abuse of the victim and poor conduct while in custody. The prosecutor discussed the gravity of the most recent offense against the victim as evidenced by the photographs of her injuries, and she rejected Rivera's claim that he was the victim in the case.

¶6 In imposing sentence, the circuit court placed Rivera's offense on the high end of severe and found that the victim's injuries, as depicted in the photographs, were not consistent with Rivera's claim that the victim was the aggressor. The court found that Rivera had a poor character, a history of violence, a spotty work history, and presented a risk to the public. The court was very concerned about Rivera's prior record, including numerous allegations that he battered women. In addition, Rivera engaged in violent conduct while in custody. After considering the severity of the offense, Rivera's history of violence and the need to protect the public, the court imposed prison and extended supervision totaling three and one-half years.

¶7 Postconviction, Rivera claimed that the prosecutor's sentencing remarks breached the plea agreement, and he sought resentencing. Rivera argued that the prosecutor suggested that she would not have agreed to forego prison if she had known of all of Rivera's prior offenses. Rivera further argued that the tone of the prosecutor's sentencing remarks undercut her recommendation for probation and conditional time. Finally, Rivera argued that his trial counsel's failure to object to these remarks constituted ineffective assistance.

¶8 After thoroughly reviewing the applicable law and the sentencing proceeding, the circuit court denied Rivera's postconviction motion because the State did not breach the plea agreement. The prosecutor never referred to the presentence investigation report's recommendation that Rivera go to prison, and the parties were free to argue regarding the length of probation and conditional jail time. The new information in the presentence investigation report about Rivera's record led the court to inquire of the prosecutor why probation would be appropriate. Even as it posed that question, the court cautioned the prosecutor not to breach the plea agreement, and the prosecutor echoed that caution in her response and argument for the maximum term of probation and conditional jail time.

¶9 The circuit court concluded that Rivera's case was akin to ***State v. Naydihor***, 2004 WI 43, ¶25, 270 Wis. 2d 585, 678 N.W.2d 220, which allows a prosecutor "to discuss [the defendant's] aggravating sentencing factors and relevant behavioral characteristics … in order to justify an unusual sentence recommendation within the constraints of the plea agreement." The court concluded that the prosecutor did not breach the plea agreement: her remarks addressed the sentencing factors, she discussed the positive and negative aspects of Rivera's record and character, she never mentioned the presentence

investigation report's prison recommendation, and she appropriately argued for maximum probation and conditional jail time. Rivera appeals.

¶10 A defendant may be entitled to resentencing if the State committed a material and substantial breach of the plea agreement by not adhering to the negotiated sentencing recommendation. ***Id.***, ¶10.[2] "Where, as here, there is no dispute regarding the terms of the agreement or the State's conduct allegedly constituting a breach of it, we consider only whether the State's conduct constituted a breach and whether that breach was material and substantial, questions of law we review de novo." ***State v. Wood***, 2013 WI App 88, ¶7, 349 Wis. 2d 397, 835 N.W.2d 257. In ***Wood*** we discussed the restrictions on the State at sentencing.

> At sentencing, "[t]he 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." [***State v.***] ***Williams***, [2002 WI 1, ¶42,] 249 Wis. 2d 492, [637 N.W.2d 733] (citations omitted). That said, the State also cannot agree to keep relevant information from the sentencing judge. ***Id.***, ¶43. As such, the State walks a "fine line" in balancing "its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." ***Id.***, ¶44 (citation omitted).

Wood, 349 Wis. 2d 397, ¶9.

[2] We agree with Rivera that the framework for his appeal is ineffective assistance of trial counsel because his counsel did not object to the State's sentencing remarks. However, we need not reach this issue to decide this appeal. The circuit court did not decide Rivera's ineffective assistance claim because it held that the State did not breach the plea agreement. If the State did not breach the plea agreement, then counsel's failure to object cannot be the basis for an ineffective assistance of counsel claim. ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220; ***State v. Cummings***, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996) (failure to pursue a motion for which relief cannot be granted does not constitute deficient performance).

¶11 Rivera argues that his case is akin to ***Williams***. We disagree; this is a ***Naydihor*** case. In contrast to the prosecutor in ***Williams*** who breached the plea agreement by implying that had the State known more about the defendant's record, "it would not have entered into the plea agreement," ***Williams***, 249 Wis. 2d 492, ¶47, the prosecutor in Rivera's case did not imply that had she known more about Rivera's record, the State would not have entered a plea agreement. The presentence investigation report provided a more comprehensive summary of Rivera's prior offenses. *See* ***Naydihor***, 270 Wis. 2d 585, ¶24 & n.5. A plea agreement does not immunize the defendant from examination and discussion of his or her character and behavior pattern, and it cannot bar the presentation of relevant information to the sentencing court. ***Id.***, ¶21. Rivera's record is what it is, and neither the State nor the court were free to ignore it at sentencing. The prosecutor had the right to discuss Rivera's record and the sentencing factors, ***id.***, ¶26, no matter how negative they were, to justify her request for maximum probation and maximum conditional jail time, ***id.***, ¶22 (citation omitted). The prosecutor did not "undercut the essence of the plea agreement." ***Id.***, ¶17 (citation omitted).

¶12 As the ***Wood*** court held:

> The prosecutor's comments at sentencing were appropriate in light of the sentence he was recommending, which included a lengthy period of probation and a year of confinement, and did not constitute a covert attempt to convey to the court that a more severe sentence was warranted than that recommended. Thus, the State's comments did not breach the plea agreement, much less materially and substantially breach it, and [trial] counsel was not ineffective in failing to object. *See* [***Naydihor***, 270 Wis. 2d 585], ¶9 ("If the State did not breach the plea agreement, then the failure of [defense] counsel to object did not constitute deficient performance.").

Wood, 349 Wis. 2d 397, ¶13.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).