COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1436-CR **Cir. Ct. No. 2011CF4579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK GERARD LYNCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO and JEFFREY A. KREMERS, Judges. *Affirmed*.

Before Fine, Kessler, and Brennan, JJ.

¶1 PER CURIAM. Patrick Gerard Lynch appeals a judgment convicting him of one count of armed robbery with threat of force as party to a crime and one count of attempted armed robbery with threat of force as party to a

crime. *See* WIS. STAT. §§ 943.32(2), 939.32, 939.05 (2011-12).[1] He also appeals an order denying his postconviction motion for resentencing in which he alleged the State violated the plea agreement by advising the circuit court that Lynch was not "similarly situated" to his co-defendant.[2] We affirm the judgment and order.

BACKGROUND

¶2 A criminal complaint charged Lynch and Jimmie Perkins with one count of armed robbery with threat of force as party to a crime and one count of attempted armed robbery with threat of force as party to a crime.

¶3 Lynch and the State subsequently negotiated a plea agreement. In exchange for Lynch's guilty pleas to the two counts charged in the complaint, four additional counts of armed robbery and one additional count of attempted armed robbery would be read-in and the State would recommend an unspecified amount of prison time. Lynch was free to argue for a lesser sentence. The court accepted Lynch's pleas.

¶4 To assist the court at sentencing, the defense obtained its own presentence investigation (PSI) report. The report relayed that Lynch's co-defendant Jimmie Perkins had received concurrent sentences of six years of initial confinement and four years of extended supervision on the charge of armed robbery with threat of force as party to a crime and three years of initial

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable J. D. Watts presided over Lynch's plea hearing. The Honorable Jean A. DiMotto sentenced Lynch and entered the judgment of conviction. The Honorable Jeffrey A. Kremers entered the order denying Lynch's postconviction motion.

confinement and two years of extended supervision on the charge of attempted armed robbery with threat of force as party to a crime. The PSI recommended a similar sentence for Lynch: six years of initial confinement and four years of extended supervision on each count, to be served concurrently.

¶5 During the sentencing hearing, the State requested that Lynch spend time in prison; however, it "left the length of that term to the sound discretion" of the court. In later remarks, the State told the court that Lynch and Perkins were "not similarly situated" because Perkins offered a confession sooner than Lynch and also agreed to testify against Lynch, if necessary.

¶6 On count one, the charge of armed robbery with threat of force as party to a crime, the circuit court sentenced Lynch to fifteen years of initial confinement and five years of extended supervision, to be served concurrent to another sentence Lynch was serving at the time. On count two, the charge of attempted armed robbery with threat of force as party to a crime, the circuit court sentenced Lynch to two years and six months of initial confinement and two years and six months of extended supervision, to be served consecutive to count one.

¶7 Lynch filed a postconviction motion for resentencing, claiming that the State breached the plea agreement at sentencing and that his trial counsel was ineffective for failing to object. Lynch argued that the breach occurred when the State advised the court that he and Perkins were not similarly situated, which "signaled [to] the court that any sentence imposed on Mr. Lynch should be greater than the one received by Perkins" and amounted to an impermissible end run around the plea agreement. The postconviction court denied Lynch's motion.

DISCUSSION

¶8 Lynch forfeited his right to direct review of the alleged breach of the plea agreement because he did not object to the prosecutor's statement. *See* ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522. Therefore, the issue must be reviewed under the rubric of ineffective assistance of trial counsel. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. To establish ineffective assistance of counsel, Lynch must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel is not constitutionally ineffective for failing to pursue a meritless objection or motion. ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

¶9 "Whether the State breached a plea agreement is a mixed question of fact and law." ***Naydihor***, 270 Wis. 2d 585, ¶11. The terms of the agreement and the historical and evidentiary facts surrounding the alleged breach are questions of fact to which we give deference to the circuit court. ***Id.*** Whether the State's conduct constituted a material and substantial breach of the agreement is a question of law that we decide *de novo*. ***Id.*** The threshold inquiry is whether the State breached the plea agreement. ***Id.***, ¶9. If not, Lynch's counsel did not provide inadequate representation. *See* ***id.***

¶10 In its sentencing remarks, the State explained to the circuit court:

> The defendant did ultimately admit to his involvement; however, it took some time. There were a number of interviews in which he was not cooperative and did not come forth with the information. It was after a lineup I believe was held that he did ultimately confess.
>
> He and Mr. Perkins are not similarly situated in that regard because Mr. Perkins did come forth with his confession at an earlier point prior to Mr. Lynch, and I can

> indicate that I did inform Judge Watts at the time of sentencing that Jimmy Perkins had agreed, if necessary, should Mr. Lynch have taken his case to trial, that he would testify against Mr. Lynch, and based on his cooperative response with the police and in fact defense counsel played a portion of the interview with Mr. Perkins for Judge Watts to show that the detective was commenting on Mr. Perkins' cooperation in providing information to the police.

After detailing Lynch's lengthy criminal record for the circuit court, the State continued:

> Being that he [Lynch] was the gunman, being that he was masked during these armed robberies and that the gun was fired in one of these, all of those actions are not attributed to Mr. Perkins and that's how I see them as not being similarly situated. Also, as I indicated before, he [Lynch] was not as forthcoming with his admission to these offenses.

¶11 On appeal, Lynch contends that the State's sentencing comment that Lynch was "not similarly situated" to Perkins constituted an end run around its agreement to not make a specific recommendation as to the length of Lynch's sentence. *See* ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733 ("'The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the [circuit] court that a more severe sentence is warranted than that recommended.'" (citation omitted)). He asserts that this comment was made in response to the recommendation in the defense PSI report that Lynch receive what was, in effect, the same sentence as Perkins: six years of initial incarceration and four years of extended supervision, concurrent, on both counts.[3] According to Lynch, the State's comment suggested that he

[3] As previously noted, the PSI report indicated that Perkins was sentenced to concurrent sentences of six years of initial confinement and four years of extended supervision on the charge of armed robbery with threat of force as party to a crime and three years of initial confinement and two years of extended supervision on the charge of attempted armed robbery with threat of force as party to a crime.

should receive a lengthier sentence than Perkins.

¶12 In its response, the State asserts that the comment was made in an effort to provide the court with a complete picture of Lynch so that it could find a basis for adopting the State's recommendation that Lynch be sentenced to prison and to enable it to craft an informed sentence in light of all relevant factors.

¶13 After reviewing the transcript of the sentencing hearing, we agree. Lynch himself acknowledges that a plea agreement cannot prohibit the State from informing the circuit court of aggravating sentencing factors. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 24 (Ct. App. 1991) ("The plea agreement in this case did not prohibit the [S]tate from informing the [circuit] court of aggravating sentencing factors. Nor could it. 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 [S]tate.'" (citation omitted)). Moreover, "[a] plea agreement which does not allow the sentencing court to be apprised of relevant information is void as against public policy." ***Id.*** Having all the information available was particularly important here given that the judge who accepted Lynch's plea was not the same judge who sentenced him.

¶14 In this regard, we adopt the postconviction court's analysis:

> Here, the State apprised the court of each defendant's role in the offenses, their respective criminal history, and their willingness to come forward sooner rather than later, which was intended to be a reflection on their respective characters…. [T]he State in this case did not deviate from the terms of its agreement, i.e. not to recommend a specific number of years; nor was it prohibited from commenting on the degree of seriousness of the offenses and the co-defendants' respective involvement and/or criminal history. The facts are the facts. The defendant's culpability is a relevant factor which may be considered at sentencing.

> The prosecutor did not breach the terms of the plea agreement by advising the court about the levels of culpability with respect to each defendant. The court was entitled to know if the co-defendants were similarly situated and, if they were not, why they were not. The court finds that the State's sentencing argument does not constitute a breach of the plea agreement because it was making a legitimate comparison between the co-defendants and providing the court with relevant facts about each defendant.

See WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion."). Accordingly, we conclude that the State's "not similarly situated" comment does not amount to an end run around the plea agreement. *See* ***Naydihor***, 270 Wis. 2d 585, ¶¶19-25 (detailing end-run situations occurring where the State implies at sentencing that it might have sought a harsher sentence if it had more complete information at the time of the plea). There is no indication in the record that the State was somehow displeased with the plea agreement and its decision to leave the amount of prison time to the circuit court's discretion.

¶15 Because the State did not breach the plea agreement, trial counsel had no basis for an objection. Consequently, the postconviction court properly denied Lynch's motion.

By the Court.—Judgment and order affirmed.

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