COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1327-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HANS GERGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Hans Gerger appeals from the order denying his motion for sentence modification. He argues on appeal that his sentence should be modified because the State breached the plea agreement it made with him.

Because we conclude that Gerger did not establish that the State breached the agreement, we affirm.

¶2 In 1994, Gerger pled guilty to one count of burglary as a repeat offender.[1] At the preliminary hearing, the following colloquy took place:

> THE COURT: This is here for preliminary hearing, what's the situation?
>
> [DEFENSE COUNSEL]: This is going to be waived pursuant to an agreement, your honor.
>
> [DISTRICT ATTORNEY]: Judge, it was indicated to the Defendant through [defense counsel] upon a plea of other than not guilty to Count 2 of the Complaint – the State is not prepared to file an Information today - Count 1 would be dismissed and read in. And - oh there is also an uncharged fleeing Complaint from April 23, 1994, that would also be read in and not charged. The State would ask the Court [to] order a Presentence and adjourn the matter for sentencing.
>
> THE COURT: Is that the understanding?
>
> [DEFENSE COUNSEL]: Yes, it is your honor.
>
> THE COURT: And we're going to have to set this for arraignment.
>
> [DISTRICT ATTORNEY]: That would be fine.
>
> THE COURT: You have discussed this with your client?
>
> [DEFENSE COUNSEL]: Yes, I have your honor

¶3 And later, the court asked Gerger:

> THE COURT: The D.A. has agreed to drop one charge and recommend a presentence on this charge. Was anything else promised to you to get you to give up the preliminary hearing?
>
> MR. GERGER: No.

[1] A second count was dismissed and read in, and an uncharged complaint of fleeing was read in but not charged.

¶4 At the subsequent plea hearing, the following colloquy occurred:

> [DISTRICT ATTORNEY]: Right, Judge. It was indicated to the defendant and [defense counsel] upon plea of not guilty to Count 2 of the Information, Count 1 would be dismissed and read in. There's also an uncharged fleeing, April 23, 1994, which would not be charged then and read in at this point, it would be read in but not charged.
>
> THE COURT: Are you making any recommendations on Count 2?
>
> [DISTRICT ATTORNEY]: No. We'd be asking the Court to order a presentence and adjourn the matter for sentencing.
>
> THE COURT: Is that your understanding, Ms. Mitchel?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

¶5 At the time of sentencing, the district attorney recommended imprisonment for a period of six years. Neither Gerger nor his counsel objected to this recommendation. The court sentenced Gerger to sixty months in prison. Gerger did not appeal from the judgment or the sentence.

¶6 In 1998, Gerger filed a motion in circuit court to modify his sentence. He alleged that the State had breached the plea agreement by recommending a sentence of sixty months. Gerger asserted that the State had agreed at the plea hearing not to make any recommendation. The circuit court denied the motion, finding that the State had not agreed to make "no recommendation." The court further found that Gerger "got exactly what he bargained for: a Presentence Report which actually gave him a favorable recommendation." Gerger appeals from this order denying his motion.

¶7 The State first asserts that Gerger waived any objection to the State's recommendation by not objecting at the time of the hearing. Since we reach the merits of the appeal, we will not address the waiver issue.

¶8 A party seeking to vacate a plea agreement "must establish a material and substantial breach by clear and convincing evidence." ***State v. Jorgensen***, 137 Wis.2d 163, 168, 404 N.W.2d 66, 68 (Ct. App. 1987). Whether a breach of the agreement has occurred involves a finding of fact. *See* ***id.*** at 169, 404 N.W.2d at 68. The circuit court's findings of fact will not be overturned unless they are clearly erroneous. *See* ***id.***

¶9 In this case, the circuit court found that the State had not breached the plea agreement. Our review of the record supports this finding of fact. During the colloquy at the preliminary hearing, quoted above, the court confirmed with Gerger and his counsel that the State had not made any promises other than dismissing and reading in certain counts. The court specifically asked Gerger if the State had made any other promises and Gerger responded no.

¶10 The circuit court further found that the colloquy at the plea hearing did not support Gerger's assertion that the district attorney promised not to make any recommendation as to sentence. The court found that the court's question to the prosecutor indicated that the court thought the case was going to sentencing at that time. The court further found that the district attorney's response indicated that he was not making a recommendation about sentencing at that hearing, but that both parties were asking for a presentence investigation. These findings are supported by the record and, in turn, support the conclusion that the State did not agree not to recommend a specific sentence.

¶11 There is further support for this conclusion in the record. The record establishes that Gerger signed a waiver of rights form. This form states in paragraph 13: "I understand that the Judge is not bound to follow any plea bargain or any recommendation agreed upon by the attorneys; I understand that the Judge

is free to sentence me to the maximum possible penalties in this case." Gerger initialed this paragraph.

¶12 Based on this entire record, we conclude that the circuit court's interpretation of the prosecutor's statement was reasonable. Taking the statement in context, and based on the colloquy during the preliminary hearing, it is reasonable to conclude that when the prosecutor stated at the sentencing hearing that he would not be making a recommendation as to sentence, he meant that he was not making a recommendation at that time but that he wanted a presentence report. Because the circuit court's findings of fact were not clearly erroneous, Gerger has not established that the State breached the plea agreement. Consequently, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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