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DISTRICT II

January 13, 2016

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

2014AP2940 State of Wisconsin v. Sandro H. Rodriguez (L.C. # 2010CF528)

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

Convicted in 2011 of first-degree sexual assault of a child under thirteen, Sandro Rodriguez appeals from an order denying his motion for a new sentencing hearing. As grounds, Rodriguez alleged that the State breached the plea agreement at sentencing. 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 (2013-14).[1] We affirm because the State did not breach the plea agreement.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The plea agreement required the State to recommend a prison term of no specific length. At sentencing, the State asked for a prison sentence and argued that the court should "consider[] the seriousness of this offense in determining the length of the prison sentence." The State noted that the defendant "has been convicted of one of the most severe and harshest crimes available or that occur in the community other than homicide." The State discussed the facts of the offense, the impact on the victim, Rodriguez's character, and the risk Rodriguez poses to the public and individuals in his home. The court imposed a twenty-year sentence (fifteen years of initial confinement and five years of extended supervision). Rodriguez claims the foregoing remarks constituted a breach of the plea agreement.

At the postconviction motion hearing, the circuit court found that the State's sentencing remarks did not breach the plea agreement. The court characterized the State's remarks as a request to consider the gravity and severity of the offense. The court then reviewed the facts of the case and its sentencing rationale and concluded that it considered proper sentencing factors. Rodriguez appeals.

On appeal, Rodriguez argues that the State's remarks amounted to a suggestion that the circuit court should impose a lengthy sentence and, therefore, a breach of the plea agreement.

Whether the State's sentencing argument constituted a material and substantial breach of the plea agreement presents a question of law that we determine independently. ***State v. Bokenyi***, 2014 WI 61, ¶38, 355 Wis. 2d 28, 848 N.W.2d 759. We review the circuit court's findings of fact under the clearly erroneous standard. ***Id.***, ¶37. "A material and substantial breach … is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." ***Id.***, ¶40 (citation omitted).

We agree with the circuit court's characterization of the State's sentencing remarks as relevant to the gravity and severity of the offense. Other than requiring the State to refrain from recommending a specific sentence, the plea agreement did not restrict the State's ability to offer

argument directed at the sentencing factors. ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991) (a plea agreement cannot immunize a defendant from sentencing arguments addressing pertinent sentencing factors).

We also agree with the State that this case is governed by ***State v. Jackson***, 2004 WI App 132, 274 Wis. 2d 692, 685 N.W.2d 839. As part of the plea agreement in ***Jackson***, the State "agreed not to make a specific sentencing recommendation, but was free to argue what [the State] believed were the mitigating and aggravating circumstances." ***Id.***, ¶5. At sentencing, the State "made a lengthy and compelling argument, but did not recommend a specific sentence." ***Id.***, ¶6.

Jackson complained that the State breached the plea agreement by offering "remarks designed to influence the severity of the sentence…." ***Id.***, ¶10. The ***Jackson*** court concluded that the State agreed "not to recommend a specific sentence," complied with that agreement and did not breach the plea agreement. ***Id.***, ¶13. The court reasoned that a compelling sentencing argument by the State does not breach a plea agreement that allows the State to recommend an unspecified period of confinement. ***Id.***, ¶15.

Applying ***Jackson*** here, we conclude that the State did not breach the plea agreement. The State did not recommend a specific confinement period and properly argued the sentencing factors. A new sentencing hearing was not required.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals