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March 15, 2016

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

2015AP339 State of Wisconsin v. Charles E. Spangler (L.C. # 2011CF116)
2015AP340 State of Wisconsin v. Charles E. Spangler (L.C. # 2013CF70)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Charles Spangler appeals an order that denied his motion for postconviction relief from the sentences in two OWI cases, without holding an evidentiary hearing. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm for the reasons discussed below.

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

In Jackson County Case 2011CF116, the circuit court followed the joint recommendation of the parties for the disposition of Spangler's seventh OWI conviction by withholding sentence and placing Spangler on probation for a period of five years, with nine months of conditional jail time. Although the judgment of conviction appears to be silent as to whether the term of probation was to be served consecutive or concurrent to any other term of probation that Spangler was then serving, the parties agree that it was treated as concurrent with a period of extended supervision that Spangler was then serving on his sixth OWI case. The written plea agreement further provided: "Successfully complete [Jackson County Treatment Court]. If not, State will seek 3 years [initial confinement] plus max [extended supervision] w/ [Earned Release Program] eligibility."

While on probation and still participating in the Jackson County Treatment Court for his seventh OWI case, Jackson was charged with an eighth OWI offense in Jackson County Case 2013CF70. The circuit court again followed a joint recommendation of the parties, and imposed a sentence of three years of initial confinement and three years of extended supervision. The judgment of conviction included a note stating: "Extended Supervision[_]Concurrent[_]With any other supervision serving."

Spangler's eighth OWI case also resulted in the revocation of his probation on the seventh OWI case. At the hearing for sentencing after revocation, the State argued that the court should impose the maximum available penalty of five years of initial confinement and five years of extended supervision—notwithstanding the provision of the plea agreement that indicated that the State would recommend only three years of initial confinement in the event that Spangler failed to complete his alternative to revocation drug treatment program. The defense asked the court to follow the presentence investigation report's recommendation of three years of initial

confinement and three years of extended supervision, but did not object to the State's recommendation as a violation of the plea agreement.

The circuit court imposed a sentence after revocation on the seventh OWI case of four years initial confinement and four years extended supervision. The court noted that Spangler had just received a sentence of six years' imprisonment on the eighth OWI case, and that the prior six-year sentence on his sixth OWI case had not deterred Spangler from committing the seventh offense. The court expressed its view that the only way to deter "hard core" OWI offenders such as Spangler was "to lock them up for ever [sic] longer periods of time."

Spangler filed a postconviction motion challenging the imposition of both his initial five-year term of probation and his eight-year sentence of imprisonment following revocation on the seventh OWI case. He claimed: (1) that the circuit court lacked authority under ***State v. Givens***, 102 Wis. 2d 476, 307 N.W.2d 178 (1981), to direct that his term of probation be served concurrent to his extended supervision on his sixth OWI case, and (2) that trial counsel provided ineffective assistance by not objecting when the State breached the plea agreement with regard to its sentence recommendation following the revocation of Spangler's probation.

The circuit court correctly determined that Spangler's reliance upon ***Givens*** was misplaced because that case held that a term of probation cannot be ordered *to commence* upon a defendant's *future release* on *parole*. ***Givens***, 102 Wis. 2d at 478-79. Here, Spangler was already serving the extended supervision portion of a bifurcated sentence on his sixth OWI when the court imposed a concurrent term of probation; thus, the term of probation was neither concurrent to *parole*, nor delayed to *commence* in the future. Under WIS. STAT. § 973.09(1)(a), the circuit court plainly had the authority to impose a term of probation for the seventh OWI

case, and the discretion to decide whether to make the probation consecutive or concurrent to the bifurcated sentence Spangler was already serving on his sixth OWI case.[2] We therefore reject Spangler's claim that the original term of probation on the seventh OWI case was illegally imposed.

As to Spangler's claim regarding a breach of the plea agreement at his sentencing after revocation, the State concedes that the circuit court overlooked the portion of Spangler's motion that alleged that trial counsel provided ineffective assistance by failing to object to the alleged breach. The State argues that this court should deem Spangler to have forfeited his ineffective assistance claim because Spangler failed to produce trial counsel to testify at a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (It is the defendant's responsibility to obtain counsel's presence at the hearing at which his conduct is challenged; without testimony from trial counsel, this court is unable to evaluate claims of deficient performance.). The flaw in that argument, however, is that the circuit court never provided Spangler with an evidentiary hearing at which Spangler could have produced counsel. Rather, the circuit court held an oral argument by video conference on Spangler's motion—at which the court erroneously advised Spangler that he would need to file a separate motion alleging ineffective assistance in order to get an evidentiary hearing, not recognizing that Spangler had already done so.

[2] In its brief, the State points out that Spangler improperly cited to a per curiam opinion in violation of WIS. STAT. RULE 809.23(3). However, the State then goes on to argue why the case fails to support Spangler's position, and that argument also violates the rule against citing to unpublished, unauthored decisions. We remind both parties that they are free to follow the reasoning of an unpublished, unauthored decision, but cannot cite to it except for the limited exceptions set forth in the rule.

Thus, although neither party has framed the issue this way, we believe the true question before this court is whether the circuit court properly denied Spangler's motion alleging that counsel provided ineffective assistance by failing to object to an apparent breach in the plea agreement, without first affording Spangler an evidentiary hearing on his motion.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. We are satisfied that Spangler's allegations that trial counsel failed to object to a breach in the plea agreement would, if true, be sufficient to establish deficient performance.

The question then becomes whether Spangler's allegations were also sufficient to establish prejudice. Notably, Spangler did not explicitly allege that, if the State had recommended only three years of initial confinement, as did both Spangler and the presentence investigation report, there would have been a reasonable probability that the circuit court would have followed the joint recommendation. Rather, Spangler suggested that, as a result of the breach in conjunction with his erroneous view that the original term of probation was illegal, the proper remedy would be to impose a new five-year term of probation. That result was not remotely plausible, if even possible, when Spangler was being sentenced after revocation, and the crime of conviction had a three-year mandatory minimum period of incarceration.

Given the circuit court's contemporaneous comment at sentencing after revocation that "ever longer" periods of incarceration were required for persistent OWI offenders, as well as the court's statements in the postconviction order that the court stood by its "stiffer" sentence on the seventh OWI after having imposed a more "lenient" sentence on the eighth OWI, and that it declined to resentence Spangler, it is apparent that a new sentencing hearing at which the State recommended only three years of initial incarceration would not lead to a reduced sentence, much less the new probationary period that Spangler desires. We therefore conclude that Spangler's allegations are insufficient to establish prejudice, and that he is not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

IT IS ORDERED that the order denying Charles Spangler's postconviction motion for resentencing is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals