

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1100-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES R. WINCEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Charles Wincek appeals from a judgment convicting him on one count of failing to obey a Department of Agriculture, Trade and Consumer Protection order, § 100.26(3), STATS., and three counts of theft, § 943.20(1)(b), STATS. He also appeals from an order denying his motion for

postconviction relief. In our first decision on this appeal, we affirmed the trial court's judgment and order. *State v. Wincek*, 208 Wis.2d 372, 561 N.W.2d 351 (Ct. App. 1997). By order dated May 13, 1997, the supreme court summarily vacated our decision and remanded for further consideration in this court in light of *State v. Smith*, 207 Wis.2d 259, 558 N.W.2d 379 (1997). Based on the supreme court's holding in *Smith*, we now reverse and remand for further proceedings.

In exchange for Wincek's guilty plea, the State agreed to consolidate proceedings in three counties, and to drop one of the charges pending against him. The prosecutor also agreed to recommend three thirty-day jail sentences, to be served consecutively, followed by probation on the fourth count, all consecutive to an unrelated sentence Wincek was already serving. At sentencing, the prosecutor recommended that Wincek receive five years probation consecutive to his current sentence. In doing so, the prosecutor indicated that his primary concern was to obtain restitution for Wincek's victims. However, he also added that "[a]s far as additional prison time I would leave that up to the discretion of the court. He's serving at this time seven years, six months." Wincek's counsel did not object when the prosecutor omitted the recommendation for the three jail sentences. The court subsequently sentenced Wincek to concurrent one and two-year prison terms, followed by concurrent five and two-year probation terms, all consecutive to his seven and one-half year sentence.

Wincek brought a postconviction motion to withdraw his plea on grounds that the prosecutor violated the plea agreement, and that trial counsel failed to effectively assist Wincek when she failed to object to that violation. The trial court denied relief and Wincek appealed. Our first decision held that Wincek waived the prosecutor's violation when counsel failed to object at the sentencing

hearing, and that counsel's failure to object was not ineffective representation because Wincek failed to show he would have received a different sentence had counsel preserved the issue. We now reconsider that decision in light of *State v. Smith*.

The supreme court's opinion in *Smith* requires that we reverse Wincek's conviction and remand for resentencing. *Smith* holds that "when a prosecutor agrees to make no sentence recommendation but instead recommends a significant prison term, such conduct is a material and substantial breach of the plea agreement. Such a breach of the State's agreement on sentencing is a 'manifest injustice' and always results in prejudice to the defendant." *Id.* at 282, 558 N.W.2d at 389. The same holds true when the prosecutor makes no recommendation on time served, but expressly leaves that decision to the court's discretion despite a promise to recommend a very lenient sentence. Although the State argues that the prosecutor actually made a more favorable recommendation by avoiding any request for time served, that is not necessarily the case. The trial court's comments at sentencing plainly indicate that the court believed that some time served was necessary. Had it heard the prosecutor's recommendation, it might have considered a lesser term than subsequently imposed. That recommendation might also have reminded the court of the State's principal concern in this case, which was restitution of the victims rather than Wincek's punishment.

Although Wincek asked for the opportunity to withdraw his plea, we remand solely for resentencing, before a different judge if Wincek so chooses. That is the remedy in Wisconsin for the State's breach of a sentence reconsideration promise. *State v. Poole*, 131 Wis.2d 359, 365, 394 N.W.2d 909, 911-12 (Ct. App. 1986).

By the Court.—Judgment and order reversed and cause remanded.

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

