COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-0084-CR
97-0085-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL MARCELLUS JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: VICTOR MANIAN and LAURENCE C. GRAM, JR., Judges.[1] *Judgments affirmed; order reversed in part and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

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[1] The Honorable Victor Manian presided over the plea hearing and entered the judgments of conviction. The Honorable Lawrence C. Gram, Jr., presided over the postconviction hearing and entered the order denying the motion for postconviction relief.

PER CURIAM. Daniel Marcellus Johnson appeals from the judgments of conviction, following his guilty and no contest pleas, for theft by fraud, operating vehicle without owner's consent, fleeing an officer, and battery. He also appeals from an order denying his motion for postconviction relief. Johnson claims that: (1) the State breached the plea agreement; (2) his trial counsel was ineffective for failing to object to the State's breach of the plea agreement; (3) the trial court erred in denying his motion for sentence modification; and (4) the trial court erred in denying his appellate counsel's request for a copy of his presentence report. Because we agree that the trial court erred in denying Johnson's appellate counsel's request for a copy of the presentence report, we reverse the order and remand with instructions. In all other respects, we affirm.

I. BACKGROUND

On February 26, 1992, Johnson was charged with battery, criminal damage to property, operating vehicle without owner's consent and fleeing an officer as a result of a February 20, 1992 incident involving his girlfriend, Deborah Jones. On December 8, 1992, Johnson was charged with theft by fraud, stemming from a bus ticket exchange scam. On April 21, 1993, Johnson entered into a plea agreement with the State. Under the terms of the original agreement, Johnson would plead guilty to the theft by fraud charge and enter no contest pleas to the battery, operating vehicle without owner's consent, and fleeing charges, and the State would move to dismiss the criminal damage to property charge and would not make a "specific recommendation, other than asking for restitution …." At the plea hearing, the parties complied with their agreement, Johnson was found guilty of all the charges except the criminal damage to property, which was

dismissed, and the trial court ordered a presentence investigation report (PSI) and set a date for sentencing.

On the scheduled sentencing date, Johnson failed to appear, and the trial court issued a bench warrant for his arrest. Two years later, after Johnson was picked up on the outstanding warrant, he was returned to court for sentencing. According to his new defense counsel's testimony at the ***Machner***[2] hearing, at the time Johnson returned to court, the State made a new offer, based on its claim that Johnson's bail jumping breached the original agreement. Defense counsel testified that after he advised Johnson of his options, Johnson decided not to seek to withdraw his pleas. Instead, he accepted the State's modification of the plea agreement, which now called for the State to recommend a prison term consistent with that recommended by the presentence writer.

The trial court sentenced Johnson to concurrent terms of one year on the fleeing charge, nine months on the battery charge, and seventy-two months on the theft by fraud charge. On the operating vehicle without owner's consent charge, the trial court sentenced him to five years' imprisonment, imposed and stayed, consecutive to the theft by fraud sentence, and placed him on probation for five years following that sentence.

II. ANALYSIS

Johnson first argues that the State violated the plea agreement. Johnson is incorrect. Whether a plea agreement was breached is a question of fact. *See* ***State v. Windom***, 169 Wis.2d 341, 349, 485 N.W.2d 832, 835 (Ct. App.

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

1992). Findings of fact will not be overturned unless they are clearly erroneous. *See* ***id.*** Further, the party asserting that a plea agreement has been breached bears the burden of establishing by clear and convincing evidence that a breach actually occurred and that it was material and substantial. *See* ***id.***

When entering into a plea agreement, a defendant implicitly promises that the circumstances of the case will not change. *See* ***id.*** at 351, 485 N.W.2d at 836. A defendant who, of his or her own volition, does not appear for sentencing changes the circumstances. This change of circumstances presents a new and additional factor that the prosecutor may consider when making a sentencing recommendation. *See* ***id.***; *see also* ***Witzel v. State***, 45 Wis.2d 295, 300, 172 N.W.2d 692, 695 (1969). Consequently, the prosecutor is not held to the recommendation agreed upon in the original plea agreement.

At the ***Machner*** hearing, defense counsel testified that after Johnson was returned on the bench warrant, the assistant district attorney made it clear that the intervening circumstances, i.e., Johnson's absconding, vitiated the original agreement. Defense counsel testified that he entered into new negotiations with the prosecutor, that he advised Johnson that he could seek to withdraw his guilty and no contest pleas, and that Johnson decided not to attempt to withdraw his pleas, but rather, decided to accept the new plea agreement.

Denying Johnson's motion for postconviction relief, the trial court concluded:

> Yes, the plea - - the original plea agreement was breached by the defendant, not by the State, and so thus when he was returned on a bench warrant, what you have is some guilty pleas with a broken agreement.

> It's quite clear from the testimony that there were new negotiations that took place. The case proceeded to sentencing based upon those new negotiations.

The trial court's findings are not clearly erroneous. Between the date he entered his pleas and the date scheduled for his sentencing, Johnson absconded. When he returned twenty-seven months later, the State renegotiated the case and agreed not to charge the new crime of bail jumping, but instead altered its sentencing recommendation. Given the changed circumstances and Johnson's post-agreement conduct, the State was so entitled.[3] *See* ***State v. Giebler***, 591 P.2d 465, 467 (Wash. Ct. App. 1979) (defendant cannot rely upon an agreement when he commits another offense while awaiting sentencing).

In the alternative, Johnson argues that he is entitled to resentencing based on "new factors." The new factors that Johnson presented to the trial court were allegations that his battery victim, Deborah Jones, was untruthful about the status of her health before the crime and that, contrary to the prosecutor's statements at the time of sentencing, he was not expected to inform on any person or produce any co-actor relating to the theft by fraud charge. He also claimed that the presentence report was inaccurate. We are not persuaded.

A new factor is:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

[3] We also reject Johnson's argument that his defense counsel was ineffective for failing to object to the State's alleged breach. Because the State did not breach the plea agreement, defense counsel had no duty to object. Accordingly, defense counsel was not ineffective. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (counsel not ineffective if actions were not deficient).

Rosado v. State, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing--something which strikes at the very purpose for the sentence selected by the trial court." *See* ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a fact or set of facts constitutes a new factor is a question of law which we decide de novo. *See* ***id.*** at 97, 441 N.W.2d at 279.

The facts Johnson alleges are not new factors; each was known to him prior to or at the time of sentencing. At the postconviction hearing, Johnson conceded that the victim's prior health status was known to him at the time of sentencing. Moreover, the prosecutor's comments, to which the defendant now objects, were made at the sentencing hearing. Consequently, these factors cannot constitute "new factors" providing the basis for sentence modification. Accordingly, the trial court correctly denied Johnson's motion for sentence modification.

Finally, Johnson argues that the trial court erred in denying his appellate counsel's request for a copy of the presentence report. In response, the State contends that Johnson "made no effort at the beginning of the hearing to establish that he needed a copy of the presentence report in order to properly pursue the issues before the court." Johnson replies, however, that "at the motion hearing[,] defense counsel asked the trial court to decide the defendant's motion for the presentence investigation report first, however, the [trial] court declined to do so." We have reviewed the record; it confirms Johnson's position.

The State, citing ***State ex rel. Oliver v. Guolee***, 179 Wis.2d 376, 507 N.W.2d 145 (Ct. App. 1993), maintains that if Johnson needed the presentence

report, he could have pursued a mandamus action. While we agree that Johnson could have pursued a mandamus action, his failure to do so does not preclude our review of whether the trial court erred in denying his request. Pursuant to § 967.06, STATS.,[4] and ***Oliver***, we conclude that the trial court should have granted Johnson's counsel's request for a copy of the presentence report. *See* ***Oliver***, 179 Wis.2d at 385, 507 N.W.2d at 149. Given Johnson's right to be sentenced on the basis of accurate information, he and his appellate counsel were entitled to receive

[4] Section 967.06, STATS., provides:

> **Determination of indigency; appointment of counsel; preparation of record**. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Persons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.07(1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority. *In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of circuit court prepare and transmit any transcript or court record. The request shall be complied with.* The state public defender shall, from the appropriation under s. 20.550(1)(f), compensate the court reporter or clerk of circuit court for the cost of preparing, handling, duplicating and mailing the documents.

(Emphasis added.)

a copy of the report. Accordingly, we reverse the order denying his request for a copy of the PSI.[5]

By the Court.—Judgments affirmed; order reversed in part and cause remanded with directions.

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

[5] On reviewing the PSI, should counsel discover any basis for resentencing, counsel may file another motion in the trial court.