COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2212-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK THOMAS ERICKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Mark Erickson appeals a judgment convicting him of sexual exploitation of a child. He argues that the trial court should have granted his presentence motion to withdraw his no contest plea on the ground that the prosecutor breached the plea agreement. We reject his argument and affirm the judgment of conviction.

Erickson was initially charged with sexual exploitation of a child, second-degree sexual assault of a child and second-degree sexual assault of an unconscious person. The complaint alleged that he gave medication to a fifteen-year-old girl, tied her up and took photographs of her while performing sexual acts with her. Pursuant to a plea agreement, Erickson agreed to plead no contest to the sexual exploitation charge. The State agreed to recommend ten years' probation with six months in jail as a condition of probation and to dismiss the sexual assault charges that would be read in for sentencing purposes. The defense was free to argue for any sentence it chose.

After the guilty plea was accepted, the trial court ordered a presentence investigation. The PSI recommended a "lengthy to maximum" prison sentence. After the initial sentencing hearing was postponed at Erickson's request, a sheriff's deputy applied for a search warrant to search Erickson's home for photo albums containing pictures of sexually explicit scenes of bondage involving possible juvenile females; videotapes, photographs or negatives depicting nudity or sexual activities involving juveniles or drugged adults; bondage paraphernalia; Halcion or other prescription or controlled substances; and documents that might identify the adults and juvenile participants. The application for the search warrant was supported by an affidavit that alleged the facts contained in the complaint filed in this case as well as a statement given to the investigator after the sentencing hearing was postponed that a witness had seen bondage paraphernalia, seven photo albums containing "photographs of females ranging from approximately twelve to twenty-one years" and a bondage videotape depicting persons that were "nude and looked young."

Before the next sentencing hearing, Erickson filed a motion to suppress the evidence obtained pursuant to the search warrant. In a letter brief, he

argued that he should be allowed to withdraw his plea because the prosecutor breached the spirit of the plea agreement by instigating the search after the plea had been taken. The trial court deferred a ruling on that motion when the prosecutor agreed not to raise issues surrounding the recent search as long as the defense did not "open the door" for such testimony.

At the plea hearing, the State complied with the plea agreement by recommending ten years' probation with six months in the county jail. The defense then called numerous witnesses in an effort to undermine the recommendation made in the presentence report. One of those witnesses, Dr. Patrick Price, testified regarding the progress Erickson had made in treatment. On cross-examination, the prosecutor asked Price whether Erickson told him that he had thrown away his bondage paraphernalia. The defense objected and asked to withdraw the plea. The trial court overruled the objections, but instructed the prosecutor to drop that line of questioning because the court would be asking the doctor those questions in any event. The court later examined the doctor regarding Erickson's treatment. Price indicated that it would not change his opinion that a prison sentence was unnecessary if he found that Erickson still had bondage paraphernalia in his home. Price indicated that he was not surprised that Erickson still had bondage materials in his home.

The State continued to recommend ten years' probation throughout the hearing. At the close of the hearing, the defense joined in the State's recommendation. The court stated that it would not take the recent search into account, but found that Erickson's sexual exploitations of adults and juveniles over numerous years justified imposition of the maximum sentence allowed by law, ten years in prison.

Erickson concedes that the prosecutor was obligated to inform the court of relevant evidence it discovered after the plea was entered. *See* ***State v. Ferguson***, 166 Wis.2d 317, 324, 479 N.W.2d 241, 244 (Ct. App. 1991); ***State v. Jorgensen***, 137 Wis.2d 163, 169-70, 404 N.W.2d 66, 68-69 (Ct. App. 1987). He argues, however, that when the State enters into a plea agreement, there is no legitimate reason for the State to pursue the investigation further and that it is evident that the State was attempting to circumvent the plea agreement by gathering additional information that would undercut its own recommendation. Therefore, he argues that the State violated the spirit of the plea agreement by executing the search warrant before the sentencing hearing.

Whether the State violated the terms or spirit of a plea agreement is a question of law that we review de novo. ***Ferguson***, 166 Wis.2d at 320-21, 479 N.W.2d at 243. The State is required to adhere to its promises regarding sentence recommendation and it may not make an "end run" around its agreement to accomplish indirectly what it promised not to do directly. ***Id.***

The prosecutor's decision to conduct a search before the sentencing hearing did not constitute an "end run" on the State's plea recommendation and does not evince bad faith. We do not construe the plea agreement to require the prosecutor to overlook new evidence of sexual assaults or exploitation of children that were not the subject of this plea or the read-in offenses. In addition, the prosecutor was free to uncover facts that would support his plea recommendation because the defense was free to request a more lenient sentence under the terms of the plea agreement. The prosecutor's good faith in seeking this information is shown by his subsequent conduct in which he agreed not to disclose the results of the search unless the defense opened the door, only mentioned the search after a defense witness testified to therapeutic progress that was seemingly contradicted

by the results of the search, and when the prosecutor continued to recommend probation after these facts were disclosed. The prosecutor succeeded in informing the court of the outcome of the search as required by ***Ferguson***, but did it in such a manner that the court ultimately decided on the sentence without considering the result of the search.

Nothing in the prosecutor's statements or actions suggested that the prosecutor believed his recommended sentence was inadequate. Unlike the situation presented in ***State v. Wills***, 187 Wis.2d 529, 535, 523 N.W.2d 569, 572 (Ct. App. 1994) *aff'd*, 193 Wis.2d 273, 533 N.W.2d 165 (1995), the prosecutor's recommendation here did not violate the plea agreement and was not half-hearted or presented as an obligation imposed by the agreement to which the prosecutor reluctantly adhered.

By the Court.—Judgment affirmed.

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