COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0558

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County: ROBERT RASMUSSEN, Judge. *Reversed and cause remanded.*

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

HOOVER, J. Gregory Johnson appeals an order denying his post-trial motions. On appeal, Johnson contends the trial court erred by denying his motion to modify his sentence due to a new factor of disparity of sentences between co-defendants and by denying his motion for a new trial based on ineffective assistance of counsel. Because we conclude that the trial court erred by

failing to find ineffective assistance of counsel when trial counsel failed to object to the State's breach of the plea agreement in its sentencing recommendation, we reverse and remand to the trial court for resentencing.

On the evening of September 27, 1995, Johnson and his co-defendants, Thomas Kerns and Dave Connor, went to the home of Dan Doe and Ann Kuehl in the Village of Elk Mound, Dunn County, Wisconsin. Johnson held both Doe and Kuehl at gunpoint, and told them not to testify against him in a felony court action in St. Croix County in which they were both witnesses. Johnson threatened to kill both Doe and Kuehl and then pointed the gun at Doe's feet and fired. Johnson then directed Kuehl to the bathroom where both he and Kerns sexually assaulted her. Before Johnson left, he and his co-defendants took some money and other valuables from the home.

As a result, Johnson was charged with two counts of intentional restraint, two counts of armed robbery, one count of sexual assault, and one count of reckless endangerment. In a plea agreement with the State, Johnson's pending charges from St. Croix County, Pierce County, and Dunn County were consolidated. Johnson agreed to plead guilty to two counts of armed robbery stemming from the Dunn County incident, one count of delivery of methamphetamine from St. Croix County and one count of reckless endangerment from Pierce County. In return, the State agreed to dismiss the remaining charges and to limit its sentence recommendation to not more than twenty-five years imprisonment.

Johnson was sentenced on May 30, 1996. The presentence investigation report recommended a twenty-five-year sentence. At the hearing, the State argued "that the minimum incarceration be not less than 25 years …." The

State further presented a witness, Russel Cragin, an investigator with the Dunn County Sheriff's Department, in support of its sentencing recommendation. Johnson's attorney did not object to either the State's sentencing recommendation or its presentation of a witness at sentencing. The trial court sentenced Johnson to a total of thirty-one years imprisonment and forty years imposed and stayed with twenty years probation.

Johnson filed post-trial motions, arguing for a new trial due to ineffective assistance of counsel. Johnson alleged his counsel was ineffective for failing to (1) object to the State's breach of the plea agreement in recommending a minimum of twenty-five years imprisonment, (2) object to the State's presentation of a witness at sentencing, and (3) inform Johnson of his right to withdraw his plea based on the presentence investigation report. Johnson further asserted he was entitled to resentencing due to the new factor of disparity between the sentences of

Johnson and his co-defendant, Kerns.[1] Johnson appeals the trial court's denial of his post-trial motions.[2]

The principal issue on appeal is whether Johnson was denied effective assistance of counsel when his trial counsel failed to object to the State's alleged breach of the plea agreement by recommending a minimum of twenty-five years imprisonment at sentencing. The first issue we address is whether the State materially breached the plea agreement with Johnson. If there was no breach there would be no reason to object and therefore no deficient performance. When the facts are undisputed, whether the State's conduct breached the plea agreement is a question of law that we review de novo. ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995).

A defendant has a constitutional right to enforce a negotiated plea agreement. ***State v. Smith***, 207 Wis.2d 258, 271, 558 N.W.2d 379, 384 (1997). "Although a defendant has no right to call upon the prosecution to perform while

[1] Kerns was sentenced to 22 years of imprisonment.

[2] We reverse the trial court's denial of post-trial motions based solely on its failure to find ineffective assistance of counsel based on trial counsel's failure to object to the State's recommendation of a 25-year minimum sentence. We reject Johnson's other arguments. First, the State did not breach the plea agreement by presenting a witness to support its sentencing recommendation. The State has a right to present to the court any information supporting its argument for a specified sentence. *See* ***State v. Voss***, 205 Wis.2d 586, 595, 556 N.W.2d 433, 436 (Ct. App. 1996). The State did not bargain this right away. Second, Johnson's trial counsel was not ineffective for failing to inform him of his right to withdraw his plea based on the presentence investigation report because Johnson had no such right. A motion to withdraw a plea prior to sentencing is addressed to the trial court's discretion. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). Further, Johnson gave no indication that he was reluctant to proceed with the plea agreement. We will not place a duty on trial counsel to anticipate their clients' unexpressed concerns. Third, the sentence disparity between Johnson and his co-defendant was not a new factor that would require sentence modification. *See* ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). The trial court considered proper sentencing factors based on Johnson's individual culpability and need for rehabilitation, which were distinguishable from his co-defendant's.

the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." ***Id***. (quoting ***State v. Wills***, 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (Ct. App. 1994)). A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. ***Id***. at 272, 558 N.W.2d at 385.

Once a breach occurs, however, a defendant is not automatically entitled to relief. ***State v. Bangert***, 131 Wis.2d 246, 289, 389 N.W.2d 12, 33 (1986). To be entitled to a remedy, there must be "a material and substantial breach of the agreement." ***Smith***, 207 Wis.2d at 272, 558 N.W.2d at 385. "A party seeking to vacate [or enforce] a plea agreement[3] has the burden of establishing 'both the breach, and that the breach is sufficiently material to warrant [relief] before the same judge who accepted the plea, whenever possible.'" ***Bangert***, 131 Wis.2d at 289, 389 N.W.2d at 32 (quoting ***State v. Rivest***, 106 Wis.2d 406, 414, 316, N.W.2d 395, 399 (1982). A material and substantial breach must be established by clear and convincing evidence. ***Id***.

Here, as part of the plea agreement, the prosecutor agreed *not* to argue for *more than* twenty-five years at sentencing. At sentencing, however, the prosecutor recommended that "the minimum incarceration be *not less* than 25 years …." (Emphasis added.) That the prosecutor materially breached the plea agreement cannot be seriously disputed. The State's sentencing recommendation was contrary to what it had originally agreed and was more than a mere technical breach. In fact, the prosecutor's recommendation gave the court an open invitation to sentence Johnson to well over the twenty-five-year cap to which it

[3] The trial court has the discretion to vacate or enforce the agreement. ***State v. Bangert***, 131 Wis.2d 246, 292, 389 N.W.2d 12, 34 (1986).

had originally agreed. The prosecutor, in recommending a term of incarceration, turned the last call into the opening bid. The breach deprived Johnson of what he had originally negotiated, constituting a material and substantial breach of the plea agreement. *See* ***Smith***, 207 Wis.2d at 273, 558 N.W.2d at 385.

Consequently, we must next determine whether Johnson received ineffective assistance of counsel when his attorney failed to object to the State's breach. Every defendant has a Sixth Amendment right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel, a defendant must prove that his lawyer's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Fritz***, 212 Wis.2d 284, 292, 569 N.W.2d 48, 51 (Ct. App. 1997). Whether counsel's performance was deficient and prejudicial are questions of law that this court reviews de novo. ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

To prove deficient performance, the defendant must show that his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (quoting ***Strickland***, 466 U.S. at 687). The defendant must overcome the strong presumption that his counsel acted within the professional norms. ***Id***. at 127, 449 N.W.2d at 847-48. In ***Smith***, the court held that "defense counsel's failure to immediately object to the prosecutor's sentence recommendation, a recommendation that clearly breached Smith's plea agreement, was not reasonable conduct within professional norms and constitutes deficient performance." ***Smith***, 207 Wis.2d at 274-75, 558 N.W.2d 379, 386.

Here, as in ***Smith***, the prosecutor's sentencing recommendation breached the plea agreement. The breach was obvious, substantial and material. As emphasized earlier, the prosecutor's recommendation placed the State's sentencing position in a different light before the trial court, in effect asking the court to impose a greater sentence than the twenty-five-year cap originally agreed upon. Johnson's counsel's failure to immediately object to a recommendation that clearly breached Johnson's plea agreement was not reasonable conduct within the professional norms and constituted deficient performance. *See* ***id***. Thus, following ***Smith***, we conclude that counsel's failure to object to the State's breach of the plea agreement was per se deficient performance.

When the defendant has received ineffective assistance of counsel, he will not be entitled to relief unless he can prove that he was prejudiced by the deficient performance. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. Normally, in order to prove prejudice the defendant must show that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. In certain instances, however, prejudice can be presumed. ***Smith***, 207 Wis.2d at 278, 558 N.W.2d at 388. In ***Smith***, the court held that when a prosecutor materially and substantially breaches the plea agreement, such a breach is a "'manifest injustice' and always results in prejudice to the defendant." ***Id***. at 281, 558 N.W.2d at 389.[4] Accordingly, we

[4] The rationale behind this rule is the difficulty in measuring the degree to which a defendant is prejudiced when his counsel fails to object to the State's breach. *See* ***State v. Smith***, 207 Wis.2d 258, 280, 558 N.W.2d 379, 388 (1997). This rationale is premised on the rule in ***Santobello v. New York***, 404 U.S. 257, 262 (1971), that "when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." ***Smith***, 207 Wis.2d at 281, 558 N.W.2d at 389.

conclude that Johnson was automatically prejudiced by counsel's failure to object to the State's material and substantial breach of the plea agreement.

In summary, we conclude that Johnson received prejudicial ineffective assistance of counsel by counsel's failure to object to the State's material and substantial breach of the plea agreement. We therefore remand for a new sentencing hearing before a different judge.[5]

[5] Johnson argues that the appropriate remedy is the opportunity to withdraw his guilty plea. The ultimate relief, however, is discretionary,

> [The State court] is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by the petitioner, *i.e.*, the opportunity to withdraw[al] of his plea of guilty.

Santobello, 404 U.S. at 263. We believe that Johnson's plea was entered into knowingly, voluntarily, advisedly and intentionally and that justice will be served by ordering specific performance of the plea agreement at a new sentencing hearing before a different judge. *See* ***Bangert***, 131 Wis.2d at 292, 389 N.W.2d at 34.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.