

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-2432-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. ZUNKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Zunker appeals a judgment sentencing him to six years in prison and an order denying his motion for resentencing. He argues that he is entitled to resentencing before a different judge because the prosecutor violated the plea agreement, and that his trial counsel was ineffective for failing to object to the prosecutor's breach of the agreement. Because we

conclude that the prosecutor did not breach the agreement, we affirm the judgment and order.

¶2 Zunker pled guilty to three counts of failure to support his children in violation of WIS. STAT. § 948.22(2). The maximum sentence for each count is two years. The plea agreement required the prosecutor to recommend “no more period of incarceration than is recommended in the presentence investigation.” An addendum to the presentence report recommended “a medium term in the Wisconsin State Prison System.” At the sentencing hearing, the prosecutor recommended the maximum two-year sentence on counts 1 and 2 to be served consecutively, followed by probation on count 3.

¶3 To establish grounds for resentencing, Zunker must prove by clear and convincing evidence that a material and substantial breach of the plea agreement occurred. *See State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 643, 579 N.W.2d 698 (1998). The prosecutor’s recommendation of four years in prison on a possible six-year sentence did not materially and substantially breach the agreement. The agreement did not require the prosecutor to merely repeat the words “a medium term in the Wisconsin State Prison System” as recommended in the addendum to the presentence report. Rather, the prosecutor was free to recommend any sentence that was not greater than a “medium term” of imprisonment. The recommendation of four years on a potential six-year sentence is within the range of a “medium term” of imprisonment. In addition, as the trial court noted, the minimum term of imprisonment in the state prison is one year. The prosecutor’s recommendation was only six months longer than half the difference between the minimum term and the maximum term.

¶4 Because the prosecutor's sentence recommendation did not breach the plea agreement, there was no basis for counsel to object. Therefore, Zunker has not established deficient performance by his trial counsel based on his failure to object.

By the Court.—Judgment and order affirmed.

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

