

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2000

Cornelia G. Clark
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. 99-2692-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY D. KLINKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Cory Klicko appeals from a judgment convicting him of felony bail jumping and from an order denying postconviction relief. Klicko claims the State breached a plea agreement by recommending that he serve a consecutive, rather than concurrent, term of probation for the offense, and that

counsel was ineffective for failing to object to the breach. We are persuaded, however, that counsel's assessment that the State's recommendation accorded with the plea agreement was within professional norms. Accordingly, we affirm the judgment and order.

BACKGROUND

¶2 Klicko was charged in two separate cases with one count of armed robbery and two counts of bail jumping. An attorney for the State sent Klicko a letter offering to "recommend 5 years prison on the armed robbery followed by 5 years probation on the 2 felony bail jumpings." At a joint plea hearing a second attorney for the State advised the court:

In entering the plea today Mr. Klicko is doing so in part based upon the State's recommendation that the State would cap its recommendation for disposition at five years in prison on the armed robbery, five years probation on the bail jumping concurrent with the armed robbery. And that would be on each count of bail jumping, each count to run concurrent.

Klicko affirmed that the State's explanation of the plea agreement accorded with his own understanding of the agreement and entered his pleas. At the sentencing hearing a third attorney for the State recommended that Klicko receive five years on the armed robbery, five years concurrent probation on one of the bail jumpings, and five years consecutive probation on the second bail jumping. Defense counsel did not object, and the court imposed the sentences proposed by the State.

¶3 Klicko filed a postconviction motion alleging that the State's recommendation breached the plea agreement as set forth on the record prior to the plea hearing, and claiming that counsel should have objected. Defense counsel testified at the motion hearing that he believed the State misstated the plea

agreement at the plea hearing, and that the recommendation actually given was an accurate statement of the plea agreement. The trial court found the original plea agreement was as stated at the sentencing hearing and concluded on that basis that there was no breach.

STANDARD OF REVIEW

¶4 Klicko waived any right to directly challenge the alleged breach of the plea agreement by proceeding to sentencing without objection. *See State v. Smith*, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). Therefore, this case comes to us in the context of an ineffective assistance of counsel claim.

¶5 Claims of ineffective assistance of counsel present mixed questions of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2);¹ *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See id.* at 634.

ANALYSIS

¶6 The test for ineffective assistance of counsel has two elements: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *See Strickland*,

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *See id.* at 688. Here, we conclude that Klicko has failed to demonstrate that counsel's performance was deficient.

¶7 To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See id.* at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶8 We first note that the trial court made a factual finding that the parties had agreed prior to the plea hearing that the State could recommend consecutive probation terms. This finding was directly supported by the testimony of defense counsel as well as the assistant district attorney's letter, and, therefore, is not clearly erroneous.

¶9 We next note that there was nothing unreasonable about defense counsel's failure to object to the State's misstatement of the plea agreement at the plea hearing, because the misstatement clearly favored the defendant. Had defense counsel brought the error to the State's attention, the State would most likely have corrected it on the record before the pleas were entered. By remaining silent, defense counsel increased the chance that the State would recommend concurrent, rather than consecutive, probation terms.

¶10 Finally, Klicko claims that once the State misstated the plea agreement on the record and he agreed that the misstatement represented his understanding, the misstatement itself become the enforceable plea agreement.

Therefore, he argues, counsel should have objected when the State deviated from the new agreement at sentencing. However, it appears that Klicko's theory presents a novel issue of law in this state. In the absence of any precedent on the issue, we are satisfied that counsel could reasonably conclude that the defendant's initial agreement with the State was the binding one. Therefore, we need not decide what the actual plea agreement was in order to determine that counsel acted within professional norms.

By the Court.—Judgment and order affirmed.

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

