COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1027-CR
2016AP1028-CR
2016AP1029-CR

Cir. Ct. Nos. 2014CF358
2015CF107
2015CF156

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHANCE WILLIAM ANDREWS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Chance Andrews appeals judgments convicting him of felony murder, battery by a prisoner and threats to injure. He also appeals an order denying his motion for resentencing in which he alleged the State

violated the plea agreement and Andrews' trial counsel was ineffective for failing to object to the State's breach. Andrews makes the same arguments on appeal. Because we conclude the State did not violate the plea agreement and there was no basis for defense counsel to object, we affirm the judgments and order.

¶2 Andrews pled guilty to felony murder in return for the State's agreement to dismiss and read in for sentencing purposes a charge of attempted armed robbery. The State also agreed to recommend seventeen and one-half years' initial confinement, later reduced to sixteen and one-half years due to Andrews' cooperation locating the gun used in the murder. At a separate plea hearing, Andrews entered a no-contest plea to one count of battery by a prisoner and one count of threat to injure. In return, the State moved to dismiss and read in one count of battery by a prisoner and misdemeanor theft, and agreed to recommend concurrent sentences.

¶3 At the sentencing hearing, the State recommended concurrent sentences totaling sixteen and one-half years' initial confinement and the maximum term of extended supervision. The State noted the violent and aggravating circumstances of the felony murder, Andrews' lack of remorse, his failure to take responsibility and his continued loyalty to co-defendants. The State also noted Andrews' multiple juvenile dispositions, his conduct while in custody, his COMPAS risk assessment, his aggressiveness displayed in photographs where he is seen pointing a gun and flashing gang signs, and his gang affiliation openly displayed through a tattoo on his forehead. The State also presented victim impact statements from the victim's parents. They recommended the maximum sentences.

¶4 Andrews' trial counsel began his argument by saying the sixteen and one-half years' initial confinement was "being jointly recommended." The State interrupted, noting there was no agreement for a joint recommendation. Rather, defense counsel chose to join in the State's recommendation, but "the State's having no part of colluding with the Defense on the recommendation."

¶5 The court imposed consecutive sentences totaling twenty-five years' initial confinement and fifteen years' extended supervision. Andrews contends the State's arguments at the sentencing hearing materially and substantially breached the plea agreement because its sentencing argument did not match the sentence the State "briefly recommended," and the clear message of these statements was that the State only offered the plea bargain in order to get a dangerous weapon off the street. He contends the State's message was that the harshest possible penalties were warranted, as suggested by the victim's parents. He further argues that the State's objection to his counsel's characterization of a "joint recommendation" and describing a joint recommendation as "colluding" with the defense was designed to subvert the State's own recommendation. He contends his trial counsel was ineffective for failing to object to these alleged breaches of the plea agreement.

¶6 Counsel is not ineffective for failing to raise an objection when there is no basis for the objection. ***State v. Maloney***, 2006 WI 15, ¶37, 288 Wis. 2d 551, 709 N.W.2d 436. Because we conclude the State did not violate the plea agreement, Andrews' trial counsel was not ineffective for failing to object to the State's argument.

¶7 A material and substantial breach of a plea agreement is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained. ***State v. Bowers***, 2005 WI App

72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. The terms of the plea agreement and the facts surrounding the alleged breach are questions of fact, which this court reviews under the clearly erroneous standard. ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. This court independently reviews whether those facts constitute a material and substantial breach. ***Id.***

¶8 The prosecutor's statements were necessary to justify his recommended sentence. ***State v. Naydihor***, 2004 WI 43, ¶27, 270 Wis. 2d 585, 678 N.W.2d 220. A prosecutor may inform the court of aggravating sentencing factors, including facts concerning the defendant's character and behavior patterns. ***Id.*** Contrary to Andrews' assertion, the State did not argue for the "harshest possible penalties." That request was made by the victim's parents and was never adopted by the State. The right of the parents to speak is protected by article I, section 9m of the Wisconsin Constitution, and WIS. STAT. §§ 972.14(3)(a) and 950.04(1v)(m) and (pm) (2015-16).[1] Andrews argues the prosecutor in effect adopted the parents' recommendation by calling for their comments in the middle of the prosecutor's sentencing argument. Had the prosecutor begun or finished his argument with the parents' recommendations, the same argument might have been made.

¶9 The prosecutor's interruption of defense counsel's sentencing argument for the purpose of clarifying the plea agreement does not suggest the prosecutor wished to withdraw from the agreement. The plea agreement did not include any joint recommendation. Andrews was free to argue for any sentence.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Clarifying that the State and defense did not "collude" on a sentence recommendation did not constitute an "end run" around the plea agreement. Unlike in ***Williams***, the prosecutor never intimated to the court that the State no longer supported the plea agreement. *See* ***Williams***, 249 Wis. 2d 492, ¶47.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).