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DISTRICT II

December 26, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2283-CR State of Wisconsin v. Chad E. Jahn (L.C. #2015CF325)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Chad E. Jahn appeals from an amended judgment of conviction and the denial of his postconviction motion to be declared eligible for the Wisconsin Substance Abuse Program (SAP). Jahn seeks a remand for a new sentencing hearing to address his eligibility for SAP. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the judgment and orders of the circuit court.

In November 2015, Jahn was charged (case No. 2015CF300) with strangulation and suffocation, misdemeanor battery, and disorderly conduct all resulting from an attack upon the victim. In December 2015, Jahn was charged (case No. 2015CF318) with felony bail jumping and disorderly conduct as a result of conduct in going to the victim's home. Later in December 2015, Jahn was charged (the case underlying this appeal) with felony intimidation of a witness, two counts of felony bail jumping, and violation of a temporary restraining order for harassing the same victim. In early 2016, Jahn was charged (case No. 2016CF7) with perjury, possession of a firearm contrary to an injunction, felony bail jumping, and knowingly violating a domestic abuse injunction after it was discovered that Jahn had purchased a gun on December 10, 2015. All of the charges were consolidated and a plea agreement was reached.

In return for Jahn pleading to one count of strangulation and suffocation, one count of felony bail jumping, one count of possession of a firearm, and one count of violating a domestic abuse injunction, the State agreed to dismiss and read in all remaining charges and recommend a withheld prison sentence, with four years of probation, and condition time of twelve months in the county jail. Following an appropriate plea colloquy, the court accepted Jahn's pleas, ordered a presentence investigation, and set the matter over for sentencing.

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

The State honored the plea agreement at the plea and sentencing hearings. At the sentencing hearing, Jahn's counsel argued that Jahn's alcohol use was a factor in his offenses and that Jahn was making efforts in jail to address his alcohol problems.

The court did not follow the parties' joint recommendation for a withheld prison sentence. The court imposed a global prison sentence totaling four years and nine months' initial confinement and six years' extended supervision, followed by a probationary term of seven years coupled with a withheld and stayed ten-year prison sentence. Jahn does not challenge the court's exercise of discretion in the imposition of his sentence.

In response to the court's sentence, Jahn filed a postconviction motion seeking eligibility for SAP. The State objected to Jahn's request at the postconviction hearing based upon the seriousness of Jahn's offenses and the numerous dismissed and read-in charges. The State argued there was a need to protect the victim and the public and that Jahn needed "a substantial period of time of incarceration in order to deal with his needs" as well as to satisfy the punitive demands of the sentence. Jahn objected to the State's remarks as inconsistent with its sentencing agreement.

The court denied Jahn's request for SAP eligibility.

Jahn thereafter filed a motion for reconsideration of the court's denial of SAP eligibility on the grounds that the State breached the plea agreement when it opposed his eligibility for the SAP program at the postconviction motion hearing. The State responded that SAP eligibility was not within the parties' plea agreement. The court denied Jahn's reconsideration motion as the State had complied with the plea agreement at the plea and sentencing hearings, and once the court rejected the parties' joint recommendation, the State was free to offer its opinion regarding

eligibility for SAP. The court also observed that SAP eligibility was not part of the parties' plea agreement. Jahn appeals.

A prosecutor breaches a plea agreement when the prosecutor does not make the negotiated sentencing recommendation. *See State v. Deilke*, 2004 WI 104, ¶11, 274 Wis. 2d 595, 682 N.W.2d 945 (“Once a plea agreement has been reached and a plea made, a defendant’s due process rights require the bargain be fulfilled.”). The breach must be material and substantial. *Id.*, ¶13. “A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party.” *Id.*, ¶14. Whether there has been a breach of a plea agreement is a question of law that we review de novo. *Id.*, ¶10. Jahn has the burden to show by clear and convincing evidence that a breach occurred and that it was material and substantial. *Id.*, ¶13.

Jahn argues that the State promised to argue for probation in exchange for Jahn’s plea and that the State materially and substantially breached the plea agreement when it argued at the postconviction hearing that the court should not grant SAP eligibility. Jahn’s argument is misplaced. The bargain reached in the plea agreement was fulfilled. The State made the probation recommendation per the parties’ agreement at both the plea and sentencing hearings. The State adhered to the promises it made, but it is not bound to promises it did not make. *See State v. Bowers*, 2005 WI App 72, ¶16, 280 Wis. 2d 534, 696 N.W.2d 255. SAP eligibility was not a term, let alone a material term, of the parties’ plea agreement.

Once the court rejected the parties’ recommendation and imposed a prison sentence, the plea agreement was fulfilled. Jahn’s independent request for SAP eligibility had no relation to the parties’ prior plea agreement, and the State had no “contractual” obligation to argue for

Jahn's eligibility for any prison program. SAP eligibility was not bargained for in the plea agreement and we will not engraft such an obligation into the agreement. See *State v. Tourville*, 2016 WI 17, ¶33, 367 Wis. 2d 285, 876 N.W.2d 735.

Jahn argues that per *Deilke*, an “unarticulated requirement” can serve as the basis for a breach of a plea agreement. See *Deilke*, 274 Wis. 2d 595, ¶18. *Deilke* is distinguished by the fact that the “unarticulated requirement” (that Deilke collaterally attacked his prior OWI convictions) went to the heart of the parties' plea agreement. Deilke prevented the State from receiving what it had bargained for in the plea agreement; whereas in this case, SAP eligibility and the parties' respective positions towards SAP eligibility do not go to the core of the parties' agreement. The core of the parties' agreement was for a non-prison sentence.

The State did not breach the parties' plea agreement when it did not argue for SAP eligibility at the postconviction motion hearing. SAP eligibility was never a term of the parties' plea agreement and SAP eligibility was not a core component of the parties' agreement.

IT IS ORDERED that the judgment and orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals