COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2306-CR **Cir. Ct. No. 2005CF2926**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD L. MULDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. In this direct appeal, Donald L. Mulder appeals from a judgment of conviction, entered on his no-contest plea, for second-degree sexual assault of a child who has not attained the age of sixteen years, contrary to WIS.

STAT. § 948.02(2) (2005-06).[1] Mulder also appeals from an August 2009 order denying his third postconviction motion for relief. Mulder, who was resentenced twice due to errors in the first two sentencing hearings, argues that seven errors that occurred prior to and after he pled no contest entitle him to withdraw his no-contest plea. With one exception, we reject his arguments and affirm the judgment and order.

¶2 With respect to Mulder's claim that his plea was not knowingly, voluntarily and intelligently entered because the trial court violated ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, we conclude that Mulder is entitled to an evidentiary hearing. We reverse that portion of the third postconviction order denying Mulder's request for an evidentiary hearing. On remand, the trial court shall conduct a hearing consistent with the dictates of ***Hampton***.

BACKGROUND

¶3 Mulder was charged with two counts of sexual assault of a child who had not attained the age of sixteen years. He reached a plea agreement with the State pursuant to which: (1) Mulder was allowed to plead no contest; (2) one count was dismissed and read in; and (3) the State would not "provide the [trial c]ourt with any specific sentencing recommendation, but [was] free to argue the facts as the State sees them; and any mitigating or aggravating factors, as the State

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

sees them." Mulder was convicted and sentenced to eight and one-half years of initial confinement and six years of extended supervision.[2]

¶4 Mulder secured postconviction counsel and filed a WIS. STAT. § 809.30 motion seeking resentencing based on three grounds related to the sentencing hearing, none of which is relevant to this appeal. The trial court concluded that resentencing was required. At the resentencing, Mulder was sentenced to eight years of initial confinement and seven years of extended supervision.

¶5 Mulder secured new postconviction counsel and filed a second WIS. STAT. § 809.30 motion, arguing that the trial court erred because it did not read the transcript of the original sentencing hearing or state the reason for imposing a higher sentence. The trial court granted the motion and Mulder was resentenced again, this time to eight years of initial confinement and six years of extended supervision.

¶6 Mulder secured new postconviction counsel and filed his third WIS. STAT. § 809.30 postconviction motion. For the first time, Mulder alleged that there were errors in the proceedings that occurred prior to his plea, at his plea hearing and at the third sentencing hearing. He sought plea withdrawal based on these errors, arguing that "a resentencing would now be impossible."

¶7 The trial court denied Mulder's third postconviction motion without a hearing. With respect to numerous issues, the trial court agreed with the State's

[2] Mulder's plea was accepted by the Hon. Charles F. Kahn, who also sentenced him and granted his first postconviction motion seeking resentencing. The Hon. M. Joseph Donald considered Mulder's second and third postconviction motions and resentenced him twice.

assertion that Mulder's claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), because Mulder did not raise the issues in his prior two postconviction motions. This appeal follows.

DISCUSSION

¶8 Mulder's third postconviction motion alleged seven errors which he claims entitle him to withdraw his pleas. We consider the alleged errors in three groups: (1) errors occurring prior to his no-contest plea; (2) errors occurring when Mulder entered his no-contest plea; and (3) an error occurring at the third sentencing hearing. At the outset, however, we note that the State has explicitly abandoned its argument that many of the issues raised in Mulder's third postconviction motion are procedurally barred because he did not raise them in his first two postconviction motions, where all the postconviction motions were filed prior to Mulder's direct appeal. Based on the State's abandonment of that issue, we decline to consider whether procedural waiver should apply.

I. Alleged errors prior to the entry of Mulder's no-contest plea.

¶9 Mulder presents three issues that arose prior to the entry of his no-contest plea, none of which were raised by his trial counsel at any time. We consider each in turn.

A. Allegation that complaint should be dismissed on personal jurisdiction grounds.

¶10 Mulder argues that the criminal complaint "was not sufficiently definite in terms of the time period of the alleged offense" and that Mulder is

therefore "entitled to dismissal on personal jurisdictional grounds." (Bolding omitted.) We conclude that Mulder forfeited this claim when he pled no contest.[3]

¶11 "The general rule is that a guilty, no contest, or ***Alford*** plea 'waives all nonjurisdictional defects, including constitutional claims.'" ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citation, footnote and bracketing omitted). "Courts refer to this as the guilty-plea-waiver rule," although "a more accurate label would be the 'guilty-plea-forfeiture' rule." ***Id.***, ¶18 & n.11. This rule applies to "objections to personal jurisdiction, but does not waive objections to subject matter jurisdiction." ***State v. Schroeder***, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999); *see also* ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991) (where defendant "made no objection to the personal jurisdiction of the court before entering his plea, any such objection has been waived").

¶12 Here, Mulder's claim is that the trial court lacked personal jurisdiction over him. He forfeited that claim when he pled no contest. *See* ***id.*** Therefore, we reject his claim.

B. Trial court action after substitution.

¶13 The trial judge originally assigned to this case in 2005 was the Hon. Mel Flanagan. Mulder filed a motion for substitution on August 17, 2005, and the

[3] Our supreme court has recognized that it is frequently more accurate to say a defendant forfeited, rather than waived, a right. *See* ***State v. Ndina***, 2009 WI 21, ¶¶28-29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Therefore, where appropriate, we use the term "forfeited" rather than "waived," although we do not attempt to rephrase older case law that used the term "waived."

case was reassigned to the Hon. Charles F. Kahn. At a pretrial hearing on February 10, 2006, at which the trial was reset to April 24, 2006, trial counsel for Mulder indicated that he wanted to set a bail hearing for the next week. The trial court said it could set the bail motion for February 16, but noted that it "may have to find a different judge to handle that bail motion," for scheduling reasons.

¶14 Mulder filed a written motion to reduce his bail. On February 16, the bail motion hearing was heard by Judge Flanagan. Mulder was not present and trial counsel did not object to the motion being heard by Judge Flanagan, even though she had been substituted in August 2005. Indeed, the transcript does not contain any mention of the fact that she was substituted in the past. Judge Flanagan heard the bail reduction motion and denied it. No other matters related to the case were discussed.[4]

¶15 Mulder argues that because Judge Flanagan presided over a proceeding after she was substituted, Mulder should be allowed to withdraw his no-contest plea and proceed to trial. The State responds that this argument should be rejected because Mulder forfeited any objection to Judge Flanagan's previous hearing of the bail motion when he pled no contest. We agree. With his plea, Mulder forfeited "'all nonjurisdictional defects." *See* ***Kelty***, 294 Wis. 2d 62, ¶18 (citation omitted). A violation of a substitution request affects only a judge's competency to act, not the judge's jurisdiction over the case. ***State v. Damaske***, 212 Wis. 2d 169, 188-89, 567 N.W.2d 905 (Ct. App. 1997). When Mulder entered

[4] Contrary to Mulder's assertion, this was not the final pretrial. On February 10, Judge Kahn scheduled the final pretrial for April 13, and Judge Flanagan did not alter that or consider anything besides the motion to reduce bail. At the conclusion of the bail reduction hearing, the clerk noted that the final pretrial remained scheduled for April 13.

his plea, he forfeited his right to later object to Judge Flanagan's hearing of the bail reduction motion. *See* ***id.*** at 189 (defendant who pled guilty forfeited right to seek post-judgment review of the trial court's denial of his substitution request).

C. Failure to produce Mulder for the bail reduction hearing.

¶16 Mulder did not personally appear at the February 16, 2006 bail reduction hearing before Judge Flanagan. Trial counsel explicitly waived Mulder's appearance. In his third postconviction motion, Mulder argued that the waiver of his appearance violated his constitutional right to due process and that his trial counsel provided ineffective assistance by waiving Mulder's appearance.

¶17 We conclude that when Mulder pled no contest, he forfeited his claim that he was unconstitutionally denied the right to be present at the bail reduction hearing. *See* ***Kelty***, 294 Wis. 2d 62, ¶18 (citation omitted) (constitutional claims are among those forfeited when a guilty, no-contest or ***Alford*** plea is entered). Furthermore, to the extent Mulder is arguing that he was denied the effective assistance of counsel at the bail hearing, neither his third postconviction motion nor his appellate brief explain how he was prejudiced by trial counsel's alleged deficiency. Therefore, Mulder's ineffective assistance of counsel claim fails. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 697 (1984) (to establish an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and that he was prejudiced by the deficient performance, and a reviewing court may dispose of a claim of ineffective assistance of counsel on either ground).

II. Alleged errors at the plea hearing.

¶18 Mulder presents three issues that arose at his no-contest plea hearing, none of which were raised by his trial counsel at any time. We consider each in turn.

A. Determination of competence to proceed.

¶19 Mulder argues that he is entitled to withdraw his no-contest plea because neither the trial court nor trial counsel determined his competence to proceed at the plea hearing. First, Mulder draws this court's attention to the following language from ***State v. Meeks***, 2003 WI 104, ¶48, 263 Wis. 2d 794, 666 N.W.2d 859:

> [C]ourts are required to determine the competency of a defendant whenever there is reason to doubt the defendant's competence. In [***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986)], we concluded that an attorney's obligation, as an officer of the court, required that he or she raise the issue of competency whenever there was reason to doubt as well.

(Citation omitted). Then, Mulder notes that at the plea hearing, the trial court did not ask him about the fact that he was taking the medication Paxil for anxiety, and trial counsel did not comment on it. Mulder concludes, without further analysis, that he is entitled to a hearing on whether he was competent to understand the plea agreement. Mulder's briefing on this issue is inadequate. He does not explain why there was "reason to doubt" his competence or how his taking this particular medication should have led the trial court or his trial counsel to doubt his competence, and he provides no additional case citations to support his implied proposition that a competence determination is automatically required when a defendant is on medication for anxiety. We decline to develop Mulder's argument

for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

B. State's request for a presentence investigation ("PSI").

¶20 After the trial court accepted Mulder's plea, the parties discussed a sentencing date. The State told the trial court: "Your Honor, I did provide the defense notice, the State is asking for a [PSI] in the matter." Trial counsel did not object and a PSI report was prepared.

¶21 Mulder argues that the State's actions breached the plea agreement.[5] He explains:

> Immediately after the Plea Colloquy was completed, the State advocated for a [PSI] Report. The State, therefore, breached the Plea Agreement by advocating for a [PSI] Report.
>
> Furthermore, the PSI itself contained a recommendation of a sentence and so constituted an end-run around the Plea Agreement because it was done at the behest of the State, which had agreed to make no sentencing recommendation. (See [PSI] Report.) As a result, Mr. Mulder's interest in the Right to the enforcement of the Plea Agreement (pursuant to the Due Process clauses of the United States Constitution and the Wisconsin Constitution) was violated.

(Record citations omitted.) We are not convinced.

[5] Mulder also briefly references his trial counsel's failure to object. He contends that he was "automatically prejudiced" when his trial counsel did not object and asserts that no ***Machner*** hearing is necessary. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Because we conclude that the State did not breach its plea agreement with Mulder when it requested a PSI report, we conclude that Mulder's ineffective assistance claim also fails.

¶22 It is undisputed that the plea agreement did not include any provisions concerning the request for a PSI, as the trial court found in its order denying Mulder's third postconviction motion. Thus, the issue is whether by asking for a PSI report, the State breached its agreement to not provide "any specific sentencing recommendation." We conclude that the PSI report request did not violate the plea agreement, for the following reasons argued by the State:

> Mulder's argument misunderstands the function of a PSI. "The securing of a PSI is an integral part of the sentencing function and is solely within the judicial function." [***State v. Howland***, 2003 WI App 104, ¶32, 264 Wis. 2d 279, 663 N.W.2d 340] (citation omitted). "A probation or parole officer preparing a presentence report functions as an agent of the court, acting on behalf of an independent judiciary," and does not act on behalf of the State or the defense. ***State v. Matson***, 2003 WI App 253, ¶24, 268 Wis. 2d 725, 674 N.W.2d 51 (citation omitted). "The preparer of the presentence report is to be a neutral and independent participant in the sentencing process." [***Id.***,] ¶24.
>
> The State did not make an "end run" around the plea agreement by asking for a PSI. Mulder is arguing that the State's request let it make a sentencing recommendation even though it promised not to ask for one. But the recommendation in the PSI was not on the State's behalf and was instead made by a neutral agent of the court. The State had no role in the PSI's compilation or its recommendation, and its request did not constitute an "end run" around the plea bargain. *C.f.* ***Howland***, 264 Wis. 2d 279, ¶37 (prosecutor's complaints to PSI author about PSI's sentence recommendation when State agreed not to make sentencing recommendation constituted a breach of plea agreement). Mulder is not entitled to withdraw his plea because the State requested a PSI.

(Some citations omitted.) For these reasons, Mulder is not entitled to relief.

C. Faulty plea colloquy.

¶23 Mulder argues that the trial court's plea colloquy was faulty because the trial court did not tell Mulder that it was not bound by the plea agreement. Mulder asserts that he is therefore entitled to an evidentiary hearing on whether his plea was knowingly, voluntarily and intelligently entered. We agree.

¶24 In ***Hampton***, our supreme court "reaffirm[ed] that where the court is aware of a plea agreement, the court must advise the defendant personally that the court is not bound by the terms of that agreement and ascertain that the defendant understands this information." ***Id.***, 274 Wis. 2d 379, ¶73. In doing so, ***Hampton*** cited ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 203 N.W.2d 638 (1973), for the proposition that "[i]f the court discovers that 'the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court.'" ***Hampton***, 274 Wis. 2d 379, ¶32 (quoting ***White***, 57 Wis. 2d at 24) (emphasis omitted). ***Hampton*** further held that the remedial measures specified in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), would apply "for plea colloquies that are defective because of the failure of the court to advise the defendant personally that the terms of the plea agreement are not binding on the court and to ascertain that the defendant understands this information." ***Hampton***, 274 Wis. 2d 379, ¶48.

¶25 In this case, the plea agreement included a sentence concession (the State agreed not to make "any specific sentencing recommendation") and a charge concession (dismissal of one count, which would be read in for sentencing purposes). When the trial court accepted Mulder's plea, it did not tell Mulder that it was not bound by those concessions and it did not ascertain whether Mulder

understood that. In his third postconviction motion, Mulder alleged that he did not know that the trial court was not bound by those concessions. He sought an evidentiary hearing on his motion to withdraw his plea.

¶26 Given these facts, the State recognizes "that, on its surface, Mulder's postconviction motion and brief suggest that the [trial] court should have held a ***Bangert*** hearing on this claim." Nonetheless, the State argues that under the facts here, remand for a ***Bangert*** hearing is not warranted.[6]

¶27 One might reasonably conclude that there was no reason for the court to tell Mulder that it was not bound by the State's sentence concession because the State agreed not to make "a specific sentencing recommendation." One might also reasonably conclude that because the trial court went along with the charge concession, Mulder was not prejudiced by the trial court's failure to

[6] At the same time, the State recognizes that we may be bound by ***Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, to order an evidentiary hearing. The State explains:

> Despite the lack of any conceivable prejudice from the court's failure to inform Mulder that it was not bound by the plea agreement, ***Hampton*** may require remand for a ***Bangert*** hearing. As noted, the court did not personally inform Mulder that it was not bound by the plea agreement and he alleged in his postconviction motion he did not understand this information. Thus, Mulder has sufficiently pled his ***Bangert*** claim and a hearing may be warranted.
>
> In the event of a remand, the State notes that it will likely be able to meet its burden of showing that Mulder understood the court was not bound by the plea agreement.... Mulder's claim that he did not understand this information is questionable in light of his statements at the plea hearing, although the State acknowledges that this presents a factual dispute that the [trial] court would have to resolve on remand.

(Citations and record citations omitted.)

inform him that it was not bound by the charge concession. However, ***Hampton*** did not carve out exceptions to its requirement that a trial court advise the defendant that it is not bound by sentence and charge concessions. ***Hampton*** also did not establish a lack-of-prejudice exception to the requirement that a ***Bangert*** hearing be held, and no subsequent case has established such an exception.[7] We are bound by ***Hampton***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188-90, 560 N.W.2d 246 (1997) (only the supreme court is authorized "to overrule, modify or withdraw language from a previous supreme court case"). We reverse that portion of the third postconviction order denying Mulder's request for an evidentiary hearing. On remand, the trial court shall conduct a hearing consistent with the dictates of ***Hampton***. The burden is on the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered." ***Id.***, 274 Wis. 2d 379, ¶46.

III. Alleged breach of the plea agreement at the third sentencing hearing.

¶28 Mulder argues that the State breached the plea agreement at the third sentencing hearing and that the breach was "material and substantial." At the hearing, the trial court started by putting on the record its reasons for resentencing Mulder, and the parties also explained their concerns with the prior sentencing.[8] Then the following exchange took place:

[7] This court has previously questioned whether ***Hampton*** should apply where the trial court stays within the bounds of the plea agreement. We certified that issue to the Wisconsin Supreme Court in 2005, but the Supreme Court refused certification. *See* ***State v. Elvers***, No. 2003AP2637-CR, 2005 WL 1525459 (WI App June 29, 2005), *cert. denied*, 2005 WI 150, 286 Wis. 2d 102, 705 N.W.2d 663. Thus, there is no available exception to the ***Hampton*** requirements even when the error results in no harm to the defendant.

[8] The assistant district attorney who appeared for the third sentencing had not previously appeared in the case.

> THE COURT: So at this time if there are any other matters that the parties want to put on the record, I will first indicate with respect to the negotiations, in essence, the State, you're free to argue the facts aggravating and mitigating in this matter, that you were making no specific recommendation.
>
> [THE STATE]: Well, my understanding was that there was no specific recommendation regarding the amount of incarceration but it was a general incarceration recommendation.
>
> [TRIAL COUNSEL]: Judge, that actually came up at the first sentencing.[9]
>
> THE COURT: I know. At this point let me just have a quick sidebar.

¶29 After the sidebar, the trial court clarified that the agreement was that the State would make no specific recommendation. Trial counsel did not seek to postpone sentencing or assert that the plea agreement had been breached. Subsequently, the State offered its sentencing recommendation, beginning with the following statement: "As noted, the State is not making a specific recommendation but rather leaving fashioning of the sentence in this case to the sound discretion of the Court."

¶30 In his third postconviction motion, Mulder argued that based on the State's original statement that incarceration was recommended, he should be allowed to withdraw his plea. We are not convinced.

[9] At the first sentencing hearing, the prosecutor stated: "The State is recommending incarceration, Judge. Pursuant to the negotiations we are not providing the court with any specific length of the incarceration." After trial counsel requested a sidebar and spoke with his client, trial counsel told the trial court that it had discussed with Mulder the State's misstatement of its recommendation. Trial counsel said that Mulder wanted to waive the "potential breach of [the] plea agreement" and proceed with sentencing. The trial court also said that it would disregard that single statement from the prosecutor. Sentencing proceeded.

¶31 "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Bowers***, 2005 WI App 72, ¶7, 280 Wis. 2d 534, 696 N.W.2d 255. However, "[n]ot all breaches of a plea agreement require a remedy." ***Id.***, ¶9. ***Bowers*** explained:

> A defendant is not entitled to relief when the breach is merely a technical one rather than a substantial and material breach of the agreement. 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. However, even an oblique variance will entitle the defendant to a remedy if it "taints" the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for.

Id., ¶9 (citations omitted).

¶32 In this case, the trial court rejected Mulder's claim in its order denying Mulder's third postconviction motion, stating:

> [T]he prosecutor, who was not the prosecutor during the first and second sentencing hearings, misstated the plea agreement, stating that the plea agreement was for "general incarceration." Defense counsel, who was not the same defense counsel at the first or second hearings, immediately requested a side bar....
>
> [Later], the prosecutor opened her sentencing argument with a correct recitation of the negotiated sentencing recommendation.... The prosecutor did not repeat her initial error during any other portion of the sentencing proceeding.
>
> ....
>
> ... [T]his court agrees with the State[] ... that the breach was not substantial under the circumstances. The court was well aware of what the plea negotiations were in this case because it sentenced the defendant at his second sentencing hearing when the recommendation was correctly stated. When the prosecutor misstated the sentencing recommendation at the third sentencing hearing, defense

> counsel promptly requested a sidebar; the court confirmed what the correct recommendation was; the defendant acknowledged that that was his understanding of the negotiations; and the prosecutor corrected herself during her sentencing argument. Where the prosecutor misstates the plea agreement, the defendant promptly objects and the prosecutor quickly corrects the misstatement, the breach is not substantial.

(Citation, italics and record citations omitted).

¶33 In support of this reasoning, the trial court cited ***State v. Knox***, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), where the court considered whether the State breached the plea agreement when it "misstated the parties' plea agreement, asking for a consecutive rather than the concurrent sentence agreed upon." *See* ***id.*** at 319. After defense counsel urged the State to look at the plea questionnaire form, "the prosecutor advised the court that there had apparently been a miscommunication regarding the agreement, and that she wished to make a new record regarding the State's recommendation." ***Id.*** at 320-21. On appeal, we concluded that the perceived breach "was not substantial." ***Id.*** at 322. Similarly, in ***Bowers***, we concluded that where the prosecutor's misstatement as to the recommended number of years of initial confinement and extended supervision was immediately brought to light and the prosecutor "immediately amended its recommendation," such a breach was not substantial. ***Id.***, 280 Wis. 2d 534, ¶¶3, 11-12. ***Bowers*** explained: "***Knox*** teaches us that it is sufficient for the State to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." ***Bowers***, 280 Wis. 2d 534, ¶12.

¶34 "The question of whether the State's conduct breached the terms of the plea agreement is a question of law that we review de novo." ***Id.***, ¶5. We agree with the trial court that the breach of the plea agreement was not substantial. As in ***Knox*** and ***Bowers***, the prosecutor in this case misstated the plea agreement

and, after it was brought to her attention, she corrected the recommendation. Based on the facts of this case, we cannot say that the breach of the plea agreement was substantial.

¶35 Mulder, however, argues that this case is unlike ***Knox***. He asserts that the prosecutor in this case "stated that [s]he was going to argue for incarceration because [s]he was entitled to do so" and "[t]hus, [s]he covertly implied to the sentencing court that a more stringent sentence was due." These bald assertions are not supported by the record and we reject them.

CONCLUSION

¶36 We conclude that Mulder is entitled to an evidentiary hearing on his claim that his plea was not knowingly, voluntarily and intelligently entered based on a violation of ***Hampton***. Therefore, we reverse that portion of the third postconviction order denying Mulder's request for an evidentiary hearing. On remand, the trial court shall conduct a hearing consistent with the dictates of ***Hampton***. In all other respects, the judgment and order are affirmed.

By the Court.—Judgment affirmed, order affirmed in part and reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.