COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP2022-CR
2009AP2023-CR

Cir. Ct. Nos. 2006CF260
2008CF534

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SERGIO M. PEGUES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: DENNIS J. BARRY, and FAYE M. FLANCHER, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Sergio M. Pegues has appealed from an order entered on July 23, 2009, in the circuit court for Racine county, the Honorable

Dennis J. Barry presiding, denying Pegues' motion for postconviction relief in Racine county circuit court case No. 2006CF260. He has also appealed from an order entered by the Honorable Faye M. Flancher on the same date, denying postconviction relief in Racine county circuit court case No. 2008CF534.[1] We affirm both orders.

¶2 The issues presented by each appeal are different but related. In February 2006, Pegues entered a guilty plea to one count of possession of marijuana as a repeat drug offender in Racine county circuit court case No. 2006CF260. On May 2, 2006, the trial court withheld sentence and placed Pegues on two years of probation. The trial court ordered sixty days in jail as a condition of probation pursuant to WIS. STAT. § 973.09(4)(a) (2007-08).[2] Because Pegues had already been confined for thirty-five days of pretrial detention, the trial court granted him thirty-five days of credit against the sixty days of jail time.[3] As a condition of probation, Pegues was also ordered to pay costs and surcharges, including $20 for court costs, $8 for other costs, $85 for the mandatory victim/witness surcharge, and $250 for a DNA surcharge.

¶3 On April 22, 2008, Pegues signed a Petition and Stipulation to Waive Appearance and Hearing, and Order Extending Probation. In this petition, Pegues stated that he had failed to fulfill the conditions of his probation by failing to pay "Court ordered financial obligations" in the amount of $371.15. He

[1] These appeals have been consolidated by this court.

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

[3] The trial court stayed the remainder of the jail time imposed as a condition of probation.

acknowledged that the Wisconsin Department of Corrections believed that he had not made a good faith effort to pay and was asking the trial court to extend his probation for one year. He acknowledged that he was aware of and understood that he had a right to a trial court hearing on whether the Department's request should be granted. He acknowledged that at the hearing, the Department would have to show that he had the ability to pay and that an extension would further his rehabilitation as well as the interests of the community. He acknowledged that he had a right to appointed counsel, and that if he waived these rights, the trial court could enter an order extending his probation. Pegues stated that he wanted to waive his right to a hearing and asked the trial court to grant the Department's request for an extension. He stated that by signing the document, he certified that his waiver was made freely and voluntarily, without promises or threats.

¶4 The trial court signed the order on April 30, 2008, stating that probation was extended from May 2, 2008, to May 2, 2009, or until all court obligations were completed, whichever came first. The order stated that the relief requested was in the best interests of the defendant and the community, and that it served the purpose for which probation was imposed.

¶5 Based on violations of the terms and conditions of Pegues' probation, an apprehension request was issued for him by probation authorities on April 27, 2008. According to the complaint in Racine county circuit court case No. 2008CF534, police officers saw Pegues on May 1, 2008, and approached him because he had "an outstanding felony warrant out of Probation and Parole." According to the complaint, the officers told Pegues that he had an outstanding warrant and that he should come with them, at which point Pegues fled. Pegues subsequently was charged in Racine county circuit court case No. 2008CF534

with obstructing an officer, disorderly conduct, and possession of marijuana with intent to deliver.

¶6 Revocation proceedings were commenced against Pegues in Racine county circuit court case No. 2006CF260 and, on July 11, 2008, he waived his right to a revocation hearing. On August 14, 2008, the trial court sentenced him after revocation of probation to a bifurcated thirty-month sentence, consisting of eighteen months of initial confinement and one year of extended supervision.

¶7 On August 14, 2008, Pegues also entered guilty pleas to the obstruction and disorderly conduct charges in Racine county circuit court case No. 2008CF534. Pursuant to the plea agreement, the drug charge was dismissed. The plea agreement also provided that the State would recommend two year sentences on each charge, consisting of one year of initial confinement and one year of extended supervision, consecutive to each other and consecutive to the sentence imposed after revocation of probation in Racine county circuit court case No. 2006CF260. This was the sentence ultimately recommended by the prosecutor and imposed by the trial court.

¶8 Pegues' first argument on appeal is that the trial court lacked jurisdiction to extend his probation in Racine county circuit court case No. 2006CF260 because his term of probation expired on March 28, 2008. A trial court loses jurisdiction over a probationer when the probationer has served his term of probation. ***State v. Stefanovic***, 215 Wis. 2d 310, 319, 572 N.W.2d 140 (Ct. App. 1997). Pegues contends that the thirty-five days of sentence credit which was applied by the trial court to reduce the sixty days of jail time imposed as a condition of probation also reduced his two-year term of probation. Based on this reasoning, he contends that his original term of probation expired on March

28, 2008, thirty-five days before May 2, 2008. He contends that the trial court therefore lacked jurisdiction to extend his probation on April 30, 2008.

¶9 In support of his argument, Pegues cites ***State v. Fearing***, 2000 WI App 229, ¶21, 239 Wis. 2d 105, 619 N.W.2d 115, for the proposition that conditions of probation, including the condition of jail confinement and the length of that confinement, are a component of the criminal penalty of probation. Based on ***Fearing***, Pegues contends that when a trial court awards credit for pretrial detention to reduce jail time imposed as a condition of probation, its order also reduces the defendant's overall term of probation.

¶10 Contrary to Pegues' argument, nothing in ***Fearing*** or WIS. STAT. § 973.09(4)(a) provides any support for such a conclusion. Instead, as argued by the State, this issue is controlled by WIS. STAT. § 973.155(1)(a).

¶11 Pursuant to the express language of WIS. STAT. § 973.155(1)(a), a convicted defendant is entitled to credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. By its terms, § 973.155(1)(a) provides for credit toward the service of a sentence. Within the meaning of § 973.155(1)(a), a sentence to which credit can attach requires confinement or incarceration. *Cf.* ***State v. Martinez***, 2007 WI App 225, ¶¶17-18, 305 Wis. 2d 753, 741 N.W.2d 280 (defendant was not entitled to have time spent serving a federal sentence credited against a Wisconsin sentence because he was on parole in the Wisconsin case when he was incarcerated on the federal sentence and the prospect of him serving any further Wisconsin sentence at the time he served the federal sentence was speculative); ***State v. Rohl***, 160 Wis. 2d 325, 331-32, 466 N.W.2d 208 (Ct. App. 1991) (because the defendant was on parole in Wisconsin at the time he was

confined on charges in California, the period of confinement in California could not be credited against his Wisconsin sentence). Pegues' two-year term of probation was not a period of confinement. His pretrial detention and the credit awarded on his condition of probation jail time therefore did not reduce his term of probation.[4]

¶12 In concluding that probation is not a sentence for purposes of awarding credit under WIS. STAT. § 973.155(1)(a), we also note that probation is generally considered to be an alternative to a sentence, not a sentence. ***Fearing***, 239 Wis. 2d 105, ¶3, ¶6. *See also* ***State v. Pierce***, 117 Wis. 2d 83, 85, 342 N.W.2d 776 (Ct. App. 1983); ***Prue v. State***¸ 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974). Sentence was not imposed in this case until August 14, 2008, when Pegues was sentenced after revocation of his probation. *See* ***Prue***, 63 Wis. 2d at 116. No

[4] As already noted, the trial court granted Pegues credit against the thirty-five days of jail confinement that was imposed as a condition of probation and not stayed. Although Pegues' reply brief also discusses the law pertaining to sentence credit for time served as a condition of probation when a sentence is imposed after revocation of probation, these appeals present no issue dealing with credit against the thirty-month sentence imposed after revocation of probation on August 14, 2008. We therefore do not discuss that matter.

basis therefore exists to conclude that Pegues' two-year term of probation was reduced by the thirty-five days he spent in pretrial detention.[5]

¶13 Pegues' second argument is that the trial court erroneously extended his probation for failure to make payments ordered as a condition of probation. This argument fails because, as discussed above, Pegues expressly waived his right to a hearing on extension and stipulated to entry of an order extending his probation.

¶14 A trial court may extend a defendant's probation if, prior to the expiration of the period of probation, the defendant stipulates to the extension of supervision and the trial court finds that the extension would serve the purposes

[5] In determining that a term of probation is not a sentence that may be reduced by credit for a period of pretrial detention, we acknowledge case law holding that the meaning of the term "sentence" depends upon the particular statute involved and the setting to which the statute applies. ***State v. Mentzel***, 218 Wis. 2d 734, 740, 581 N.W.2d 581 (Ct. App. 1998). In ***Mentzel***, this court concluded that a defendant who was placed on probation with a withheld sentence was in custody under sentence of a court for purposes of filing a motion for postconviction relief under WIS. STAT. § 974.06. ***Mentzel***, 218 Wis. 2d at 739, 743-44. In ***State v. Booth***, 142 Wis. 2d 232, 234-35, 418 N.W.2d 20 (Ct. App. 1987), this court concluded that the imposition of probation constituted sentencing for purposes of determining which standard to apply to the consideration of a motion to withdraw a guilty plea. Similarly, in ***State v. Thompson***, 208 Wis. 2d 253, 257-58, 559 N.W.2d 917 (Ct. App. 1997), this court held that when a trial court imposed and stayed a sentence and ordered probation, this constituted a sentence to which a new sentence could be made consecutive under WIS. STAT. § 973.15(2).

Each of these cases involved legal standards, statutes, and issues which are not involved in this case. Moreover, while "sentence" is a term that may be used in a more general sense to include probation, it is a legal term and is given its legal meaning when used in a statute unless there is a strong indication that the term was used in a general sense. ***State v. Fearing***, 2000 WI App 229, ¶6, 239 Wis. 2d 105, 619 N.W.2d 115. Nothing in WIS. STAT. § 973.155(1)(a) provides a basis for concluding that the term "sentence" was used in a general sense to include probation. As noted by the State, the purpose of § 973.155 is to ensure that a person does not serve more time than the time to which he is sentenced. ***State v. Johnson***, 2007 WI 107, ¶37, 304 Wis. 2d 318, 735 N.W.2d 505. A defendant who is simply serving a term of probation is not "serving time." No basis therefore exists to conclude that the term "sentence" in § 973.155(1)(a) includes a term of probation.

for which probation was imposed. WIS. STAT. § 973.09(3)(c)3. As previously discussed, in the Petition and Stipulation to Waive Appearance and Hearing, and Order Extending Probation signed by Pegues, he conceded that he had failed to fulfill the conditions of his probation by failing to pay court-ordered financial obligations. He acknowledged that he was entitled to a hearing at which the Department would have to show that he had the ability to pay and that an extension would further his rehabilitation as well as the interests of the community. Pegues stated that he wanted to waive his right to a hearing and asked the trial court to grant the Department's request for an extension. Because Pegues chose to waive his right to put the Department to its proof on the issue of whether an extension of probation was warranted, and because the trial court found that the extension would serve the purposes for which probation was imposed, Pegues' probation was properly extended under § 973.09(3)(c)3.

¶15 Pegues' third argument pertains to Racine county circuit court case No. 2008CF534. He contends that because the trial court had no authority to extend his probation in Racine county circuit court case No. 2006CF260, the police lacked authority to execute a warrant arising from that case, and the obstructing and disorderly conduct charges were invalid as a matter of law. Based on our determination that Pegues' probation was properly extended to May 2, 2009, this argument fails.

¶16 Pegues' final argument is that the prosecutor violated the plea agreement at sentencing in Racine county circuit court case No. 2008CF534. Pegues waived his right to directly challenge the alleged breach of the plea agreement on appeal when he failed to object to the prosecutor's alleged breach of

the agreement at the sentencing hearing.[6] *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Nevertheless, even reviewing the issue on its merits, we conclude that it provides no basis for relief on appeal.

¶17 A defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. A prosecutor who does not present the negotiated sentencing recommendation at sentencing breaches the plea agreement. ***Id.***, ¶38. However, an actionable breach must be a material and substantial breach. ***Id.*** A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for which the defendant bargained. ***Id.*** When, as here, the terms of the plea agreement and the historical facts surrounding the prosecutor's alleged breach are not in dispute, whether the prosecutor's conduct constituted a material and substantial breach of the plea agreement is a question of law that this court reviews de novo. *See* ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220.

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[6] In ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244, this court stated that the defendant waived his right to directly challenge an alleged breach of a plea agreement when he failed to object to the alleged breach at the sentencing hearing. We then reviewed the prosecutor's alleged breach of a plea agreement within the context of the defendant's claim that his trial counsel rendered ineffective assistance when he failed to object to the alleged breach at sentencing. ***Id.***

In his postconviction motion, Pegues alleged that the prosecutor breached the plea agreement, but he did not allege that his trial counsel was ineffective for failing to object to the alleged breach. Pegues contends that the language and holding set forth in ***Howard***, 246 Wis. 2d 475, ¶12, regarding waiver was expressly overruled in ***State v. Smith***, 207 Wis. 2d 258, 558 N.W.2d 379 (1997). However, since the decision in ***Smith*** preceded the decision in ***Howard***, this contention makes no sense. In addition, the principle that a defendant waives his right to direct review of a prosecutor's alleged breach of a plea agreement when he does not object at sentencing recently has been reiterated. *See, e.g.*, ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522.

¶18 When a prosecutor has agreed to make a certain sentence recommendation, he or she may not render less than a neutral recitation of the terms of the agreement and may not make an "end run" around the agreement. ***Williams***, 249 Wis. 2d 492, ¶42. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***Id.*** (citation omitted). However, the prosecutor may discuss negative facts about the defendant in order to justify a recommended sentence within the parameters of the plea agreement. ***Naydihor***, 270 Wis. 2d 585, ¶24. The prosecutor may discuss pertinent factors related to the defendant's character and behavior patterns. ***Id.***, ¶25. He or she may convey information to the trial court that is both favorable and unfavorable to the defendant, as long as he or she abides by the plea agreement. ***Williams***, 249 Wis. 2d 492, ¶44.

¶19 After reviewing the sentencing transcript, including the prosecutorial comments highlighted by Pegues in his brief on appeal, we conclude that the prosecutor did not breach the agreement. She recommended that Pegues be sentenced to two prison terms, each consisting of one year of initial confinement and one year of extended supervision, consecutive to each other and consecutive to the sentence imposed after revocation of probation in Racine county circuit court case No. 2006CF260. Her comments at sentencing related to the three primary sentencing factors, which are the nature of the offense, the character of the defendant, and the rights of the public. *See* ***Naydihor***, 270 Wis. 2d 585, ¶26. She described the offenses for which Pegues was being sentenced and Pegues' conduct during the crimes. She described his juvenile and criminal history, his performance on probation, and his supervising agent's comments about her frustration in supervising him. The prosecutor contended that a prison sentence

was warranted, and recommended that Pegues be sentenced as set forth in the plea agreement.

¶20 Although the prosecutor discussed negative factors and made uncomplimentary comments concerning Pegues, the negative information conveyed by her in no way insinuated that she was distancing herself from the sentencing recommendation. Instead, the prosecutor's comments supported the recommended sentence and were relevant to the pertinent sentencing factors the sentencing court was required to consider. The plea agreement was not breached. *See* ***Naydihor***, 270 Wis. 2d 585, ¶30.

By the Court.—Orders affirmed.

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