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DISTRICT II

July 1, 2026

To:

Hon. William J. Domina
Circuit Court Judge
Electronic Notice

Gregory Bates
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Alexander Schmidt
Electronic Notice

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

2025AP1151-CR

State of Wisconsin v. Malik D. Phillips (L.C. #2022CF583)

Before Gundrum, Grogan, and Lazar, JJ.

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).

Malik D. Phillips appeals from a judgment of conviction and an order of the circuit court.¹ 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 (2023-24).² We affirm the circuit court's judgment and order denying Phillips's postconviction motion seeking resentencing due to ineffective assistance of counsel.

¹ The Honorable Brad D. Schimel presided over the plea hearing, and the Honorable Jennifer R. Dorow presided over the sentencing and signed the judgments of conviction. The Honorable William J. Domina presided over the postconviction motion and signed the order denying that motion.

² All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

In March 2022, Phillips, operating a vehicle without license plates, rear-ended a vehicle in front of him at a stoplight. A state trooper who had been tailing Phillips performed a traffic stop, and immediately noticed Phillips's speech was slurred. An officer from the Town of Brookfield arrived on the scene as back-up, after which the trooper had Phillips exit the vehicle to perform field sobriety tests. Concluding Phillips was under the influence of a depressant, the trooper arrested Phillips for operating while impaired. The officers searched Phillips's car and found Oxycodone, Alprazolam, digital scales, bundles of cash, a handgun, and two replica BB guns. After he was taken to the county jail, Phillips mocked the trooper who had arrested him, challenging the trooper to a fight. Phillips also pointed to a human silhouette that appeared on a body scanner and, referring to it as the trooper, mimicked punching it and firing a gun at it.

Phillips faced seven charges: possessing Oxycodone with intent to deliver, as a second and subsequent offense; possessing a controlled substance; possessing a firearm as a felon; carrying a concealed weapon; possessing drug paraphernalia; maintaining a drug trafficking place; and threatening a law enforcement officer. Phillips was charged as a repeat offender on all seven counts due to a prior felony conviction within the last five years; the enhancement for the possessing a firearm as a felon charge was dismissed prior to sentencing as a matter of law. *See* WIS. STAT. § 939.6195(3).

In February 2023, Phillips entered into a plea agreement with the State in which he pled guilty to Oxycodone possession with intent to deliver, maintaining the repeater but striking the habitual criminal enhancer; firearm possession as a felon as a habitual criminal; and threat to law enforcement officer, striking the habitual criminal enhancer. In exchange, the State dismissed

and read in the other four charges. The State made promises about sentence recommendations but agreed to remain silent about whether the sentence should be served concurrently or consecutively to the sentence Phillips was already serving on another conviction.

At sentencing, the prosecutor said “the State does believe this is a very aggravated case[,]” and “[h]e wanted to fight with the officer off camera. Again, very aggravated.” The prosecutor recommended: “on the felon in possession of a firearm charge, ... the State is asking the [c]ourt to impose four years initial term of confinement, followed by four years of extended supervision, consecutive to his current sentence.” Defense counsel then interjected: “[w]ell, I’m going to -- can we have a moment?” The parties subsequently conferred off the record. Once the record resumed, the prosecutor said: “[y]our honor, [the attorneys] have had conversations about this case and I believe [defense counsel] is correct that the State was recommending four years of initial term of confinement on that followed by four years of extended supervision, remaining silent on the concurrent or consecutive nature of that sentence.”

The circuit court sentenced Phillips to eight years of imprisonment for the firearm charge (four years each of initial confinement and extended supervision) to be served consecutively to the sentence Phillips was already serving. For the possession with intent to deliver charge, the court stayed the prison sentence but added a five-year probationary period to be served consecutively to the prison sentence on the firearm charge. For the threat to law enforcement charge, the court stayed the prison sentence and added probation consecutive to the firearm charge but concurrent with the probation imposed on the possession with intent to deliver charge.

Phillips filed a postconviction motion arguing ineffective assistance of counsel on the basis his trial counsel should have formally objected when the prosecutor recommended a

consecutive sentence on the firearms charge. He contended the prosecutor’s correction did not cure the breach because she had previously undercut the agreement by characterizing his offenses as “aggravated[.]” The circuit court denied his motion without a hearing. Phillips appeals.

DISCUSSION

In *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364, our supreme court outlined the standard of review for ineffective assistance of counsel claims:

[w]hether a defendant received ineffective assistance of counsel presents a mixed question of law and fact. This court will uphold the circuit court’s findings of fact, “inclu[ding] ‘the circumstances of the case and the counsel’s conduct and strategy,’” unless they are clearly erroneous. Whether counsel’s performance constitutes constitutionally ineffective assistance of counsel, which requires a showing by the defendant that counsel performed deficiently and that the error or errors prejudiced the defendant, presents a question of law this court decides de novo.

Id., ¶33 (second alteration in original; citations omitted). A defendant asserting an ineffective assistance claim must prove (1) that his counsel’s performance was deficient and (2) that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

“A defendant seeking to vacate a plea must establish by clear and convincing evidence that the breach was material and substantial.” *State v. Nietzold*, 2023 WI 22, ¶8, 406 Wis. 2d 349, 986 N.W.2d 795. Breached plea agreements present a mixed question of law and fact. *See State v. Bokenyi*, 2014 WI 61, ¶¶37-38, 355 Wis. 2d 28, 848 N.W.2d 759. “The terms of [a] plea agreement and the historical facts of the State’s conduct that allegedly constitute a breach of

a plea agreement are questions of fact.” *Id.*, ¶37 (alteration in original; citation omitted). But “[w]hether the State’s conduct ‘constitutes a material and substantial breach of a plea agreement is a question of law that we review de novo.’” *Id.*, ¶38 (citation omitted).

Phillips contends that the State breached its promise under the plea agreement to not make any recommendations regarding consecutive or concurrent sentences, and that because his counsel failed to formally object to the breach, he had ineffective assistance of counsel. We disagree because “[t]he failure to raise a meritless objection does not constitute deficient performance.” *State v. Counihan*, 2020 WI 12, ¶51 n.15, 390 Wis. 2d 172, 938 N.W.2d 530. Phillips’s counsel had already taken action by correcting and speaking with the prosecutor off the record. Once the prosecutor corrected the statement on the record, a formal objection became unnecessary. Even a breach that would otherwise be material and substantial may still be cured. *Nietzold*, 406 Wis. 2d 349, ¶9. Our decision in *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997) is instructive on this issue. In that case, the State agreed to recommend a concurrent sentence. *Id.* at 320. However, the prosecutor recommended a consecutive sentence at the sentencing hearing. *Id.* Defense counsel immediately requested a recess to confer with the prosecutor. *Id.* When the hearing reconvened, the prosecutor said there had been a “miscommunication” regarding the plea agreement and recommended a concurrent sentence. *Id.* at 320–21. We held that this was not a substantial breach of the agreement because the deviation was merely a mistake and was immediately objected to and corrected. *Id.* at 322–23.

Phillips contends that because the prosecutor described his crimes as “aggravated[.]” his sentencing can be distinguished from *Knox*, and, accordingly, an objection would not have been meritless. Specifically, he contends that this negative language was enough to taint the proceedings against him, breaching the agreement by implying reservation about the terms of the

agreement. We disagree. The State has a “duty to convey relevant information to the sentencing court[.]” *State v. Williams*, 2002 WI 1, ¶44, 249 Wis. 2d 492, 637 N.W.2d 733. Aggravating and mitigating factors are relevant to a sentencing, so the prosecutor here had a duty to convey that information. *See State v. Gallion*, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. Further, “nothing prevents prosecutors from supplying information that supports a harsher sentence than the one recommended by the prosecutor[.]” and “[a] plea agreement which does not allow the sentencing court to be appraised of relevant information is void[.]” *State v. Liukonen*, 2004 WI App 157, ¶10, 276 Wis. 2d 64, 686 N.W.2d 689 (citation omitted).

Even assuming an objection would not have been meritless, Phillips still fails to show the first prong of ineffective assistance of counsel. “To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are ‘outside the wide range of professionally competent assistance.’” *State v. Beauchamp*, 2010 WI App 42, ¶15, 324 Wis. 2d 162, 781 N.W.2d 254 (citation omitted). “[T]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Id.* (citation omitted). While a formal objection would have been in the range of professionally competent responses, so too was simply correcting the prosecutor off the record and ensuring that the prosecutor properly advised the circuit court as Phillips’s counsel did.³

Having concluded that Phillips’s counsel did not provide deficient performance, we need not address whether the conduct was prejudicial to Phillips. *See Strickland*, 466 U.S. at 697.

³ While Phillips claims his counsel should have objected in order to preserve the argument for a possible later appeal, this is at best judgment with the benefit of hindsight. It was reasonable for his counsel to believe, based on the prosecutor’s immediate correction, that there was no need to do so.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals