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**DISTRICT II**

January 18, 2017

To:

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

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2016AP819-CR

State of Wisconsin v. Michael James Edelman (L.C. #2014CF402)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Michael James Edelman seeks resentencing on the grounds that the State breached the plea agreement and his trial counsel was constitutionally defective for failing to object to the breach. 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).<sup>1</sup> As the State did not breach the plea agreement, we summarily affirm.

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

Edelman was charged on March 17, 2014, with two counts of felony bail jumping as a repeat offender. On January 12, 2015, Edelman pled guilty to one count of bail jumping in return for the State dismissing the second count and not charging a separate and distinct count of bail jumping. The parties further agreed that they would jointly recommend a sentence of ninety days in jail, consecutive to any other sentence Edelman was serving, as well as court costs, a DNA sample, and DNA surcharge.

At the plea hearing, the prosecutor initially misstated the agreement on the record:

PROSECUTOR: It is my understanding that Mr. Edelman will be pleading to Count 1 of the information. In exchange for the no contest plea to Count 1, Count 2 would be dismissed and read in. The state would recommend a withheld sentence with two years of probation. Conditions of probation would include a prohibition on the possession or consumption of alcohol.

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State is recommending 90 days in the county jail. The state also agreed not to issue any referrals in this matter.

The prosecutor was immediately alerted, off the record, by defense counsel that he had misstated the plea agreement, and the prosecutor promptly indicated to the court, "We're going to have to pass this." The case was passed by the court and later recalled, at which time the prosecutor informed the court:

PROSECUTOR: We've been negotiating this since October, and there was initially a recommendation for probation and jail time, and I was advised that Mr. Edelman was going to reject probation, so that left me with the jail, so it's our understanding that in exchange for the plea to Count 1, that state would recommend ninety days in the county jail, and I believe that he will affirmatively reject any probation.

THE COURT: Is that accurate, Miss Grotelueschen?

TRIAL COUNSEL: Sure. My understanding of our agreement is that Mr. Edelman will be pleading guilty to Count 1. Count 2

would be dismissed and read in. The state is agreeing not to issue a pending bail jumping referral, and the parties are jointly recommending ninety days in jail with Huber, which would be consecutive to any other sentence. May be served in Walworth County. Court costs and then a DNA surcharge.

PROSECUTOR: Agreed.

The written plea agreement was attached to the plea questionnaire form. Edelman acknowledged that the court was not bound by the plea agreement. The court, after a thorough colloquy, accepted Edelman's plea to one count of bail jumping.

The matter proceeded directly to sentencing. The State succinctly noted that Edelman had a bond condition that prohibited him from consuming alcohol and that he admitted to consuming alcohol. The State then recited the agreement stating, "I believe that ninety days in the county jail as a sanction for that bond violation is appropriate, and I ask the court to follow that recommendation." Edelman's counsel commenced her sentencing recommendations explaining, "[W]e're also asking that you adopt the agreement of the parties." Defense counsel explained the nonaggravated offense (drinking alcohol but no other crime or disturbance) and that a sentence of ninety days in jail with Huber privileges would allow Edelman to serve his penalty and continue working.

The court asked if Edelman was rejecting probation, and defense counsel stated, "As part of negotiations, he did not want probation." The court pressed the issue: "Is he affirmatively rejecting probation, because that limits my options here." Defense counsel informed the court that Edelman told her that if the court felt probation was appropriate that he would not object to it. The court confirmed with Edelman that probation could be for a period of up to three years. Edelman declined his right of allocution.

The court commenced its sentencing remarks by noting that under WIS. STAT. § 973.09, probation should be the disposition unless confinement is necessary to protect the public. A defendant has a right to reject probation. See *State v. McCready*, 2000 WI App 68, ¶6, 234 Wis. 2d 110, 608 N.W.2d 762. The court noted that Edelman was not rejecting probation and that the court would rather monitor Edelman for a longer period of time than put him in an incarcerated setting. The court withheld sentence and placed Edelman on probation for two years with numerous conditions, including thirty days in jail with Huber privileges.

Eleven months later, Edelman filed this postconviction motion arguing that the State breached the plea agreement and that his counsel was ineffective for not objecting to the breach. At the *Machner*<sup>2</sup> hearing, trial counsel testified that she did not object to the initial misstatement by the prosecutor at the plea hearing as she called his attention to the misstatement, and the prosecutor promptly corrected his error after looking through his notes. Edelman acknowledged that he told the court that he would accept probation. Edelman also agreed that the sentence imposed by the court fell within the parameters of the plea offer and what he told the court—that he would accept probation.

The trial court denied Edelman’s motion, finding that there was no breach of the plea agreement and the initial misstatement by the prosecutor was corrected by “good lawyering” on the part of Edelman’s defense counsel.

We agree with the court, the State, and Edelman’s trial counsel that there was no breach of the plea agreement. Edelman was well aware that he had a right to reject probation, but he

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

chose to accept the court's probationary sentence. A defendant forfeits his right to directly challenge an alleged breach of a plea agreement by not objecting to it. *State v. Liukonen*, 2004 WI App 157, ¶6, 276 Wis. 2d 64, 686 N.W.2d 689. The State's misstatement at the outset of the plea hearing was promptly corrected. The plea agreement was attached to the plea questionnaire. The recommendation by the State at the sentencing hearing was the party's agreement, and the court was clearly aware of what the plea agreement was.

The court correctly looked to probation rather than incarceration. Probation is a privilege. "Probation is not a sentence; it is an alternative to sentence." *State v. Edwards*, 2013 WI App 51, ¶7, 347 Wis. 2d 526, 830 N.W.2d 109. Edelman, having agreed to a probationary sentence, may not now claim his counsel was ineffective in her representation of him. The order denying Edelman's motion for resentencing is summarily affirmed.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order denying the postconviction motion are summarily affirmed. WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*