OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

December 29, 2022

To:

Hon. Marc A. Hammer
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Sonya Bice
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

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

2021AP1305-CR State of Wisconsin v. Spartacus Demetrius Outlaw
(L. C. No. 2018CF1608)

Before Stark, P.J., Hruz and Gill, 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).

Spartacus Outlaw appeals from a judgment of conviction for human trafficking and from an order denying his postconviction motion for plea withdrawal. Outlaw contends he is entitled to withdraw his plea based upon the State's violation of the plea agreement. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

As a threshold matter, we will review Outlaw's plea withdrawal claim under the framework for ineffective assistance of counsel because he did not raise a contemporaneous

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

objection to the alleged violation of the plea agreement. *See* ***State v. Duckett***, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522. To establish a claim of ineffective assistance, a defendant must prove two elements: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Sholar***, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. The first step in determining whether counsel provided deficient performance in the context at issue here is to determine whether there was a "material and substantial breach" of the plea agreement to which counsel should have objected. *See* ***Duckett***, 324 Wis. 2d 244, ¶6 (citation omitted).

A material and substantial breach of the plea agreement is one that "defeats the benefit for which the accused bargained." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. We will uphold the circuit court's factual findings regarding the terms of the plea agreement and the State's conduct unless they are clearly erroneous, and we will then determine as a question of law whether the facts establish a material and substantial breach of the plea agreement. ***Id.***, ¶20.

The facts related to the plea agreement and the State's conduct are undisputed here. Outlaw agreed to plead guilty to one count of being a party to the crime of human trafficking, as a repeat offender. In exchange, the State agreed to recommend that two other counts be dismissed and read in; to make a joint sentence recommendation of five years' initial incarceration followed by five years' extended supervision, to be served concurrently to a sentence Outlaw was already serving; and to not request a presentence investigation report (PSI). The explanation of the plea agreement on the plea questionnaire form did not mention the PSI, however, and the parties did not state the terms of the plea agreement at the beginning of the plea hearing. At the end of the plea hearing, a prosecutor—who was not the one who had negotiated

the plea deal for the State—mistakenly requested a PSI, and the court ordered one over Outlaw's objection. The objection was simply to the general notion of ordering a PSI, not in relation to the plea agreement. Indeed, neither defense counsel nor Outlaw himself pointed out the State's violation of the terms of the plea agreement at the plea hearing.

About two weeks after the plea hearing, after consulting with defense counsel, the State realized its mistake and sent the circuit court a letter withdrawing its request for a PSI. The court responded with a letter stating that "the State's request that the court order a PSI had no impact [on the court's] decision to do so." Rather, the court's decision had been based upon "the nature of the underlying conviction." The court therefore refused to rescind its order for a PSI and left the scheduled sentencing hearing on the calendar. Outlaw did not move to withdraw his plea at that time.

At the sentencing hearing, defense counsel told the circuit court that "[t]here was no harm" in having the PSI. The parties proceeded to provide a joint recommendation for a concurrent sentence of five years' initial incarceration followed by five years' extended supervision, consistent with the plea agreement. The PSI recommended a slightly shorter sentence of four to five years' initial incarceration followed by four to five years' extended supervision, without specifying whether that sentence should be concurrent or consecutive to any other sentence. The court imposed a sentence of three years' initial incarceration followed by five years' extended supervision, but it directed the sentence to be served consecutive to a sentence Outlaw was already serving. Outlaw later moved to withdraw his plea based upon the State's initial failure to fulfill the plea agreement.

We conclude that these facts do not demonstrate a material and substantial breach of the plea agreement. A breach is not material when it is the result of a mistake that is quickly acknowledged and rectified. *See* ***State v. Knox***, 213 Wis. 2d 318, 322-23, 570 N.W.2d 599 (Ct. App. 1997) (error corrected during sentencing hearing). Here, the State's breach was corrected before the sentencing hearing and before the PSI was completed. While that correction was not made as quickly as the one in ***Knox***, Outlaw still received the substantial benefit of his plea bargain because the other charges against him were dismissed, the State made the joint sentence recommendation agreed upon, and the circuit court had an opportunity to proceed without the PSI if the State's recommendation had been material to the court's decision.

Our determination that there was no substantial and material breach of the plea agreement leads to the conclusion that counsel did not provide deficient performance by failing to object. We could end our analysis there. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (holding the circuit court need not address both elements of the ineffective assistance test if the defendant fails to make a sufficient showing on one of them). We briefly note, however, that Outlaw also would be unable to demonstrate prejudice. Outlaw asserts that he was "left in limbo" while awaiting the PSI and would have preferred that the court not be provided with the additional information contained in the PSI. However, because the court stated that it would have ordered the PSI regardless of the State's request for one, counsel's failure to object to the State's request ultimately did not affect the amount of time Outlaw had to wait to be sentenced (during which time he was already incarcerated related to another offense) or the information before the court at sentencing.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals