STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP714-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON LUIS FORTES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND FROM ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Fortes voluntarily and intelligently waive his right to challenge an alleged breach of the plea agreement at sentencing?

When it became apparent at the outset of sentencing that the parties disagreed on whether a term of the plea agreement was that the state would make no sentence recommendation (as understood by Fortes and his attorney), or that both parties would be "free to argue"

(as understood by the prosecutor), Fortes decided to proceed to sentencing with both parties "free to argue" rather than seek any remedy for the alleged breach.

2. Did Fortes meet his burden of proving that trial counsel performed deficiently, and prejudicially so, once the misunderstanding regarding the plea agreement came to light?

The trial court held that counsel was not ineffective for allowing Fortes to decide to proceed to sentencing, rather than seek any remedy for the alleged breach of the plea agreement.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. The briefs of the parties should adequately address the legal and factual issues presented. The outcome of this appeal will be determined by applying firmly established principles of law to the unique facts.

STATEMENT OF THE CASE

Fortes appeals (56) from a judgment of conviction (13), and from orders denying a postconviction motion (26-27), and a supplemental postconviction motion (55), entered in the Circuit Court for Milwaukee County, Honorable Jeffrey A. Wagner, presiding.

Fortes pled guilty March 12, 2012, to one count of substantial battery to an elderly person, and one count of burglary, both as party-to-the-crime (34:2-6). The court granted the state's request for a presentence investigation (34:6-7). The parties agreed that the author of the presentence investigation report would make no sentence recommendation (34:7).

Fortes was sentenced May 4, 2012. The prosecutor recommended consecutive prison terms for the two offenses of three years of initial confinement, followed by three years of extended supervision for substantial battery; and three years of initial confinement, followed by five years of extended supervision for burglary (36:2-3, 4-5). Counsel for Fortes recommended "global" concurrent sentences for both offenses of three years of initial confinement, followed by three years of extended supervision (36:17). The trial court followed the state's recommendation, imposing consecutive sentences of three years of initial confinement, followed by three years of extended supervision for substantial battery, and three years of initial confinement, followed by five years of extended supervision for burglary (36:26-27).

As Assistant District Attorney Kelly Hedge began making the state's sentence recommendation at the outset of the hearing, Defense Attorney Vincent Guimont objected. It was his understanding that the state had agreed not to make any sentence recommendation and the length of sentence "would be left up to the court" (36:3). The prosecutor recalled differently. Hedge believed the understanding had been all along that both parties were "free to argue" for whatever sentence they deemed appropriate, and there would be a presentence investigation. Hedge noted that at the sentencing of co-defendant Kuhnke a week earlier, both sides were "free to argue" (36:3-4).

With this misunderstanding out in the open, Attorney Guimont discussed the matter with Fortes. After doing so, Fortes decided to proceed with sentencing rather than seek withdrawal of the plea. Fortes agreed with counsel's summary of their discussion and decided to go ahead with sentencing. Fortes also acknowledged that the court would not be bound by anyone's sentence recommendation (36:4). The colloquy was as follows:

> MR. GUIMONT: I discussed it with Mr. Fortes, and this is not something that he wants

> to withdraw his plea over and he's prepared to proceed to sentencing.
>
> THE COURT: Is that correct, sir?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you want to proceed to sentencing on today's date?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: You understand the court is not bound by any negotiations or plea bargains regardless. And you stand before the court on a substantial battery and I think the burglary, is that correct?
>
> DEFENDANT: Yes, sir.

(*Id.*).

In his sentencing remarks, Attorney Guimont stated:

> Even when we thought that the Assistant District Attorney was going [to] leave the sentence up to the court as the pre-sentence did, we were going to come in here today and say we understand given the serious nature of this case, given Mr. Fortes and his background that this is a prison case. We were going to ask for prison any way.

(36:16-17).

This prompted the court to clarify on the record that Fortes and his attorney were indeed waiving any claim of an alleged breach of the plea agreement. Fortes and his attorney confirmed that they were waiving any challenge to the plea (36:17). Attorney Guimont stated that Fortes is "willing to proceed and let the state make their recommendation. Because we know that Your Honor is the ultimate determination [sic] of the sentence" (*id.*).

Attorney Guimont recommended a "global" prison sentence for the two offenses of three years of initial confinement, followed by three years of extended supervision, or "slightly more than" what the co-defendant received (36:17).

Fortes filed a postconviction motion seeking plea withdrawal, or resentencing before another judge and specific performance of the state's supposed agreement to make no sentence recommendation. Fortes also alleged that trial counsel was ineffective for not pursuing either remedy, and for allowing him to proceed with sentencing instead (19). The state opposed the motion (21). The trial court ordered an evidentiary hearing to determine the following fact issues: what, if any, agreement there was; if the state agreed to make no sentence recommendation, what did defense counsel explain to Fortes about the decision to proceed with sentencing rather than object to the alleged breach; and whether Fortes knowingly, voluntarily, and intelligently decided to proceed with sentencing rather than seek plea withdrawal or specific performance of the agreement (23:3; A-Ap. 104 at 3).

Evidentiary hearings were held February 21-22, 2013 (37-38). Attorney Guimont testified he thought that the state had agreed to make no sentence recommendation and "would leave the sentence up to the court" (37:10, 13-14, 19-20). Guimont explained that this was why he did not want a sentence recommendation in the presentence report. He did not want a "back door" recommendation by the author of the presentence report after the state had agreed not to make its own recommendation (37:11-12).

Guimont explained that when the issue of a plea breach arose at sentencing, he and Fortes discussed their options. Counsel told Fortes he could move to withdraw the plea, move to adjourn sentencing and to get a transcript of the plea hearing in hopes it would verify what the agreement was, or proceed with sentencing and make his own sentence recommendation, recognizing that both sides were "free to argue." Counsel left that decision up to

his client. Fortes decided to go ahead with sentencing (37:12-13, 15, 20-21).

According to Guimont, Fortes decided to proceed with sentencing because Fortes wanted the case resolved, he knew the state would add a robbery charge if the case went to trial, and Guimont planned to recommend a prison sentence in any event (37:16-18, 22-23). Guimont and Fortes discussed the option of getting a plea hearing transcript in hopes it would show that the state had agreed to make no sentence recommendation and, if the transcript so showed, then force the state to abide by its agreement (37:21). The plea hearing transcript did not support defense counsel's understanding (37:21-22). The plea questionnaire and waiver form that Fortes and Guimont filled out and signed before the guilty plea hearing did not reflect any agreement regarding sentence recommendations (6; 37:25).

Fortes testified that Attorney Guimont told him the state had agreed not to make any sentence recommendation, and the presentence report would make no recommendation as well (37:26). When the misunderstanding came to light, Fortes said he decided to go ahead with sentencing after discussing it with counsel because his sentence would still "be up to the judge" and, so, it made no difference (37:26-27). Fortes said they also discussed the likelihood that the state would add a robbery charge if the case went to trial (37:27-28). Fortes understood that the judge was free to disregard anyone's recommendation and impose "whatever sentence he thinks is appropriate" (37:28). Fortes believed that initially both sides were "free to argue," but the day before the plea hearing counsel told him the state had changed course and now agreed not to make any sentence recommendation (37:29, 31). Fortes conceded that it was his own decision to proceed with sentencing after the misunderstanding came to light (37:31), but insisted that his attorney did not tell him he had the option to seek specific enforcement of the plea agreement; Guimont only told him he could seek plea withdrawal (37:32).

Assistant District Attorney Hedge testified that, according to documents in her case file, both sides were "free to argue." Hedge told Attorney Guimont when he called her the day before sentencing that she would be asking for a sentence approaching the maximum because this was an aggravated case, but both sides were "free to argue" for whatever sentence they deemed appropriate (38:4-6, 9). Hedge also made the defense aware that she would file an amended information containing a robbery charge in addition to the burglary and battery charges if the case went to trial (38:12-13, 14-15). Hedge believed the plea was beneficial to Fortes because the trial court might give him credit at sentencing for taking responsibility by pleading guilty, and he would not face the additional robbery charge (38:17).

The trial court directed the parties to submit proposed findings of fact and conclusions of law at the close of the postconviction hearing (38:23). They did so (24-25). The trial court issued a Decision and Order Denying Postconviction Motion, supported by comprehensive findings of fact and conclusions of law, April 2, 2013 (26-27; A-Ap. 102-03). The court concluded that Fortes failed to prove there was a material and substantial breach of the plea agreement, or that his attorney was ineffective.

Based on its extensive findings of fact, the court concluded: (1) there was no agreement regarding what the state would recommend at sentencing because there was no "meeting of the minds." There was a "mutual misunderstanding" as to whether the state agreed not to make a sentence recommendation (26:5, ¶¶ 1-2; A-Ap. 103 at 5, ¶¶ 1-2); (2) because there was no agreement, there was no breach of the plea agreement when the state made its sentence recommendation (*id.* at 5, ¶ 3); (3) although defense counsel did not tell Fortes he could seek "specific performance" of the plea agreement, counsel told Fortes he could seek an adjournment to obtain a plea hearing transcript in hopes it would confirm counsel's belief that the state had agreed not to make any

sentence recommendation, so he could then enforce that term of the plea agreement. Fortes rejected that option and made a voluntary and intelligent decision to proceed with sentencing instead (*id.* at 5, ¶ 4); (4) because there was no agreement as to whether the state would make any sentence recommendation, there was no agreement to specifically enforce: the only remedy available to Fortes was plea withdrawal, which he rejected after discussing it with counsel (*id.* at 5, ¶ 5); (5) defense counsel explained to Fortes he had the option to withdraw his plea but Fortes voluntarily and intelligently rejected that option and chose to proceed to sentencing (*id.* at 5, ¶ 6); and (6) Attorney Guimont did not perform deficiently because he could not claim a breach of a non-existent plea agreement, and he properly advised Fortes of his options once the mutual misunderstanding came to light before Fortes decided to proceed with sentencing (*id.* at 5-6, ¶ 7).

In its March 13, 2014 order denying the supplemental postconviction motion, the trial court determined that, "any claim that trial counsel was ineffective for failing to convey the correct terms of the plea agreement to the defendant has already been resolved. The defendant's desire to continue with the sentencing after being given the option of withdrawing his plea constitutes a waiver" of any claim that his attorney failed to accurately convey the terms of the plea agreement (55:3; A-Ap. 105 at 3).

ARGUMENT

I. FORTES FAILED TO PROVE A MATERIAL AND SUBSTANTIAL BREACH OF THE PLEA AGREEMENT BECAUSE THERE WAS NO AGREEMENT REGARDING SENTENCE RECOMMENDATION.

Fortes failed to prove a material and substantial breach of the plea agreement because he failed to prove

that the state agreed not to make any sentence recommendation. Fortes has, therefore, failed to prove by clear and convincing evidence a "manifest injustice" entitling him to withdraw the plea.

A. The applicable law and standard for review.

A defendant who seeks to withdraw his guilty plea after sentencing bears the heavy burden of proving by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw the plea. *State v. Brown*, 2006 WI 100, ¶¶ 18-19, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996); *State v. Roou*, 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173. Whether the defendant proved a "manifest injustice" is an issue left to the sound discretion of the trial court. *State v. Roou*, 305 Wis. 2d 164, ¶ 15.

To prevail, the defendant must prove there was a serious flaw in the fundamental integrity of the plea; not just disappointment in a lengthier than expected sentence. *Id.* This stiff burden of proof is imposed on the defendant, and deference is owed to the trial court's determination that he failed to prove a "manifest injustice," to protect the state's strong interest in preserving the finality of criminal convictions once the plea has been accepted and sentence has been imposed. *Id. See State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999).

Fortes bears the burden of proving that his plea was involuntary and unintelligent. *Virsnieks v. Smith*, 521 F.3d 707, 714-15 (7th Cir. 2008). To be constitutionally valid, a guilty plea must be knowingly, voluntarily, and intelligently entered. *Parke v. Raley*, 506 U.S. 20, 28-29 (1992); *Brady v. United States*, 397 U.S. 742, 747-48 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Only if the plea was coerced, or the defendant

was not fairly apprised of the plea's consequences, might there be a challenge under the due process clause. *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984). This is a question of constitutional fact. The appellate court independently determines whether the plea was voluntary and intelligent but based on the not clearly erroneous facts as found by the trial court. *State v. Brown*, 293 Wis. 2d 594, ¶ 19.

The Constitution requires that the defendant receive "'real notice'" of the nature of the charges against him. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). He must possess an understanding of the "law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). At the time of the plea, the defendant must know the nature of the charge, the constitutional rights being waived, and the direct consequences of his plea. *State v. Bangert*, 131 Wis. 2d at 266-72.

To ensure the constitutionality of guilty pleas in Wisconsin, both the state legislature and the Wisconsin Supreme Court require the trial court to address the defendant personally on the record to ascertain his understanding of the nature of the charges, the constitutional rights being waived, and the potential punishment he faces. Wis. Stat. § 971.08(1)(a); *State v. Bangert*, 131 Wis. 2d at 266-72.

When a defendant's "plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). *See United States v. Rourke*, 74 F.3d 802, 805-06 (7th Cir. 1996). The breach must, however, be substantial and material. *State v. Bangert*, 131 Wis. 2d at 288; *State v. Quarzenski*, 2007 WI App 212, ¶¶ 18-19, 305 Wis. 2d 525, 739 N.W.2d 844. *See United States v. Hauptman*, 111 F.3d 48, 51-52 (7th Cir. 1997). The defendant bears the burden of proving by clear and convincing evidence that (1) a breach occurred, and (2) it was material and

substantial. *State v. Deilke,* 2004 WI 104, ¶ 13, 274 Wis. 2d 595, 682 N.W.2d 945.

The failure of a defendant to object to an alleged breach of the plea agreement, especially if represented by counsel when the breach allegedly occurred, is strong evidence that the breach was not material or substantial. *State v. Bangert,* 131 Wis. 2d at 290. *See United States v. Rourke*, 74 F.3d at 807; *United States v. Pollard*, 959 F.2d 1011, 1019-20, 1025, 1027-28, 1030 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992). *Compare State v. Williams*, 2002 WI 1, ¶ 27, 249 Wis. 2d 492, 637 N.W.2d 733 (defense counsel immediately objected to the prosecutor's negative sentencing remarks and argued they effectively breached the plea agreement).

Resentencing with specific performance of the plea agreement is the preferred remedy over plea withdrawal. *Santobello v. New York*, 404 U.S. at 263; *United States v. Williams,* 102 F.3d 923, 927 n.5 (7th Cir. 1996); *State v. Matson,* 2003 WI App 253, ¶ 33, 268 Wis. 2d 725, 674 N.W.2d 51. To obtain resentencing and specific performance, Fortes must prove that the breach occurred and that it adversely affected his sentence. *Puckett v. United States,* 556 U.S. 129, 142 n.4 (2009).

B. There was no breach because there was no agreement barring the state from making a sentence recommendation.

Fortes failed to prove a "manifest injustice" because, as the trial court properly held, he failed to prove that a "material and substantial" breach occurred. Fortes failed to prove that the state had agreed not to make any sentence recommendation.

There was in fact no such agreement. According to the prosecutor, both parties agreed all along that they were "free to argue." According to Fortes, "free to argue" was the original agreement but the prosecutor somewhere

along the way changed her mind and agreed not to make any sentence recommendation, leaving the length of sentence "up to the court." The prosecutor testified that she never deviated from the "free to argue" term, noting that the state and defense were also "free to argue" at the co-defendant's sentencing a week before Fortes's sentencing.[1]

There was, therefore, no basis for defense counsel to object on the ground that the state breached the plea agreement. There was no basis to demand specific performance of a term that was not made part of the plea agreement. There was no breach; only a misunderstanding. That misunderstanding was brought to light and fully addressed before Fortes decided to go ahead with sentencing rather than seek any remedy for what he erroneously believed was a breach. He was willing to proceed with both sides "free to argue," whether that term was always part of the agreement or was added at sentencing. Fortes failed to prove by clear and convincing evidence that a breach occurred, or that any breach was material and substantial. *State v. Deilke,* 274 Wis. 2d 595, ¶ 13.

C. Fortes knowingly and voluntarily waived his right to seek plea withdrawal or specific performance.

Fortes insists the misunderstanding that came to light at sentencing retroactively rendered his plea almost two months earlier involuntary and unintelligent. In arguing on appeal that his plea on March 12, 2014 was involuntary and unintelligent, or that it failed to comply

[1] Fortes seems to now think that "'free to argue'" sentence length and leaving sentence length "up to the court" are mutually exclusive concepts. Fortes's brief at 20. They are not. Whether or not the parties are "'free to argue,'" the length of sentence will always be "up to the court." That is, indeed, how Fortes correctly grasped those consistent concepts at sentencing and at the postconviction hearing (36:4, 16-17; 37:26-27, 28).

with the requirements for a valid plea, Fortes simply ignores his voluntary and intelligent decision to waive any such challenges to the plea on the record at sentencing May 4, 2012. Forte's brief at 10-15.

When defense counsel brought the misunderstanding to light at sentencing, Fortes could have moved for an adjournment or to withdraw the plea. But, after discussing his options with counsel, Fortes decided to forgo any remedy and proceed to sentencing, with the understanding that both sides were now "free to argue." Fortes voluntarily and intelligently did so because he wanted to resolve the case, he did not want to face the added robbery charge at a trial, he remained free to argue for whatever sentence he desired, he knew the judge was not bound by anyone's sentence recommendation, and he knew his attorney would recommend prison time in any event.[2]

Fortes thereby unequivocally waived his right to challenge the plea agreement by choosing not to pursue it once the misunderstanding came to light at sentencing. He chose to stick with the plea and go ahead with sentencing with the proviso that both sides were "free to argue." Fortes thereby reaffirmed his decision to plead guilty and go ahead with sentencing, "with full prior knowledge of

[2] Fortes insists there is something confusing or ambiguous about the term "free to argue," but does not explain why. Fortes has somehow convinced himself that "free to argue" meant the state was *not* "free to argue" sentence length here. Fortes's brief at 17-18. "Free to argue" means just that – the parties were "free to argue" for whatever sentence (within the statutory range) they deemed appropriate (26:4, ¶ 2). There was no ambiguity. *Compare State v. Wesley*, 2009 WI App 118, ¶ 17, 321 Wis. 2d 151, 772 N.W.2d 232 (the agreement that one charge be "dismissed outright" in exchange for a guilty plea to another charge was ambiguous because it could be understood to mean either: (1) dismissal with prejudice, with no reference to the facts underlying that dismissed charge at sentencing on the other charge; or (2) defendant could not be sentenced on the dismissed charge, but the parties would be free to refer to the facts underlying that charge at sentencing on the other charge as would be the case with a dismissed "read-in" charge). *See id.* ¶ 8.

the state's altered position on sentencing." *State v. Paske*, 121 Wis. 2d 471, 474, 360 N.W.2d 695 (Ct. App. 1984). Fortes's "ultimate bargain with the state" was now that both sides were "free to argue." *Id.* at 475. This "violated no standards of fairness or decency or any factors bearing upon due process." *Id.*

> [T]here is nothing to support the proposition that the Government's breach of a plea agreement retroactively causes the defendant's agreement to have been unknowing or involuntary. Any more than there is anything to support the proposition that a mere breach of contract retroactively causes the other party's promise to have been coerced or induced by fraud. . . . In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary.

Puckett v. United States, 556 U.S. at 137.

Fortes specifically waived at sentencing any right to withdrawal or specific performance of his voluntary and intelligent plea entered almost two months earlier. Fortes's brief at 9-10. In arguing that his waiver at sentencing of any challenge to his plea was in itself not knowing and voluntary, Fortes does not explain what critical information he lacked, or who coerced him to go ahead with sentencing, once the misunderstanding came to light.

Rather than request an adjournment to get a transcript of the plea hearing to confirm what its terms were so the plea could then be enforced, Fortes decided to go ahead with sentencing. Fortes discussed his options with counsel and decided to proceed because he wanted his case resolved, he did not want to face the additional robbery charge, his attorney was going to request prison time in any event, and the trial court could disregard anyone's sentence recommendation. Even before the plea hearing, Forte acknowledged on the plea questionnaire and waiver form, "that the judge is not bound by any plea agreement or recommendation and may impose the maximum penalty" (6). Fortes knew that the length of

sentence would still "be up to the judge" (37:26-27), and that the judge could impose "whatever sentence he thinks is appropriate" (37:28).

Fortes proceeded with eyes wide open on the sound advice of competent counsel. Fortes's reaffirmation of his voluntary and intelligent plea after the misunderstanding came to light represents a voluntary and intelligent waiver, or the abandonment, of a known objection to the plea in its truest sense. *See Farrar v. State,* 52 Wis. 2d 651, 660, 191 N.W.2d 214 (1971); *State v. Damaske,* 212 Wis. 2d 169, 193, 567 N.W.2d 905 (Ct. App. 1997). Fortes waived at sentencing any remedy for the alleged breach – such as withdrawal or specific performance – when he decided to go ahead with sentencing. *See Puckett v. United States,* 556 U.S. at 137.

D. Fortes waived any claim that the trial court failed to follow the judicially and statutorily-imposed mandatory procedures for a voluntary and intelligent plea.

Fortes also raised for the first time in his supplemental postconviction motion a separate claim that the plea violated the mandatory requirements of Wis. Stat. § 971.08 and *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986) (49:2-3, ¶ 8). Even assuming he cannot prove his plea was involuntary or unintelligent, Fortes claims he is entitled to an evidentiary hearing on the ground that the trial court failed to comply with the requirement that it discuss with him at the plea hearing the terms of the plea agreement. Fortes's brief at 14 ("Thus, the trial court erred in denying an evidentiary hearing to determine a knowing, intelligent and voluntary plea in light of the defective colloquy and Fortes' misunderstanding."). *See State v. Frey,* 2012 WI 99, ¶¶ 100-01, 343 Wis. 2d 358, 817 N.W.2d 436. This new claim is bereft of merit for several reasons.

First, this new claim is procedurally barred. Fortes did not raise this separate challenge to the plea in his initial postconviction motion (19; 22), or at the evidentiary hearing, so it is waived. Fortes included this new claim, and only in conclusory fashion, along with several other claims for the first time in his supplemental post-conviction motion filed almost nine months after the trial court denied his initial motion (49:2-3, ¶ 8). Fortes did not in that supplemental motion offer a "sufficient reason" to excuse his failure to present this new but closely related claim in his first postconviction motion, so it is procedurally barred (51:6). Wis. Stat. § 974.06(4); *State v. Escalona-Naranjo,* 185 Wis. 2d 168, 181-86, 517 N.W.2d 157 (1994).

Second, this new claim was also effectively "finally adjudicated" against Fortes when his first postconviction motion challenging the voluntary and intelligent nature of his plea was denied after the lengthy evidentiary hearings (51:10). Wis. Stat. § 974.06(4). In the words of the trial court: "The plea agreement issues were formerly resolved" (55:3; A-Ap. 105:3). Fortes is barred from relitigating essentially the same claim in his supplemental motion no matter how "artfully" he tries to rephrase it. *See State v. Witkowski,* 163 Wis. 2d 985, 990-92, 473 N.W.2d 512 (Ct. App. 1991). And, as discussed at length above, Fortes expressly waived any challenge to his voluntary and intelligent plea at sentencing when the misunderstanding regarding whether the state had agreed not to make a sentence recommendation came to light (36:4, 16-17; 55:3; A-Ap. 105 at 3).

Third, because there was no agreement other than that the drafter of the presentence report would make no sentence recommendation (34:7), there was nothing more for the court to explore on the record at the plea hearing. If defense counsel thought that there was more, it behooved him to bring it to the court's attention at that time. *See State v. Frey,* 343 Wis. 2d 358, 817, ¶ 80 ("In plea bargaining, *defense counsel* has a duty to assure that the defendant understands and approves the plea

agreement."); *id.* ¶ 102 ("It is the responsibility of *defense counsel* to assure that the defendant understands and consents to the terms of any plea bargain and appreciates the authority and independence of the sentencing court.") (emphasis added).

Finally, Fortes received the very evidentiary hearing that a proven *Bangert* violation would have called for (37-38). *See State v. Bangert*, 131 Wis. 2d at 274. His supplemental postconviction motion filed ten months after those hearings blithely ignored the very fact that those hearings occurred. It ignored the fact that Fortes's plea was proven at those hearings to have been voluntary and intelligent despite the misunderstanding that later came to light.

Both Fortes and Attorney Guimont testified at that hearing about whether there was a plea agreement regarding sentence recommendation, what Fortes's understanding of that agreement was, why it mattered to Fortes, and why both counsel and Fortes decided to go ahead with sentencing rather than seek to withdraw the plea despite the misunderstanding (37:9-24, 26-32). As shown above, the state proved that his "plea was entered knowingly, intelligently, and voluntarily, despite the deficiencies in the plea hearing." *State v. Brown*, 2006 WI 100, ¶ 36, 293 Wis. 2d 594, 716 N.W.2d 906. A remand for a second hearing to explore the same issues with the same witnesses, and likely arriving at the same result, serves no purpose. Fortes "should not be permitted to game the system by taking advantage of judicial mistakes" that we now know did not matter to him at the time. *Id.* ¶ 37. *See Puckett v. United States*, 556 U.S. at 140 (requiring an objection to a plea agreement breach so that a defendant will not "'game'" the system by waiting to see if his sentence is favorable and "seeking a second bite at the apple" if it is not).

II. FORTES FAILED TO PROVE TRIAL COUNSEL WAS INEFFECTIVE FOR NOT INSISTING ON PLEA WITHDRAWAL OR ON SPECIFIC PERFORMANCE OF A NON-EXISTENT AGREEMENT.

Fortes strategically decided to forgo any challenge to the alleged breach. *State v. Howard*, 2001 WI App 137, ¶ 12, 246 Wis. 2d 475, 630 N.W.2d 244. Consequently, his challenge is only reviewable now in the context of an ineffective assistance of counsel challenge with the burden of proving both deficient performance and prejudice squarely on Fortes. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Pinno* & *State v. Seaton*, 2014 WI 74, ¶¶ 81-82, __ Wis. 2d __, 850 N.W.2d 207; *State v. Beauchamp*, 2011 WI 27, ¶¶ 14-15, 333 Wis. 2d 1, 796 N.W.2d 780; *State v. Miller*, 2005 WI App 114, ¶ 7, 283 Wis. 2d 465, 701 N.W.2d 47; *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Jones*, 2010 WI App 133, ¶ 25, 329 Wis. 2d 498, 791 N.W.2d 390. *See State v. Haywood*, 2009 WI App 178, ¶ 15, 322 Wis. 2d 691, 777 N.W.2d 921 (because defendant forfeited his right to appellate review of a prosecutorial misconduct claim by not objecting at trial, the claim could only be reviewed as an ineffective assistance claim). *See Puckett v. United States*, 556 U.S. at 134-35 (because defense counsel did not object when the alleged plea agreement breach occurred, it is reviewable only for "plain error"); *United States v. Johnson*, 641 F. Supp. 2d 543, 548 n.4 (W.D. Va. 2009) (same). *Also see State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 26, 314 Wis. 2d 112, 758 N.W.2d 806. *Compare State v. Williams*, 249 Wis. 2d 492, ¶¶ 27-28 (defense counsel immediately objected when the prosecutor's discussion of the presentence report, which recommended prison time, undermined the state's agreement to recommend probation and indicated that the state wished to change its recommendation; the circuit court upheld the defense objection).

A. The applicable law and standard for review governing challenges to the effectiveness of trial counsel.

To establish the denial of his constitutional right to the effective assistance of counsel at sentencing, Fortes bore the burden of proving at the postconviction hearing that his attorney's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

On review of an ineffective assistance of counsel challenge, this court is presented with a mixed question of law and fact. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. The ultimate determinations based upon those findings of fact whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review in this court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d at 127-28. *See also State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); *State v. Wright*, 2003 WI App 252, ¶ 30, 268 Wis. 2d 694, 673 N.W.2d 386.

1. Deficient performance.

To establish deficient performance, Fortes had to prove at the postconviction hearing that Attorney Guimont's failure to insist on plea withdrawal or specific performance, and to instead let Fortes decide to go ahead with sentencing, was so serious that Fortes was effectively denied the "counsel" guaranteed him by the Sixth Amendment. To do so, Fortes had to overcome a strong presumption that counsel performed reasonably and within professional norms. *Strickland v. Washington*, 466 U.S. at 690. *See Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006); *Bieghler v. McBride*, 389 F.3d 701, 707-08 (7th Cir. 2004).

This court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. "'The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.'" *Eckstein v. Kingston*, 460 F.3d at 848 (quoting *Kimmelman v. Morrison*, 477 U.S. at 381). Counsel need not even be very good to be considered constitutionally adequate. *McAfee v. Thurmer*, 589 F.3d 353, 355-56 (7th Cir. 2009) (citing *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985)).

2. Prejudice.

Assuming he could overcome the presumption of reasonable competence, Fortes had to next prove prejudice; a reasonable probability of a different outcome had counsel's error not occurred. *Strickland v. Washington*, 466 U.S. at 687. Fortes could not speculate. He had to affirmatively prove prejudice at the postconviction hearing. *State v. Balliette*, 2011 WI 79, ¶¶ 24, 63, 70, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

In seeking specific performance of the plea agreement despite his forfeiture of the claim by not objecting, Fortes had to prove that the breach occurred and that it adversely affected his sentence. *Puckett v. United States*, 556 U.S. at 142 n.4. *See United States v. Johnson*, 641 F. Supp. 2d at 548 n.4.

When seeking to withdraw his plea based on the alleged ineffective assistance of counsel, Fortes had to prove he would not have entered the plea but for counsel's deficient performance. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Fortes's mere unsubstantiated allegation that he would have insisted on going to trial but for counsel's errors is insufficient to establish prejudice. *Bethel v. United States*, 458 F.3d 711, 716-17 (7th Cir. 2006); *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir.

1990). A specific explanation why he would have gone to trial is required. *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989) (citing *Key v. United States*, 806 F.2d 133, 138-39 (7th Cir. 1986)). Fortes must prove his lawyer's deficiency was a decisive factor in his decision to plead guilty. *Bethel v. United States*, 458 F.3d at 719. *See United States v. Cieslowski*, 410 F.3d at 358-59. He must establish through *objective evidence* that there is a reasonable probability he would have gone to trial but for counsel's errors. *Koons v. United States*, 639 F.3d 348, 351 (7th Cir. 2011); *Morales v. Boatwright*, 580 F.3d 653, 663 (7th Cir. 2009); *Berkey v. United States*, 318 F.3d 768, 773 (7th Cir. 2003). In evaluating the impact of counsel's alleged errors, the strength of the state's case is a factor. *Eckstein v. Kingston*, 460 F.3d at 848.

B. Fortes failed to prove his attorney was ineffective for letting him proceed to sentencing.

1. Fortes failed to prove deficient performance.

Fortes failed to prove that any breach occurred. *Compare State v. Scott*, 230 Wis. 2d 643, 664, 602 N.W.2d 296 (Ct. App. 1999) (where "the State reconsidered its sentencing recommendation and unilaterally sought to modify the sentencing recommendation" in violation of the plea agreement). Fortes is left merely to second-guess his own decision, after discussing it with counsel, to go ahead with sentencing rather than withdraw his plea once the mutual misunderstanding came to light. But that decision was made by Fortes with eyes wide open after discussing his options with counsel. Fortes decided to go ahead with sentencing knowing that both sides were now "free to argue."

Counsel did not force Fortes to proceed to sentencing. Counsel merely laid out the various options

for his client who then chose the option of going ahead. Fortes and counsel were fully aware that a consequence of plea withdrawal would be an additional robbery charge. They both realized that the court was free to ignore anyone's sentence recommendation and, like the state, defense counsel was "free to argue"; but defense counsel would also recommend prison time. Rather than delay the case any further, Fortes knowingly and voluntarily decided not to make an issue of the misunderstanding and to proceed to sentencing.

Trial counsel did nothing wrong here. Fortes insists, however, that it was not enough for counsel to explore with him the option of plea withdrawal. He also had to explore the option of specific performance of the plea agreement. That was not an option here because there was no agreement barring the state from making any sentence recommendation. There was, therefore, no agreement to specifically enforce. The only options were: (a) withdraw the plea, or (b) proceed with sentencing.

Even so, counsel offered Fortes a third option: adjourn sentencing and obtain a plea hearing transcript to see if it would confirm defense counsel's understanding of the agreement. If it did, the agreement could then be enforced on its original terms. Fortes rejected that option and wisely so. The plea hearing transcript would not have confirmed defense counsel's understanding (34; 37:21-22). Counsel performed reasonably and in accordance with his client's wishes, by letting Fortes make his own decision to proceed with sentencing. Fortes, "consented to continuing with the sentencing hearing . . . [his] counsel had a sufficient strategic reason for not objecting to the 'new' agreement and he consulted with [Fortes] and secured his consent to proceed." *State v. Miller*, 283 Wis. 2d 465, ¶ 9. Counsel's performance was not deficient.

Moreover, had trial counsel pursued a claim that the state breached the plea agreement or that the state had to specifically perform something it never agreed to do,

his challenge would have been properly rejected as devoid of merit. Trial counsel is not as a matter of law ineffective for failing to interpose a meritless objection. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Quarzenski*, 305 Wis. 2d 525, ¶ 18; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12; *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

2. Fortes failed to prove prejudice.

Fortes also failed to prove prejudice at the postconviction hearing.

Fortes did not prove why any of this matters. Fortes did not prove he had any right to specific performance of an agreement that never existed, or that plea withdrawal would benefit him at all. Plea withdrawal, a remedy that he expressly waived at sentencing, would invite an additional robbery charge and potential maximum consecutive prison sentences. If, in the alternative, Fortes were to win resentencing and specific enforcement of the state's non-existent "agreement" to make no sentence recommendation, the sentence would in all reasonable probability remain the same. The prosecutor, it is true, would not recommend any sentence length, but she would once again vigorously emphasize in her sentencing remarks the aggravated nature of the burglary, substantial battery and robbery of the 85-year-old woman, Fortes's deplorable record and his bad character (36:6-16). She would also refer to the additional robbery conviction. Fortes's attorney would again, presumably, recommend a prison sentence.

In place of the relatively lenient fourteen-year global sentence the prosecutor recommended and the trial court imposed here (he faced a maximum of twenty-one years), Fortes would now face an additional fifteen years

maximum prison sentence for robbery, a Class E felony. Wis. Stat. §§ 943.32(1) and 939.50 (1)(e) and (3)(e).

Fortes will likely be convicted of all three counts at a trial if his plea is withdrawn because the state's case is strong. Fortes confessed as did his cohort, Kuhnke (2:3-4).

Fortes failed to show it is reasonably probable that he will receive a sentence any lower than what the state recommended and the trial court gave him here; initial confinement that was only three years more than what defense counsel recommended, and extended supervision that was five years more than what defense counsel recommended.

Finally, Fortes argues that the trial court denied him an evidentiary hearing into trial counsel's effectiveness. Fortes's brief at 19, 23. That claim is spurious. The evidentiary hearing was held February 21-22, 2013, as ordered by the trial court in direct response to Fortes's initial postconviction motion seeking plea withdrawal and challenging trial counsel's effectiveness. (37-38). Attorney Guimont testified and explained his actions (37:9-23). Fortes testified about his discussions with counsel regarding what counsel thought the plea agreement was, and what he and counsel decided to do once the misunderstanding came to light (37:26-32). *See* Fortes's brief at 22-23 (summarizing trial counsel's testimony at the postconviction hearing). Fortes is not entitled to a second hearing at which the same issues will be addressed by the same witnesses, likely with the same result. That would be a waste of everyone's time.[3]

[3] Fortes is not sure what remedy he wants for the harm he supposedly suffered. He tosses out three alternatives: plea withdrawal, specific performance of the plea at another sentencing hearing, or another evidentiary hearing to explore the same voluntariness and ineffective assistance issues that were explored at the first one. Fortes's brief at 23. Fortes's equivocation calls into serious doubt whether he suffered harm of a sufficient degree to warrant any of these alternative remedies.

Fortes has failed to prove there was a breach of the plea agreement that adversely affected his sentence. Fortes has not come close to meeting his heavy burden of proving by clear and convincing evidence that a "manifest injustice" occurred here. [4]

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and orders denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin, this 15th day of September, 2014.

Respectfully submitted,

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[4] Fortes presumably understands that plea withdrawal means he will now be tried for the burglary, substantial battery *and robbery*. If found guilty, he faces possible maximum consecutive prison sentences for all three charges totaling thirty-six years in this aggravated case where he and his accomplice burglarized the home of an 85-year-old woman, put a coat over her head and severely beat her about the head before fleeing with her jewelry and other items (2).

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,295 words.

Dated this 15th day of September, 2014.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of September, 2014.

_____
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