STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP1254-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WARREN E. SCHABOW,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

The prosecutor did not imply that Schabow should get a sentence more severe than the prosecutor recommended so as to violate the plea agreement.

When, as here, the defendant's attorney does not timely object that there has been a breach of the plea agreement, the question on appeal is whether counsel was ineffective for failing to object. *State v. Liukonen*, 2004 WI App 157, ¶ 18, 276 Wis. 2d 64, 686 N.W.2d 689. *See State v. Sprang*, 2004 WI App 121, ¶ 12, 274 Wis. 2d 784, 683 N.W.2d 522. There is ineffective assistance if defense counsel's performance was deficient and the defendant was prejudiced as a result. *Liukonen*, 276 Wis. 2d 64, ¶ 18; *State v. Naydihor*, 2004 WI 43, ¶ 9, 270 Wis. 2d 585, 678 N.W.2d 220.

The issue of deficient performance turns on whether there was in fact a substantial and material breach of the plea agreement to which counsel should have objected. *Sprang*, 274 Wis. 2d 784, ¶ 13; *Naydihor*, 270 Wis. 2d 585, ¶ 9. If the agreement was not breached, there was no reason to object, and thus no deficient performance for not objecting. *Sprang*, 274 Wis. 2d 784, ¶ 13; *Naydihor*, 270 Wis. 2d 585, ¶ 9.

Since a claim of ineffective assistance fails if the defendant fails to prove either deficient performance or prejudice, *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893, failure to prove that there was any reason to object to a breach of the plea agreement disposes of the defendant's claim. *See Sprang*, 274 Wis. 2d 784, ¶ 13; *Naydihor*, 270 Wis. 2d 585, ¶ 9.

When the facts are not disputed, the question of whether there was a breach of the plea agreement is a question of law

which is determined de novo by the appellate court. *Sprang*, 274 Wis. 2d 784, ¶ 14; *Naydihor*, 270 Wis. 2d 585, ¶ 11. The court must examine the entire sentencing proceeding to evaluate the prosecutor's remarks. *State v. Williams*, 2002 WI 1, ¶ 46, 249 Wis. 2d 492, 637 N.W.2d 733.

When a prosecutor agrees to make a sentencing recommendation as part of a plea agreement, he may properly argue that the court should impose the recommended sentence and nothing less. *Liukonen*, 276 Wis. 2d 64, ¶¶ 10, 12, 16. *See Sprang*, 274 Wis. 2d 784, ¶ 18; *Naydihor*, 270 Wis. 2d 585, ¶ 19; *State v. Hanson*, 2000 WI App 10, ¶¶ 27-28, 232 Wis. 2d 291, 606 N.W.2d 278.

The prosecutor may supply the court information that would support a sentence more severe than the sentence recommended, as long as the prosecutor argues that this information should support the recommended sentence. *Liukonen*, 276 Wis. 2d 64, ¶¶ 10, 16; *Sprang*, 274 Wis. 2d 784, ¶ 18; *Naydihor*, 270 Wis. 2d 585, ¶¶ 19, 24-25, 27; *Hanson*, 232 Wis. 2d 291, ¶¶ 27-28.

What the prosecutor may not do is argue, even implicitly, that the court should not impose the recommended sentence, but a sentence that is more severe. *Liukonen*, 276 Wis. 2d 64, ¶¶ 9, 11, 15; *Sprang*, 274 Wis. 2d 784, ¶ 17; *Naydihor*, 270 Wis. 2d 585, ¶¶ 30-31; *Hanson*, 232 Wis. 2d 291, ¶ 29.

In this case, the prosecutor gave a completely neutral recitation of factors relevant to the imposition of a sentence on the defendant-appellant, Warren E. Schabow (54:8-13, A-Ap:114-119).

Schabow accuses the prosecutor of assembling his argument by finding and emphasizing every negative remark about him in the PSI. Brief for Defendant-Appellant at 12. But

Schabow does not point out any positive remarks in the PSI the prosecutor might have ignored.

Similarly, Schabow accuses the prosecutor of noting many negative facts about his character and almost no positive facts. Brief for Defendant-Appellant at 12. But Schabow does not reveal any positive facts about his character the prosecutor might have missed.

In fact, Schabow ignores an important positive fact stated by the prosecutor, i.e., that Schabow helped the police recover some of the property he stole, including the firearms (54:12, A-Ap:118). The prosecutor said he gave Schabow credit for that cooperation (54:12, A-Ap:118).

Although the prosecutor agreed that this offense had a devastating impact on the victim, he noted that this was the case with all home burglaries (54:11-12, A-Ap:117-18). The prosecutor did not personally adopt or even comment on the victim's recommendation of a five to ten year sentence (54:6).

If anything, considered in its entirety, the prosecutor's discussion of the relevant sentencing factors was actually somewhat sympathetic to Schabow.

The prosecutor emphasized that the most important factor in sentencing was "sadly enough" Schabow's "very serious drug problem" (54:9-10, 12-13, A-Ap:115-16, 118-19). The prosecutor stated that this offense was committed because of that problem (54:10, A-Ap:116). The prosecutor identified Schabow's biggest rehabilitative need as drug treatment (54:8, 13, A-Ap:114, 119).

There was no fire breathing demand that Schabow be put away for a long time because the relevant sentencing factors showed he was an incorrigible vicious criminal. He was just

someone who slipped into stealing to support his unfortunate addiction. Cure the addiction, rehabilitate the criminal.

The prosecutor's statement that the two years of confinement he recommended was the minimum that should be considered (54:13, A-Ap:119) was completely in keeping with argument that is permissible under the law. *Liukonen*, 276 Wis. 2d 64, ¶¶ 10, 12, 16. *See Sprang*, 274 Wis. 2d 784, ¶ 18; *Naydihor*, 270 Wis. 2d 585, ¶ 19; *Hanson*, 232 Wis. 2d 291, ¶¶ 27-28.

Indeed, the courts have repeated numerous times over the years that the sentence in each case should be the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitation of the defendant. *See, e.g., State v. Taylor*, 2006 WI 22, ¶ 20, 289 Wis. 2d 34, 710 N.W.2d 466; *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The prosecutor was just arguing that two years of confinement was that minimum.

If the prosecutor would not have been "heartbroken" if the court had confined Schabow for more than two years, Brief for Defendant-Appellant at 14, that would not have breached the plea agreement for the prosecutor made no promise to be heartbroken if the court imposed a more severe sentence than the one he recommended.

A prosecutor does not have to be enthusiastic about his recommendation. *Liukonen*, 276 Wis. 2d 64, ¶ 15; *Williams*, 249 Wis. 2d 492, ¶ 42. He must merely be supportive. He cannot suggest that his recommendation should not be adopted because a longer sentence would be more appropriate. *Liukonen*, 276 Wis. 2d 64, ¶¶ 9, 11, 15; *Sprang*, 274 Wis. 2d 784, ¶ 17; *Naydihor*, 270 Wis. 2d 585, ¶¶ 30-31; *Hanson*, 232 Wis. 2d 291, ¶ 29.

Here, the prosecutor concluded his argument by expressly affirming that he believed the six year sentence he recommended was appropriate (54:13, A-Ap:119). He did not distance himself from his recommendation but embraced it.

That was what was required to comply with the terms of the plea agreement.

The circuit court imposed a sentence of five years on the burglary charge, two years of confinement and three years of extended supervision (54:20), which was one year less than the prosecutor recommended. Apparently, the court did not get the impression that the prosecutor believed the sentence he recommended was too lenient.

The court imposed a sentence of three years, one year of confinement and two years of extended supervision, on each of the theft charges (54:20), which was one year less than the prosecutor recommended. Again, it does not appear that the court got the impression that the prosecutor believed the sentence he recommended was too lenient.

The court made the sentences on the theft charges consecutive (54:20-21), contrary to the prosecutor's recommendation. But the prosecutor cannot be blamed for these consecutive sentences because he said the sentences on the theft charges should be concurrent (54:8, A-Ap:114). Schabow does not point to anything the prosecutor might have said which might have suggested that he was not fully convinced that concurrent sentences were appropriate.

Schabow's claim that the prosecutor's remarks at sentencing implied that a harsher sentence was warranted is simply not supported by the record.

Since the prosecutor did not even arguably breach the plea agreement in any way, Schabow's attorney was not deficient for failing to object when there was nothing to object to. Therefore, Schabow's claim of ineffective assistance necessarily fails. *Sprang*, 274 Wis. 2d 784, ¶ 13; *Naydihor*, 270 Wis. 2d 585, ¶ 9.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: February, 2, 2015.

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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 1,467 words.

Dated this 2nd day of February, 2015.

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Assistant Attorney General

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 2nd day of February, 2015.

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