

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 28, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1014-CR

Cir. Ct. No. 2006CF200

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS D. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Curtis D. Moore appeals from a judgment convicting him upon his plea of guilty to one count of substantial battery and from

the order denying his postconviction motion for resentencing. We affirm the judgment but reverse the order and remand for resentencing because the State's omission of a key component of the sentence recommendation constituted a substantial and material breach of the plea agreement.

¶2 The facts are undisputed. The State charged Moore with one count each of substantial battery and disorderly conduct, in violation of WIS. STAT. §§ 940.19(2) and 947.01 (2005-06).¹ Pursuant to a plea agreement, Moore agreed to plead guilty to the substantial battery. In exchange, the State agreed to dismiss other charges pending against Moore and to recommend at sentencing a maximum sixteen months' initial confinement and fourteen months' extended supervision (ES). The State also would be free to argue the ES conditions.

¶3 At the January 10, 2007, plea hearing, the trial court advised Moore it understood the State's part of the bargain to be two-fold:

[T]he district attorney is ... going to dismiss all of the other charges against you ... and, secondly, he's going to recommend that the sentence of the Court be no more oppressive to you than 16 months of initial confinement followed by a 14-month period of extended supervision.

Moore confirmed that that also was his understanding.

¶4 At the sentencing hearing on March 30, 2007, the prosecutor advised the court that the State agreed "to cap any prison recommendation at sixteen months and free hand to the conditions of extended supervision." The prosecutor said nothing about the length of ES. Defense counsel did not object to, clarify or

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

add to the prosecutor's statement of the agreement. The court imposed a sentence of eighteen months' initial confinement followed by two years' ES.

¶5 Moore moved for postconviction relief seeking resentencing on the basis that the State breached the plea agreement by failing to state the agreed-upon cap on the ES component of the sentence. The motion also alleged ineffective assistance of trial counsel on grounds that counsel neither objected to the omission nor consulted with Moore about foregoing an objection. The trial court denied the motion without granting Moore the *Machner*² hearing he requested. The court found no breach, stating it was "well aware" of the full agreement because it made a note of the terms of the plea bargain in the case file and specifically recalled reading the note while preparing for sentencing. The court concluded: "That the assistant district attorney who was present for the hearing did not specifically repeat the extended supervision component did not result in any misunderstanding on [the court's] part about what was being recommended." Moore appeals.

¶6 A defendant has a constitutional right to enforce a negotiated plea agreement. *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "[O]nce the defendant has given up his [or her] bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." *Id.* (citation omitted). A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. *Id.* at 272.

¶7 The State concedes a breach occurred. Moore is not automatically entitled to relief, however. "A breach must not merely be technical, but rather

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

must deprive the party of a substantial and material benefit for which he [or she] bargained.” *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). The party seeking relief must establish that the breach is material and substantial by clear and convincing evidence. *Id.* at 289. Whether the State breached the plea agreement and, if so, whether the breach was material and substantial are questions of law that we review de novo. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

¶8 Here, as part of the plea agreement, the prosecutor agreed that at sentencing it would cap its ES recommendation. At sentencing, however, the prosecutor omitted any comment at all about ES, contrary to what the parties had negotiated and agreed upon. The State contends the breach was merely technical because the parties’ agreement had been accurately presented at the plea hearing some months earlier. We disagree. We assume the misstatement was made innocently. Nonetheless, it did not fairly present what the parties originally had agreed to, thus depriving Moore of what he agreed to accept in exchange for the rights he relinquished. It is not for us to guess at the value Moore placed on the length of ES. We conclude the breach was material and substantial. *See Smith*, 207 Wis. 2d at 273.

¶9 Moore also contends he received ineffective assistance of counsel when his attorney failed to object to the State’s breach. Every defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). To establish ineffective assistance, a defendant must prove that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Deficient performance and prejudice both are

questions of law that this court reviews de novo. *State v. Johnson*, 2004 WI 94, ¶10, 273 Wis. 2d 626, 681 N.W.2d 901.

¶10 To prove deficient performance, a defendant generally shoulders the difficult burden of overcoming the strong presumption that his counsel acted within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In this scenario, however, a defense counsel’s failure to immediately object to a prosecutor’s sentence recommendation that clearly breaches the plea agreement “[is] not reasonable conduct within professional norms and constitutes deficient performance.” *Smith*, 207 Wis. 2d at 274-75.

¶11 A defendant who has received ineffective assistance of counsel is not entitled to relief absent proof of prejudice from the deficient performance. *Johnson*, 153 Wis. 2d at 127. Typically, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* In certain instances, however, prejudice can be presumed. *Smith*, 207 Wis. 2d at 278. This is such a case. A prosecutor’s material and substantial breach of the plea agreement is a “‘manifest injustice’ and always results in prejudice to the defendant.” *Id.* at 281.

¶12 We offer a final observation about the order denying Moore’s postconviction motion. The order states that the prosecutor’s erroneous recommendation caused no misunderstanding on the court’s part, implying that the error was harmless. We observe here that the prejudice prong in ineffective assistance of counsel cases is not precisely the same as the prejudice prong in harmless error cases. In harmless error cases, we analyze prejudice from the

perspective of the error's effect on the outcome of the proceeding. *See, e.g., State v. Weed*, 2003 WI 85, ¶29, 263 Wis.2d 434, 666 N.W.2d 485. The *Strickland* test, by contrast, is not outcome-determinative. *See Smith*, 207 Wis. 2d at 276. Rather, the focus is on the inherent reliability of the process. “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair,” even if counsel's errors cannot be shown to have determined the outcome. *Id.* (quoting *Strickland*, 466 U.S. at 694). A defendant therefore need demonstrate to the court only that the outcome is suspect, not that the final result would have been different. *Smith*, 207 Wis. 2d at 275.

¶13 The appropriate remedy for a material and substantial breach of a plea agreement depends on the totality of the circumstances. *State v. Deilke*, 2004 WI 104, ¶25, 274 Wis. 2d 595, 682 N.W.2d 945. We could vacate the negotiated plea agreement and reinstate the original charges against Moore. *See id.* Moore asks that we reverse the order denying his postconviction motion and order a *Machner* hearing. Considering the totality of the circumstances, however, we remand for a new sentencing hearing in accordance with the terms of the plea agreement.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

