COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 10, 1997

NOTICE

No. **96-3089-CR**

STATE OF WISCONSIN   IN COURT OF APPEALS
         DISTRICT III

STATE OF WISCONSIN,

     PLAINTIFF-RESPONDENT,

   V.

DEON MCGRAW,

     DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Deon McGraw appeals his conviction for possession of cocaine with intent to deliver, as a repeater, having pleaded no contest to the charge. The trial court sentenced McGraw to a fifteen-year prison term, after the prosecution proposed a fifteen-year term and McGraw's counsel proposed an eight-year term. The crime carried a presumptive minimum ten-year

term, and the prosecution honored its promise to McGraw to recommend no more than a fifteen-year term. On appeal, McGraw raises two arguments: (1) the trial court should have let McGraw withdraw his no contest plea under *State v. Mohr*, 201 Wis.2d 693, 549 N.W.2d 497 (Ct. App. 1996), on the ground that he did not understand the crime's ten-year presumptive minimum sentence; and (2) trial counsel furnished ineffective representation by permitting McGraw to plead no contest before getting a trial court ruling on McGraw's suppression motion challenging the constitutionality of his warrantless vehicle search. We reject these arguments and therefore affirm McGraw's conviction.

We are not persuaded by McGraw's attack on his no contest plea. We also reject McGraw's reading of the *Mohr* decision. In *Mohr,* we held that defendants who did not understand their presumptive minimum sentences may have grounds to move to withdraw their pleas. Implicit in our decision was a concern for accuseds who received presumptive minimum sentences they had had no reason to anticipate. McGraw's particular misunderstanding on the presumptive minimum sentence falls outside the *Mohr* rule; McGraw's misunderstanding ultimately had no relevance to his sentence. Unlike the defendant in *Mohr*, McGraw did not receive the presumptive ten-year minimum sentence; instead, he received the maximum sentence that the prosecution recommended and had promised McGraw to recommend, a fifteen-year term. *Mohr* does not alter the basic rule that defendants may not withdraw pleas for sentence misunderstandings that ultimately have no impact on their sentences. *See Ernst v. State*, 43 Wis.2d 661, 672, 170 N.W.2d 713, 718 (1969) (plea maker's confusion over consecutive and concurrent sentences immaterial to plea maker who obtained concurrent sentences).

McGraw's ineffective counsel claim also has no merit. McGraw cannot establish ineffective counsel unless he shows both deficient performance by counsel and prejudice from the performance. *See **Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, if McGraw's trial counsel had pursued his motion to suppress the evidence from the warrantless vehicle search, the prosecution would have withdrawn the plea offer. McGraw's suppression motion was his whole case; the State's evidence of guilt was overwhelming. McGraw exchanged the risk of conviction on a greater charge, together with his suppression motion with an uncertain outcome, for a lesser charge with a more certain outcome. This was an arm's-length transaction, a strategic exchange of old rights for new ones. Moreover, trial counsel stated that McGraw insisted on taking the prosecution's plea offer against counsel's advice that he should pursue his motion to suppress the evidence from the warrantless vehicle search. Under these circumstances, trial counsel's actions had no adverse effect on McGraw's right to effective representation.

By the Court.—Judgment and order affirmed.

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