COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2567-CR
99-2568-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN O. BROWN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Norman Brown appeals from a set of orders denying his postconviction motions for plea withdrawal following a hearing on remand. Brown challenges the trial court's factual findings regarding the terms of

his plea agreement and further contends that the trial court should have refused to accept his pleas after he had questioned the applicability of the repeater allegations. However, we conclude that the trial court's findings are not clearly erroneous and determine that the penalty enhancers were properly applied. We therefore affirm.

BACKGROUND

¶2 On December 10, 1993, Brown entered no contest pleas to six counts of being party to the crimes of forgery and theft, all as a repeat offender. At the plea hearing the prosecutor informed the court that, pursuant to the plea agreement, "The State agrees to an incarceration portion of the penalty no more than 18 years in the Wisconsin State Prison System." Both the defendant and defense counsel indicated to the court that the prosecutor's statement was a fair and accurate statement of the plea agreement.

¶3 When the trial court inquired about the factual basis for the repeater allegations, Brown admitted that he had been convicted of felony forgery on December 8, 1985, and had been in custody related to that charge from December 9, 1995 to January 26, 1988, and from August 21, 1989 to September 20, 1990. Brown questioned, however, whether the second period of incarceration should be used to toll the time period relating to his prior conviction, because it was served in relation to a probation revocation determination which was later reversed. The trial court ruled that the only relevant fact for purposes of the repeater determination was that Brown had in fact been in custody, and it accepted the pleas.

¶4 At the sentencing hearing, the prosecutor recommended consecutive four-and-a-half-year prison terms on the first four counts, and asked for sixteen

years of probation on the other two counts to begin after the first sentence was served. The trial court sentenced Brown to consecutive five-year prison terms on three of the counts, and withheld sentence and imposed sixteen years of probation to be served on the other three counts, to be served following the third prison sentence.

STANDARD OF REVIEW

¶5 The failure of a prosecutor to fulfill a plea agreement constitutes a manifest injustice sufficient to allow a defendant to withdraw his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986). To establish that a plea agreement has been breached, a defendant must show by clear and convincing evidence that: (1) the terms of the agreement were violated, and (2) the deviation was material and substantial. *See* ***id.*** Because the determination of what the parties agreed to is factual in nature, we will defer to the trial court on that question unless its findings were clearly erroneous. *See* ***id.*** at 288-89.

ANALYSIS

¶6 The original plea offer indicated that the State was "not free to argue for more than 25 years." This phrase was still present in the third draft of the plea agreement, but was supplemented by a handwritten notation that there would be an "18 years cap." The prosecutor testified that the draft represented her notes, and did not fully encompass the final deal. She said that the original offer of twenty-five years in prison was reduced to eighteen years in prison, so long as the State was also free to argue for probation.

¶7 The attorney who represented Brown at the time of the plea could not recall if the parties had discussed probation, but was quite certain that the

eighteen-year cap referred to incarceration. He also indicated that he believed his client to be very sophisticated about the criminal justice system, and was satisfied that Brown understood his exposure. The attorney who represented Brown at the time of sentencing testified that he did not object to the prosecutor's recommendation because he believed the State was free to argue for probation in addition to incarceration of no more than eighteen years.

¶8 The defendant was the only one who testified that he believed the plea agreement limited the prosecutor to asking for no more than eighteen years of prison and probation combined. He admitted, however, that he understood what the prosecutor said at the plea hearing and did not object. On this record, we are satisfied that the trial court's determination that the eighteen-year cap referred only to the amount of incarceration, and did not bar the prosecutor from recommending an additional period of probation, was not clearly erroneous.

¶9 We are further satisfied that Brown's challenge to the applicability of the penalty enhancer for habitual criminality provides no basis for him to withdraw his pleas. In effect, Brown raised a question about the factual basis for the penalty enhancers, which the trial court resolved against him. We agree with the trial court that the time which Brown spent in jail on a probation revocation which was later reversed should be excluded from the five-year look-back period for computing prior convictions because Brown's ability to reform and abide by the criminal law was not being tested during that time. *See* ***State v. Crider***, 2000 WI App 84, ¶12, 234 Wis. 2d 195, 610 N.W.2d 198.

By the Court.—Orders affirmed.

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