

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2007

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. 2007AP487

Cir. Ct. No. 2002CF262

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEE E. PARRETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. Lee E. Parrett, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion without a

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

hearing. Parrett claimed that his trial attorneys were ineffective² because they failed to object when the State allegedly breached a plea agreement by recommending consecutive sentences. On this ground, he moved to withdraw his guilty pleas to two counts of sexual assault of a child as a habitual criminal. The circuit court determined that neither trial counsel performed deficiently because Parrett received the benefit of his plea agreement. We affirm.

Background

¶2 On August 14, 2002, Parrett entered guilty pleas pursuant to a plea agreement for resolution of three felony cases. In aid of the plea proceeding, Parrett submitted a guilty plea questionnaire. On the questionnaire, Parrett described the plea agreement as “[a] [g]lobal recommendation (encompassing [three cases]) for imprisonment in a length in the discretion of the court; [d]ismiss [] fleeing.”

¶3 At the outset of the plea hearing, the State presented its description of the negotiations. In exchange for Parrett’s guilty pleas to one charge of escape and two charges of sexual assault of a child as a habitual criminal, the State would move to dismiss a fleeing charge. The State would make no recommendation as to a disposition for the escape conviction, and would recommend an unspecified prison term for the assault convictions, to run consecutive to any sentence for the escape. Both Parrett and his attorneys told the court that the State had described the agreement as they understood it. Parrett accordingly entered guilty pleas to the escape and sexual assault charges; the fleeing charge was dismissed.

² Parrett appeared for plea and sentencing with two attorneys.

¶4 The matter proceeded immediately to sentencing, and the State made the recommendations it had described at the beginning of the plea hearing. Parrett asked the court to impose an aggregate prison term of eight years, without specifying how the court should allocate the time imposed for each offense. The court sentenced Parrett to a determinate ten-year term of imprisonment for the escape conviction. For the sexual assaults, the court imposed two determinate twenty-year terms of imprisonment, concurrent with each other but consecutive to the sentence for escape. Parrett did not file a direct appeal.

¶5 In January 2007, Parrett moved, pursuant to WIS. STAT. § 974.06, to withdraw his pleas to the sexual assault charges. He claimed that the State violated the plea agreement when it recommended that his sentences for these offenses run consecutive to his sentence for escape and that his trial attorneys were ineffective by failing to object. The circuit court denied the motion without a hearing, and this appeal followed.

Discussion

¶6 Parrett did not object at sentencing to the alleged breach of his plea agreement, thus waiving his right to challenge the validity of his pleas on that ground. *See State v. Howard*, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Therefore, he frames his claim as an allegation that his trial attorneys provided ineffective assistance of counsel by failing to object to the alleged breach. To prevail on this claim, Parrett must prove both that his attorneys performed deficiently and that he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶7 A defendant who makes allegations that, if true, would satisfy both prongs of the *Strickland* test, is entitled to the opportunity to prove his contentions

at an evidentiary hearing. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If, however, the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a hearing. See *id.*, ¶¶12-13, 36.

¶8 We first consider whether Parrett has shown that the State breached the plea agreement. See *State v. Naydihor*, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. If the State did not breach the agreement, then neither of Parrett’s attorneys performed deficiently by failing to object to the recommendation. See *id.*

¶9 “Whether the State breached a plea agreement is a mixed question of fact and law.” *Id.*, ¶11. The determination of the terms of a plea agreement and of the historical facts surrounding the alleged breach are questions of fact. *Id.* We will uphold the circuit court’s resolutions of these questions unless they are clearly erroneous. *Id.* The question of whether the State breached the agreement is a question of law that we review *de novo*. *Id.*

¶10 The circuit court determined that the terms of the agreement were disclosed by the State at the start of the plea hearing. The State expressly described the agreement on the record as including a recommendation that the court impose sentences for the second-degree sexual assaults “consecutive to the escape case.” Parrett and his attorneys each confirmed that this recommendation accurately reflected the agreement.

¶11 Parrett does not discuss the plea hearing, but instead points to the guilty plea questionnaire to show that the agreement did not include a recommendation for consecutive sentences. The agreement described on the

questionnaire is “for imprisonment ... in a length in the discretion of the court.” The terms reflected on the questionnaire do not conflict with the State’s description of the agreement in open court. Any possible ambiguity in the questionnaire stemming from its omission of an express reference to consecutive or concurrent sentences was clarified during the plea colloquy when the State described the agreement and Parrett concurred. The circuit court’s finding that the plea agreement included the State’s recommendation for consecutive sentences is not clearly erroneous.

¶12 The sentencing hearing immediately followed the plea proceeding and the State made a recommendation exactly in conformity with the terms it had described, including a recommendation that the sentences for sexual assault run consecutive to any sentence for escape. The record conclusively demonstrates that the State did not breach the plea agreement. Therefore, Parrett has not demonstrated that his attorneys performed deficiently by failing to object to the recommendation. The circuit court properly denied Parrett’s ineffective assistance of counsel claim without a hearing. *See Allen*, 274 Wis. 2d 568, ¶¶12-13.

By the Court.—Order affirmed.

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

