COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1580-CR **Cir. Ct. No. 2004CF968**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTE E. MASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELA and DENNIS P. MORONEY, Judges. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Donte Mason appeals a judgment convicting him of burglary, and an order denying postconviction relief. The issue is whether

Mason's trial counsel performed ineffectively at sentencing. We affirm on all issues.

¶2 Police apprehended Mason fleeing a liquor store burglary. The State charged him with one count of burglary, and he entered a guilty plea. His plea bargain included the State's promise to recommend a prison sentence, but to withhold a recommendation on the length of the sentence.

¶3 Before sentencing, the State submitted a twenty-page sentencing memorandum that described Mason as a member of a burglary gang responsible for numerous burglaries in three states. It described several of those burglaries and set forth the evidence of Mason's involvement in them. It described his conduct as "highly aggravated," and essentially depicted Mason as a non-repentant, career criminal.[1] Mason fairly characterizes it as a document advocating for a lengthy sentence.

¶4 At the sentencing hearing, the presiding judge informed the parties that the previous day she had sentenced Kim Johnson, an individual with burglary convictions, and had asked a police detective present at the hearing if Johnson had any links to Mason. The detective responded that he believed there were links because they were once seen together in a car. The prosecutor then pointed out that his sentencing memorandum identified Johnson as the leader of a burglary that Mason was implicated in, although never charged with. The hearing then proceeded with no objection from counsel to the presiding judge's consideration of the information she received from her ex parte contact the previous day.

[1] At the sentencing hearing the prosecutor asked the court not to infer anything from the "highly aggravated" characterization and the court indicated it would not.

¶5 Counsel did, however, ask the court not to consider the State's allegations of Mason's involvement in several burglaries, including the burglary with Johnson, because they were either uncharged or recently charged but as yet unproven. The court responded that it would not consider several pending charges, but would consider the information about the uncharged offenses, including the one involving Johnson, as relevant to Mason's character. The court subsequently sentenced Mason to six years of initial confinement followed by five years of extended supervision based in significant part on its conclusion that Mason had committed other uncharged burglaries.

¶6 Mason moved for postconviction relief, alleging that counsel performed ineffectively at sentencing when he did not object to: (1) the court's use of prejudicial information obtained by the presiding judge's ex parte contact with a police officer; (2) the court's use of unproven allegations of criminal conduct; and (3) the prosecutor's harsh portrayal of Mason in his sentencing memorandum, which, in Mason's view, breached the plea agreement. The trial court denied the motion without a hearing, resulting in this appeal.

¶7 The trial court properly denies a hearing on a postconviction claim of ineffective assistance of counsel when, among other reasons, the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Here, as explained below, the record conclusively shows that the trial court did not commit prejudicial errors at sentencing, and that the State did not breach the plea agreement. Consequently, Mason has no basis to contend that counsel's failure to object prejudiced him. Without demonstrating prejudice, the defendant cannot prevail on a claim of ineffective assistance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶8 Judges may not initiate ex parte communications concerning a pending case. SCR 60.04 (g)(1); *see also* ***State v. Vanmanivong***, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76 (a judge must not seek evidence independently and then rely on such evidence to make a ruling). However, the error in doing so may be deemed harmless. ***Id.***, ¶¶35-37. In this case, the ex parte contact was harmless because what the court learned from it was far less damaging than what the prosecutor told the court in his sentencing memorandum about Mason's link to Johnson. While the officer reported only that he once saw Mason and Johnson together in a car, the sentencing memorandum detailed the evidence of Mason's participation with Johnson in a burglary. An error is harmless if it is beyond a reasonable doubt that the error did not contribute to the outcome. *See* ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74. Such is the case here.

¶9 As Mason concedes, the sentencing court may consider unproven criminal acts as evidence of the defendant's character. *See* ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). However, he contends that in his case the court erroneously inferred that he had committed other criminal acts based on nothing more than "sketchy information," suspicions, and guilt by association. In fact, the prosecutor presented evidence specifically linking Mason to numerous burglaries, including:

> 1. police discovery of Mason and two others in a van containing burglary tools near the scene of an attempted burglary
>
> 2. police stop of a vehicle he was in shortly after another burglary, in the company of an individual who later admitted his involvement in the burglary.
>
> 3. His arrest after police saw him running and then fleeing by vehicle from the scene of a third burglary.

> 4. The fact that a member of the burglary gang which committed these burglaries made a statement implicating Mason in eight other uncharged commercial burglaries.

This information went far beyond mere suspicion or guilt by association. Mason had the opportunity to rebut it at sentencing but did not, and the trial court reasonably exercised its discretion in determining that Mason had committed other, uncharged burglaries. *See* ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993) (evaluating the evidence of the defendant's other uncharged and unproven acts is left to the sentencing court's discretion).

¶10 The prosecutor did not breach the plea agreement. As Mason notes, the prosecutor must not present information in a manner that undermines the agreed sentencing recommendation. *See* ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986). Here, the prosecutor promised to withhold recommendation for a specific length prison term. The prosecutor did not undermine that promise by portraying Mason in a harsh light, because a promise to withhold a specific recommendation does not prevent advocating for a long sentence.

By the Court.—Judgment and order affirmed.

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