COURT OF APPEALS
DECISION
DATED AND FILED

April 01, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1668-CR **Cir. Ct. No. 2000CF61**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE D. GRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Jimmie D. Gray appeals from the order denying his motion for postconviction relief. He argues that the postconviction court erred when it denied his motion for plea withdrawal or sentence modification. Because we conclude that the postconviction court did not err, we affirm.

¶2 Gray pled guilty to two counts of armed robbery.[1] Under the plea agreement, the State agreed to recommend ten-year sentences on each count to run concurrently. The trial court sentenced him to twelve years of initial confinement and eight years of extended supervision on the first count, with a concurrent twelve-year sentence on the second count.[2]

¶3 In 2007, Gray moved to withdraw his guilty pleas or for sentence modification. He argued that his trial counsel was ineffective at the plea and sentencing hearings because counsel did not object when the trial court "breached" the plea agreement and because counsel recommended a sentence different than the one set forth in the plea agreement. He also argued that the trial court erred because it did not tell him that it was not bound by the plea agreement, that it could impose consecutive sentences, and that he could withdraw his pleas if the court did not follow the plea agreement. The postconviction court denied the motion without holding a hearing. The court found that the trial court was not obligated to follow the plea agreement or tell Gray that he could withdraw his pleas if it did not follow the agreement. The court also found that the guilty plea questionnaire that Gray had signed stated that the trial court was not bound by the plea agreement and that it could impose consecutive sentences.

¶4 Gray argues to this court that the trial court erred when it conducted the plea colloquy with him because it did not tell him that it was not bound by the plea agreement. At the hearing, the following colloquy took place:

[1] The Honorable Jeffrey Wagner conducted the plea hearing, while the Honorable Mel Flanagan sentenced Gray.

[2] One of the counts was subject to truth-in-sentencing, while the other was not.

> THE COURT: And you understand the penalty the Court could impose as to each one of those counts, up to a total of 60 years. You understand that?
>
> THE DEFENDANT: That is correct. I understand.
>
> [DEFENSE COUNSEL]: No, actually I think it's 60 years on Count 1.
>
> THE COURT: Oh, strike that. 60 years on the first count, 40 years on the second count. You understand that?
>
> THE DEFENDANT: I understand that.

The trial court did not personally advise Gray that it was not bound by the plea agreement, or ask him whether he understood that it was not bound by the agreement.

¶5 When taking a guilty or no contest plea from a criminal defendant, "the circuit court must advise the defendant personally on the record that [it] is not bound by any plea agreement and ascertain whether the defendant understands the information." ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14.

> The essence of the mandate is that the court must engage in a colloquy with the defendant on the record at the plea hearing to ascertain whether the defendant understands that the court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement. The plea colloquy is defective if it fails to produce an exchange on the record that indicates that the defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing.

Id., ¶42. The circuit court cannot infer "from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement." ***Id.***, ¶69. The circuit court "must ask the question that ascertains that the defendant understands what he has been

told." ***Id.*** The defendant is entitled to an evidentiary hearing on this issue when he or she "shows that the court failed to inform the defendant that it was not bound by the plea agreement, and the defendant alleges that he did not understand that the court was not bound." ***Id.***, ¶73.

¶6 In this case, the record shows that the trial court did not personally advise Gray that it was not bound by the plea agreement as required by ***Hampton***. The record also shows that Gray did not allege in his motion that he did not understand that the court was not bound by the agreement as is also required by ***Hampton***. Because Gray did not allege that he did not understand that the court was not bound, we conclude that the postconviction court properly declined to hold a hearing on the issue.

¶7 Gray also was not entitled to a hearing on his claim that his trial counsel was ineffective for failing to object when the trial court deviated from the plea agreement. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A circuit court is not bound by the State's sentencing recommendation in a plea agreement. ***Hampton***, 274 Wis. 2d 379, ¶37. Counsel is not ineffective for failing to raise a meritless issue. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Since the court was not bound by the State's recommendation, Gray's counsel was not ineffective for failing to object when the court deviated from the recommendation.

¶8 Gray further argues that his trial counsel was ineffective because his counsel recommended that the trial court impose a sentence that was different from the recommended sentence in the plea agreement. First, it appears that the

plea agreement established a sentence recommendation for the State to make, but not one for defense counsel. Second, the sentence that defense counsel recommended was less than the State's recommendation. Consequently, even were we to conclude that counsel's performance was deficient, Gray cannot show that he was prejudiced by his counsel's recommendation. He has not established that he was entitled to a hearing on his claim of ineffective assistance of trial counsel.

¶9 Gray also argues that his plea colloquy was defective because the trial court did not tell him that it could impose consecutive sentences. The failure to advise a defendant that sentences can run consecutively is not an error if the defendant does not allege that he did not understand that multiple sentences could run consecutively. ***State v. Brown***, 2006 WI 100, ¶78, 293 Wis. 2d 594, 716 N.W.2d 906. Further, the error, if there is one, is harmless when the total sentence imposed does not equal the potential maximum of one of the sentences. ***Id***. In this case, the plea questionnaire stated that the sentences could be consecutive to each other, and the court explained to Gray the potential sentence for each of the counts. Moreover, the court did not impose consecutive sentences. Gray is not entitled to withdraw his pleas on this basis.

¶10 Gray raises some additional arguments in his brief to this court. He did not, however, raise these issues before the circuit court. Generally, we will not consider an issue raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Gray suggests that he attempted to raise these issues in a supplemental motion in the circuit court. That motion, however, is not part of the record in this appeal. Since the document is not part of the record, we will not consider it. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314,

284 N.W.2d 108 (Ct. App. 1979). For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).