

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 1, 2003**

Cornelia G. Clark  
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. 02-1586-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CF-635**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TODD JEROVETZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Todd Jerovetz appeals a judgment convicting him of conspiring with eight others to commit a series of thefts. He also appeals an order denying his motion to reduce his sentence. He argues that: (1) the trial court sentenced him on inaccurate information and ignored Jerovetz's postsentencing notarized letters from co-defendants retracting their earlier

assertions that Jerovetz was involved in specific thefts; (2) the State violated Jerovetz's constitutional right to be informed of the nature of the accusations by using co-defendants' statements at sentencing that were not included in discovery; (3) the State violated Jerovetz's due process rights when it induced co-defendants to make statements against Jerovetz by offering favorable plea agreements; (4) the court violated the plea agreement by sentencing Jerovetz to eight years in prison when the agreement called for a "cap" of three years' imprisonment, and Jerovetz would not have pled no contest if he had been informed that the court was not required to abide by the plea agreement; (5) the prosecutor violated the plea agreement by reciting Jerovetz's involvement in the conspiracy to the extent that the court disregarded the prosecutor's request for a three-year sentence and imposed an eight-year sentence; and (6) Jerovetz was denied his right to effective assistance of counsel. We reject these arguments and affirm the judgment and order.

¶2 The complaint initially charged Jerovetz and eight co-conspirators with the inchoate crime of conspiracy in violation of WIS. STAT. § 939.31.<sup>1</sup> The complaint alleged that Jerovetz was the main organizer and provided a leadership role in thefts and burglaries between January 1, 1996, and July 14, 2000. Pursuant to a plea agreement, the State amended the information to change the time period to between June 1, 1999, and December 30, 1999. Because the conspiracy ended before the truth in sentencing statute took effect, Jerovetz would be eligible for parole and there would be no period of extended supervision. The prosecutor agreed to recommend no more than three years' incarceration.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Following Jerovetz's no contest plea, the prosecutor recommended three years' imprisonment. Arguing against Jerovetz's position that probation should be granted, the prosecutor detailed statements of co-defendants indicating that Jerovetz was "tightly connected" to some of the other defendants and played an integral role in the conspiracy. The court sentenced Jerovetz to eight years in prison.

¶4 At the postconviction hearing, Jerovetz admitted that he purchased stolen property from his co-defendants, but denied that he had been as directly involved in the thefts as the prosecutor asserted at sentencing. He introduced a number of statements from co-defendants and others that were intended to cast doubt on the State's evidence of Jerovetz's involvement. The trial court denied Jerovetz's motion to reduce his sentence, noting that Jerovetz was convicted of conspiracy to steal a large number of items and it did not matter whether some of the items should not be attributed to Jerovetz's role in the conspiracy.

¶5 Jerovetz's argument that the trial court relied on false information at sentencing fails for three reasons. First, because he pled no contest to conspiracy, Jerovetz's involvement in particular thefts was not a substantial factor leading to the sentence. Second, the evidence Jerovetz presented at the postconviction hearing does not contradict statements made by several co-defendants that implicated him in numerous thefts. Third, Jerovetz presented evidence contradicting earlier statements made by the same individuals. Whether the retractions were more credible than the initial allegations is a matter involving witness credibility that is the sole province of the trial court. See *Wheeler v. State*, 87 Wis. 2d 626, 634, 275 N.W.2d 651 (1979). The trial court could reasonably find that Jerovetz failed to meet his burden of showing by clear and convincing

evidence that the sentencing court relied on inaccurate information. See *State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶6 The prosecutor's failure to turn over statements of co-defendants that were used at sentencing provides no basis for relief. Jerovetz's discovery rights are determined by statute. See *State v. DeLao*, 2002 WI 49, ¶49, 252 Wis. 2d 289, 343 N.W.2d 600. Because this case was resolved by plea agreement, the prosecutor's statutory discovery obligations under WIS. STAT. § 971.23 are not applicable. In addition, the remedy for any violation of a defendant's discovery rights is suppression of evidence. Because the court can consider suppressed evidence at sentencing, see *State v. Rush*, 147 Wis. 2d 225, 226, 432 N.W.2d 688 (Ct. App. 1988), there is no prohibition from using statements at the sentencing hearing that were not provided in discovery. A guilty or no contest plea constitutes a waiver of nonjurisdictional defects and defenses. *Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563, 566 (1980).

¶7 Jerovetz has not established that the State's plea agreements with other defendants improperly induced them into giving false statements against Jerovetz. Inducements given to accomplices in exchange for their testimony does not necessarily violate a defendant's due process rights. See *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987). Cross-examination, not exclusion, is the proper tool for challenging the weight and credibility of accomplices' testimony. *Id.* at 45. The trier of fact, not appellate courts, determine whether the State's inducements "crossed the line," rendering the statements unreliable.

¶8 Jerovetz's complaint that the trial court failed to follow the plea agreement provides no basis for relief. The trial court is not bound by the plea agreement. See *State v. McQuay*, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990).

Jerovetz's claim that he would not have pled no contest if he had known that the trial court was not bound by the agreement is belied by the plea questionnaire and waiver of rights form he signed on the day he pled no contest. The form states: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: 10 yrs. and a \$10,000 fine."

¶9 The prosecutor's arguments in support of his three-year recommendation did not violate the plea agreement. Whether the prosecutor violated the terms of the plea agreement is a question of law that this court reviews de novo. See *State v. Williams*, 2001 WI App 7, ¶5, 241 Wis. 2d 1, 624 N.W.2d 164. By reciting Jerovetz's extensive involvement in the conspiracy, the prosecutor was not attempting to undermine his own recommendation. The trial court did not consider the prosecutor's argument an attempt to undercut the negotiated plea agreement. This case is not comparable to *Williams*, where the prosecutor developed a negative impression of Williams after negotiating the plea agreement, and, while affirming her recommendation for probation, endorsed the presentence report that recommended a prison term. Here, all of the prosecutor's comments support his argument for a three-year prison sentence rather than probation. As a matter of law, the recommendation did not violate the plea agreement.

¶10 Finally, Jerovetz did not properly preserve his arguments regarding effective assistance of trial counsel. Before that issue can be raised on appeal, a postconviction hearing must be held at which trial counsel must testify regarding matters of strategy and his knowledge of the facts. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Jerovetz's failure to make a proper

record constitutes a waiver of that issue. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

*By the Court.*—Judgment and order affirmed.

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

