COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2667-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. PERRY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

SCHUDSON, J. William J. Perry appeals from a judgment of conviction for armed robbery, party to a crime, and from the order denying his postconviction motion. He argues that the prosecutor breached the plea agreement by informing the trial court of an additional conviction, altering the sentencing matrix score on which the agreement had been based. We conclude that the prosecutor did not breach the agreement by advising the trial court of additional, accurate information about Perry's criminal record. Therefore, we affirm.[1]

The facts are not disputed. During the guilty plea hearing, the prosecutor informed the trial court of the plea agreement:

> Your Honor, the State is going to recommend consistent with the matrix. When I filled the matrix out with [the defendant's attorney], we determined that he fits into the zero on the A scale and a one on the B scale, placing him at forty-eight to sixty months. I did not know at the time whether he had been convicted of an open drug case that was pending in the system. That would change the A scale to a two. The B scale would remain at a one and that would place him at sixty to seventy-eight months.
>
> The State is going to recommend consistent with the matrix as I understood it to be at the time that I filled it out, which would be forty-eight to sixty months....

On questioning from the court, Perry's lawyer agreed that this was an accurate statement of the agreement.

[1] Because we conclude that there was no breach, we need not address Perry's argument that his attorney was ineffective for failing to object to the alleged breach. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

At the sentencing hearing, the trial court reviewed a completed sentencing matrix and then invited the parties to offer their recommendations. The prosecutor stated:

> Your Honor, the State was going to recommend consistent with the matrix as I had filled it out without—not knowing about his out of state conviction which would have been [48] to 60 months in the Wisconsin state prison system. And I feel that I have to make that recommendation because that's the recommendation Mr. Perry believed I would be making.
>
> Obviously, the new matrix places him about double that. But I'm going to stick with the recommendation that I had made earlier ....

Perry contends that these statements constituted a breach of the agreement. We disagree.

"[P]lea bargaining must be attended by procedural safeguards to ensure that a defendant is not treated unfairly" because a plea agreement induces a defendant to waive his or her fundamental right to a trial. ***State v. Beckes***, 100 Wis.2d 1, 3-4, 300 N.W.2d 871, 872 (Ct. App. 1980). Although the prosecutor is not required to enthusiastically advocate for a particular sentence, the prosecutor "may not render less than a neutral recitation of the terms of the plea agreement." ***State v. Poole***, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986). Where, as here, the facts are undisputed, we independently review whether the State's conduct violated the terms of the plea agreement, benefitting from the trial court's analysis. ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). Denying Perry's postconviction motion, the trial court explained:

Both the prosecutor and the defense attorney, as officers of the
> court and in the exercise of their professional responsibilities, were obliged to advise the court of any errors in the scoring of the matrix or change in

> the defendant's status which would affect the matrix score.
>
> In this case, the plea negotiations were based upon the matrix score, with the prosecutor agreeing to recommend a sentence "consistent with the matrix." At the time the negotiation was entered into and the agreement to recommend "consistent with the matrix" was made, the matrix was incorrectly scored. Nevertheless, as the transcript reveals, the prosecutor maintained her original recommendation even though it was based upon an inaccurately scored matrix. In doing so, however, she noted the accurate information and score to the court, as she was obliged as an officer of the court to do.

We agree. This court has recognized "a strong public policy of providing all relevant information to a trial court charged with the responsibility of sentencing a criminal defendant." ***State v. McQuay***, 148 Wis.2d 823, 827, 436 N.W.2d 905, 906 (Ct. App. 1989), *rev'd on other grounds*, 154 Wis.2d 166, 452 N.W.2d 377 (1990). Further, "pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the state." ***Id.*** at 826, 436 N.W.2d at 906. Certainly, in most if not all cases, a trial court's accurate understanding of a defendant's full criminal record is critical to informed and intelligent sentencing. Where, as here, a prosecutor provides a neutral, accurate statement of a defendant's criminal record and its impact on the sentencing matrix, the prosecutor has not breached the plea agreement.

By the Court. – Judgment and order affirmed.

Recommended for publication in the official reports.