

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

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. 01-0857-CR

Cir. Ct. No. 00-CF-16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Sanders appeals a judgment sentencing him to ten years in prison and ten years' extended supervision for second-degree sexual assault, and an order denying his postconviction motion. He argues that the State's sentence recommendation violated the plea agreement, his trial attorney was ineffective for failing to object to the State's violation, and his plea was not

knowing and voluntary because he misunderstood the plea agreement. We reject these arguments and affirm the judgment and order.

¶2 The plea agreement required Sanders to plead no contest to one count of sexual assault. The State agreed to drop three other charges. The agreement, as recited by defense counsel at the plea hearing, required the State to “cap its recommendation in [sic] no more than 10 years in prison.” At the sentencing hearing, the prosecutor recommended ten years in prison followed by ten years’ extended supervision. At the postconviction hearing, the prosecutor and Sanders’ trial counsel agreed that there had been no discussion about extended supervision. Sanders testified that he thought the agreement called for the prosecutor to recommend a total of ten years’ imprisonment and extended supervision. On cross-examination, he explained that he believed the words “10 years in prison” meant seven years in prison and three years out. The trial court found Sanders’ testimony incredible and denied postconviction relief.

¶3 Whether the State violated the terms of the plea agreement is a question of law that we decide without deference to the trial court. *See State v. Williams*, 2000 WI App 7, ¶5, 241 Wis. 2d 1, 7, 624 N.W.2d 164. Sanders has the burden to show by clear and convincing evidence that a breach occurred. *See State v. Jorgensen*, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987). Whether Sanders’ plea was voluntarily, knowingly and intelligently entered is a question of law that we independently review. *See State v. Yates*, 2000 WI App 224 ¶4, 239 Wis. 2d 17, 20, 619 N.W.2d 132. The trial court’s findings of fact and assessment of the witnesses’ credibility are reviewed with deference. *See State v. Grandberry*, 156 Wis. 2d 218, 222, 456 N.W.2d 615 (Ct. App. 1990); *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶4 The State did not violate the plea agreement. The parties never reached an agreement regarding extended supervision. The State recommended exactly what the plea agreement required him to recommend, “10 years in prison.” The agreement is not ambiguous and is not susceptible to any other interpretation.

¶5 Sanders’ trial counsel was not ineffective for failing to object to the prosecutor’s recommendation because it was not objectionable.

¶6 The trial court’s finding that Sanders understood the plea agreement is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1999-2000). Sanders acknowledged at the postconviction hearing that he knew his time in prison would be followed by some other form of supervision. As the arbiter of Sanders’ credibility, the trial court reasonably disbelieved his self-serving assertion that he interpreted the words “in prison” to include the time he spent under supervision after being released from prison. Sanders’ understanding of the plea agreement is further demonstrated by his failure to voice any objection to the prosecutor’s recommendation at the sentencing hearing. The record as a whole suggests that the plea negotiations focused on the dismissal of three charges and the cap to the State’s recommendation for prison time. Other ramifications of the plea were not central to the negotiated settlement and formed no part of the plea agreement. Sanders entered the plea agreement knowing that post-imprisonment supervision was possible and that no agreement had been reached on that question.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

