COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 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. 95-2639-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESUS SERRANO,
a/k/a JESSE SERRANO,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

FINE, J. Jesus Serrano appeals from a judgment convicting him of possession of marijuana with intent to deliver, as a second or subsequent offense, *see* §§ 161.14(4)(t), 161.41(1m)(h)(2), and 161.48, STATS., and possession of a firearm by a felon, *see* § 941.29(2), STATS. He also appeals from the trial court's denial of his motion for post-conviction relief. The judgment was

entered on Serrano's guilty pleas. He claims that the trial court erred in not permitting him to withdraw the plea to the marijuana charge. We affirm.

I.

This case was plea bargained. As reflected by the comments of both the prosecutor and by Serrano's trial lawyer at the plea hearing, the State agreed to recommend incarceration of between three and four years on the marijuana charge, and a concurrent eighteen-month sentence on the firearm charge. In fulfillment of its obligations under § 971.08(1)(a), STATS., the trial court informed Serrano that he faced "imprisonment not less than 3 months, no [*sic*] more than 5 years" on the marijuana charge.[1] Although this is also what the criminal complaint recited, the trial court was wrong. Serrano was charged as a second or subsequent offender; accordingly, the "applicable ... minimum and maximum periods of imprisonment" were "doubled." Section 161.48(2), STATS. Therefore, Serrano, contrary to what he was told by the trial court at the plea hearing, faced a period of incarceration on the marijuana charge of between six months and ten years. This error was disclosed by the prosecutor at the sentencing hearing when he explained that he was increasing his recommended sentence on the marijuana charge to five years in prison, which was the maximum penalty that Serrano was told at the plea hearing that he faced. Serrano did not seek to either withdraw his plea or enforce the plea bargain. Rather, his lawyer argued that the trial court should put Serrano on "probation with conditional time as the Court sees fit." The trial court sentenced Serrano to five years in prison on the marijuana charge.

II.

[1] Section 971.08(1)(a), STATS., provides:

> **971.08 Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

This case presents two issues: first, whether Serrano is entitled to withdraw his guilty plea to the marijuana charge because the State did not fulfill the terms of the plea bargain; second, whether Serrano is entitled to withdraw his guilty plea to the marijuana charge because the trial court did not advise him accurately of his "potential punishment if convicted" on that charge. *See* § 971.08(1)(a), STATS. We discuss these issues in turn, although the defendant folds the breach-of-the-plea-bargain argument into his claim that his guilty plea was not voluntary because the trial court did not comply fully with § 971.08(1)(a), STATS.

A. *Breach of the plea bargain*. A defendant is entitled to have a plea bargain enforced according to its terms. ***State v. Poole***, 131 Wis.2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986). The State's failure to abide by a plea-bargained sentencing recommendation does not permit the defendant to withdraw his or her guilty plea; the appropriate remedy is a re-sentencing. ***Id.***, 131 Wis.2d at 365, 394 N.W.2d at 911–912. Even that relief, however, is beyond a defendant's reach when he or she does not object timely to the breach. ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). Serrano did not object timely to the prosecutor's breach of the plea bargain.

B. *Compliance with § 971.08(1)(a), STATS.* A guilty plea is not voluntary unless the defendant knows his or her potential punishment. ***State v. Bartelt***, 112 Wis.2d 467, 472–475, 334 N.W.2d 91, 93–95 (1983). Thus, § 971.08(1)(a), STATS., requires that the trial court determine that a defendant who wishes to plead guilty have an "understanding of the ... potential punishment if convicted." This must be done prior to acceptance of the plea. ***Ibid.***; ***State v. Bangert***, 131 Wis.2d 246, 274–275, 283, 389 N.W.2d 12, 26, 30 (1986). This was not done here. Thus, Serrano could have sought to withdraw his guilty plea, *see* ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26, and would have been successful unless the State proved by clear and convincing evidence that he did understand, at the time he entered his plea, his "potential punishment," *see* ***id.***, 131 Wis.2d at 274–275, 389 N.W.2d at 26. Serrano did not seek to withdraw his guilty plea, however, until after he knew both his "potential punishment" and his actual sentence.

A defendant may not withdraw a guilty plea after imposition of sentence unless he or she establishes by "clear and convincing evidence" that there has been a "manifest injustice." ***State v. Woods***, 173 Wis.2d 129, 136, 496

N.W.2d 144, 147 (Ct. App. 1992). Whether this standard has been met is within the trial court's informed and reasoned discretion. ***Id.***, 173 Wis.2d at 136–137, 496 N.W.2d at 147. A trial court erroneously exercises its discretion, however, if it bases its decision on "an error of law." ***Ibid.***

The trial court found that Serrano knew prior to imposition of sentence that the prosecutor had changed his recommendation. This finding is supported by the transcript of the sentencing hearing and is thus not "clearly erroneous." *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS. The trial court also concluded that Serrano's decision to proceed with sentencing after he knew the correct "potential punishment," *see* § 971.08(1)(a), STATS., "was in essence a reaffirmation of his earlier plea."[2] We agree.

Although concerned with a prosecutor's breach of a plea bargain, ***State v. Paske***, 121 Wis.2d 471, 360 N.W.2d 695 (Ct. App. 1984), is instructive here. The defendant in ***Paske*** decided to proceed with sentencing even though he knew, prior to sentencing, that the prosecutor had breached the bargain. ***Id.***, 121 Wis.2d at 473, 360 N.W.2d at 696–697. Thus, Paske's decision not to seek to withdraw his no contest pleas was not induced by the breached plea bargain. ***Id.***, 121 Wis.2d at 475, 360 N.W.2d at 697–698. By the same token, Serrano's decision to proceed with sentencing after he knew the correct "potential punishment" was not induced by either the trial court's failure at the plea hearing to accurately comply with § 971.08(1)(a) or Serrano's erroneous belief that he faced only a maximum of five years in prison. As the supreme court explained more than two decades ago when a defendant did not challenge the prosecutor's breach of a plea bargain: "The situation is not so much waiver of claimed error, rather it is an abandonment of right to object by persisting in a

[2] Although the trial court made no specific finding that Serrano knew the correct "potential punishment" prior to imposition of sentence, the transcript establishes conclusively that he did know, and such a finding is implicit in the trial court's ruling. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991) (appellate court will uphold trial court's discretionary decision if there are facts of record that support it). Moreover, Serrano does not on this appeal contend that he did not know prior to imposition of sentence what the potential penalties were.

plea strategy after the basis for the claim of error is known to defendant." ***Farrar v. State***, 52 Wis.2d 651, 660, 191 N.W.2d 214, 219 (1971) (parenthetical and footnote omitted). We apply this rationale here. Serrano has not established that failure to permit him to withdraw his guilty plea to the marijuana charge will result in a "manifest injustice," and the trial court here acted well within its discretion in denying that relief.

By the Court.—Judgment and order affirmed.

Publication in the official reports is recommended.