

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2009AP1778-CR

Cir. Ct. No. 2007CF222

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL B. GALVIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Darrell Galvin appeals from a judgment convicting him of delivering heroin and from an order denying his postconviction motion alleging a defective plea colloquy and an erroneous exercise of sentencing discretion. On appeal, Galvin challenges the plea colloquy and the exercise of

sentencing discretion. We affirm the circuit court's refusal to permit Galvin to withdraw his plea because Galvin knew at the time he pled that the circuit court was not bound by the terms of the plea agreement. We further determine that Galvin's challenge to his sentence is not properly before this court. We affirm the judgment and order.

¶2 Galvin argues that the plea colloquy was defective because the circuit court did not advise him that it was not bound by the plea agreement or the parties' sentencing recommendations.¹ The following facts are relevant to the issues on appeal. Galvin agreed to plead guilty to delivering heroin, and the parties were free to argue at sentencing. At the plea hearing, the circuit court warned Galvin that the terms of the plea agreement were those placed on the record and that no "secret agreements" or promises were allowed or would be binding. Galvin acknowledged this admonition. The court warned Galvin of the maximum penalties he faced. Galvin agreed that he read, signed and understood the plea questionnaire. The plea questionnaire stated that the circuit court was not bound by the plea agreement or recommendations and could impose the maximum penalty.

¹ The law requires a circuit court to inform the defendant during the plea colloquy that it is not bound by the plea agreement. *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Here, the plea agreement left the parties free to argue at sentencing. We question whether the defect alleged by Galvin runs afoul of *Hampton* because there was no agreed upon sentencing recommendation which the circuit court might have disregarded. We set aside this reservation to decide this appeal.

¶3 At sentencing, the State asked the circuit court to impose an appropriate sentence without specifying a specific sentence. Galvin argued that prison was not appropriate. The circuit court imposed a nine-year sentence.

¶4 Postconviction, Galvin argued that his trial counsel told him before he entered his plea that the court would impose probation. At the postconviction motion hearing, Galvin testified that he discussed his case on several occasions with his trial counsel, but she did not tell him that the circuit court was free to ignore the parties' recommendations and impose a longer sentence. She also told Galvin he would receive probation.² Had Galvin known the circuit court was not bound to accept the parties' sentencing recommendations, he would not have entered a plea. Galvin testified that he did not read the plea questionnaire before he signed it.

¶5 On cross-examination, the State explored Galvin's multiple experiences in the criminal justice system, including several cases disposed of via plea agreements and featuring plea questionnaires that stated that the court was not bound by the plea agreement or any recommendations. Galvin could not recall much about these cases. The circuit court reminded Galvin that he conceded at the plea hearing that he had read, signed and understood the plea questionnaire. Galvin responded that he had lied about reading the questionnaire.

¶6 Trial counsel testified that she would have discussed with Galvin all of the concepts in the plea questionnaire. Counsel denied predicting any particular

² There was no discussion of probation during the plea hearing. The circuit court specifically told Galvin that the only features of the plea agreement were those features placed on the record at the plea hearing.

sentence, particularly given the identity of the sentencing judge. Counsel denied telling Galvin that he would receive probation, even though counsel was optimistic about a favorable sentence.

¶7 The circuit court found that Galvin's postconviction testimony was not credible. The court found that a reasonable person would not think that when the plea hearing judge discusses the possibility of a maximum sentence, the judge is nevertheless required to accept a party's sentencing recommendation. The court informed Galvin during the colloquy that secret agreements were not allowed and anything left off the record would not bind the court in the future. There was no mention of probation at the plea hearing. The court found credible trial counsel's testimony that she told Galvin she could not predict the sentence. Galvin was aware of all of this at the time he entered his plea. These credibility determinations were for the circuit court to make. *State v. Plank*, 2005 WI App 109, ¶11, 282 Wis. 2d 522, 699 N.W.2d 235. The circuit court's findings are not clearly erroneous based upon the record. *See id.*, ¶6.

¶8 Post-sentencing, a defendant may withdraw a plea if the defendant establishes by clear and convincing evidence that the plea was not knowingly, voluntarily and intelligently entered. *Id.*, ¶6. The defendant must make a prima facie showing that the plea colloquy was defective, and assert that the defendant did not know or understand information the court should have provided at the plea colloquy. *Id.* If the defendant makes this showing, the burden shifts to the State to show that the plea was proper by reference to the entire record. *Id.*, ¶7. We review the circuit court's determination that the State met its burden for an erroneous exercise of discretion. *Id.*

¶9 Galvin asserted that he did not understand or know information the court should have provided at the plea hearing, and that the plea colloquy was defective for this reason. The burden then shifted to the State to show that the plea was proper. The circuit court’s findings of fact about what Galvin knew and understood when he entered his plea are not clearly erroneous. *See id.*, ¶6. The circuit court properly exercised its discretion when it concluded, based upon the entire record, that the State met its burden to show that Galvin knew that the court was not bound by the plea agreement or the parties’ sentencing recommendations. Accordingly, the circuit court did not err when it denied Galvin’s motion to withdraw his plea.

¶10 Galvin next challenges the nine-year sentence. At sentencing, the circuit court considered that Galvin trafficked in drugs and the toll such drug activity takes on communities. The court also considered Galvin’s character and his prior criminal offenses. The court imposed a nine-year sentence.

¶11 Although Galvin’s postconviction motion challenged the sentence, he did not litigate that claim at the postconviction motion hearing. The hearing was restricted to the validity of his plea, and neither the parties nor the circuit court addressed Galvin’s challenge to his sentence. Because a postconviction motion is required to challenge a sentence, *State v. Krueger*, 119 Wis. 2d 327, 331, 351 N.W.2d 738 (Ct. App. 1984), this issue is not properly before us. There is no ruling for us to review.

¶12 Even if Galvin’s challenge to the sentence were properly before us, we would affirm the sentence. The record reveals that the sentencing court’s discretionary decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately

discussed the facts and factors relevant to sentencing Galvin. In fashioning the sentence, the court considered the seriousness of the offense, Galvin's character and history of prior offenses, and the need to protect the public, all proper sentencing factors. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may balance the various factors as it sees fit. *State v. Russ*, 2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483. The sentencing court considered the proper factors, individualized them and imposed a sentence within statutory limitations.

By the Court.—Judgment and order affirmed.

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

