COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3204-CR **Cir. Ct. No. 2006CF15**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. STEWART, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert A. Stewart, Jr., appeals from the judgment of conviction entered against him and the orders denying his motions for postconviction relief. Stewart argues that he is entitled to withdraw his plea. We disagree and affirm the judgment and orders.

¶2 Stewart pled no contest to one count of second-degree sexual assault of a child. The court sentenced him to twelve years in prison. Stewart then moved the circuit court to be allowed to withdraw his plea on the basis that the court had not informed him during the plea colloquy that it was not bound by the sentencing recommendation in the plea agreement. The circuit court denied the motion and Stewart appealed. We concluded that the plea colloquy was defective and remanded the case to the circuit court for an evidentiary hearing under ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906, to determine whether Stewart was aware when he entered the plea that the court was not bound by the sentencing recommendation. The circuit court held a hearing at which Stewart and his counsel testified. The court determined that Stewart was aware that the court could exceed the sentencing recommendation and again denied the motion. Stewart appeals once again.

¶3 Stewart argues that the circuit court erred when it found that the State met its burden of establishing that he understood that the court was not bound by the sentencing recommendation in the plea agreement. Stewart specifically argues that the circuit court erred because there was no evidence in the record that Stewart "verbally acknowledged his understanding" that the court could exceed the sentencing recommendation and because the court did not discuss the extent to which Stewart's past experiences in the criminal justice system led him to believe that courts honored the sentencing recommendations in plea agreements. We disagree.

¶4 Once a prima facie violation of the plea colloquy requirements of WIS. STAT. § 971.08(1) (2007-08)[1] has been shown, the court must hold an evidentiary hearing at which the State is allowed to show "by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." ***Brown***, 293 Wis. 2d 594, ¶40. "In meeting its burden, the State may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record.'" ***Id.*** (citation omitted).

¶5 At the hearing on remand, the circuit court heard testimony from Stewart's trial counsel as well as Stewart. Counsel testified at length about his discussions with Stewart and his practice when explaining plea agreements to defendants. Counsel stated that he "[a]bsolutely" would have told Stewart that he could be sentenced to more than the recommended sentence. Counsel also stated that it was always his practice to read the plea questionnaire to a defendant. The plea questionnaire stated that the defendant understood that the judge was not bound by the plea agreement and could impose the maximum sentence allowed. The associate who worked with counsel on Stewart's case also testified that she was present when counsel read the questionnaire to Stewart. Stewart testified that his counsel did not explain this to him, but rather told him he was not going to get the maximum because of the plea agreement. The court found the attorneys to be more credible than Stewart and denied the motion.

¶6 We conclude that the evidence at the hearing was sufficient to establish that Stewart understood that the court was not bound by the sentencing

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

recommendation in the plea agreement. We also conclude that there is no requirement that the State must offer evidence that Stewart verbally acknowledged his understanding, although there was evidence from which this could be inferred. We also are not convinced that the court erred when it did not discuss Stewart's expectations based on his previous experience. The fact that a defendant's sentencing expectations are not met is not a reason to invalidate a plea. *See* ***Johnson v. State***, 49 Wis. 2d 455, 460, 182 N.W.2d 502 (1971). The State met its burden by clear and convincing evidence. For the reasons stated, we affirm the judgment and orders of the circuit court.

By the Court.—Judgment and orders affirmed.

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