

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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No. 98-3168-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD HUTCHINSON,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Edward Hutchinson appeals from the judgment of conviction entered after he pled guilty to one count of burglary, as a party to a

crime, contrary to WIS. STAT. §§ 943.10(1)(a) and 939.05,¹ and from the order denying his postconviction motion. Hutchinson alleges that the prosecutor breached the plea agreement; that the trial court improperly considered his refusal to testify against his co-defendant, resulting in an unduly harsh sentence; and that the trial court erroneously denied his postconviction motion without a hearing. We conclude that the prosecutor did not breach the plea agreement. Further, our review of the record indicates that the sentence was not unduly harsh and that the trial court considered the proper factors in sentencing Hutchinson. Finally, we are satisfied that the trial court properly denied Hutchinson's postconviction motion without a hearing.

I. BACKGROUND.

¶2 On November 26, 1997, City of Milwaukee Police Officer Louise Schaefer was dispatched to a burglary in progress. When she arrived at the scene, Officer Schaefer spoke briefly with a witness who stated that she first saw two men, one wearing a red coat, loitering on the driveway of an adjacent house. The witness asserted that later she saw the man wearing the red coat inside her neighbor's house.

¶3 Approaching the house, Officer Schaefer observed that the front and side doors seemed to be secure, and that there were lights on inside the house. When she walked around to the rear of the house to check the back door, Officer Schaefer, who was standing only ten feet from the back door, saw two men walk out. Officer Schaefer shined the beam of her flashlight directly at the two men.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

She noticed that one of the men, subsequently identified as Hutchinson, was wearing a red, waist-length coat and a red knit cap. The other man was wearing a tan coat and a black knit cap. Upon seeing the officer, Hutchinson threw down a flashlight he was holding and the two men fled on foot through the yards with Officer Schaefer, also on foot, in pursuit.

¶4 Several squads responded to the area and the two men were apprehended minutes later. When police stopped them, both men had shed their hats and coats and were sweating profusely. The officers retraced the escape route and recovered the jackets and hats the men had been wearing. In one of the pockets of the tan coat the police found a roll of quarters. In the pockets of the red coat, the police found a twenty-dollar bill and two rings. The police found several more rings in the possession of Hutchinson's accomplice. The owners of the house informed police that a roll of quarters, a twenty-dollar bill, and two rings were missing. They subsequently identified two of the rings recovered from Hutchinson's accomplice as the missing rings. A later view of the scene of the burglary revealed that a significant amount of damage had been done to the back door of the residence, and that the inside of the house was in total disarray.

¶5 The two men were arrested and charged with one count of burglary as a party to a crime. Hutchinson pled guilty and the trial court entered a judgment of conviction. Hutchinson's attorney then requested that the trial court sentence Hutchinson that same day. The State opposed the request and asked the trial court to postpone sentencing until after Hutchinson's co-defendant's trial. The trial court agreed. The State asserted that it intended to call Hutchinson as a witness, and that if he testified truthfully against his co-defendant, this factor would be considered by the State at sentencing. Hutchinson's attorney indicated that it was unlikely that Hutchinson would testify against his co-defendant, and

informed the court that Hutchinson would probably invoke his Fifth Amendment right if called to testify. In fact, Hutchinson did refuse to testify against his co-defendant. Later, at his sentencing hearing, Hutchinson received a 110-month sentence, to be served consecutive to any other sentences he was currently serving.

¶6 Hutchinson filed a postconviction motion requesting that the trial court permit him to withdraw his guilty plea and grant him a trial, or, in the alternative, vacate the sentence and grant a new sentencing hearing. The trial court denied Hutchinson's motion without a hearing.

II. ANALYSIS.

¶7 Hutchinson argues that: the prosecutor breached the plea agreement by making a recommendation regarding Hutchinson's sentence to the trial court when, Hutchinson contends, the State had agreed not to make any recommendation in exchange for his guilty plea; the trial court at sentencing improperly considered his refusal to testify against his co-defendant, resulting in an unduly harsh sentence; and the trial court erred when it denied his postconviction motion without a hearing.

¶8 At the sentencing hearing, the prosecutor recommended that Hutchinson receive a concurrent sentence of "anywhere between 4 and 8 years." Hutchinson alleges that in making this recommendation, the prosecutor breached the plea agreement because, in exchange for Hutchinson's guilty plea, the prosecutor had agreed to make no recommendation as to sentencing. Hutchinson contends that, "[t]his breach was substantial resulting in manifest injustice,"

because it deprived him “of a sentencing proceeding whose result was fair and reliable.” We conclude that no breach occurred.²

¶9 In deciding the postconviction motion, the trial court concluded that the guilty plea hearing transcript revealed that the only negotiations in the case involved the State’s agreement not to charge two additional counts of bail jumping if Hutchinson pled guilty. The trial court also noted that the State had offered to withhold any sentencing recommendation *only if* Hutchinson testified against his co-defendant. The trial court found that Hutchinson “failed to perform his part of the bargain” when he refused to testify; thus, the State was under no obligation to withhold a sentencing recommendation. Consequently, the trial court concluded, based on the record, that “no breach of a plea agreement occurred in this instance” and Hutchinson’s trial counsel was not ineffective for failing to object to the prosecutor’s sentencing recommendation. We conclude that the record clearly supports the trial court’s findings.

¶10 The record indicates that the only agreement between Hutchinson and the State involved the State’s promise not to charge Hutchinson with bail jumping in exchange for his guilty plea. The record clearly reveals that the State offered to refrain from making a sentencing recommendation *only if* Hutchinson testified against his co-defendant. When Hutchinson refused to testify against his co-defendant, the State was under no obligation to refrain from making a

² Hutchinson’s trial counsel never objected to the alleged breach. In his postconviction motion Hutchinson claimed that trial counsel’s failure to object to the alleged breach of the plea agreement constituted ineffective assistance of counsel. The trial court concluded that no breach had occurred and, therefore, found that Hutchinson’s trial counsel was not ineffective for failing to object. We agree. However, we note that a material and substantial breach of the plea agreement would result in a manifest injustice to the defendant. See *State v. Smith*, 207 Wis. 2d 258, 272, 558 N.W.2d 379 (1997).

sentencing recommendation. Therefore, the State did not breach the plea agreement when it made a recommendation at Hutchinson's sentencing hearing, and we conclude that the record conclusively demonstrates that Hutchinson was not entitled to relief on this issue.

¶11 Next, Hutchinson argues that the trial court's sentence was unduly harsh because the trial court punished him for refusing to testify against his co-defendant. Despite the fact that Hutchinson's trial counsel acknowledged at the plea hearing that Hutchinson was pleading guilty "to a burglary, which is a 10-year felony," Hutchinson argues that his sentence of less than 10 years is unduly harsh because the trial court considered an improper factor – Hutchinson's refusal to testify against his co-defendant. Hutchinson asserts that the trial court failed to consider the proper sentencing factors, and instead, was materially influenced by his decision to exercise his Fifth Amendment rights. Consequently, Hutchinson concludes that the trial court erroneously exercised its sentencing discretion.

¶12 Sentencing is left to the discretion of the trial court. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character and rehabilitative needs of the offender, and the need for protection of the public. *See State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). To obtain relief on appeal, Hutchinson "must show some unreasonable or unjustified basis in the record for the sentence imposed." *State v. Borell*, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). He argues that the unreasonable or unjustified basis is provided by the fact that the trial court improperly considered his decision to exercise his Fifth Amendment right not to incriminate himself by refusing to testify against his co-defendant. *See, e.g., Williams v. State*, 79 Wis.

2d 235, 239, 255 N.W.2d 504 (1977) (trial court erroneously exercises its sentencing discretion if it is materially influenced by defendant's decision to exercise his constitutional rights). We disagree with Hutchinson's contention.

¶13 As noted, Hutchinson first raised this issue in his postconviction motion. In its decision denying Hutchinson's postconviction motion, the trial court stated that, "there is nothing in the record to support [Hutchinson's] assertion that he was sentenced to 110 months in prison for his refusal to testify against his co-defendant." Rather, the trial court found that the record revealed that Hutchinson's sentence was based "on the fact that [he] was out on bail for another burglary at the time he committed the burglary in this case; the fact that this was his third felony conviction; the specific need for deterrence; and the absolute need to protect the community." We agree.

¶14 The record does not contain a scintilla of evidence that the trial court considered Hutchinson's refusal to testify against his co-defendant when imposing his sentence. The record clearly indicates that the trial court considered the proper factors when sentencing Hutchinson. The court noted that the crime Hutchinson was charged with was a ten-year felony, and it was his third conviction; that the court was concerned with the fact that the crime was perpetrated against elderly victims, and that the trial court found it particularly egregious that Hutchinson was out on bail for another burglary when he committed this offense. Additionally, the court indicated that it considered Hutchinson's criminal history, the presentence report, his age, educational experience, employment record, cooperativeness, need for close rehabilitative control, the public's rights, and the crime's effect on the victims, which, the court indicated, was very traumatic in this case. Contrary to Hutchinson's assertions, a review of the record discloses that the trial court never discussed Hutchinson's refusal to testify against his co-defendant at sentencing.

Based on the transcript of the sentencing hearing, we are satisfied that the trial court considered the proper factors when sentencing Hutchinson. Thus, we conclude that the trial court properly exercised its sentencing discretion and, therefore, Hutchinson is not entitled to relief.³

¶15 Finally, Hutchinson argues that the trial court erred when it denied his postconviction motion without an evidentiary hearing. As noted, in his postconviction motion, Hutchinson claimed that trial counsel was ineffective for failing to argue that the prosecutor breached the plea agreement by making a recommendation as to sentencing, and that the trial court erred when it based Hutchinson's sentence on an improper factor – his refusal to testify against his co-defendant. In its decision on the postconviction motion, the trial court concluded that the record conclusively established that Hutchinson was not entitled to relief and, therefore, the trial court denied his motion without an evidentiary hearing. Hutchinson argues that the trial court erred and concludes that he was entitled to an evidentiary hearing. We disagree.

¶16 The trial court properly denied Hutchinson's postconviction motion without a hearing. If Hutchinson's postconviction motion, on its face, alleged sufficient facts which, if true, would entitle him to relief, the trial court was required to hold an evidentiary hearing. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, if Hutchinson's motion failed to allege

³ We note that the State also argues that once Hutchinson pled guilty, his Fifth Amendment right against self-incrimination ceased to exist, *see, e.g., State v. Olson*, 127 Wis. 2d 412, 428, 380 N.W.2d 375 (Ct. App. 1985), and that consequently, his refusal to testify against his co-defendant was not a right protected by the Fifth Amendment, *but see State v. Marks*, 194 Wis. 2d 79, 91, 533 N.W.2d 730 (1995) (“[T]he Fifth Amendment privilege extends beyond a guilty plea and conviction.”). However, we do not reach this issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W.2d 663 (1938) (an appellate court need only consider dispositive issues).

sufficient facts, presented only conclusory allegations, or if the record conclusively demonstrated that he was not entitled to relief, the trial court had the discretion to deny the motion without an evidentiary hearing. *See id.* at 309-10. Because we have already concluded, based on the record, that the prosecutor did not breach the plea agreement by making a recommendation regarding Hutchinson's sentence, we are satisfied that the record conclusively demonstrates that Hutchinson's trial counsel was not ineffective for failing to object when the prosecutor made the recommendation. Further, as discussed, we are satisfied that the trial court considered the proper factors in sentencing Hutchinson, and there is nothing in the record to indicate that the trial court based its sentence on Hutchinson's refusal to testify against his co-defendant. Therefore, we determine that Hutchinson's claim that the trial court based its sentence on an improper factor is unfounded and amounts to nothing more than a conclusory allegation. For these reasons, we are satisfied that the trial court properly denied Hutchinson's postconviction motion without a hearing. *See id.* Accordingly, we affirm the trial court's decision.

By the Court.—Judgment and order affirmed.

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

