COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP21-CR **Cir. Ct. No. 2013CF141**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY M. RADAJ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Gregory Radaj appeals from a judgment convicting him of four counts of burglary as party to the crime on his no contest pleas. Radaj also appeals from a postconviction order denying his motion to vacate the DNA surcharge imposed by the circuit court at sentencing, withdraw his no contest pleas

or be resentenced. We agree with the circuit court that Radaj did not establish a basis either to withdraw his no contest pleas or be resentenced. We uphold the imposition of the DNA surcharge as a proper exercise of discretion on the record before us. Therefore, we affirm.

¶2 In January 2013, Radaj committed a series of motor home burglaries in Winnebago and Lafayette counties. During Radaj's February 3, 2014 plea colloquy, the State advised that Radaj had agreed to plead no contest to four burglary counts as party to the crime with the remaining thirty-one counts dismissed and read in. With regard to sentencing, the State described the agreement as follows: the State agreed to recommend seven to eight years of initial confinement and seven to eight years of extended supervision; Radaj was free to argue. Radaj responded that the parties had discussed a joint recommendation of seven years of initial confinement. The prosecutor replied that this was not the parties' agreement, but if the parties were going to offer a joint recommendation of seven years, the State could "live with that." Radaj agreed that he understood the plea proceedings and his discussions with his attorney. The court warned Radaj that it was not bound by any sentencing recommendation and confirmed that Radaj understood the proceedings. Radaj entered his no contest pleas.

¶3 Later the same day, Radaj wrote to the circuit court about the plea hearing. He complained that he did not understand the proceedings and that his trial counsel had pressured him into entering his no contest pleas.

¶4 At Radaj's April 2014 sentencing, the State recommended seven to eight years of initial confinement and seven to eight years of extended supervision, but the State did not recommend how those sentences should be served. Radaj

argued for seven years of confinement concurrent to his Lafayette county sentences. The circuit court imposed three concurrent sentences of seven-and-one-half years of initial confinement and five years of extended supervision to be served concurrently to Radaj's Lafayette county sentences. For the fourth burglary, the court imposed a consecutive six-year sentence (three years of initial confinement and three years of extended supervision).

¶5 Postconviction, Radaj moved the circuit court to withdraw his no contest pleas, citing a March 5, 2014 letter from his trial counsel describing the February 2014 plea agreement as "a 7 year IC offer with & (sic) years concurrent from Lafayette County." As grounds for his claim that the State breached the plea agreement at sentencing, Radaj noted that at sentencing, the State recommended seven to eight years of initial confinement and seven to eight years of extended supervision and was reluctant to concede that the plea agreement called for concurrent sentences. Radaj argued that he could demonstrate a manifest injustice warranting plea withdrawal because he did not understand the plea agreement, and his counsel and the prosecutor never had a meeting of the minds on the plea agreement. In the alternative, Radaj argued that he should be resentenced because the State breached the plea agreement by recommending seven to eight years of initial confinement rather than seven years.

¶6 Without holding an evidentiary hearing, the circuit court denied Radaj's plea withdrawal and resentencing motion. The court found that the State did not oppose a concurrent sentence, that the prosecutor merely misspoke when she referred to a seven to eight-year term of initial confinement instead of a seven-year term, the court's notes from the plea hearing reflected the agreed upon seven-year recommendation, and at sentencing, the court was aware of the

recommendation. The court found that the State did not breach the plea agreement, and Radaj did not show a manifest injustice requiring plea withdrawal.

¶7 The circuit court also declined to resentence Radaj. The court had warned Radaj at the plea hearing that it was not bound by the parties' sentencing recommendation. The court imposed a combination of concurrent and consecutive sentences even though the court understood that the parties had recommended concurrent sentences.

¶8 On appeal, Radaj argues that the circuit court should have held an evidentiary hearing on his postconviction motion. We disagree. A circuit court has discretion to deny a postconviction motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We conclude that the record surrounding the entry of Radaj's pleas conclusively demonstrates that Radaj could not prevail on his claim that the State breached the plea agreement or that a manifest injustice required plea withdrawal.

¶9 "Not all conduct that deviates from the precise terms of a plea agreement constitutes a breach that warrants a remedy." ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. A breach must be "material and substantial" to warrant vacating a plea agreement. ***Id.*** Radaj bore the burden to establish that a material and substantial breach occurred. ***Id.***

¶10 The record does not establish a material and substantial breach of the plea agreement. The plea agreement was placed on the record at the plea colloquy, the plea agreement matched the agreement discussed in counsel's March 5, 2014 letter to Radaj, with the exception of how the sentences would be served. While Radaj claims that the plea agreement contemplated concurrent

sentences, the State did not contest this point at sentencing. When evaluated in light of the record, Radaj's postconviction motion did not establish that the State materially and substantially breached the plea agreement. Therefore, the circuit court did not err in denying Radaj's postconviction motion without a hearing. ***Allen***, 274 Wis. 2d 568, ¶9.

¶11 We turn to Radaj's challenge to the DNA surcharge imposed at sentencing. At the April 2014 sentencing, the circuit court confirmed that Radaj had previously given a DNA sample, waived the sample and ruled that "you have to pay the surcharge pursuant to new state law on that."

¶12 Postconviction, Radaj moved the court to vacate his WIS. STAT. § 973.046 (2013-14)[1] DNA surcharge as an ex post facto violation because he previously gave a DNA sample and the burglaries occurred in January 2013 before the law mandated a DNA surcharge for every felony conviction. ***State v. Radaj***, 2015 WI App 50, ¶¶1-5, 363 Wis. 2d 633, 866 N.W.2d 758 (discussing change in DNA surcharge law). In the case before us, Radaj argued that the surcharge was an ex post facto violation because the court viewed the surcharge as mandatory when the surcharge would have been discretionary under prior surcharge law. Radaj argued that if the court had addressed the DNA surcharge under the applicable ***Cherry***[2] discretion standard, imposing the surcharge would have been a misuse of discretion because Radaj faced a lengthy prison term and a large restitution obligation, among other considerations. The State countered that the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393.

surcharge was a permissible cost. The circuit court declined to vacate the DNA surcharge because the surcharge was a cost, not a penalty subject to ex post facto rules.

¶13 Before we address the merits of Radaj's challenge to the DNA surcharge, we must clarify the amount of the surcharge at issue. In their appellate briefs, Radaj and the State agree that the court imposed a $250 DNA surcharge for each of the four counts of conviction, or $1000 in DNA surcharges. The record does not confirm that the court imposed $1000 in DNA surcharges. The judgment of conviction for the four burglary counts shows only $250 in the "DNA Anal. Surcharge" column, and there is no reference in the body of the judgment to a surcharge imposed for each felony ($250 x 4 felonies =$1000 surcharge). In addition, the circuit court's reference to the DNA surcharge was always singular, not plural. We are bound by the record before this court. We conclude that the circuit court imposed one $250 DNA surcharge.

¶14 We turn to the merits of Radaj's challenge to the $250 DNA surcharge. We are not required to address an appellate argument in the manner in which a party has framed the issue. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). We may affirm on other grounds. ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984). If the surcharge was not mandatory under the new law, ***Radaj***, 363 Wis. 2d 633, ¶¶1-5, then the surcharge had to be the result of an exercise of discretion. ***Id.***, ¶5. "[R]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted).

¶15 We have rejected the notion that the "circuit court must explicitly describe its reasons for imposing a DNA surcharge" or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. We may examine the court's entire sentencing rationale to determine if imposition of the DNA surcharge was a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

¶16 We conclude that the circuit court's entire sentencing rationale supports a discretionary decision to impose a $250 DNA surcharge. Moreover, Radaj pled no contest to four burglary counts, and thirty-one other counts were dismissed and read in. At sentencing, Radaj admitted his involvement in the burglaries, and he did not object to restitution or seek a subsequent hearing on his ability to pay restitution. ***Id.***, ¶11. The DNA surcharge was substantially less than the restitution to which Radaj did not object. Radaj cannot show that the surcharge was unreasonable. ***Id.***, ¶12. In this sentencing environment, imposing a single DNA surcharge was a proper exercise of discretion. The court did not err in denying Radaj's motion to vacate the DNA surcharge.

By the Court.—Judgment and order affirmed.

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