

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2000

Cornelia G. Clark
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.

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.

No. 00-0345-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES DURRAH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC AMATO, Judge, and RUSSELL W. STAMPER, SR., Reserve Judge.¹ *Affirmed.*

¹ Judge Dominic Amato sentenced Durrah; Judge Russell Stamper presided over the motion to modify sentence.

¶1 CURLEY, J.² James Durrah appeals the judgment entered following his guilty pleas to two counts of misdemeanor battery and one count of criminal trespass to dwelling, contrary to WIS. STAT. §§ 940.19(1) and 943.14.³ Durrah also appeals the order denying his motion seeking a modification of his sentences. Durrah contends that two of the prosecutor's statements resulted in a violation of the plea negotiation. First, he points to a statement the prosecutor made in an earlier proceeding, stating that Durrah faced twenty-seven months incarceration rather than the nine months that the trial court mistakenly believed he faced. He couples that with the prosecutor's statement made to the trial court during the guilty plea that advised that the prosecutor was agreeing to "leave consecutive or concurrent terms up to the trial court." He contends these statements constituted an improper signal to the trial court that the State wanted consecutive terms.⁴ This court determines that there was no breach of the plea negotiation and affirms.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

⁴ This case is confusing for several reasons. First, the remedy Durrah seeks on appeal is for this court to modify his sentence. The appropriate remedy on appeal is to request the matter be remanded for resentencing. This court is satisfied that because Durrah is not seeking to withdraw his pleas, the proper remedy for the prosecutor's violation of the plea agreement, if such an event occurred, would be to remand for resentencing, and this court will treat Durrah's petition accordingly. Adding to the confusion is the fact that, although Durrah has never requested that he be allowed to withdraw his pleas, much of the State's brief is devoted to arguing against such a remedy. Finally, the State argues that Durrah appeals the postconviction decision, but has not included the postconviction decision in the file. This is incorrect. A review of the record reveals that the postconviction decision can be found at exhibit 25 in the appellate record.

I. BACKGROUND.

¶2 Durrah was charged in July 1998 with three misdemeanor counts emanating from an incident at a former girlfriend's house where he broke into his former girlfriend's house and struck her and another person. A warrant was issued for his arrest and he was apprehended in September 1998. During the pendency of these proceedings, Durrah began serving a five-year felony sentence on an unrelated matter. As a consequence, he was transferred to a Texas prison to serve his sentence. Confusion over exactly where Durrah was serving his sentence caused several adjournments of this case. During one of the earlier proceedings, the trial court inquired of the State why the State was going to the expense of bringing Durrah back from Texas when Durrah only faced a nine-month sentence. The prosecutor corrected the trial court and advised that Durrah faced three counts, each of which carried a nine-month sentence or twenty-seven months in the aggregate. Eventually Durrah was located and brought back to Wisconsin some time before his scheduled trial date of June 22, 1999.

¶3 On the trial date, Durrah's attorney conferred with the prosecutor and an agreement was reached. Durrah was required to plead guilty to the three charges in exchange for the prosecutor's agreement to recommend sentences of four to six months on each charge. At the guilty plea hearing, the State explained that it was taking no position on whether the sentences should be served consecutively or concurrently. Specifically, the prosecutor said that "the State is recommending four to six months in the House of Correction. We would leave consecutive or concurrent up to the court." Neither Durrah nor his attorney objected to the recitation of the prosecutor's recommendation. The trial court then proceeded to sentence Durrah to the maximum term of nine months on each charge, to be served consecutively to one another, and consecutive to the sentence

he was then serving. Immediately following the trial court's pronouncement of Durrah's sentences, Durrah objected and attempted to withdraw his pleas. The trial court would not permit a withdrawal of the guilty pleas.

¶4 Durrah brought a postconviction motion seeking a modification of his sentence. In the motion, Durrah claimed the prosecutor "irretrievably altered his promised recommendation" by "adding on" that the State was letting the court decide whether the sentences should be concurrent with each other or consecutive to one another and, as a result, the prosecutor "prejudic[ed] the trial court against the defendant." At the postconviction motion hearing, Durrah did not seek to withdraw his pleas; rather, he sought only a modification of his sentences to concurrent time. The motion was denied.

II. ANALYSIS.

¶5 Durrah now maintains that the prosecutor violated the plea agreement.⁵ As noted, no objection was raised at the time the prosecutor advised the trial court of the plea negotiation and it was not until the postconviction motion that Durrah claimed a prosecutorial plea negotiation violation.⁶

¶6 As noted in *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997):

⁵ Durrah's brief also suggests that his attorney may have been ineffective for failing to confer with Durrah prior to the trial date. This issue, however, was not briefed and this court declines to address it. This court will not consider arguments raised, but never really argued, by the parties. *Reiman Assocs. v. R/A Advertising*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981); cf. *State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) ("On appeal, issues raised but not briefed or argued are deemed abandoned.").

⁶ While an argument could be made that Durrah's failure to object to the prosecutor's statement constituted waiver, the State has not raised this defense and this court will proceed to address the issue briefed by the parties; i.e., whether the prosecutor breached the plea negotiation.

Whether the State violated the plea agreement is a question of law to be decided without deference to the trial court. ...

To be entitled to a remedy, the defendant must rely on the agreement and the prosecutor's breach must be material and substantial. Even an oblique variance will entitle the defendant to a remedy if it "taints" the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for.

Id. at 321 (citations and footnote omitted). In arguing that the prosecutor acted improperly and violated the plea agreement, Durrah cobbles together two of the prosecutor's statements made four months apart. In the earlier proceeding, the prosecutor's statement regarding the maximum sentences was prompted by the court's mistake. After correcting the trial court's comment that Durrah only faced nine months incarceration, the prosecutor advised the trial court that because there were three counts, Durrah actually faced twenty-seven months of incarceration. This colloquy with the court took place four months before any settlement discussion. Notwithstanding the fact that the prosecutor was, at the time, merely advising the trial court of the correct maximum exposure that Durrah faced, Durrah now claims that this earlier statement, coupled with the prosecutor's later statement at the time of his guilty pleas, concerning the neutral position taken by the State as to whether the sentences would be served concurrently or consecutively, constituted a violation of the plea agreement. Durrah argues that the two statements resulted in "the prosecutor add[ing] a 'consecutive' term consideration. The term 'consecutive' to a trial court is a 'go' sign. It is an indication that the prosecutor's recommendation, of a 4 to 6 months [sic] for the three criminal counts, includes consecutive terms."

¶7 After considering Durrah's arguments, this court is led to the conclusion that such an argument borders on the absurd. The prosecutor's earlier statement to the trial court merely corrected the mistaken belief by the judge about

the maximum sentence Durrah faced. Advising the trial court of the maximum sentence facing Durrah can hardly be considered a “signal,” as Durrah contends, that the State secretly desired consecutive sentences. First, the statement was accurate. Durrah did face twenty-seven months, not the nine months suggested by the trial court. Indeed, it was ultimately his sentence. Had the prosecutor not responded to the trial court’s misperception, it could be argued that Durrah would have been misled. However, the prosecutor corrected the problem. Further, the proceeding where the innocuous statement was made took place four months before the trial and four months prior to any negotiations.

¶8 The prosecutor’s comment at the time of the guilty plea hearing was also an accurate recitation of the parties’ agreement. The negotiation between Durrah’s attorney and the State did not include any agreement as to whether the State would argue for concurrent or consecutive incarceration. Thus, the prosecutor correctly advised the trial court that the State was taking “no position” as to whether the sentences should run concurrently or consecutively. Further, Durrah cannot claim he was expecting something different because, based upon the negotiation, Durrah had no expectation that the State would recommend either concurrent or consecutive time. Thus, the prosecutor’s statement was totally benign.

Finally, this court concludes that whether considered singly or collectively, no reasonable person could construe these innocent comments, as Durrah does, to mean that the prosecutor “intended to eliminate the four- to six-month term and encourage the trial court to order consecutive terms.”

In sum, there was no breach of the plea negotiation and Durrah could not have been misled by the statements because they were accurate. As a result, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.⁷

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁷ The judgment reflects the name of Durrah's attorney as "Dawn E. Matos Gillespie." The record, however, reveals that Durrah's attorney was actually Kristina Cervera Garcia. The clerk is directed to correct the judgment upon remand.

