COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP1567-CR **Cir. Ct. No. 2003CF663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD S. DAMMON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Richard Dammon appeals an order denying his motion for postconviction relief filed under WIS. STAT. § 974.06 (2003-04).[1] We affirm.

¶2 Dammon was convicted of one count of repeated first-degree sexual assault of the same child. The circuit court denied his postconviction motion without a hearing. A defendant is entitled to a hearing on the motion unless the motion and the files and records of the action conclusively show that the person is entitled to no relief. WIS. STAT. § 974.06(3).

¶3 Dammon first argues that the prosecutor breached the plea agreement by making a comment at sentencing to the effect that the negotiated joint recommendation may "seem too lenient." Because Dammon did not object to the comment at the time, we assess the issue in the context of ineffective assistance of counsel. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. The first step in that analysis is whether Dammon's counsel deficiently failed to object to the prosecutor's comment. This question, in turn, begins with determining whether the prosecutor's comment was a breach, such that Dammon's counsel should have objected. *See* ***id.*** We are satisfied that the record shows there was no breach of the agreement. The prosecutor's comments, read as a whole, show that the prosecutor was acknowledging what the court might have perceived as undue leniency in the recommendation. The readily apparent purpose was to persuade the court that the recommendation was, nonetheless,

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

appropriate. It is also clear from the court's comments before imposing sentence that the court understood this was the purpose for the prosecutor's discussion.

¶4 Dammon next argues that his trial counsel was ineffective regarding alleged inaccuracies in the presentence investigation (PSI) report. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Dammon's argument appears to be that certain statements by his then-wife, recounted in the PSI, about the acts constituting the crime for which Dammon was convicted were untrue. Among other assertions, Dammon asserts that his then-wife had ulterior motives and that the victim recanted. Dammon appears to be arguing that the "inaccuracy" in the PSI is the assertion that he committed the crime for which he was sentenced. The problem with this argument is that Dammon pled guilty to the charge and the court, therefore, was entitled to assume that he committed the crime. If Dammon wanted to dispute whether he committed the crime, he should have gone to trial. We see no cognizable claim of ineffective assistance in this argument.

¶5 Finally, Dammon argues that his counsel was ineffective by "allowing" Dammon to accept, as part of the plea bargain, the reading in of certain uncharged conduct with a foster child. There is no law that prevents the reading in of uncharged conduct. The decision to accept that plea bargain was Dammon's, not his attorney's. Dammon does not allege that his plea was unknowingly entered and does not otherwise present a basis for granting plea withdrawal.

By the Court.—Order affirmed.

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