COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3149-CR **Cir. Ct. No. 2008CF565**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY EDWARD REED, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Henry Edward Reed, Jr. appeals a judgment convicting him of burglary and attempted burglary. He also appeals an order denying him postconviction relief. Reed contends that he should be allowed to withdraw his guilty pleas and/or should be granted a new sentencing hearing

because: (1) his pleas were not intelligently entered; (2) the State materially and substantially breached the plea agreement; and (3) the judge who presided over his postconviction hearing should have recused himself. Because Reed has waived his first two arguments and has provided insufficient support for his third argument, we disagree and affirm.

I. BACKGROUND.

¶2 Reed was charged with three counts of burglary for incidents that occurred in January 2008. Shortly thereafter, the State filed an Information alleging these charges.

¶3 After Reed was charged and the Information was filed, Reed and the State made the following plea agreement: (1) Reed would plead guilty to count one of the Information; (2) the State would amend count two of the Information from burglary to attempted burglary and Reed would plead guilty to the amended charge; (3) the State would dismiss and read in count three of the Information; (4) at sentencing, the State would not make any specific recommendation but would instead leave the sentence up to the trial court's discretion.

¶4 At the plea hearing, the parties informed the trial court of the plea agreement; the trial court then conducted a plea colloquy with Reed. The colloquy included a discussion of the "Plea Questionnaire/Waiver of Rights" form that Reed had signed prior to the hearing. A portion of this form stated:

> I understand that if any charges are read-in as part of a plea agreement they have the following effects:
>
> ● Sentencing – although the judge may consider read-in charges when imposing [the] sentence, the maximum penalty will not be increased.

> ● Restitution – I may be required to pay restitution on any read-in charges.
>
> ● Future prosecution – the State may not prosecute me for any read-in charges.

Reed not only acknowledged that he signed the form during the colloquy, but also told the trial court that his attorney had explained the form to him and that he understood everything on it. When the colloquy concluded, the trial court accepted Reed's plea and found him guilty of one count of burglary as well as one count of attempted burglary as amended in the Information pursuant to the plea agreement.

¶5 Before the plea hearing ended, the State introduced three additional uncharged incidents for which it wanted Reed to pay restitution. Reed's attorney did not object to the State's using these three offenses for restitution purposes. The trial court decided that these uncharged offenses were to be read in for restitution purposes, and then adjourned the case for sentencing.

¶6 At Reed's sentencing hearing, the district attorney made a comment that violated the part of the plea agreement whereby the State agreed not to make any specific recommendation regarding Reed's sentence. Specifically, the assistant district attorney said, "I think the only appropriate response [in this case] is prison, and it's really just a question of how long should Mr. Reed go to prison."

¶7 Almost immediately thereafter, the assistant district attorney withdrew his comment:

> Well, I may have misspoken, Judge. [Reed's attorney] informs me that my notes here are incorrect, and I'm not making any specific recommendation.
>
> I'd like to withdraw those comments. Perhaps[] we should just adjourn this whole thing and another DA and

> another judge should hear this … It just seems to me that's gonna be safer at this point, for which I apologize.

¶8 Despite the fact that the assistant district attorney had breached the plea agreement, Reed did not object or move for a new sentencing hearing. Instead, he elected to go forward with sentencing. Reed's attorney explained Reed's decision to the trial court:

> [Reed is] aware of the fact that he's gonna get prison time for this … He's indicated that he would like to go forward today. We are going to be acknowledging that this is a prison case, so I don't believe that the comments thus far that the DA's made are going to [a]ffect it.

¶9 The trial court then discussed the matter with Reed directly:

> THE COURT: The district attorney and your lawyer cut a deal, and … the deal was that the district attorney was not supposed to tell me anything other than comment on the crime but not give me an idea of whether I should sentence you to prison, put you on probation, or put you in jail.
>
> The district attorney has violated that agreement because he said I should send you to prison. If you want, I'll recuse myself right now; and we'll give this to another judge; and there will be a different district attorney and that district attorney won't mention the word "prison" or I can handle the sentencing today. What do you want to do?
>
> REED: I think it's been going on long enough. I think it should just be settled today.
>
> THE COURT: You understand if you want the adjournment before a different judge, I'd give it to you?
>
> REED: Yes.
>
> THE COURT: Anybody promise you anything to get you to do that?
>
> REED: No.

> THE COURT: Anybody threaten you in any way to get you to agree that I should do the sentencing?
>
> REED: No.

¶10 At the sentencing hearing, the trial court also confirmed that Reed understood the potential implications of the uncharged, read-in offenses that the State presented at the plea hearing:

> THE COURT: You understand that the read ins that aren't charged, you can never be charged with them; and I can consider them [for] purposes of sentencing? Do you understand that?
>
> REED: Now I do.
>
> THE COURT: You understand that in addition to the burglary that you pled guilty to and the attempted burglary that you pled guilty to, I am going to consider three other burglaries, the one that's on this complaint and two that are not and a receiving stolen property in deciding what to sentence you? I can't increase the maximums that you're looking at. The maximum that you're looking at on the burglary and the attempt burglary are 18 and three quarters years in prison. Okay.
>
> REED: (Nods head.)
>
> THE COURT: And that … I can consider them in deciding what to do with you. You can never be charged with those three burglaries and the receiving stolen property; do you understand that?
>
> REED: Now I do, yes.
>
> THE COURT: Okay … I'll make the same offer to you again. If you feel this record is so messed up at this point that you don't want me to handle the sentencing, I'll pass the case 'cause I got to recuse myself on the restitution anyway or if you want me to go ahead, I'll go ahead.
>
> REED: I think—I think it's just been … It's been going on a year. I think it should be resolved.
>
> THE COURT: You want to go ahead today?
>
> REED: Yes.

¶11 The trial court sentenced Reed, and the matter was adjourned for a restitution hearing. Reed's restitution hearing was heard by a different judge because the judge who had sentenced Reed had a personal matter with American Family Insurance, which was requesting restitution from Reed, and had consequently recused himself.

¶12 After the restitution hearing, Reed filed a postconviction motion requesting the court grant him a new plea hearing and new sentencing hearing. For the postconviction motion, Reed's case was transferred back to the judge who had sentenced him—in other words, the same judge who had recused himself from the restitution hearing. The trial court denied Reed's postconviction motion and Reed now appeals.

II. ANALYSIS.

¶13 Reed presents three bases for appeal. He first argues that because he was not aware of the potential consequences of the uncharged, read-in offenses, he did not intelligently enter into his pleas and he is therefore allowed to withdraw them as a matter of right. Second, Reed argues that the State materially and substantially breached the plea agreement at the sentencing hearing, which automatically entitles him to a new sentencing hearing. Third, Reed argues that the judge who sentenced him should have recused himself from the case when it was transferred back to him for the postconviction hearing. We address Reed's arguments in turn.

A. Reed waived his right to argue that he did not intelligently enter his pleas.

¶14 Reed first argues that the trial court erred in concluding that he waived his right to argue that his plea was not intelligently entered because he did

not understand the potential impact that the uncharged, read-in offenses might have on his sentence. This is a question of law that we review *de novo*. *See* ***State v. Kelty***, 2006 WI 101, ¶13, 294 Wis. 2d 62, 716 N.W.2d 886 (Questions involving waiver are questions of law reviewed *de novo*.).

¶15 The only evidence Reed cites to support his contention is the trial court's failure to explicitly discuss the potential impact of the read-ins at the plea hearing.[1] According to Reed, this omission by the trial court constitutes *prima facie* evidence that he did not understand his plea, and he is consequently entitled to withdraw it as a matter of right. *See, e.g.*, ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (A defendant is entitled to an evidentiary hearing if he or she makes a *prima facie* showing that the court accepted the plea in violation of WIS. STAT. § 971.08 or other mandatory procedures, and alleges that he or she did not know or understand the information that should have been produced at the plea colloquy.).

¶16 We not only disagree with Reed's analysis, but we also conclude that he waived his ability to argue that he did not intelligently enter his plea.

¶17 We first note that the trial court's decision not to explain the effect of the read-ins does not constitute *prima facie* evidence that Reed did not intelligently enter his plea in this case because the trial court confirmed that Reed understood the consequences of the read-ins via the discussion of the "Plea

[1] Reed also cites as evidence the fact that he alleged that "his pleas were not intelligently made because he did not understand the consequences of three un-charged read-in offenses" in "the first page of his moving papers." Reed fails to identify these moving papers and fails to explain how this conclusory allegation evinces a lack of understanding. Because this argument is undeveloped, we will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review inadequately developed arguments).

Questionnaire/Waiver of Rights" form. Specifically, the trial court elicited testimony that Reed had not only read the form, understood everything on the form, and signed it, but also that he had gone over the form with his attorney prior to the plea hearing. As we explained in ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987), this procedure more than adequately guarantees that a defendant has intelligently entered into a plea agreement:

> The defendant appears to claim … that there is something inherently wrong about using a form—that its employment undermines the trial court's ability to accurately assess the defendant's understanding of the rights being waived. We reject that notion.
>
> People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting. A trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one.

See ***id.*** at 827-28.

¶18 Moreover, the trial court's use of the "Plea Questionnaire/Waiver of Rights" form to ensure Reed's understanding of the read-ins is not, as Reed implies, inconsistent with the dicta he cites from ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, which states that a trial court should advise defendants of the effects of read-in charges. *See* ***id.***, ¶5. In Reed's case, the trial court *did* advise Reed of the effects of the read-ins; the judge did so via a plea colloquy which confirmed that Reed understood the "Plea Questionnaire/Waiver of Rights" form—a form that explained: (1) that the judge may consider read-in charges when imposing the sentence; (2) that Reed may be required to pay

restitution on any read-in charges; and (3) that the State may not prosecute Reed for any read-in charges.

¶19 Second, we conclude that Reed waived any argument that he did not intelligently enter into his plea when he affirmed his understanding of the read-ins at sentencing. At sentencing, the trial court clearly and completely explained the potential impact of the read-ins, and after the court did so, Reed not only stated that he understood the impact of the read-ins, but also that he wanted to continue with sentencing:

> THE COURT: You understand that the read ins that aren't charged, you can never be charged with them; and I can consider them in purposes of sentencing? Do you understand that?
>
> REED: Now I do.
>
> THE COURT: You understand that in addition to the burglary that you pled guilty to and the attempted burglary that you pled guilty to, I am going to consider three other burglaries, the one that's on this complaint and two that are not and a receiving stolen property in deciding what to sentence you? I can't increase the maximums that you're looking at. The maximum that you're looking at on the burglary and the attempt burglary are 18 and three quarters years in prison. Okay.
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> REED: (Nods head.)
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> THE COURT: And that … I can consider them in deciding what to do with you. You can never be charged with those three burglaries and the receiving stolen property; do you understand that?
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> REED: Now I do, yes.
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> THE COURT: Okay … I'll make the same offer to you again. If you feel this record is so messed up at this point that you don't want me to handle the sentencing, I'll pass the case 'cause I got to recuse myself on the restitution anyway or if you want me to go ahead, I'll go ahead.

> REED: I think—I think it's just been … It's been going on a year. I think it should be resolved.
>
> THE COURT: You want to go ahead today?
>
> REED: Yes.

Reed does not argue that he did not understand the effect of the read-ins at the sentencing hearing. He merely argues that he did not understand at the plea hearing.

¶20 We find Reed's case to closely parallel ***State v. Paske***, 121 Wis. 2d 471, 360 N.W.2d 695 (Ct. App. 1984), in which we held that a defendant waived his right to object to a plea by "expressly choosing to proceed with the sentencing after being made aware of the change in the prosecutor's sentencing recommendation." ***Id.*** at 472. In ***Paske***, the defendant entered into a plea agreement whereby the district attorney agreed to recommend a sentence for a term not to exceed eleven years in return for the defendant's guilty plea to seventeen felonies and one misdemeanor. ***Id.*** While incarcerated and awaiting sentencing, the defendant conspired with other inmates to escape from jail. ***Id.*** At the sentencing proceeding, but prior to the imposition of the sentences themselves, the district attorney stated that he would not stand by his original recommendation, but would instead make no recommendation on the original eighteen counts. ***Id.*** at 473. After the district attorney stated that he would no longer make any recommendation, the defendant's attorney acknowledged that the defendant had the right to withdraw his pleas. ***Id.*** Nevertheless, the defendant elected to continue on with sentencing. ***Id.*** When the defendant later argued that he should be allowed to withdraw his plea, we disagreed, holding that the defendant had waived his right to do so:

> In the instant case … [the defendant's] no contest pleas were reaffirmed with full prior knowledge of the [S]tate's altered position on sentencing. [The defendant's] reaffirmation of the pleas further spurned the [S]tate's thrice conveyed offer (twice before the sentencing

> proceeding and once at the sentencing proceeding itself) not to oppose a request to withdraw the pleas.

Id. at 474.

¶21 As in ***Paske***, we note that Reed had full knowledge of the effect of the read-ins when he reaffirmed his decision to continue with sentencing. By opting to move forward with sentencing after explicitly stating that he understood the effects of the read-ins, Reed waived his right to argue that he did not intelligently enter his plea.

B. Read waived his right to object to any error that may have resulted from the district attorney's breach of the plea agreement.

¶22 Reed next argues that the trial court erred in concluding that he waived his right to object to the State's breach of the plea agreement. We review this question *de novo*. *See* ***Kelty***, 294 Wis. 2d 62, ¶13; *see also* ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475 (whether a defendant has strategically waived an objection is a question of law subject to *de novo* review).

¶23 Reed contends, without legal support, that the doctrine of waiver does not apply to situations where a defendant elects to continue with sentencing after the State breaches a plea agreement. He argues that we should reverse the trial court's ruling as a matter of fundamental fairness.

¶24 In fact, this court has, consistent with principles of fairness, held that a defendant waives the right to postconviction and appellate review of the issue of whether the State breached a plea agreement when he or she fails to object at sentencing. *See* ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). The facts of ***Smith*** so closely parallel Reed's case that we repeat them in their entirety here:

> Smith entered his plea of no contest pursuant to a plea agreement with the district attorney whereby the district attorney agreed to refrain from making a sentencing recommendation. At the sentencing hearing, prior to imposition of the sentence, the district attorney made statements which Smith now argues constituted a breach of the plea agreement. Smith did not object to the statements at the sentencing hearing. Now, on motion for postconviction relief, he raises for the first time his claim that the district attorney breached the plea agreement.

Id. at 740-41.

¶25 Also applicable here is our analysis in ***Smith*** concerning why the defendant waived the right to object to the breach of plea agreement:

> The supreme court has held that the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant. Here Smith does not dispute that at sentencing he was fully aware that the plea agreement was that the district attorney would refrain from making a sentencing recommendation. He and his attorney were present at sentencing and had the opportunity to make the same objection Smith now raises for the first time on a motion for postconviction relief. Smith had the opportunity, but he did not object. We conclude that by failing to object to the prosecutor's statements on the ground of the breached plea agreement when the basis for that objection was known, Smith has waived his right of review on that issue.

Id. at 741 (citations and footnote omitted).

¶26 As in ***Smith***, Reed had the benefit of having his attorney present when the State breached the agreement. *See* ***id.*** Indeed, contrary to what Reed argues, the record shows that he had time to consult with his attorney before deciding to continue sentencing. Also in keeping with ***Smith***, Reed's trial counsel specifically stated that the State's comments did not warrant a new sentencing hearing because Reed knew and understood that this was a "prison case." *See* ***id.***

¶27 Additionally, in the instant case the trial court talked with Reed personally, and confirmed several times that Reed wanted to continue with sentencing despite the State's breach:

> THE COURT: The district attorney and your lawyer cut a deal, and … the deal was that the district attorney was not supposed to tell me anything other than comment on the crime but not give me an idea of whether I should sentence you to prison, put you on probation, or put you in jail.
>
> The district attorney has violated that agreement because he said I should send you to prison. If you want, I'll recuse myself right now; and we'll give this to another judge; and there will be a different district attorney and that district attorney won't mention the word "prison" or I can handle the sentencing today. What do you want to do?
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> REED: I think it's been going on long enough. I think it should just be settled today.
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> THE COURT: You understand if you want the adjournment before a different judge, I'd give it to you?
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> REED: Yes.
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> THE COURT: Anybody promise you anything to get you to do that?
>
> REED: No.
>
> THE COURT: Anybody threaten you in any way to get you to agree that I should do the sentencing?
>
> REED: No.

Thus, we find, as we did in ***Smith***, that, by electing to continue with sentencing after acknowledging that the State breached the plea agreement, Reed has waived his right to argue that the State's breach constitutes reversible error. *See* ***id.***

C. The trial court did not err in deciding not to recuse himself from Reed's postconviction motion.

¶28 Reed's third argument on appeal is that the trial court erred in deciding not to recuse himself from the postconviction motion. Reed provides no factual or legal basis for his contention; he merely argues, "once the [c]ourt recused itself [from the restitution hearing], it should not have had any further connection with the case." Because Reed offers no basis for this argument, we decline to consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). The trial court's recusal was limited only to the restitution hearing and was prompted by a conflict the judge had with an insurance company seeking restitution. No conflict existed with respect to Reed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.