COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-2362-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE M. SAKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Bruce M. Saks appeals from a judgment of conviction of five counts of party to the crime of burglary and from an order denying his postconviction motions. We reject his claims that the prosecution breached the plea agreement in its sentencing remarks and that his plea was invalid. We affirm the judgment and the order.

Saks was charged as a habitual criminal with the unlawful entry into five different homes on five different occasions. A plea agreement was reached whereby in exchange for Saks' no contest plea the penalty enhancer on each count would be dismissed. The prosecution agreed that at sentencing it would recommend prison but be silent as to whether the sentences should be imposed concurrently or consecutively. Saks' sentencing exposure exceeded 120 years.[1] Saks was sentenced to five years on each count to be served consecutive to each other and consecutive to a prior prison sentence imposed in another matter.

Saks argues that the prosecution breached its agreement to remain silent on whether the sentences should be imposed concurrently or consecutively. He points to the prosecutor's comment that, "Mr. Saks is a career criminal in the truest sense of the word .... [T]he only appropriate place for this defendant to spend the rest of his life or the rest of—or a great deal of his life" is prison. Saks contends that these comments, coupled with the prosecution's rendition of Saks' criminal history, violated the spirit of the plea agreement and improperly cast doubt on the prosecutor's sentencing recommendation. *See* ***State v. Wills,*** 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (Ct. App. 1994), *aff'd*, 193 Wis.2d 273, 533 N.W.2d 165 (1995).

When viewed in context, we do not read the prosecutor's sentencing remarks to implicitly suggest that the court impose consecutive sentences. Indeed, the prosecutor stated that he was not specifying whether the sentences should run concurrently or consecutively. By doing so, Saks got the benefit of his plea

[1] Three counts charged that after entering the dwelling, Saks or his codefendant armed himself. A forty-year maximum applied. *See* §§ 939.50(3)(b) and 943.10(2)(b), STATS.

bargain. He was able to argue to the sentencing court that the "State took no opposition to the court running the sentences concurrent."

Any reference to the need to keep Saks in prison for a long time referred only to the length of sentences, something the prosecution was free to argue. Moreover, Saks had already been sentenced to sixty-seven years in another case. The prosecution's comment that Saks spend a great deal or the rest of his life in prison was merely bespeaking the reality of the situation.[2]

We summarily reject Saks' contention that the prosecution violated the plea agreement by presenting false and inflammatory information. The information Saks alleges to be false was not objected to. Nor would an objection have been appropriate. Information that Saks' codefendant had armed himself during one of the burglaries and pointed the gun at a witness was relevant to the circumstances of the crime.[3] That Saks may have threatened his codefendant for giving testimony against Saks, including Saks' vehement denial that he made threats, was information the court could consider regarding Saks' character. *See* ***Elias v. State,*** 93 Wis.2d 278, 284, 286 N.W.2d 559, 562 (1980).

Saks argues that his no contest plea was invalid because the trial court failed to ascertain whether he had an understanding of the nature of the charges. A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***State v. Booth,*** 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987). Where, as here, the defendant contends that the trial court did not comply

[2] Saks was forty-eight years old at the time of sentencing.

[3] Saks has not demonstrated that the information was false.

with the mandates of § 971.08, STATS., in accepting the plea, the defendant must first make a prima facie showing that his or her plea was not accepted in conformance with the statutory procedures. *See* ***State v. Hansen,*** 168 Wis.2d 749, 754-55, 485 N.W.2d 74, 76-77 (Ct. App. 1992). If that threshold is met and the defendant alleges that he or she lacked an understanding of the elements of the offense, the burden shifts to the State to show by clear and convincing evidence that, despite the inadequate plea colloquy, the defendant's plea was knowingly, voluntarily and intelligently entered. *See* ***id.***

Saks' contention that the trial court never summarized the elements of the offense or asked defense counsel whether he had explained the elements is facially appealing.[4] It is true that the trial court did not specifically tell Saks that it was going to explain the elements of the offense and that trial counsel was not asked whether he explained these elements to Saks. The waiver of rights form Saks executed did not list the elements of the offense. However, at the beginning of the plea hearing the trial court read the criminal information. The information alleged that Saks did "intentionally enter a dwelling without the consent of the person in lawful possession thereof." Saks heard this language five times. When asked if he understood the nature of the charges, Saks answered affirmatively. This is not an instance where the charges were referred to generically as "burglary." Reading the information, with the elements of the offense strung out, informed Saks of the nature of the charge. *See* ***State v. Krause,*** 161 Wis.2d 919, 929, 469 N.W.2d 241, 245 (Ct. App. 1991) (trial court may summarize elements by reading from the applicable statute). We conclude that Saks did not make a

[4] *See* ***State v. Krause,*** 161 Wis.2d 919, 929-30, 469 N.W.2d 241, 245-46 (Ct. App. 1991) (explaining three methods trial courts may utilize to determine if the defendant understands the charge).

prima facie showing that the trial court failed to ascertain that he possessed an understanding of the charges.

Even if the burden shifted to the State or Saks' affirmation that he understood is considered merely perfunctory, the record establishes that Saks had knowledge of the elements of the offense.[5] Just prior to these charges being filed, Saks had gone through a jury trial which resulted in prior convictions for burglary.

Further, Saks did not demonstrate at the plea hearing any equivocation in his responses to having an understanding. For this reason, we summarily reject Saks' additional claim that his plea was involuntary because his ability to understand the entire proceeding was impaired.[6] We cannot impose a duty on the trial court to probe deeper when a defendant gives coherent and affirmative acknowledgment of an understanding and there is not one inkling that a defendant is confused. Saks' verbal responses were consistent with the written waiver of rights form Saks executed.

We cannot conclude that a manifest injustice will result if Saks' plea stands. *See* ***Booth,*** 142 Wis.2d at 235, 418 N.W.2d at 21. The trial court properly exercised its discretion in denying Saks' motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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

[5] Knowledge of the elements of the offense is distinguished from knowledge that the offenses occurred. Saks' claim that he did not, because of heavy drug use, remember committing the offenses has no bearing.

[6] In his motion to withdraw his plea, Saks alleged that he was confused, misinformed and depressed at the time of the plea hearing and that these conditions interfered with his ability to understand the proceeding and knowingly enter his plea.