

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 1999

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. 98-0466-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERRY MONROE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK and STEVEN D. EBERT, Judges. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Perry Monroe, Jr. appeals from a judgment convicting him of delivering cocaine, as a repeat drug offender. He also appeals from an order denying him postconviction relief. The issues he raises concern the three-year prison sentence he received. We reject his arguments and affirm.

The State charged Monroe with four felony drug counts. Pursuant to a plea bargain, Monroe pled no contest to one count of delivering cocaine as a repeat drug offender. In exchange for the plea, the State dismissed and read in a second delivery count, and dismissed the other counts. The State also agreed to recommend a prison term of no longer than four years.

At the sentencing hearing, the State breached the plea agreement by recommending a five-year prison term. The presentence investigation report recommended probation. The trial court rejected probation because it would unduly depreciate the seriousness of dealing in cocaine, and would not adequately protect the community. Additionally, the trial court determined that Monroe's spotty employment record precluded probation, as did several unanswered questions concerning his sources of income. In the trial court's view, the fact that Monroe's spending substantially exceeded his employment income, and that of his live-in girlfriend, suggested illicit activities. The trial court ordered a three-year prison term.

Monroe subsequently moved for a reduced sentence on the grounds that the trial court sentenced him on inaccurate information and unsupported inferences, and that the State's recommended sentence breached the plea agreement, as did its argument focusing on the facts surrounding the dismissed charges.

At the hearing on his motion, Monroe testified that his excess income came from gifts or advances from a business partner, totaling \$20,000 over nine years. He further contended that he was not a sophisticated drug dealer, but a user who was caught sharing cocaine with his friends. The State conceded it breached the plea agreement and agreed that Monroe should be resentenced.

On resentencing, the trial court rejected Monroe's arguments for a reduced sentence, stating:

So to conclude and very briefly summarize, the additional charge against the defendant was not a factor in this case. The actual economic condition of the defendant is not a factor in this case of any significance in conjunction with the sentencing. There was never any implication or statement by the Court that I considered the defendant to be a sophisticated drug dealer.

The bottom line is the Court considered him as a dealer based upon the fact that he delivered and that is the basis for the sentence in this case.

The trial court again sentenced Monroe to a three-year prison term.

After resentencing, Monroe once again sought postconviction relief, restating his argument that the trial court sentenced him on inaccurate information and inferences, and also contending that the State's argument on resentencing, if not its recommendation, violated the plea agreement. The trial court, with a different judge presiding, denied the motion, resulting in this appeal. Monroe now contends that the trial court wrongly characterized him as a drug dealer when the offense of conviction and the read-in offense both involved his gift of cocaine to others; that the trial court wrongly inferred illicit activities from the facts concerning Monroe's business dealings; and that the State's sentencing argument focused on other acts by Monroe as opposed to the charged and read-in offenses, in violation of the plea bargain.

Monroe has no factual basis to contend that the trial court sentenced him on erroneous information. Monroe contends that the trial court erroneously considered him a drug dealer for purposes of sentencing, using Monroe's definition of "drug dealer" as one who regularly sells illegal drugs for cash. However, the court expressly noted at resentencing that it equated "delivery" with

“dealing,” and delivering drugs, although perhaps without charge, is what Monroe concedes he did. The court also expressly acknowledged that Monroe was not a “sophisticated” dealer of drugs, and was not sentenced as such. Although Monroe finds those explanations unconvincing, and urges that we reject them, we cannot. We do not go beyond the trial court’s statements on the record to speculate as to any other reasons it may have had. *See State v. Thompson*, 146 Wis.2d 554, 566-67, 431 N.W.2d 716, 721 (Ct. App. 1988).

Monroe next contends that the trial court erroneously and prejudicially inferred illicit activities from his legitimate business dealings. The trial court expressly denied that those dealings, or any inferences from them, were a significant factor in sentencing. Again, we must accept that statement. *Id.*

Additionally, we conclude that the State did not breach the plea agreement through its argument at the resentencing. A defendant may seek a remedy based on a prosecutor’s material and substantial breach of a plea agreement. *State v. Bangert*, 131 Wis.2d 246, 289, 389 N.W.2d 12, 32 (1986). A prosecutor has a duty to deal in good faith and use his or her best efforts to implement the agreement. *State v. Wills*, 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (1994). Here, Monroe contends that the prosecuting attorney did not act in good faith when she argued facts suggesting that Monroe dealt drugs for money on other occasions, although charged here with delivering them as a gift. However, the plea agreement in this case provided that the parties were free to argue Monroe’s sentence, with the State capping its recommendation at four years. That is what the State did at resentencing. Monroe cites no authority for the proposition that under those terms the State could not in good faith argue facts concerning Monroe’s character and actions that went beyond the allegations in the complaint.

By the Court.—Judgment and order affirmed.

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

