

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 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. 00-0132-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. NEUMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Jeffrey Neuman appeals from a judgment convicting him of second-offense possession of less than five grams of cocaine with intent to deliver it. He also appeals from an order denying postconviction relief. He contends that he is entitled to withdraw his plea or to obtain a modified

prison sentence because the State breached his plea agreement. We conclude that he is not so entitled and therefore affirm.

¶2 Neuman's plea agreement, stipulated to in writing and presented to the trial court on the record, provided that Neuman would plead guilty to the possession charge in exchange for the dismissal of four other counts. The agreement further stipulated that the parties would jointly recommend a seven-year prison term.

¶3 At the plea hearing, counsel for Neuman asked the court to recommend in the judgment that Neuman serve his sentence in a Wisconsin prison due to compelling family reasons. The court replied, "I believe that anything that a sentencing judge says in regards to that is simply a recommendation. I don't believe that it is binding on the Department of Corrections." Counsel replied "Understood. Understood. It's not binding." The court then agreed to make the requested recommendation but stated again that it was not binding. In response to the court's question, the prosecutor responded, "I don't have any objection to the request for a recommendation by the Court, your Honor." Consequently, Neuman's judgment of conviction "recommends" that "the defendant remain in the State of Wisconsin during his prison sentence due to his family situation."

¶4 Notwithstanding the trial court's recommendation, the Department of Corrections (DOC) recommended that Neuman be transferred out of state. He then filed for postconviction relief, asserting that the transfer breached the plea agreement and was a new factor justifying a modified sentence. The trial court denied relief, resulting in this appeal. Neuman was transferred to a prison in Duluth during the appeal.

¶5 The trial court properly denied postconviction relief. There was no breach of the plea agreement because the State never agreed to a binding provision that Neuman complete his sentence in Wisconsin. Nor could Neuman reasonably have believed that such an agreement existed. The trial court twice informed Neuman that the requested recommendation would not bind the DOC. Neuman's counsel affirmatively agreed that it was not binding. The prosecutor also labeled it a recommendation only. Neuman was present and sought no clarification.

¶6 For the same reason, Neuman cannot reasonably contend that his transfer is a new factor justifying a modified sentence. A new factor is one unknown to the parties or the court at the time of sentencing. *See State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). As noted, the DOC's authority to transfer Neuman despite the court's recommendation was explicitly acknowledged and understood at the sentencing hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

