COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

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. 00-3101-CR
00-3102-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANK J. SACKATOOK, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Frank Sackatook, Jr., appeals judgments convicting him of first-degree sexual assault of a child and burglary. He also appeals an order denying his motion to withdraw his no contest pleas. We conclude that the trial court properly denied the motion to withdraw the no contest pleas without a hearing. However, the judgments contain a clerical error in that they do not reflect the trial court's oral ruling granting Sackatook credit for pretrial jail time. In addition, both judgments require Sackatook to submit a DNA sample and pay a $250 DNA surcharge. We conclude that the record does not demonstrate that the trial court exercised its discretion when it ordered the DNA test and surcharge on the burglary conviction. Therefore, we reverse those parts of the judgments that fail to give credit for jail time and that impose the DNA test and surcharge on the burglary conviction.

¶2 Sackatook pled no contest to the sexual assault and burglary charges. He argues that the court did not adequately inform him of his right to a unanimous verdict. The record shows that the trial court informed Sackatook that the prosecutor would have to prove the charges beyond a reasonable doubt and "if we had a jury deciding the case, everybody on the jury would have to believe that you're guilty before you could be found guilty." That statement not only informed Sackatook of his right to a unanimous jury, it did so in language calculated to be more easily understood by most people. Because Sackatook's motion does not make a prima facie showing that the plea colloquy was defective, the trial court properly denied the motion without a hearing. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶3 Both of the judgments of conviction allow "zero days" sentence credit under WIS. STAT. § 973.155.[1] The transcript of the sentencing hearing, however, shows that the trial court credited Sackatook with eighty-four days of sentence credit. On remand, the court should modify the judgments of conviction to reflect the court's oral pronouncement at sentencing. *See* ***State v. Prihoda***, 2000 WI 123, ¶24, 239 Wis. 2d 244, 257, 618 N.W.2d 857.

¶4 Finally, the State concedes that the trial court did not exercise its discretion when it ordered a DNA sample and surcharge on the burglary case as well as the sexual assault case. The DNA sample and surcharge were required for the sexual assault but were left to the trial court's discretion on the burglary charge. *See* WIS. STAT. § 973.047(1)(b) (1997-98).[2] The sentencing transcript shows that the prosecutor asked for a DNA sample as a condition of probation in the burglary case, and the trial court stated that it would follow the prosecutor's recommendation. The court did not explain why another biological specimen was necessary inasmuch as the specimen provided as a result of the sexual assault conviction would satisfy the State's need for a DNA database. Because the trial court did not exercise its discretion on the record, we reverse that part of the judgment in 99-CF-151, and remand the cause for redetermination of whether Sackatook must provide an additional DNA sample and pay the second surcharge.

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

[2] The statute has since been modified so that the only condition for ordering a DNA surcharge is entry of a judgment of conviction in a felony case. *See* WIS. STAT. § 973.046(1g); 1999 Wis. Act 9 § 3202(k), (l), (m), and (p).

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded.

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