

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP1203-CR

Cir. Ct. No. 2006CF4910

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. ANDERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and CARL ASHLEY, Judges.¹
Affirmed.

Before Fine, Kessler and Brennan, JJ.

¹ The Honorable M. Joseph Donald entered the judgment of conviction and imposed sentence. The Honorable Carl Ashley entered the order denying Andersen's postconviction motion.

¶1 PER CURIAM. James A. Andersen appeals from a judgment of conviction, entered upon his guilty plea, for two counts of delivery of cocaine, and from an order denying his motion for postconviction relief. Andersen asserts the court's plea colloquy was inadequate and, therefore, he was entitled to an evidentiary hearing on his motion to withdraw his plea. He also argues his sentence was excessive. We conclude the colloquy was adequate, Andersen has failed to show he is entitled to a hearing on his motion for withdrawal, and the trial court appropriately exercised its sentencing discretion. We therefore affirm the judgment and order.

BACKGROUND

¶2 In April 2006, Andersen was charged with two counts of delivery of cocaine, greater than fifteen grams but less than forty grams, for events occurring on two separate days. Each charge carried a maximum imprisonment term of twenty-five years. In exchange for Andersen pleading other than not guilty, the State offered to recommend a sentence of two years' imprisonment plus two years' extended supervision. Andersen rejected the offer and elected to proceed to trial. After two days, at the close of the State's case, Andersen entered a guilty plea to both original counts, with "both sides free to argue."

¶3 At sentencing, the State recommended a total of thirty years' imprisonment. Andersen requested one to two years' initial confinement and two years' extended supervision, imposed and stayed with three years' probation, similar to the presentence investigation's recommendation. The court sentenced Andersen to five years' initial confinement and ten years' extended supervision on each count, to be served consecutively.

¶4 Andersen moved to withdraw his plea, arguing he “did not understand that the State would be allowed to argue for 30 years of incarceration.” Alternatively, he sought resentencing, arguing the sentences were excessive and that consecutive sentences were unwarranted. The court denied the motion after briefing but without a hearing, stating that Andersen was aware of the maximum penalties for each count and knew the State could recommend any amount of prison time. Thus, Andersen had not shown his plea was anything but knowing, intelligent, and voluntary. The court also stated that sentencing discretion had been properly exercised.

DISCUSSION

I. The Plea

¶5 Plea withdrawal after sentencing is permitted only if necessary to correct a manifest injustice. See *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). A plea that is not knowing, intelligent, and voluntary is a manifest injustice. *Id.* To warrant an evidentiary hearing on a plea withdrawal motion, premised on an invalid plea, the defendant must satisfy the requirements of *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 2 (1986), of *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). A defendant invokes *Bangert* when alleging the plea is invalid because the colloquy was defective and *Nelson/Bentley* when alleging the plea is invalid because of a factor extrinsic to the colloquy. *State v. Howell*, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48.

¶6 Andersen first attacks his plea by invoking *Bangert*. He claims that *State v. Hampton*, 2004 WI 107, ¶¶31-32, 274 Wis. 2d 379, 683 N.W.2d 14, “makes clear that ascertaining the defendant’s understating of a plea comes within

the duties of a trial court as outlined” in *Bangert*. Thus, Andersen asserts, the court was obligated to engage in “questioning of the defendant to ascertain if he understood what the language ‘both sides were free to argue’ entailed, or what they were free to argue.” Andersen’s reading of *Hampton* is too broad.

¶7 *Hampton* recommends that a court not accept a guilty or no contest plea unless it ascertains whether the plea is the result of plea discussions and an agreement. This is consistent with *Bangert*’s requirement the court ascertain whether promises have been made to the defendant. See *Hampton*, 274 Wis. 2d 379, ¶31; *Bangert*, 131 Wis. 2d at 262. *Hampton* also requires that if a court is aware a plea is the result of negotiations, it must ask about the terms of the agreement. *Hampton*, 274 Wis. 2d 379, ¶32.

¶8 Here, the court asked whether there had been negotiations in the matter. The State informed the court there had been none, and that Andersen would be pleading to the original charges and “both are free to argue.”² Once aware of those “terms,” the court asked both trial counsel and Andersen personally whether this was their understanding of the agreement as well. Nothing in *Hampton* requires the court to engage the defendant to see if he understands what he just confirmed he understands.³ If a plea is precipitated by an agreement between the parties, *Hampton* only requires the court to advise the defendant the court is not bound by that agreement. *Id.*, ¶2. Because the court had no duty to

² Andersen attempted to advise the court at sentencing that there had been earlier plea negotiations; however, those negotiations were essentially nullified by the trial and did not directly induce the plea Andersen actually entered.

³ The court in *State v. Hampton*, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14 did take steps to clarify with the defendant that he understood the State’s recommendation, but in that case, the State had actually offered two scenarios to the defendant.

inquire whether Andersen knew what “free to argue” meant, the colloquy here was not deficient.

¶9 Alternatively, Andersen argues the *Nelson/Bentley* line applies. To be entitled to a hearing under *Nelson/Bentley*, a defendant must allege facts which, if true, entitle him to relief. *Howell*, 301 Wis. 2d 350, ¶75. “However, if the defendant fails to allege sufficient facts ... or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,” the trial court may deny the motion without a hearing. *Id.* The burden is on the defendant to show the plea was invalid. *See Hampton*, 274 Wis. 2d 379, ¶63.

¶10 Andersen’s motion alleges that he “would not have entered his plea had he understood that the State was free to argue for such a lengthy sentence.” However, a defendant “must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.” *Bentley*, 201 Wis. 2d at 313. Andersen’s motion lacks such additional objective assertions.

¶11 Additionally, Andersen has not shown he is entitled to relief. The court concluded his plea was knowing, intelligent, and voluntary and made with full knowledge the State was free to argue for any amount of time it deemed appropriate. In determining whether the plea is knowing, intelligent, and voluntary, we uphold the trial court’s factual findings so long as they are not clearly erroneous, although whether those facts show the plea is valid is a question we review independently. *State v. Lackershire*, 2007 WI 74, ¶24, 301 Wis. 2d 418, 734 N.W.2d 23.

¶12 The record supports the court’s factual conclusions. The plea questionnaire explicitly states that Andersen would plead to both charges and “both sides [were] free to argue.”⁴ At the plea hearing, the court confirmed with Andersen directly whether he understood the parties were free to argue. At no time during the plea or sentencing hearings did Andersen ever express any doubt to the court about what “free to argue” meant.⁵

¶13 We do not subscribe to Andersen’s appellate argument that “free to argue” is somehow ambiguous. In his reply brief, he asserts:

We do not believe that it is self-evident to a lay person what the phrase “free to argue” means. “Free to argue” what?, is the question that could be asked. In this case, the P.S.I. recommended probation. Being free to argue can mean many things. It could mean, in spite of the P.S.I., (i.e. a recommendation of probation) that the state would be free to argue against probation.

That is one possibility, just as the State could also recommend the same sentence that the PSI recommends, or any other sentence up to the statutorily prescribed

⁴ Andersen tries to analogize his case to *State v. Issa*, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994), *overruled on other grounds by State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, and *State v. Hansen*, 168 Wis.2d 749, 425 N.W.2d 74 (Ct. App. 1992). In *Issa*, the defendant alleged he did not understand the possible deportation consequences of his plea. *Issa*, 186 Wis. 2d at 209-11. However, WIS. STAT. § 971.08(1)(c) requires the court to personally advise a defendant of the possibility of deportation; we therefore concluded reliance on the plea questionnaire alone was inadequate to meet the statutory requirement. *Issa*, 186 Wis. 2d at 201-02. There is no corresponding statutory duty here. In *Hansen*, the defendant was permitted to withdraw his plea because an abbreviated plea colloquy failed to adequately ascertain whether the defendant comprehended the constitutional rights he was surrendering with his plea. *Hansen*, 168 Wis. 2d at 755. Andersen’s case does not involve a constitutional right.

⁵ Andersen references a note to counsel where he asked if it was possible to get the same two years in, two years out deal that was offered before the trial. This letter does not demonstrate confusion about what the State could argue so much as Andersen’s realization that he might be sentenced to a much longer term than what was originally proposed.

maximum.⁶ To the extent Andersen’s argument is that he simply did not know what the State’s specific argument would be, the fact that one may not know the details of what the opposing party will argue is not the same thing as claiming not to know what it means for the parties to be “free to argue.”⁷

¶14 There is no ambiguity to the phrase “free to argue.” The court concluded Andersen fully understood the State had the freedom to argue for any sentence; this finding is not clearly erroneous. Based on that finding, we agree with the trial court that Andersen has not shown his plea was invalid and he therefore has not shown he is entitled to relief.

II. Sentencing

¶15 Andersen also claims that the trial court erroneously exercised its discretion when it sentenced him to consecutive fifteen-year terms. He argues the sentences were unduly harsh in relation to his activities and contends the reasoning for making the sentences consecutive was inadequate. We disagree.

¶16 Sentencing is a matter for the trial court’s discretion, and its decision is afforded a strong presumption of reasonableness. *State v. Gallion*, 2004 WI 42, ¶¶17-18, 270 Wis.2d 535, 678 N.W.2d 197. The primary factors a court considers at sentencing are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49,

⁶ Andersen states he “did not allege the he was not apprised by the court of the maximum penalties he faced.” Nevertheless, we note that he was appropriately advised of the maximum penalties and of the fact the court was not bound by the plea agreement.

⁷ In any event, it appears that the State did notify Andersen and his attorney at least six weeks prior to the sentencing hearing that it planned to recommend the thirty-year sentence.

¶23, 289 Wis. 2d 594, 712 N.W.2d 76. There are also several additional factors a court may consider. *See id.* The weight to be assigned to each factor is left to the trial court's discretion. *Id.*

¶17 Andersen complains his sentence is too harsh because he was only a middleman, used to secure the cocaine from a supplier; he received little or no compensation for his role in the transactions; and he was not the focus of a federal investigation that was going on when he was arrested. The record, however, reveals that the court appropriately exercised discretion.

¶18 The court noted the primary factors, then commented on multiple elements falling under those three criteria. The court determined that Andersen was “intimately involved” in a drug enterprise; the fact that he received little compensation for it was irrelevant to the depth of his involvement because he was evidently selected for his personal connections. The court noted Andersen's apparent willingness to get involved in the sales scheme. Lamenting the high degree of addiction often associated with drug crimes, which causes some parents to spend their last dollar on drugs instead of food for their children, the court stated it considered Andersen's cocaine delivery to be a serious crime.

¶19 The court commented that while Andersen was arguing he was a caring father in an attempt to mitigate his sentence, he nevertheless had taken both his children to the second drug transaction, allowing them to play outside while the transaction occurred. The court was concerned about the level of violence and unpredictability often associated with drug crimes and opined that Andersen's behaviors, particularly putting his children at risk, indicated a focus on satisfying only his needs.

¶20 The court observed that Andersen had been on probation three times, succeeding only once. Andersen was thirty-three years old, lived with his father, and was working odd jobs to make ends meet; these facts indicated to the court an inability or unwillingness to hold regular employment. Despite facts adduced that Andersen had begun using cocaine twice a week because he was getting it for free, the court disapproved of the fact that Andersen told the presentence investigation author that he had no drug problem.

¶21 The court determined that Andersen's prior record, plus level of involvement in the current crimes, plus inability or unwillingness to get legitimate employment put him at a high risk to reoffend. For that reason, the court considered probation inappropriate and likely to depreciate the seriousness of the offense. The court also considered that Andersen had treatment needs that would have to be met in the prison setting.

¶22 The court considered appropriate factors and imposed sentences well within the statutory maximum. It does not matter if this court would have imposed a different sentence. *See Ziegler*, 289 Wis. 2d 594, ¶22. Discretion was properly exercised, and a sentence "well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶23 The decision whether to impose consecutive sentences is likewise discretionary. *State v. Johnson*, 178 Wis. 2d 42, 52, 503 N.W.2d 575 (Ct. App. 1993). The same factors that go into determining the length of the sentence bear on whether to impose concurrent or consecutive sentences. *See id.* at 52-54. Here, the court imposed a consecutive sentence in part because the two drug transactions were wholly separate but primarily because at the second transaction, Andersen

took his children with him. The court's choice to weigh this aggravating factor heavily against Andersen is an appropriate exercise of discretion and it fairly justifies the consecutive sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

