COURT OF APPEALS DECISION DATED AND RELEASED

February 13, 1997

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0129

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CRAIG M. MOLSTAD,

Defendant-Appellant.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Craig Molstad appeals from an order denying him relief from a criminal conviction. Molstad pleaded guilty to three burglary charges pursuant to a plea bargain. He subsequently challenged his conviction on a § 974.06, STATS., motion alleging ineffective assistance of trial counsel. The issue is whether Molstad proved that counsel negligently deprived him of the opportunity to accept a more beneficial plea bargain. We conclude that no

evidence exists that counsel was negligent or that his actions prejudiced Molstad. We therefore affirm.

In February 1990, with five burglary charges pending against Molstad in two counties, the district attorney presented Molstad's counsel with a written plea bargain proposal. In it, the State offered to dismiss two burglary counts and recommend a ten to twelve year prison sentence if Molstad pleaded guilty to the remaining three charges. The proposal stated that it would remain in effect until February 27, 1990, the date of the next hearing scheduled in the case.

The February 27 hearing was postponed until April 3, 1990. In the meantime, Daniel Watson was appointed as substitute counsel for Molstad. At the time of the April 3 hearing, both Watson and Molstad believed that the district attorney's proposed plea bargain remained open, although Watson did not ask the prosecutor to confirm that belief. However, Molstad decided not to plead and instead asked for a trial.

As of an April 30 motion hearing, Watson and Molstad continued to believe that the plea bargain remained an option, although neither had received any indication from the district attorney to that effect. On the night of April 30, when Watson confronted Molstad with damaging information just received from the prosecutor, Molstad agreed to accept the plea bargain. The next morning, Molstad learned from Watson that the State had amended the terms of the offer by withdrawing its promise to recommend only a ten to twelve year sentence. Molstad nevertheless accepted this offer, despite its somewhat harsher terms, and pleaded guilty later that day. The trial court then sentenced him to prison terms totalling thirty years.

In the postconviction proceeding, Molstad argued that Watson ineffectively and prejudicially represented him by failing to advise him that the State's original offer would not remain open indefinitely. The trial court rejected that argument and denied relief, resulting in this appeal.

To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or

omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The deficient performance must fall outside the wide range of professionally competent assistance which is measured by an objective standard of what a reasonably prudent attorney would do in similar circumstances. ***Id***. at 637, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors, the result of the proceeding would have differed. ***Id***. at 642, 369 N.W.2d at 719. Whether counsel's performance was deficient and whether it was prejudicial to the defendant are questions of law. ***Id***. at 634, 369 N.W.2d at 715.

Molstad apparently contends that had he known when the State's original proposal was due to expire, he would have accepted it before that date. However, nothing in the record supports that contention. He had an opportunity to accept the proposal and enter his plea at the April 3, 1990 hearing, assuming it was still open, but refused to do so and instead requested a trial. That ends the matter because there is no evidence that the State's offer remained open after that date.

Additionally, until April 30, 1990, he did not communicate with counsel or take any other steps to accept the proposal, despite his belief that it remained in effect. He only agreed to the proposal on April 30, and to a less beneficial proposal the next day, after learning that one of his witnesses was, in fact, going to testify for the State. In other words, the inference that Molstad would have accepted the offer sometime after April 3 but before April 30, had there been some deadline during that period and had he known of it, is not reasonably available from the facts.

By the Court.—Order affirmed.

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