COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 18, 1997

NOTICE

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.

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

No. 96-0324-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EQUINEES A. BOYLES,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Brown County: PETER J. NAZE and WILLIAM M. ATKINSON, Judges. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Equinees Boyles appeals his conviction for possession of cocaine with intent to deliver, as a repeater with six felony convictions, after pleading no contest to the charge and receiving an eight-year prison sentence. In return for Boyles' no contest plea, the prosecution dropped a second charge for possession of marijuana with intent to deliver. Boyles' repeater status exposed him to a

potential of sixteen years in prison on the two charges. In his postconviction motions, Boyles asked the trial court to permit him to withdraw his no contest plea. Boyles alleged that the prosecution had violated its original plea agreement to recommend a prison sentence of no more than four years. Instead, the prosecution declined to make any sentence recommendation. The prosecution changed its position when, after his plea, Boyles had an additional arrest for drug trafficking. Besides the plea agreement issue, Boyles' two postconviction motions claimed various trial court errors and ineffective trial counsel. Some claims expired undecided, including the ineffective counsel claims, constructively denied by operation of law. *See* RULE 809.30(2)(i), STATS. We reject Boyles' arguments and affirm his conviction.

Boyles has offered no valid basis for attacking his plea. Litigants cannot complain of strategic waivers they make in the trial court. *See* ***State v. Kraemer***, 156 Wis.2d 761, 765-66, 457 N.W.2d 562, 563-64 (Ct. App. 1990). At sentencing, Boyles trial counsel described a new plea agreement he had reached with the prosecution. Trial counsel agreed to release the prosecution from its original agreement to recommend a sentence of no more than four years. Instead, the prosecution agreed to refrain (1) from making any kind of sentence recommendation and (2) from claiming that Boyles latest crime violated the original plea agreement. In exchange, Boyles agreed to drop his plan to pursue a motion to withdraw his no contest plea. When asked by the court, Boyles personally acknowledged this agreement. He assured the court that he understood and accepted it. In short, Boyles agreed to go forward with his plea, despite misgivings he may have about the proceedings, in exchange for concessions from the prosecution.

Boyles' no contest plea, together with his strategic decision at sentencing to drop his plans to set aside his no contest plea, forfeited most of the postconviction attacks he seeks to wage against his conviction. Boyles seeks to challenge his arrest, pretrial bail revocation, his preplea competency, the legal validity of the charges, and

various actions by trial counsel, including counsel's performance at sentencing. Boyles' plea constituted a waiver of all nonjurisdictional defects, ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986), including the adequacy of representation by trial counsel. *See* ***Smith v. Estelle***, 711 F.2d 677, 682 (5th Cir. 1983), ***cert. denied***, ***Smith v. McKaskle***, 466 U.S. 906 (1984). Boyles has alleged nothing that was a jurisdictional defect or shown how any of the claimed defects contributed to his decision to plead no contest and give up his defense. He has not shown that he had some misunderstanding about the consequences of his plea. Although one postconviction motion states that the prosecution illegally induced his plea by threatening greater charges, this argument has no merit. *See* ***Verser v. State***, 85 Wis.2d 319, 329, 270 N.W.2d 241, 286 (Ct. App. 1978); *see also* ***Brady v. United States***, 397 U.S. 742, 750-51 (1970).

Also, Boyles has not shown that any of his claims demonstrate a manifest injustice. *See* ***State v. Woods***, 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). For example, Boyles has not shown how his alleged pretrial incompetency undermines the factual basis for his plea. He has identified nothing in the factual basis that he could not have refuted earlier because of the claimed incompetency. Further, Boyles' behavior at the hearings showed no signs of incompetency. He was able to answer questions from the court without difficulty. Likewise, the pretrial bail revocation is moot; it has no bearing on the fairness of Boyles' plea.

Boyles argues that his trial counsel was ineffective in several respects that survives his no contest plea. When the time for deciding Boyles' postconviction expired, this was constructive denial of these claims by operation of law. *See* RULE 809.30(2)(i), STATS. Although we doubt that these survive his no contest plea, we address them anyway. Courts use a two-part process to determine whether an accused received ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). First, the accused must show that his trial counsel's performance was deficient. ***Id***.

Second, the accused must show that the deficient performance prejudiced his defense. ***Id.*** The second component requires a showing that trial counsel's errors were so serious they deprived the accused of fair trial court proceedings. ***Id***. Postconviction courts measure counsel's performance against the standard of a reasonably competent attorney, an objective standard of reasonableness. ***Id.*** at 687-88. In order to show prejudice, an accused must demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id***. at 694. For the following reasons, we are satisfied that none of Boyles' arguments meet the ***Strickland*** criteria.

Boyles makes several ineffective counsel claims. First, Boyles claims that his trial counsel threatened to withdraw unless Boyles pleaded no contest. This claim has no merit. Boyles assured the trial court at the plea hearing that no one pressured him to plead no contest. In the plea questionnaire, Boyles again indicated that no one had made any threats or coercion to induce his plea. He also indicated to the court and in the form that he was voluntarily giving up his right to make a defense. Second, Boyles claims that his counsel did not investigate or call a witness to Boyles' drug activities. Boyles admits cocaine possession but disclaims any intent to deliver. He instead claims to have used the drug himself to celebrate his birthday. The missing witness was a woman with whom Boyles claims to have shared his cocaine snorting birthday party. Boyles has not shown that the woman would actually testify in his favor, *see* ***Jandrt v. State***, 43 Wis.2d 497, 505-06, 168 N.W.2d 602, 606 (1969), and his plea hearing informed him that his plea would forfeit his right to call witnesses on his behalf. We, therefore, reject his argument.

Third, Boyles states that trial counsel did not confer with him adequately before the plea. The record of the plea hearing, the plea waiver of rights form Boyles signed, and his own self-impeaching recidivism answer this claim. The plea hearing

contains a comprehensive discussion of all matters by counsel and the trial court. This includes rights such as his right to a jury trial, to proof beyond a reasonable doubt, to confront the prosecution's witnesses, and to call witnesses on his behalf. The waiver of rights form similarly covers wide ranging matters. Boyles assured the trial court that he understood the magnitude of his decision to plead no contest. These records circumstantially demonstrate that trial counsel and Boyles fully discussed all material matters before trial. *See, e.g.,* ***Ernst v. State***, 43 Wis.2d 661, 669-70, 170 N.W.2d 713, 716-17 (1969). In the absence of other evidence, plea makers may not set aside pleas solely on the basis of abbreviated conferences with counsel. *See* ***id***. Fourth, Boyles states that his counsel did not stop the prosecution from dismissing charges after arraignment and introducing new, more severe charges. Boyles states that this coerced his plea. This also lacks merit; the prosecution may threaten a trial on greater charges as a means to induce a plea on lesser charges. *See* ***Verser***, 85 Wis.2d at 329, 270 N.W.2d at 286; *see also* ***Brady***, 397 U.S. at 750-51.

Although Boyles' plea did not waive his attack on the plea's factual basis, the record reveals ample evidence of guilt. Pleas must have a adequate factual basis. *See* ***State v. Smith***, 189 Wis.2d 496, 501, 525 N.W.2d 264, 266 (1995). Here, Boyles admits cocaine possession but disclaims any intent to deliver. According to the criminal complaint, a sheriff's deputy arrested Boyles in his motel room. Since 5:00 p.m. the previous day, Boyles made twenty-seven phone calls from his motel room; another account set the number at seventy-seven phone calls. Boyles had refused room service, and a motel employee had seen many people come and go from his room. Once inside Boyles' room, the deputy found a plastic bag of cocaine, $1034 of U.S. paper currency, 300 grams of marijuana, an electronic scale, a soda water can made into a smoker, a razor blade, and two substances used to cut cocaine. This evidence circumstantially showed the requisite intent to deliver, despite Boyles' postconviction claim that he was using the

drug himself in a cocaine snorting birthday celebration. Taken as a whole, the complaint's allegations created an inference that Boyles was running a commercial operation. This was enough to support his no contest plea to cocaine possession with intent to deliver.

Boyles' plea also did not waive the issue of suppression of evidence seized during his arrest. By statute, these issues survive no contest pleas. Section 971.31(10), STATS. The sheriff's department arrested Boyles under authority of an arrest warrant. Backed up by a SWAT team, they executed a no-knock entry of his motel room. The arrest warrant did not authorize a no-knock entry. Once inside, they arrested Boyles, removed him from the premises, and proceeded to search the room. Boyles argued in the trial court that the sheriff had no authority to search Boyles' motel room without a search warrant or to execute a no-knock entry of his motel room without express authorization by the arrest warrant. The police had probable cause to believe that Boyles was armed. This justified a no-knock drug pursuit entry of his hotel room, regardless of the fact that the arrest warrant did not expressly confer such authority. *See* ***State v. Stevens***, 181 Wis.2d 410, 423-24, 511 N.W.2d 591, 594-95 (1994). The police also had the right to search the motel room, regardless of the fact that they did not have a search warrant. Law enforcement officials who have arrested a suspect may reasonably search the immediate area without a separate search warrant. *See* ***State v. Milashoski***, 159 Wis.2d 99, 111, 464 N.W.2d 21, 26 (Ct. App. 1990). Exigent circumstances also justified the search. ***Id***.

Next, Boyles' eight-year sentence reflected proper sentencing discretion. *See* ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983). Relevant factors include the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and the interests of deterrence. ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). As discretionary decisions,

sentences must have a reasonable basis in the record and demonstrate a logical reasoning process applying proper legal standards to the facts of record. ***McCleary v. State,*** 49 Wis.2d 263, 277, 182 N.W.2d 512, 519-20 (1971). Here, the nature of Boyles' latest felony, together with his six felony convictions over twenty-seven years, fully justified the eight-year prison term. As put by the presentence report, Boyles was a career criminal. At age forty five, he had habitually embraced the criminal lifestyle. His latest crime was polluting the community with drugs. Boyles' character defects, the seriousness of his new crime, the public's right to protect itself from drug traffickers, and the obvious need to deter Boyles' criminal behavior, gave the trial court sufficient grounds to issue an eight-year term. Boyles cites no other factor that his counsel could have raised that would have reduced the term. Boyles' claim that the court wrongly considered his pre-***In re Gault*** uncounseled juvenile record is rejected. *See* ***Gault***, 387 U.S. 1 (1967). The court expressly disregarded that record.

Last, Boyles filed his § 974.06, STATS., motion after his RULE 809.30 motion lapsed without a decision by the trial court. During his RULE 809.30 postconviction proceedings, Boyles first proceeded with appointed counsel. He then discharged his counsel and chose to represent himself. Boyles then succeeded in obtaining a second appointed counsel, whom Boyles later discharged and wanted to proceed pro se with further postconviction motions. After months of unwarranted delay, we refused to grant him an extension of time to file further postconviction motions, and his pending postconviction motions lapsed without decision by the trial court, constructively denied by operation of law. Boyles then filed his § 974.06 motion. We need not address any issues raised in the § 974.06 motion. Some of the issues duplicate those Boyles raised in his RULE 809.30 motion; others may be new. In any event, neither require consideration. Any duplicate issues need no further review, and Boyles has not demonstrated that he could not have raised any additional issues in his first

postconviction motion. Courts need not consider § 974.06 motion issues that litigants could have raised in their RULE 809.30 motions. *See* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

By the Court.—Judgment and orders affirmed.

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