COURT OF APPEALS
DECISION
DATED AND RELEASED

June 19, 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.

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No. 96-3016-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NATHANIEL D. WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

DEININGER, J. Nathaniel Washington appeals a judgment convicting him of misdemeanor battery, felony bail jumping and escape. The first two counts included allegations that Washington was a habitual criminal under § 939.62, STATS. He also appeals an order denying postconviction relief. Washington claims that the trial court erred in denying his motion to withdraw his

no contest pleas prior to sentencing, and in failing to conduct a ***Machner***[1] hearing on his postconviction motion. We conclude that the trial court did not erroneously exercise its discretion by refusing to permit Washington to withdraw his pleas prior to sentencing. We further conclude that Washington's postconviction motion did not merit an evidentiary hearing on his claim of ineffective assistance of counsel. Accordingly, we affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

Washington was initially charged with substantial battery, a separate count of misdemeanor battery, armed robbery, felony bail jumping, and escape. He was also facing prosecution in a separate case on two counts of felony forgery. All of the charges except escape included allegations that Washington was a habitual criminal under § 939.62(2), STATS., based on a prior felony conviction within the past five years. He originally pleaded not guilty to all charges, and the five counts in this case were set to be tried to a jury.

On the morning of trial, with jury selection about to begin, Washington conferred with his defense counsel regarding a plea bargain offered by the State. Washington initially rejected the plea bargain, but after the State's offer was further modified, he accepted it and entered no contest pleas to misdemeanor battery and felony bail jumping, both as a habitual criminal, and escape. In addition to the dismissal of the felony battery and armed robbery charges in this case, the agreement also provided for the dismissal of the forgery charges from the separate case. With the penalty enhancers that were included in

[1] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

various counts, Washington's plea agreement reduced his potential maximum imprisonment from 112 years to 19 years.

During the plea colloquy, Washington accepted the court's invitation to confer further with his counsel. After a "ten or fifteen minute" conference, Washington completed the plea proceedings. A pre-sentence investigation was ordered and the case was set for sentencing approximately thirty days later.

A day after entering his pleas, Washington wrote a letter to the judge requesting that he be allowed to withdraw his pleas. His counsel subsequently formalized the request in a motion, and also moved to withdraw as counsel. After new defense counsel was appointed, the court held a hearing on the plea withdrawal motion. Both Washington and his first defense counsel testified regarding the circumstances surrounding Washington's decision to plead to the reduced charges. Washington testified that his first counsel had told him that there was "no defense" to some of the original charges, and that the jury was likely to convict him on several, if not all, of those charges. Washington stated that he felt pressured and rushed into entering the pleas on the morning of the scheduled trial.

Defense counsel testified that Washington had consistently rejected a plea agreement during the two months prior to the scheduled trial, but after discussing the State's amended offer with her on the morning of trial, "Mr. Washington indicated that he wanted to accept the plea agreement." Counsel testified that during the mid-colloquy conference with Washington, they had discussed "the process" and that he then "indicated that he wanted to proceed with the plea proceeding." She acknowledged that Washington "was feeling uncomfortable" during the mid-plea conference, but that he had not requested that she seek more time to consider the plea agreement. Counsel also recalled telling

Washington that "we need to make a decision," and that his choice was to enter the pleas or to go to trial. Finally, counsel said that she had counseled Washington that he had "a weak defense" on the escape charge, and that she had discussed with him the demographics of the jury panel and the likelihood that jurors would find police testimony more credible than his.

The trial court, after reviewing the hearing testimony and a transcript of the plea colloquy, denied Washington's request to withdraw his pleas, stating "I find no fair and just reason to withdraw the plea." Prior to sentencing, Washington moved to dismiss the habitual criminal allegations from the battery and bail jumping counts, on the grounds that the amended information had alleged an incorrect date of conviction.[2] The trial court denied the motion[3] and sentenced Washington to a total of twelve years imprisonment on the three counts.

After sentencing, Washington moved to set aside the convictions, requesting again that he be allowed to withdraw his pleas, claiming as an additional ground that his initial counsel was ineffective for failing to discuss with him the alleged defect in the pleading of the habitual criminal allegations. The trial court denied Washington's post-judgment motion "after hearing arguments of counsel," but apparently without taking any testimony on the ineffective counsel

[2] The amended information to which Washington had entered his pleas alleged that he had been "convicted of a felony within the last five years … to-wit: operating a motor vehicle without the owner's consent on May 14, 1994, in Rock County Circuit Court, Beloit, Wisconsin." The judgment of conviction for that offense, however, shows that the conviction was entered "1-10-95" for an offense committed on "5-15-94." Neither party addresses the one-day discrepancy between the date alleged in the information and the date of offense shown on the judgment of conviction. For the purposes of this appeal, therefore, we will accept that the information reflected the date of commission of the prior offense but not the date of conviction.

[3] Washington does not appeal the denial of his motion to dismiss the habitual criminal allegations.

issue.[4] He appeals the judgment of conviction and the order denying postconviction relief. Additional facts will be discussed in the analysis which follows.

ANALYSIS

a. Standard of Review

Whether to permit a criminal defendant to withdraw pleas of guilty or no contest prior to sentencing is committed to the discretion of the trial court. ***State v. Shanks***, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). We will uphold a trial court's decision to deny such a request if it appears from the record that the trial court applied the proper legal standard to the relevant facts and reached a "'reasoned and reasonable determination'" by employing a "'rational mental process.'" ***State v. Canedy***, 161 Wis.2d 565, 579-80, 469 N.W.2d 163, 169 (1991) (quoted source omitted); *see* ***State v. Simpson***, 200 Wis.2d 798, 802, 548 N.W.2d 105, 107 (Ct. App. 1996).

Whether Washington's post-judgment motion sufficiently alleges facts which, if true, would entitle him to relief, and therefore justify an evidentiary hearing, is a question of law, which we review de novo. ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996).

b. Plea Withdrawal Prior to Sentencing

Although a trial court's decision on a motion to withdraw pleas prior to sentencing is discretionary, Wisconsin courts have emphasized that such

[4] The record contains no transcript of the September 30, 1996 hearing on Washington's postconviction motion.

requests should be "freely allowed." ***State v. Canedy,*** 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991); ***Libke v. State***, 60 Wis.2d 121, 127-28, 208 N.W.2d 331, 334-35 (1973). Requests should be granted when the defendant has "shown a fair and just reason for withdrawal," and this standard is to be given "liberal application," such that "a mere showing of some adequate reason" is sufficient unless the prosecution has been substantially prejudiced in relying on the pleas. ***Id.*** at 125-28, 208 N.W.2d at 333-35; ***Shanks***, 152 Wis.2d at 288-89, 448 N.W.2d at 266. Permission to withdraw need not be granted "automatically," however, and the burden to show by the preponderance of evidence that there is a "fair and just reason" other than "the desire to have a trial" is on the defendant. ***Canedy***, 161 Wis.2d at 582-84, 469 N.W.2d at 170-71.

Washington's argument for reversal relies heavily on ***State v. Shanks,*** 152 Wis.2d 284, 448 N.W.2d 264 (Ct. App. 1989)**.** In ***Shanks***, in reversing a trial court's denial of permission to withdraw a guilty plea prior to sentencing, we listed several factors for consideration in determining whether a defendant had shown a "fair and just" reason for withdrawal: (1) an assertion of innocence; (2) a genuine misunderstanding of the plea's consequences; (3) a showing of haste, confusion and coercion during the plea process; (4) swiftness in seeking to withdraw the plea; and (5) evidentiary support in the record. ***Id.*** at 290, 448 N.W.2d at 266-67. We concluded that the defendant had shown haste and confusion in entering a plea to an incorrectly stated charge, had professed innocence during the colloquy regarding an intent element, had moved for withdrawal expeditiously, and that the State had not argued that it would be substantially prejudiced by a withdrawal. ***Id.*** at 291-92, 448 N.W.2d at 267.

Washington asserts that his showing of a reason for withdrawal is "equally strong if not stronger" than that of the defendant in ***Shanks***. We

disagree. While it is true that Washington acted expeditiously after entering his pleas to attempt to withdraw them, none of the other factors weigh in his favor. He does not argue that he misunderstood the consequences of his pleas, and he would be hard pressed to do so. The record reflects that at the time of the pleas, Washington was thirty-three years old, had attended two years of college, and had numerous prior experiences with criminal proceedings, including at least three previous convictions.

Washington argues in his brief that the record supports an assertion of innocence as a reason justifying withdrawal of his pleas. His citation to the record for this assertion, however, is to his testimony that prior to the trial date he had consistently rejected a plea agreement:

> I told [defense counsel] time and time again, I don't want any plea agreements because I am not guilty of this, and you know, we would take it to trial and let justice take its course.

Washington also testified that he had told his counsel to reject a plea agreement the week before trial "because I felt these charges that I was charged with was false." Later, during re-direct examination, Washington responded to a question from his counsel as follows:

> Q: Why did you want to go to trial on September 20th of 1995?
>
> A: I wanted to go to trial then was because I – I felt that I was innocent of those allegations that was put on me.

The recitation of his conversations with counsel during the weeks prior to his plea, and his statement of the reason he wanted to go to trial, fall several steps short of a post-plea protestation of innocence as to the charges for

which he was ultimately convicted. The statements "I am not guilty of this," "these charges [were] false," and "I was innocent of those allegations" are ambiguous given that he was then facing five charges. These statements could, for example, be interpreted to mean that Washington believed he was overcharged. It appears the State may well have come to the same conclusion given that the ultimate plea agreement resulted in the dismissal of two of the most serious charges he was facing: armed robbery and substantial battery.

Washington's sole ground asserted in his motion to withdraw pleas prior to sentencing, was "that he had insufficient time in which to make an informed decision to enter a plea of no contest." We have reviewed the transcript of Washington's testimony in support of his withdrawal request, and except for the ambiguous testimony discussed above, we find no support for his present claim that one of the reasons he was seeking to withdraw his pleas was because he was innocent of the three charges in question.[5] We cannot conclude from the record that Washington's request to withdraw his pleas was premised on asserted innocence of the charges to which he pleaded.

Washington's testimony at the motion hearing does support his argument that his plea was entered in haste and confusion, and that he was

[5] Likewise, during his allocution at sentencing, Washington did not profess innocence of the charges for which he was convicted, but claimed his plea was made "under duress." Washington's only comment about his role in the offenses was an attempt to minimize the battery:

> [W]e got into a[n] argument, and then we got into a scrap, … I was stupid for even letting it get that far….
>
> I don't want to try to minimize it, or justify my actions, sir, because the part that I did play in this was stupid.… [I]t was not like a great deal of damage done or nothing like that, whereas I probably could have.

"pressured" by his defense counsel to accept the plea offer. The remainder of the record, however, belies the claim. Washington had been bound over on the five count information following a preliminary hearing. He and his counsel had numerous conferences about the case, discussing possible plea agreements, witnesses and defenses prior to the morning of the scheduled trial. On the morning of trial, they again conferred for "at least an hour." Defense counsel acknowledged Washington was "uncomfortable" on the morning in question, but denied that she pressured him into the plea or that the decision was rushed.

During the plea colloquy, Washington gave these responses:

> Q: Is there anything about these proceedings that you feel is intimidating in any way so as to cause you to do something against your own better judgment?
>
> A: No, sir.
>
> Q: Has anybody used any force or threat or coercion or pressure to have you enter pleas to these charges?
>
> A: No, sir.
>
> ….
>
> Q: Have you had plenty of opportunity to talk with [defense counsel]?
>
> A: Yes, sir.
>
> ….
>
> Q: Do you feel she's been giving you good advice?
>
> A: Yes, sir.
>
> ….
>
> Q: And have I used any words that cause you any problem or any confusion?
>
> A: No, you haven't.

At that point, the court asked if Washington wanted more time to talk to his counsel, and he responded "[m]aybe like ten minutes." It was during this conference that Washington claims, in particular, that his counsel rushed and pressured him. Counsel's testimony, however, was that at the end of that conference, Washington "indicated that he wanted to proceed with the plea proceeding," and that "[i]f at the end of our conversation Mr. Washington had indicated that he wanted more time, I would have asked the Judge that."

As in ***State v. Canedy,*** 161 Wis.2d 565, 586, 469 N.W.2d 163, 171-72 (1991), the record here leads us to the conclusion that the trial court did not believe Washington's assertions of haste and coercion, inasmuch as these assertions were refuted by both the plea colloquy and the testimony of his counsel. We conclude that although "another judge or another court" may have reached a different conclusion, the trial court here applied the proper law to the facts before it, and used a logical reasoning process in concluding that a "fair and just reason" to allow withdrawal of Washington's pleas had not been shown. *See* ***id.*** It is a "reasoned and reasonable" conclusion, and therefore not an erroneous exercise of discretion.

c. Denial of Postconviction Relief Without a Hearing

Washington acknowledges that his no contest pleas to the charges which included the habitual criminal allegations relieved the State of its burden to prove them. He does not appeal the trial court's denial of his motion to strike the allegations prior to sentencing, and he concedes there is a factual basis for the habitual criminal allegations. He claims, however, that trial counsel's failure to discuss with him the "ability to attack the habitual criminality enhancers was

deficient performance." He also claims to have been prejudiced by this failure, in that it deprived him of the ability to make a "reasoned decision" about going to trial. Moreover, Washington implies that had he known about the ability to reduce his sentence exposure by thirty-six years on the original charges, he would have been even less inclined to accept the plea agreement. Washington asks, therefore, that we remand for an "evidentiary hearing on the issue of whether [his] pleas were entered knowingly and intelligently."

In response, the State argues that Washington's postconviction motion insufficiently alleged deficient performance by his trial counsel and completely failed to allege prejudice therefrom. Therefore, the State asserts that the trial court's denial of relief without an evidentiary hearing was proper. *See* ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972). The State also claims that even if Washington's motion was properly pled, no hearing was required because the failure by his counsel to attack or discuss the allegedly defective enhancer allegations was not deficient performance. We agree.

Washington would have us read ***State v. Wilks***, 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991), to require that the allegation of an improper date of conviction in the information[6] would have precluded the State from proving the prior conviction. ***Wilks***, however, is not the final word on the issue of the post-arraignment amendment of habitual criminality allegations that are defectively pled in an information. We noted in ***State v. Campbell***, 201 Wis.2d 783, 794 n.8, 549 N.W.2d 501, 505 (Ct. App. 1996), that "[t]o the extent that our interpretation of § 973.12 in ***Wilks*** is inconsistent with [***State v. Gerard***, 189 Wis.2d 505, 525

[6] The information contained the same date for the Rock County OMVWOC conviction as did the amended information. *See* n.2, *supra*.

N.W.2d 718 (1995)], we must follow ***Gerard***."

The supreme court in ***Gerard*** reversed our decision setting aside a habitual criminal penalty enhancer for which the increased penalty had been misstated in the information. The trial court had allowed the State to correct this "clerical error" after the defendant had pleaded not guilty to the information. We reversed, relying in part on our analysis in ***Wilks***. ***State v. Gerard***, 180 Wis.2d 327, 344-45, 509 N.W.2d 112, 119 (Ct. App. 1993). The supreme court, without referring to ***Wilks***, concluded that "an information may be amended post-plea to correct a clerical error in the sentence portion of the penalty enhancement when such amendment does not prejudice the defendant." ***State v. Gerard,*** 189 Wis.2d 505, 509, 525 N.W.2d 718, 719 (1995). The court noted that the defendant in ***Gerard*** had been given notice in the information of the State's intent to establish his repeater status, and thus he had "knowledge of the extent of his punishment before pleading to the charges." ***Id.*** at 514, 525 N.W.2d at 721.

While it is true, as the State points out, that § 973.12(1), STATS., does not require that the date of a prior conviction be alleged in the information,[7] the ***Gerard*** court said that "the information will identify" the date of conviction, the offense and whether it is a felony or misdemeanor. ***Id.*** at 515-16, 525 N.W.2d at 721-22. The information in this case fulfills the last two requirements, but the

[7] Section 973.12, STATS., provides in relevant part as follows:

> (1) Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea.

date of commission of the offense is mistakenly alleged to be the date of conviction. The supreme court in ***State v. Martin,*** 162 Wis.2d 883, 902-03, 470 N.W.2d 900, 907-08 (1991), established a bright-line rule that habitual criminality allegations could not be added to an information post-arraignment even if no prejudice would result. Our inquiry here, however, as was the supreme court's in ***Gerard,*** is whether the defendant is prejudiced by a post-arraignment amendment to habitual criminality allegations that were inaccurately pled in the information. *See* ***Gerard,*** 189 Wis.2d at 517, 525 N.W.2d at 722.

In order to analyze prejudice, we must return to the posture in which the enhancer allegation issue is before us. Washington's claim is that he is entitled to an evidentiary hearing on his postconviction motion to withdraw his plea because his counsel was ineffective for failing to advise him that the penalty enhancer allegations were defective and subject to attack. His argument is that if he had been told this, he would not have entered no contest pleas to the reduced charges because eliminating the exposure to the enhanced penalties would have caused him to opt for trial on the original charges. In order to evaluate whether counsel's performance was deficient in this regard, we must hypothesize that counsel so advised Washington; that he then opted for trial on all charges and was convicted on one or more of the enhanced counts; and that trial counsel then

sought to prevent the State from proving the enhancer allegation.[8]

We conclude that Washington would not have been able to prevent the State from proving the habitual criminal allegations. In ***Gerard***, the supreme court rejected the defendant's attempt to assert prejudice on the basis that had he known the correct (and lesser) penalty enhancement on the charge he was facing, he might have pleaded guilty to the charge instead of going to trial. ***Gerard***, 189 Wis.2d at 518, 525 N.W.2d at 722-23. Washington cannot make a similar claim inasmuch as the entire basis of his postconviction motion and this appeal is just the opposite: that all along he wanted to go to trial, and that the possible dismissal of the enhancers would have made his desire to do so even stronger. In ***State v. Wilks***, 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991), even though we did not undertake a prejudice analysis, we noted that the defendant there had entered a no contest plea to the base charge "believing that the state could not prove" a prior conviction on the date alleged in the complaint. ***Id.*** at 110, 477 N.W.2d at 636. Washington cannot make this claim either, since he is not asserting that the lack of the proper conviction date was relied upon in his decision to plead no contest to the reduced charges.

[8] We recognize that this is speculative. Conviction on all five charges in the information in this case, with enhancers where alleged, would have exposed Washington to a possible maximum imprisonment of eighty years, compared to the possible maximum of nineteen years on the charges to which he pleaded in the amended information. Without enhancers in any of the original counts, Washington's exposure in going to trial would have been fifty-five years and nine months. On the separate forgery charges that were dismissed as part of the plea agreement, his exposure was thirty-two years with the enhancers and twenty years without. (The information in that case did not specify a date of conviction or commission for the OMVWOC conviction, but did allege that it was a "felony within the last five years," and identified the court and case number for the conviction.) Even without enhancers, therefore, the plea agreement represents a drastic reduction in Washington's possible sentence exposure, and we question whether he can credibly claim that his decision to plead would have turned on the possibility of successfully attacking the enhancers.

In short, we fail to see how Washington could have demonstrated that he was prejudiced by the reference to the date of offense rather than the date of conviction in the repeater allegations had he opted to contest all charges. In the alternative, had Washington's trial counsel not waited until after trial to attack the repeater allegations, but moved instead to dismiss them soon after arraignment on the basis of the date error, we believe the ***Gerard*** holding would preclude a finding of prejudice. *See* ***Gerard***, 189 Wis.2d at 518-19, 525 N.W.2d at 722-23. Thus, we conclude that an attack on the enhancer allegations would have been unsuccessful, and consequently, the failure of trial counsel to discuss this possibility with Washington was not deficient performance. The resolution of the ineffectiveness claim and its possible impact on Washington's plea decision does not therefore require an evidentiary hearing, and the trial court did not err in denying his postconviction motion without taking evidence.[9]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[9] Both Washington and his trial counsel had testified regarding the circumstances surrounding Washington's decision to accept the plea agreement. The only new issue raised postconviction was the defective enhancer/ineffectiveness of counsel issue.