COURT OF APPEALS
DECISION
DATED AND RELEASED

May 28, 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. 96-3036-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH L. VAN PATTEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed.*

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

CANE, P.J. Joseph Van Patten appeals the denial of his motion to withdraw his no contest plea.[1] He asserts that his right to counsel was violated because his attorney appeared at the plea hearing by telephone, contrary to § 967.08, STATS. Van Patten also asserts his Sixth Amendment right to counsel was violated when his attorney discussed the plea offer with him by telephone and appeared at the hearing by telephone, resulting in his incomplete understanding of the charges against him and the constitutional rights he was waiving with his plea.

The State argues the appearance of defense counsel by telephone at the plea hearing does not constitute a "manifest injustice" sufficient to justify the withdrawal of Van Patten's plea, and defense counsel's telephonic appearance at the plea hearing did not deny Van Patten his Sixth Amendment right to counsel. We agree with the State and affirm the order.

Van Patten was charged with one count of first-degree intentional homicide. Pursuant to a plea agreement, he pled no contest to a reduced charge of first-degree reckless homicide, in violation of § 940.02(1), STATS., and was sentenced to twenty-five years in prison. Van Patten's attorney discussed the plea agreement with him and appeared at the plea hearing over a speaker phone. The court denied Van Patten's postconviction motions for the withdrawal of his plea and sentence modification. He now appeals.

[1] The court also denied Van Patten's motion for sentence modification. However, because Van Patten's appeal only presents arguments pertaining to the denial of his motion to withdraw his no contest plea, we do not address the merits of his motion for sentence modification. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (An issue raised but not briefed or argued is deemed abandoned).

The trial court's decision to deny a postconviction motion for the withdrawal of a guilty or no contest plea is discretionary, and we will reverse only if there has been an erroneous exercise of discretion. *See* ***State v. Spears***, 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). To succeed on a motion to withdraw a no contest plea, the defendant must show "manifest injustice" by clear and convincing evidence. ***Id.*** Examples of manifest injustice include the following:

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis.2d 241, 251 n.6, 471 N.W.2d 599, 602 n.6 (Ct. App. 1991) (citations omitted). Additionally, the violation of the defendant's Sixth Amendment right to counsel may constitute a manifest injustice.

Van Patten asserts that his attorney's appearance by telephone at the plea hearing violated § 967.08, STATS., which permits specifically enumerated proceedings to be conducted by telephone. We agree. Plea hearings are not included in the statute. In ***State v. Vennemann***, 180 Wis.2d 81, 508 N.W.2d 404 (1993), our supreme court decided that the defendant's telephonic appearance for a postconviction evidentiary hearing was not permitted by § 967.08.

> Section 967.08 specifically enumerates proceedings intended to be included within the parameters of the statute. There is no mention of a postconviction evidentiary hearing. We apply the principle of statutory construction

> that a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded. A postconviction evidentiary hearing … clearly is not a criminal proceeding which may be conducted by telephone.

Id. at 96-97, 508 N.W.2d at 410 (citation omitted). Pursuant to the logic of ***Vennemann***, Van Patten is correct that his attorney's telephonic appearance at the plea hearing does not conform to the provisions of § 967.08(2), STATS.[2]

Van Patten asserts the court's procedural error denied him his Sixth Amendment right to counsel. We review issues of constitutional fact de novo. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). A criminal defendant's right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and by art. I, § 7, of the Wisconsin Constitution. Van Patten claims the lack of his attorney's physical presence at the plea hearing violated his right to counsel. We disagree.

The plea hearing transcript neither indicates any deficiency in the plea colloquy, nor suggests that Van Patten's attorney's participation by telephone interfered in any way with his ability to communicate with his attorney about his plea. Van Patten confirmed that he had thoroughly discussed his case and plea decision with his attorney and was satisfied with the legal representation he had received. The court gave Van Patten the opportunity to speak privately with his attorney over the phone if he had questions about the plea, but Van Patten declined. Further, when Van Patten exercised his right to allocution at sentencing, in the personal presence of his attorney, he raised no objection to his plea. We

[2] Because we conclude that § 967.08(2), STATS., does not permit plea hearings to be conducted by telephone, we do not address Van Patten's additional argument that, contrary to § 967.08(2), he did not consent to the telephonic proceedings.

conclude Van Patten knowingly and voluntarily entered his plea, despite the lack of his attorney's physical presence at the plea hearing. The court's failure to conform with § 967.08, STATS., was harmless error, and neither interfered with Van Patten's understanding of the plea nor resulted in manifest injustice.

The right to counsel includes the right to effective assistance of counsel. ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1985). In order to prove ineffective assistance of counsel, the defendant must establish that his attorney's performance was both deficient and prejudicial. ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).[3] Counsel's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland,*** 466 U.S. at 687. To demonstrate prejudice, the defendant must allege facts to show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Bentley,*** 201 Wis.2d at 312, 548 N.W.2d at 54 (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)).

The standard of review of the performance and prejudice prongs of ***Strickland*** is a mixed question of law and fact, and the trial court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The ultimate determination whether the conduct of an attorney constitutes ineffective assistance of counsel is a question of law we review de novo. ***Id.*** at 128, 449 N.W.2d at 848. The trial court decided

[3] ***Strickland v. Washington,*** 466 U.S. 668 (1984), applies to guilty or no contest pleas based on ineffective assistance of counsel. ***Hill v. Lockhart***, 474 U.S. 52, 57-58 (1985); ***State v. Bentley***, 201 Wis.2d 303, 311-12, 548 N.W.2d 50, 54 (1996).

that Van Patten's right to counsel was not violated and he was not coerced into making the no contest plea because, aware of his options, Van Patten agreed to enter the plea. We have reviewed the record with due deference to the trial court's findings, and find nothing to support Van Patten's allegation that counsel forced him to plead no contest. The record does not support, nor does Van Patten's appellate brief include, any argument that counsel's performance was deficient or prejudicial. Therefore, we conclude Van Patten's right to effective assistance counsel was not violated. No manifest injustice exists to support plea withdrawal.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.