COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 3, 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. 96-3233-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TONY L. SUTTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

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

PER CURIAM. Tony L. Sutton appeals an order denying his motion to withdraw a guilty plea. He argues that an accumulation of errors rendered his guilty plea unknowing. We conclude that the trial court properly exercised its discretion when it refused to allow withdrawal of the plea.

Sutton was initially charged with operating a vehicle after revocation, seventh offense, and attempting to elude an officer. Sutton, appearing without counsel, pleaded guilty to one count of eluding an officer in return for a dismissal of the operating after revocation charge. When the matter was recalled for sentencing two months later, the State expressed doubts that its charge of eluding an officer was sustainable on the facts alleged. The prosecutor informed the court that the parties had agreed to an amended charge of attempted escape. Under the terms of the new plea agreement, the State would be bound by the presentence investigation which included a recommendation for two years' incarceration imposed and stayed with one year probation. The court allowed Sutton to withdraw his previous plea and plead guilty to attempted escape. The court accepted Sutton's plea and withheld sentence, placing Sutton on probation for one year. After Sutton violated the terms of his probation, the court sentenced Sutton to eight months' incarceration consecutive to another sentence.

Sutton then filed a motion to withdraw his guilty plea, alleging that (1) the short time he had to consider his plea options denied him his constitutional right to notice and an opportunity to defend; (2) the facts do not support a charge of attempted escape because he abandoned his attempt to escape without the intervention of another person; and (3) the trial court did not inform him of the elements of the inchoate crime of attempt.[1] After sentencing, a defendant who

[1] The postconviction motion also alleged that Sutton had not been informed that a conviction of the crime of attempted escape implicated a mandatory consecutive sentence, although he conceded that he had previously been convicted of escape and knew that the penalty for escape was a mandatory consecutive sentence. In his brief filed in the trial court, however, he conceded that failure to explain the mandatory consecutive sentence did not provide grounds for withdrawing the plea. *See* ***State v. James,*** 176 Wis.2d 230, 232, 500 N.W.2d 345, 346 (Ct. App. 1993). The issue is not pursued on appeal. We conclude that the issue is waived. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). The postconviction motion also alleged that Sutton did not properly waive his (continued)

seeks to withdraw a guilty plea carries the heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Krieger,*** 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). The standard of review on appeal is whether the trial court erroneously exercised its discretion when it denied the motion. *See* ***State v. Booth,*** 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987).

Sutton cites ***State v. Nuedorff,*** 170 Wis.2d 603, 489 N.W.2d 689 (Ct. App. 1992), for the proposition that an amendment to the information on short notice prejudices the defense even though there was no motion for a continuance. In ***Nuedorff,*** the defendant was required to present a defense at trial on the day of the amendment. The ability of a defendant to defend himself at trial is not comparable to the amount of preparation needed to enter a negotiated plea. The trial court offered Sutton an opportunity to change his plea decision before the plea was accepted. Sutton indicated no dissatisfaction with the time in which he had to consider the State's offer or with the plea agreement until after his probation was revoked.

Sutton argues that he is not guilty of attempted escape because after he ran from police during a traffic stop, he surrendered without the intervention of another person or an extraneous factor. The record does not support that claim. Prior to his plea, Sutton admitted that he read the complaint and that it stated sufficient facts to support an attempted escape charge. When arguing for a reduced sentence, Sutton stated, "It was a matter of, you know, 15 minutes from the time I fled, you know, to the time I, you know, seen the officer and decided,

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constitutional rights and that the State did not adhere to its plea bargain. Those issues were also abandoned on appeal and will not be considered. ***Id.***

hey, you know, I gave up, you know." The record suggests that Sutton gave up after he saw a second police officer and was too tired to continue running. The complaint constitutes an adequate factual basis for Sutton's plea.

Before accepting Sutton's plea, the court informed Sutton of the elements of the inchoate crime of escape. While giving Sutton a copy of the jury instructions would have removed all doubt on this issue, the trial court's extemporaneous recitation of the elements is sufficient to establish that Sutton's plea was knowingly entered.

Finally, Sutton contends that, although these individual errors may not warrant withdrawal of a plea, the accumulation of errors establishes a basis for withdrawal. Having concluded that each of these arguments is without substance, adding them together adds nothing. *See* ***Mentek v. State,*** 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

By the Court.—Order affirmed.

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