

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-3677-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FITZROY DONALDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

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

PER CURIAM. Fitzroy Donaldson appeals a judgment of conviction and two orders denying postconviction relief. The issues are: (1) whether Donaldson was entitled to a *Machner* hearing; (2) whether the circuit court erred in not ordering the district attorney to provide certain documents to Donaldson; (3) whether Donaldson established a manifest injustice so as to allow

him to withdraw his plea; and (4) whether Donaldson was denied effective assistance of counsel during sentencing. We affirm.

BACKGROUND

Donaldson pleaded no contest to one count of possession of more than forty grams of cocaine within 1000 feet of a park with intent to deliver. The circuit court sentenced him to fifteen years in prison. Donaldson is a citizen of Jamaica who, prior to his arrest, resided in Florida.

After sentencing, Donaldson appealed the judgment of conviction. The appeal was dismissed so that he could file a postconviction motion. In January 1996, he filed a pro se postconviction motion. In this motion, he alleged that his defense counsel had been ineffective for failing to investigate whether the offense had occurred within 1000 feet of a park, that he entered the plea without fully understanding the elements of the charge, that he was sentenced on the basis of inaccurate information, and that the circuit court abused its discretion when sentencing him because the court considered his involvement with other drug dealers.

In April 1996, the circuit court received notice that Donaldson was being represented by an attorney. Subsequently, his attorney filed an amended motion for postconviction relief which stated that it superseded the prior pro se motion. The amended motion alleged that the court sentenced Donaldson on the basis of unreliable and inaccurate information; that the inferences drawn by the circuit court concerning Donaldson's prior dealing in drugs were not supported by the evidence; that his defense counsel had been ineffective for allowing the court to consider unreliable and inaccurate information; and that the new, reliable information constituted a new factor which justified a new sentence.

After a hearing, the court denied the motion. Donaldson then appealed the judgment of conviction and the order denying the postconviction motion for relief. The appeal was once again voluntarily dismissed so that he could pursue another motion for postconviction relief.

His second motion for postconviction relief alleged that he was denied due process because the circuit court had not found a basis in fact for the penalty enhancer of the crime being committed within 1000 feet of the park. At his plea hearing, Donaldson stipulated to the fact that the crime occurred within 1000 feet of a park. He also alleged in his second postconviction motion that his trial counsel had been ineffective for failing to investigate and challenge the penalty enhancer, failing to request a preliminary hearing, failing to inform Donaldson of the consequences of his plea and failing to challenge the Wisconsin Drug Tax Stamp law.

The circuit court, stating that Donaldson had had many opportunities to pursue postconviction relief, did not hold a *Machner* hearing on Donaldson's allegations. Instead, the court allowed Donaldson to proceed only on the issue of whether the offense occurred within 1000 feet of a park. After the hearing, the circuit court denied the motion finding that Donaldson had failed to carry his burden of establishing that the offense occurred more than 1000 feet from the park. Donaldson appeals the judgment of conviction and the denial of the two postconviction motions.

ANALYSIS

The first issue is whether the trial court erred in not ordering an evidentiary hearing on the question of whether his defense counsel was ineffective. Donaldson alleges that his defense counsel was ineffective for a number of reasons. He claims that his counsel was ineffective for failing to obtain certain police reports, because he did not respond to Donaldson's request for a preliminary hearing,¹ and because he did not advise Donaldson of the nature of the case, the possible consequences of the plea, and possible constitutional challenges. Donaldson further alleges that the circuit court erred because it did not order an evidentiary hearing on these allegations.

We will not consider the claims described in the preceding paragraph because it does not appear from the record that Donaldson raised them before the circuit court. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W. 2d 140, 145 (1980) (generally, no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial court). While some of these claims were raised in Donaldson's first pro se motion before the circuit court, this motion was expressly superseded by the amended motion filed by his attorney. The amended motion is the one on which the circuit court ruled. Therefore, Donaldson has waived these issues.

The second issue Donaldson raises is that the circuit court erred in not ordering the district attorney to give him certain documents. Donaldson claims that discovery is an ongoing process and that he is entitled to continue to receive the documents even after his conviction. Donaldson does not cite any authority in support of his argument that discovery is an ongoing process that

¹ Donaldson has been represented at various times by at least five different attorneys during these proceedings. One of these attorneys waived the preliminary hearing.

extends beyond trial. The statute controlling this issue establishes that the district attorney's duty to provide documents to a defendant continues only up to and during the trial. *See* § 971.23(7), STATS. Since that time has long since passed, the district attorney did not have an obligation to provide the documents to Donaldson.

The third issue is whether the circuit court erred by not ordering an evidentiary hearing to determine whether Donaldson's counsel was ineffective for failing to investigate the applicability of the park enhancer.² The circuit court concluded that a *Machner* hearing was not necessary because if the offense had occurred within 1000 feet of park, Donaldson would not have been able to establish any prejudice because his counsel did not investigate the issue. If the offense had not occurred within 1000 feet of the park, Donaldson would have been entitled to sentence modification. Therefore, the circuit court allowed a hearing on the issue of whether the offense had occurred within 1000 feet of a park.

In reviewing a circuit court's refusal to hold a *Machner* hearing, we independently review the postconviction motion to determine whether it alleges facts sufficient to raise a question of fact necessitating a *Machner* hearing. *See State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). We agree with the circuit court's determination that a *Machner* hearing was not necessary.

In order to be successful on his claim that his counsel was ineffective, Donaldson would have had to prove both that his counsel's

² Donaldson had already had a *Machner* hearing on his first postconviction motion relating to sentencing issues.

performance was deficient and that he was prejudiced by this performance. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984). The circuit court allowed Donaldson to present evidence in an attempt to establish that the offense had not occurred within 1000 feet of a park. The record shows that he failed to establish that the offense occurred more than 1000 feet from the park. Even had he been able to establish that his attorney was ineffective for failing to investigate this issue, Donaldson would not have been able to establish that he had been prejudiced by this deficient performance. Thus he would not have been able to establish that his counsel was ineffective. *See State v. Moats*, 156 Wis.2d 74, 100-01, 457 N.W.2d 299, 311 (1990). Therefore, we affirm the order of the circuit court.

The fourth issue is whether the circuit court erred when it ruled that Donaldson failed to establish that the offense did not occur within 1000 feet of a park. Donaldson appears to be arguing that the circuit court erred by ruling that he had the burden to establish that the offense did not occur within 1000 feet of a park. Donaldson pled guilty to the offense including the park enhancer. In order to withdraw that portion of his plea stipulating to the park enhancer, Donaldson had to establish that withdrawal of his plea was necessary to correct a manifest injustice. *See State v. Rock*, 92 Wis.2d 554, 558, 285 N.W.2d 739, 741-42 (1979). In other words, he had the burden of showing that the enhancer was not appropriate. He failed to meet that burden. Therefore, we affirm.

The fifth issue is whether Donaldson should be allowed to withdraw his plea because he lacked an adequate understanding of the plea negotiations and sentencing. Specifically, Donaldson asserts that his attorney was ineffective for failing to explain to him that he had been multipliciously charged under the Drug

Tax Stamp law in violation of the constitution, and that his attorney failed to inform him of the consequences of his plea.

The record establishes, however, that Donaldson's attorney filed a motion moving to dismiss the charges under the Drug Tax Stamp law as being constitutionally invalid. This motion was specifically withdrawn as part of the plea agreement. The record does not support Donaldson's assertion that his attorney did not explain to him his possible defense under the Drug Tax Stamp act.

The record also belies Donaldson's assertion that his attorney failed to inform him of the consequences of his plea. During the plea colloquy, the circuit court asked Donaldson if he had gone over the plea questionnaire with his attorney. Donaldson responded that he had. The court then went through a description of the various rights Donaldson was waiving by entering the plea, and for each one asked Donaldson if he understood. Donaldson responded that he did. The court asked Donaldson if anyone had made any threats or promises, other than those in the plea agreement, to get him to enter into the agreement. Donaldson responded no. The court further asked Donaldson if he understood that the court could sentence him to the maximum, which was a \$500,000 fine and thirty-five years. Donaldson again responded that he understood. The court also asked Donaldson if he understood that he could be deported as a result of his conviction and Donaldson again responded that he understood. The plea colloquy satisfies the requirements set forth in *State v. Bangert*, 131 Wis.2d 246, 261-72, 389 N.W.2d 12, 21-25 (1986) and § 971.08, STATS.

The final issue is whether Donaldson was denied effective assistance of counsel during sentencing. Donaldson asserts that his counsel at sentencing was ineffective because his counsel allowed the State to argue unreliable and

inaccurate information to the court. Donaldson further asserts that the court took this information into consideration when it sentenced him. The circuit court held a hearing on this issue.³

After the hearing, the circuit court concluded that it had not relied on the information Donaldson claimed was inaccurate. The court stated that if it had relied on the information, it would have sentenced Donaldson to a sentence closer to the maximum.⁴ The court further concluded that, based on the transcripts and the presentence report, there was enough information to warrant the sentence imposed.

In order for Donaldson to establish ineffective assistance of counsel, he must demonstrate that he suffered prejudice as result of his counsel's deficient performance. *See Strickland*, 466 U.S. at 697. Even assuming that Donaldson's counsel was deficient for allowing this information to be heard, Donaldson would not be able to demonstrate that he was prejudiced by his deficient performance. Since the court determined that it did not rely on the allegedly inaccurate information, Donaldson's right to be sentenced on accurate information was not violated. Since his right to be sentenced on accurate information was not violated, Donaldson was not prejudiced by his counsel allowing the information be heard.

By the Court.—Judgment and orders affirmed.

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

³ The court did not decide whether the information was inaccurate or unreliable.

⁴ Donaldson received fifteen years out of a possible thirty-five years.

