COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2153

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG DAMASKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Craig Damaske appeals from the order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06.[1] On appeal, Damaske argues that his no contest plea was not knowingly, voluntarily, or intelligently entered because he believed his earlier substitution request, denied by the trial court, had been preserved for appeal, and because he was not told that, if convicted, he would be required to register as a sex offender. Damaske asserts that the ineffective assistance of his appellate counsel constitutes both a sufficient reason for failing to raise these claims in earlier proceedings, *see* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994), and a manifest injustice allowing him to withdraw his no contest plea, *see* ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). We reject Damaske's arguments and affirm.

I. BACKGROUND.

¶2 On October 23, 1995, Damaske was found guilty after pleading no contest to one count of second-degree sexual assault. He was sentenced to ten years imprisonment. Damaske then filed a postconviction motion in which he raised several claims of error. The trial court denied his postconviction motion, Damaske appealed, and this court affirmed the trial court's decision. *See* ***State v. Damaske***, 212 Wis. 2d 169, 567 N.W.2d 905 (Ct. App. 1997).[2] Following our

[1] The Notice of Appeal filed by Damaske in the instant action indicates that Damaske is also appealing from the judgment of conviction entered on January 30, 1996. However, Damaske has already exercised his direct appeal, and this court affirmed the judgment of conviction in an earlier opinion. *See* ***State v. Damaske***, 212 Wis. 2d 169, 567 N.W.2d 905 (Ct. App. 1997). Therefore, we conclude that Damaske can only appeal from the trial court's order denying his WIS. STAT. §974.06 postconviction motion.

[2] We have already provided a thorough recitation of the factual and procedural history of this case, *see* ***Damaske***, 212 Wis. 2d at 175-84; therefore, we shall not repeat that information here. However, we shall set forth the facts relevant to the instant proceeding.

earlier decision on Damaske's appeal, his appellate counsel contacted the State Public Defender's office requesting that new counsel be appointed to represent Damaske in order to file a motion pursuant to WIS. STAT. § 974.06, because appellate counsel had failed to raise certain issues in the direct appeal. The issues not previously raised were whether Damaske's plea was involuntary because he believed that he had preserved the right to challenge the trial court's denial of his motion for substitution[3] and he had never been informed that, if convicted of the charged offense, he would have to register with the State as a sex offender. The Public Defender's office appointed new counsel to file a § 974.06 motion on Damaske's behalf.

¶3 Represented by new counsel, Damaske brought a WIS. STAT. § 974.06 motion, in which he claimed that he had not entered his plea knowingly, intelligently and voluntarily. Damaske asserted that he would not have entered his no contest plea had he known that the substitution issue had not been preserved, and that, if convicted, he would be required to register as a sex offender. Further, Damaske acknowledged his failure to raise these issues in the prior proceedings, but he asserted that his appellate counsel's ineffectiveness constituted sufficient reason for his failure to raise the issues earlier. The circuit court construed Damaske's argument as a claim for ineffective assistance of appellate counsel. The circuit court found that because Damaske had stated a claim for ineffective

[3] As we noted in our previous decision, during a scheduling conference on May 15, 1995, Damaske was informed that Judge Sykes would preside over the pretrial conference and the trial. Damaske did not file his substitution request until August 10, 1995. Judge Sykes denied Damaske's request for substitution as untimely and Damaske challenged the ruling on appeal. This court concluded that Damaske waived his right to challenge Judge Sykes' ruling when he entered his no contest plea. Damaske claims that he believed that he had preserved the right to raise the substitution issue and that he never would have entered his plea had he known that by doing so he waived the right to challenge Judge Sykes' ruling.

assistance of appellate counsel, his challenge should have been made by petitioning this court for a writ of habeas corpus, rather than by filing a § 974.06 motion with the circuit court. Nevertheless, the circuit court concluded that Damaske's claim for ineffective assistance of appellate counsel failed because he had not proven that appellate counsel's performance was prejudicial.

II. ANALYSIS.

¶4 On appeal, Damaske argues that he should be allowed to withdraw his plea. In order to withdraw a plea after sentencing, Damaske must show that a manifest injustice would result if the withdrawal were not permitted. *See* ***Booth***, 142 Wis. 2d at 235. A manifest injustice may occur when a defendant enters a plea as the result of the ineffective assistance of counsel. *See* ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993).

¶5 Damaske asserts that he would not have pled no contest if he had been informed that by entering his plea he waived the right to challenge the trial court's ruling on his request for substitution, or that, if convicted, he would have to register as a sex offender. Damaske maintains that without this information, his plea could not have been entered knowingly, intelligently and voluntarily. However, neither Damaske's postconviction counsel nor his appellate counsel raised this challenge and, therefore, Damaske contends that appellate counsel provided ineffective assistance.[4] Damaske concludes that appellate counsel's

[4] In his WIS. STAT. § 974.06 motion, and again on appeal, Damaske confines his argument to the ineffective assistance of appellate counsel. Moreover, in its decision on the § 974.06 motion, the circuit court determined that:

> At first blush, the motion appears to be filed in the context of ***State ex rel. Rothering v. McCaughtry***. However, Damaske does not allege that appellate counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim as

(continued)

ineffective assistance not only provides sufficient reason for failing to raise this issue in prior proceedings to escape the procedural bar set forth in ***Escalona***, 185 Wis. 2d at 178, but also constitutes a manifest injustice allowing him to withdraw his plea, *see* ***Booth***, 142 Wis. 2d at 235. We reject Damaske's arguments.

¶6 The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the ***Strickland*** test applies equally to ineffectiveness claims under the State constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If this court determines that the defendant has not proven one prong, we need not address the other prong. *See* ***id.*** at 697. On appeal, the

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> required by ***Rothering***. Instead, he alleges that appellate counsel failed to raise the issue of a knowing plea on appeal. This must be addressed by a petition for writ of habeas corpus in the Court of Appeals pursuant to ***State v. Knight***.

(citations omitted). Nevertheless, the circuit court concluded that, "[e]ven if the court were to construe the defendant's motion as setting forth allegations of ineffective assistance of appellate counsel for failing to raise an ineffective assistance of trial counsel claim, the motion fails" because he had not proven that appellate counsel's performance was prejudicial. However, we are satisfied that the circuit court would have arrived at the same determination if Damaske had stated a claim for ineffective assistance of postconviction as opposed to appellate counsel. Therefore, we conclude that for the purposes of this appeal, the distinction between ineffective assistance of postconviction and appellate counsel is immaterial because as we shall demonstrate, in either case, the conclusion remains the same. We shall continue to refer to Damaske's argument as a claim for ineffective assistance of appellate counsel.

trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, proof of either prong is a question of law which this court reviews *de novo*. *See* ***id.*** at 634.

¶7 Essentially, Damaske's claim involves multiple levels of ineffective assistance of counsel. Damaske's argument is grounded in the premise that he would not have entered his plea had he known either that the substitution issue had not been preserved or that he would be required to register as a sex offender. He maintains that because he lacked the independent legal knowledge to be aware of these facts, trial counsel was ineffective for failing to adequately inform him. However, appellate counsel failed to either challenge the voluntariness of the plea itself, or argue the ineffective assistance of trial counsel on these grounds and, therefore, Damaske now alleges that appellate counsel's assistance was also ineffective. We disagree.

¶8 First, we note that Damaske has not established that trial counsel's failure to inform him that by entering his no contest plea he would waive the right to raise the substitution issue was prejudicial. In an affidavit attached to his WIS. STAT. § 974.06 motion, Damaske simply asserts that he would not have entered his plea if he had known that by doing so he would not be able to challenge the substitution issue. Damaske fails to provide any factual support for this assertion. "A 'bare-bones allegation' that a defendant would have pled differently 'is no more than a conclusory allegation....'" ***State v. Bentley***, 201 Wis. 2d 303, 316, 548 N.W.2d 50 (1996) (citation omitted). Such an allegation, without more, fails to demonstrate that the defendant was prejudiced by the lack of information. *See* ***id.*** (disagreeing with the court of appeals that the defendant's allegation that he would have pled differently, "absent more, is sufficient to raise the issue of whether [the defendant] was prejudiced by the misinformation."). Therefore,

because Damaske is unable to establish that he was prejudiced by this lack of information, this court cannot conclude that appellate counsel was ineffective.

¶9 Further, the record clearly establishes that Damaske was not prejudiced by the fact that the substitution issue had not been preserved. The record and our earlier decision indicate that at the plea hearing the trial court satisfied the requirements of WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), by ensuring that Damaske understood the nature of the charges against him. Damaske completed a no contest plea questionnaire and waiver of rights form. During the plea colloquy, the trial court asked Damaske whether he had reviewed the form with counsel, and whether he understood the form. *See, e.g.,* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987) (trial court may fulfill its obligation under ***Bangert*** by making reference to a signed waiver of rights form). Damaske answered, unequivocally, that he had reviewed the form with counsel, and that he understood it. Although nothing about the substitution issue was ever specifically mentioned in either the questionnaire or the plea colloquy, the form does inform Damaske that by entering his plea he is giving up "[the] right to challenge matters commonly set forth in motions." Damaske fails to explain, in light of the questionnaire and his colloquy with the court, how or why the handling of this matter by the trial court prejudiced him.

¶10 On the contrary, this court's decision on Damaske's direct appeal supports our conclusion here that Damaske is unable to establish prejudice based on the substitution issue. Although Damaske now argues that appellate counsel was ineffective for failing to argue that his plea was involuntary because he was unaware that he had waived the right to challenge the trial court's ruling on the substitution issue, in his postconviction motion and on direct appeal Damaske

argued that trial counsel was ineffective for failing to timely file the request for substitution against the trial judge. In his earlier appeal, this court concluded that, "Damaske has not shown that Judge's Sykes' handling of [his] case rendered 'the proceeding fundamentally unfair' or that she was not impartial." ***Damaske***, 212 Wis. 2d at 199 (citation omitted). We asserted that:

> Judge Sykes handled the case with grace, understanding, patience and fairness, all in the face of a defendant who repeatedly flip-flopped in his positions and who, she wrote in her decision, was "manipulating the system for delay purposes." Judge Sykes's rulings on the legal issues surrounding Damaske's attempt to withdraw his plea and the subsequent sentencing were correct. Her statement on sentencing reflects a careful consideration of all the appropriate factors ...

Id. (footnote omitted). Thus even if Damaske's right to challenge Judge Sykes's ruling had been preserved, he would not have prevailed. Therefore, Damaske was not prejudiced by counsel's failure to inform him of the waiver.

¶11 Finally, Damaske claims that his plea was involuntary because he was not informed that, upon conviction of the charged offense, he would be required to register as a sex offender. Damaske maintains that neither the trial court nor trial counsel ever informed him of the registration requirement. Damaske argues that the registration requirement is a direct consequence of entering his plea and, therefore, because he had not been informed of the requirement, his plea was involuntary. Moreover, Damaske contends that trial counsel was ineffective for failing to inform him of this consequence. Inasmuch as neither postconviction nor appellate counsel ever challenged trial counsel's failure to inform Damaske of the registration requirement, Damaske concludes that appellate counsel was ineffective. Damaske's argument is defeated by this

court's decision in ***State v. Bollig***, 224 Wis. 2d 621, 593 N.W.2d 67 (Ct. App. 1999).

¶12 In ***Bollig***, this court asserted that, "the requirement that a convicted sex offender register with the appropriate agency appears, at least initially, to be a direct consequence of pleading no contest," to the underlying offense. ***Id.*** at 636. We then attempted to determine whether the registration requirement constitutes a punishment. *See* ***id.*** We first considered a similar requirement for juvenile offenders in Wisconsin, which the state supreme court determined did not constitute punishment, and then we considered other states' registration requirements. We concluded that the registration requirement is not a direct punishment, but rather it is "a safeguard to protect past victims and the public in general." ***Id.*** at 639. We elected to adopt the majority conclusion and held "that a trial court is not required to notify a defendant of this registration requirement in order for the plea to be valid." ***Id.*** at 638-39. Therefore, under ***Bollig***, Damaske's plea was not affected by either the trial court's or trial counsel's failure to inform him of the registration requirement. For these reasons, we conclude that counsel's failure to inform Damaske of the registration requirement was not ineffective and, consequently, we also conclude that appellate counsel was not ineffective for failing to allege trial counsel's omission.

By the Court.—Order affirmed.

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