

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1302-CR

Cir. Ct. No. 2002CF2882

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE L. JOHNIKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eddie L. Johnikin appeals from a judgment convicting him of one count of aggravated battery, party to a crime.¹ He also appeals from a circuit court order denying his postconviction motion seeking to withdraw his no-contest plea. Johnikin argued in his postconviction motion that the circuit court improperly participated in the plea negotiations leading to his no-contest plea and that his trial counsel was ineffective for erroneously advising Johnikin that he could not be charged with homicide should the victim of the battery die in the future. We conclude that the circuit court properly rejected both claims, and we affirm.

¶2 On May 27, 2002, Isaac Jackson was found lying unconscious in front of 2710 North 27th Street in Milwaukee. He was admitted to Froedtert Memorial Lutheran Hospital where he lapsed into a coma as the result of multiple skull fractures. Witnesses led police to Johnikin as one of three males who had attacked Jackson that day. Johnikin told police that he had driven his girlfriend's Buick to a friend's residence earlier in the day. Johnikin claimed that as he returned to the vehicle, he encountered Jackson who approached Johnikin's vehicle and started pulling on its back door handle. Johnikin informed police that he told Jackson to stop and when he wouldn't, Johnikin got out of the vehicle and began to fight Jackson. Ultimately, Johnikin admitted to retrieving the vehicle's tire iron and repeatedly striking Jackson with it, knocking him down. Johnikin also admitted to striking him down again with the tire iron after Jackson briefly

¹ The circuit court judgment erroneously states that Johnikin was also convicted of using a dangerous weapon pursuant to WIS. STAT. § 939.63 (2001-02). The dangerous weapon enhancer was dismissed by the circuit court upon the entry of Johnikin's no contest plea on July 15, 2002. Accordingly, the clerk of the circuit court shall promptly enter an amended judgment deleting reference to § 939.63.

struggled to his feet. Johnikin reported that at this juncture, two boys joined the fray and kicked Jackson as he lay on the ground. Johnikin told police that he then got into the Buick and drove home.

¶3 Johnikin was charged with aggravated battery while armed with a dangerous weapon, party to a crime. He entered into plea negotiations with the State. He subsequently agreed to enter a no-contest plea and the State agreed to dismiss the dangerous weapon enhancer. The circuit court accepted the plea agreement and sentenced Johnikin to five years of initial confinement and five years of extended supervision, consecutive to any other sentence.

¶4 Johnikin sought postconviction relief, arguing that the court improperly participated in the plea negotiations when the following exchange occurred at the outset of the plea hearing:

MR. PARR: Gregory Parr on behalf of Eddie Johnikin. Mr. Johnikin is in person.

Judge, we were expecting to resolve this case today, but we are not going to be able to resolve it. Mr. Johnikin has asked that I set this case for trial. I do believe it is possible that we may resolve this case short of trial, therefore, I'm asking for a final pretrial conference date as well.

THE COURT: This has been set for two projected pleas, and if it is set for trial today there will be no plea to the charge and there will be no negotiations accepted by the Court. The Court will view that as the defendant not taking full responsibility for his actions, so it is resolved today or it goes to trial.

¶5 Johnikin argued to the postconviction court that the remarks violate the rule adopted in *State v. Williams*, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58, barring judicial participation in plea negotiations before a plea has

been reached. The postconviction court rejected the claim, concluding that Johnikin's plea was voluntary and not coerced.

¶6 Johnikin also argued that he was denied the effective assistance of trial counsel because counsel mistakenly advised him that the State was prevented from prosecuting him again in the event Jackson ultimately died from his injuries. Although counsel's alleged advice to Johnikin was incorrect,² the postconviction court rejected this claim, too, concluding that Johnikin failed to demonstrate prejudice under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (A claim of ineffective assistance of counsel depends upon a showing that counsel's performance was deficient and that the deficient performance prejudiced the defendant.). Johnikin appeals.

¶7 A request to withdraw a guilty or no-contest plea after sentencing is addressed to the circuit court's discretion. *State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). A defendant must demonstrate by clear and convincing evidence that withdrawing the plea is necessary to correct a manifest injustice. *See id.* "[W]hether a plea was knowingly [and voluntarily] entered presents a question of constitutional fact." *State v. Bollig*, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. While a circuit court's findings of historical or evidentiary facts will not be upset unless they are clearly erroneous, we review constitutional issues independently of the lower court's determination. *Id.*, ¶14.

² Under *State v. McKee*, 2002 WI App 148, ¶16, 256 Wis. 2d 547, 648 N.W.2d 34, "successive prosecution for a greater crime [is permissible] when a fact necessary [for] conviction of the greater crime does not come into existence until after a defendant has been convicted of a lesser crime based on the same act."

¶8 Johnikin does not dispute the circuit court's historical findings of fact, but rather challenges the circuit court's legal conclusions that neither claim of alleged error amounted to evidence of a manifest injustice under *Booth*. We conclude that the postconviction court's memorandum decision entered on April 22, 2004, provides an accurate analysis of the undisputed, historical facts relevant to the issues presented in this case. We further conclude that the memorandum decision presents a proper application of the law to the historical facts. Accordingly, we adopt the memorandum decision³ of the postconviction court as the decision of this court. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003). We independently conclude that Johnikin failed to meet his burden of showing that his plea was involuntary or the result of ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

³ A copy of the circuit court's April 22, 2004, memorandum decision is attached to this opinion and incorporated as though fully set forth.

