

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2006

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. 2005AP1088

Cir. Ct. No. 2000CF164

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENG XIONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Leng Xiong appeals a judgment convicting him of armed burglary as party to a crime. He also appeals an order denying his motion to withdraw his plea and an order denying his motion for reconsideration. Xiong

argues the circuit court erred when it concluded his motion to withdraw his plea was untimely and therefore denied his motion without conducting an evidentiary hearing. We agree, reverse the judgment and orders, and remand with directions to conduct an evidentiary hearing.

BACKGROUND

¶2 On March 11, 2002, Xiong pled no contest to being a party to the crime of armed burglary. The circuit court entered a judgment of conviction accordingly and sentenced Xiong. Xiong, through postconviction counsel, filed a motion to modify his sentence, which was denied on October 29. Xiong appealed; we affirmed and Xiong's petition for review was denied.

¶3 On May 27, 2004, Xiong, pro se, filed a WIS. STAT. § 974.06¹ motion and affidavit seeking, among other things, to withdraw his plea based on the court's failure to personally inform him of the plea's deportation consequences. Xiong's affidavit asserted that he was never informed of the possibility of deportation and that, had he known he would be deported, he would have insisted on a jury trial. The circuit court did not hold a hearing, instead denying Xiong's motion as untimely. Xiong, through court-appointed counsel, moved to reconsider; the circuit court denied that motion as well.

DISCUSSION

¶4 WISCONSIN STAT. § 971.08 provides, in relevant part:

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

(1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

....

(c) Address the defendant personally and advise the defendant as follows: “If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.”

....

(2) If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant’s deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant’s motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

A circuit court’s failure to personally address a defendant as required under § 971.08(1)(c) cannot constitute harmless error. *See State v. Douangmala*, 2002 WI 62, ¶42, 253 Wis. 2d 173, 646 N.W.2d 1.²

¶5 Xiong’s pro se motion asserted that he was never advised of the potential for deportation. Thus, the circuit court did not personally address Xiong as required by WIS. STAT. § 971.08(1)(c). Xiong’s pro se motion also asserted that he had received deportation papers. His motion for reconsideration included documentary evidence of his impending deportation. The circuit court did not determine whether Xiong had shown that his plea was likely to result in his

² Xiong’s plea was accepted prior to our supreme court’s decision in *State v. Douangmala*, 2002 WI 62, ¶42, 253 Wis. 2d 173, 646 N.W.2d 1. However, because *Douangmala* was decided before Xiong’s case was complete, its holding is applicable here. *See State v. Lagundoye*, 2004 WI 4, ¶2, 268 Wis. 2d 77, 674 N.W.2d 526.

deportation or make any factual findings. Rather, it concluded the record conclusively demonstrated Xiong was not entitled to relief because his motion was untimely. *See State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

¶6 Xiong contends his motion was timely and contained sufficient allegations to entitle him to relief under WIS. STAT. § 971.08(2). Xiong’s pro se motion was styled as a WIS. STAT. § 974.06 motion. Section 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), prohibit a defendant from pursuing a claim in a subsequent § 974.06 motion that could have been raised in the defendant’s direct appeal, unless the defendant provides a sufficient reason for failing to raise the claim in the first instance. Xiong’s “sufficient reason” alleged in his motion was ineffective assistance of postconviction counsel for counsel’s failure to raise the plea withdrawal issue in his direct appeal. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel can constitute a sufficient reason to clear the procedural bar of *Escalona-Naranjo*).

¶7 The State argues that Xiong’s postconviction counsel’s performance was not deficient for failing to seek plea withdrawal. It contends that Xiong could not have established a right to withdraw under WIS. STAT. § 971.08(2) at the time of his direct appeal because he could not have shown his plea was likely to result in his deportation. At that time, no deportation proceedings had commenced. Because postconviction counsel was not deficient for failing to raise a meritless argument, the State argues, there was no ineffective assistance and therefore no sufficient reason for Xiong’s failure to raise his plea withdrawal arguments in his direct appeal.

¶8 However, Xiong argues that his inability to know of his impending deportation also constitutes a sufficient reason to clear the procedural bar of *Escalona-Naranjo*. The State concedes that a defendant's inability to know, at the time of a postconviction motion, that the defendant's plea is likely to result in deportation could constitute a sufficient reason. However, the State argues that Xiong did not plead this reason in his pro se motion and, therefore, it cannot constitute a sufficient reason in this case. We decline to adopt the State's hypertechnical view of Xiong's motion. Although labeled a WIS. STAT. § 974.06 motion, Xiong's motion nonetheless requested plea withdrawal. We liberally construe Xiong's pro se motion as a WIS. STAT. § 971.08(2) motion for plea withdrawal based on the court's failure to personally inform him of the deportation consequences of his plea.

¶9 The State also argues that, even considering Xiong's motion as a WIS. STAT. § 971.08(2) motion for plea withdrawal, Xiong's motion is untimely. It complains of Xiong's delay in filing his pro se motion after he received notice of his impending deportation. An immigration detainer against Xiong was filed on September 11, 2003; Xiong filed his pro se motion on May 27, 2004. Although WIS. STAT. § 971.08(2) contemplates some delay—"a defendant *later* shows that the plea is likely to result in the defendant's deportation"—the State argues we should impose a due diligence requirement limiting the time a defendant has to move to withdraw a plea after learning the defendant is likely to be deported. We conclude it is not necessary to address the State's request for a time requirement. Rather, we simply conclude that, under the circumstances, Xiong's pro se motion was filed within a reasonable time of learning he was likely to be deported as a result of his guilty plea and subsequent conviction.

¶10 Because Xiong's pro se motion is not procedurally barred by *Escalona-Naranjo* and was filed within a reasonable time upon learning of his impending deportation, the circuit court erred when it denied Xiong's motion as untimely without conducting an evidentiary hearing. Therefore, we reverse and remand to the circuit court to conduct an evidentiary hearing.

By the Court.—Judgment and orders reversed and cause remanded with directions.

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

