COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1015

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

WALLACE A. STELLRECHT,

PETITIONER-RESPONDENT,

V.

DONALD W. GUDMANSON, WARDEN,
JACKSON CORRECTIONAL INSTITUTION,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed.*

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

¶1 PER CURIAM. The warden of Jackson Correctional Institution (the State) appeals an order granting Wallace Stellrecht habeas corpus relief. The trial court concluded that one of Stellrecht's trial attorneys, Owen Williams, was

ineffective because he failed to pursue a motion filed by previous counsel alleging destruction of exculpatory evidence. The court concluded that Stellrecht established a manifest injustice from his counsel's deficient performance and should be allowed to withdraw his no contest pleas to three counts of recklessly endangering safety as a party to a crime while using a dangerous weapon. The State argues that habeas corpus is an incorrect procedural device and that Stellrecht failed to establish deficient performance or prejudice from his counsel's abandonment of the destruction of evidence issue. Because we conclude that Stellrecht did not establish ineffective assistance of counsel, we reverse the order granting habeas corpus relief.

¶2 Stellrecht was charged with two counts of attempted first-degree intentional homicide, five counts of recklessly endangering safety and several lesser offenses for an incident arising out of an armed standoff and shootout at Stellrecht's home. The complaint alleged that Stellrecht and David Spears fired at sheriff's deputies or their squad cars. Stellrecht was later charged with four counts of bail jumping for possessing firearms and intoxicants while released on bail.

¶3 Stellrecht's first attorney, Thomas Mulligan, filed a motion to dismiss based on the State's failure to preserve evidence when it had the squad car that was struck by gunfire repaired before the defense had an opportunity to examine it. Stellrecht then retained Owen Williams to represent him and Williams filed a motion to suppress Stellrecht's statement in which he admitted that he fired a rifle shot toward the squad car. Williams then negotiated a plea agreement that resulted in dismissal of six of the initial nine counts including the attempted homicide charges and all of the bail jumping charges. The motions filed by Mulligan and Williams were never heard.

¶4 In granting habeas corpus relief, the trial court noted that the complaint alleged that Stellrecht and Spears discharged a .22 caliber firearm and a 308 rifle into the police cruiser. Notwithstanding his threatening words to the sheriff's dispatcher, Stellrecht contended that he did not shoot at the officers or their cruisers, but rather fired one shot into the air. The court concluded that examination of the bullet holes was extremely important to Stellrecht's theory of defense and that Williams was ineffective for not addressing or developing the destruction of evidence issue.[1] The court made no specific finding of prejudice from Williams' performance.

¶5 We review the merits of Stellrecht's claims of ineffective assistance of counsel because the State waived any procedural objection to reviewing the issue by habeas corpus by its failure to object in the trial court. To prevail, Stellrecht must show that his counsel's performance was deficient and prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To establish prejudice, he must show that he would not have entered the no contest pleas but for counsel's deficient performance. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

[1] Although not raised in Stellrecht's petition or litigated at the postconviction hearing, the trial court also faulted Williams for his failure to pursue Stellrecht's challenge to the voluntariness of Stellrecht's inculpatory statements to the police in which he admitted to firing at least one shot in the direction of a squad car. The court also thought it was significant which of the two men yelled "lock and load" and faulted Williams for failing to bring out inconsistencies between the complaint and the testimony at the preliminary hearing regarding who made that statement. Stellrecht does not respond to the State's persuasive argument that the record discloses no basis for suppressing his inculpatory statement. The statement was preceded by ***Miranda*** warnings and the officer testified that Stellrecht did not appear to be intoxicated. The State notes that Stellrecht repeatedly threatened to shoot at the squad car and police officers. As a party to Spears' crimes, Stellrecht is guilty of these offenses regardless of whether he yelled "lock and load." The State's arguments are deemed conceded based on Stellrecht's failure to respond. *See* ***Charlolais Breeding Ranches, Ltd. V. FPC Securities***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶6 Stellrecht established neither deficient performance nor prejudice from Williams' decision to pursue plea negotiations rather than the destruction of evidence issue. Which of the perpetrators fired specific shots from the two rifles is inconsequential. Stellrecht is a party to the crimes committed by Spears. He threatened officers and admitted to firing at least one shot. There is no reason to believe the bullet holes in the squad car constituted exculpatory evidence. Counsel reasonably chose to pursue a favorable plea bargain rather than attempting to exaggerate the significance of his inability to determine the caliber of the bullet holes in the squad car. While Williams candidly admitted that he was not aware of Mulligan's motion, he stated that his recommendation to accept the plea agreement would have been the same had he known.

¶7 Stellrecht also presented no evidence that he would not have accepted the plea agreement if Williams had pursued the motion filed by Mulligan. Therefore, he has not established prejudice from Williams' performance. *See* ***Hill***, 474 U.S. at 59. Having failed to establish ineffective assistance of counsel, Stellrecht has presented no basis for concluding that a manifest injustice compels withdrawal of his no contest pleas. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).