COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2070-CR **Cir. Ct. No. 2003CF6558**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL BERTON MOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Russell Berton Mott appeals *pro se* from a judgment and an order entered after he pled guilty to child enticement (exposing a sex organ) as a habitual criminal, pursuant to WIS. STAT. §§ 948.07(3) and 939.62

(2003-04).[1] He claims the trial court erred in denying his motion seeking plea withdrawal. Because Mott failed to demonstrate any "manifest injustice," we affirm.

BACKGROUND

¶2 Mott was charged with one count of child enticement (exposing a sex organ) as a habitual criminal. The charge stemmed from incidents which occurred over a period of time between September 1, 2003, and November 12, 2003. During these incidents, Mott put his mouth on the sixteen-year-old victim, K.T.M.'s penis for oral sex.

¶3 Mott entered a guilty plea and was sentenced to fourteen years, with four years of initial confinement followed by ten years of extended supervision. After sentencing, Mott elected to proceed *pro se* and filed a postconviction motion seeking to withdraw his guilty plea. The trial court denied the motion. Mott now appeals.

DISCUSSION

¶4 Mott claims that he should be entitled to withdraw his plea because: (1) the habitual criminality enhancer does not apply; (2) he was not adequately informed of the consequences of his plea; (3) his trial counsel provided ineffective assistance and threatened to withdraw if Mott did not enter a guilty plea; and (4) he should not have been charged with child enticement because the acts were

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

consensual and the victim was almost seventeen years old. Because Mott fails to prove that any manifest injustice occurred in this case, we affirm.

¶5 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶6 Wisconsin courts consider six factual scenarios that could constitute "manifest injustice":

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶7 In Mott's largely undecipherable brief, he asserts a variety of claims, all of which are refuted by the record. During the plea hearing in this case, the trial court conducted an extensive colloquy. The trial court made sure that Mott understood he was being charged with the crime of child enticement, as a habitual criminal, and that this was a Class D felony for which the maximum sentence was

twenty-five years and a $100,000 fine. The trial court also explained to Mott that because he had been convicted of a misdemeanor on three separate occasions during the five-year period immediately preceeding the current crime, that he was also charged as a habitual criminal.

¶8 The trial court went over the guilty plea questionnaire and waiver of rights form, which Mott had signed, noting the constitutional rights and potential defenses Mott was giving up as a result of his guilty plea. The trial court confirmed that Mott was entering his plea knowingly, voluntarily, and intelligently, and that he had not been promised anything to plead guilty. The trial court then went through the amended complaint which formed the factual basis for Mott's plea, made sure Mott had reviewed the complaint, and confirmed the facts as each related to the elements of the crime charged. The trial court also verified the three misdemeanor convictions that formed the basis for the habitual criminal penalty enhancer.

¶9 Mott stipulated to the facts in the amended complaint, admitted committing each element of the crime charged, and acknowledged the three prior convictions. The trial court then accepted Mott's guilty plea, stating:

> The Court finds that Mr. Mott is entering his guilty plea today freely, voluntarily, and intelligently, with a full understanding of the nature of the offense charged, the maximum possible penalties as enhanced, and all of the constitutional rights that he is giving up by pleading guilty; therefore, the Court accepts the guilty plea.
>
> The Court also finds there's a factual basis for the acceptance of your plea. And based upon your plea of guilty, the Court now finds you guilty of the offense of child enticement, exposing a sex organ, habitual criminality, as charged in the information in this case. The Court adjudges you convicted as of today's date of that crime and orders a judgment of conviction entered into the record.

¶10 Based on our review of the record, the trial court conducted the plea hearing in compliance with the requirements of WIS. STAT. § 971.08. There was no statutory violation. Moreover, the record reflects that Mott's plea was entered knowingly, voluntarily, and intelligently as required by the law of this state. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Both the plea questionnaire and the plea hearing transcript demonstrate that Mott knew and understood the nature of the crime, its elements and penalties. Mott has failed to establish any reason to grant his motion to withdraw his plea.

¶11 Mott also asserts that his counsel provided ineffective assistance of counsel for failing to: (1) adequately review the presentence investigation report (PSI) or explain that the PSI could be contested; (2) advise Mott that he would be subject to the sexual predator law after completion of the sentence; and (3) correct Mott's mistaken belief that his sentence was being reduced to a misdemeanor that carried a maximum penalty of two years' incarceration and some extended supervision. We reject Mott's contentions.

¶12 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a

trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶13 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶14 Mott fails woefully to either adequately brief his claim of ineffective assistance or provide citation to pertinent authority. His claims are all conclusory and without factual basis in the record. Accordingly, we reject them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶15 We reach a similar conclusion with respect to his claim that trial counsel coerced him into pleading guilty and the prosecutor breached the plea agreement by "harping" on his past convictions and on letters he sent to the victim after his arrest. Both assertions are inadequately developed and, in any event, are refuted by the record.

¶16 Finally, by pleading guilty, Mott waived any claim that he was improperly charged and any other arguments not involving subject matter

jurisdiction. *See* ***State v. Merryfield***, 229 Wis. 2d 52, 53-54, 598 N.W.2d 251 (Ct. App. 1999); ***State v. Higgs***, 230 Wis. 2d 1, 8-9, 601 N.W.2d 653 (Ct. App. 1999).

¶17 Based on the foregoing, we conclude that the trial court did not err in denying Mott's motion seeking plea withdrawal. Mott has failed to establish that a manifest injustice exists. Accordingly, plea withdrawal is not required.

By the Court.—Judgment and order affirmed.

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