COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1715-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Michael R. Nelson appeals from a judgment of conviction and an order denying his motion for postconviction relief. He argues on appeal that he should be allowed to withdraw his plea. Because we conclude

that he has not established a manifest injustice which would entitle him to withdraw his plea, we affirm.

¶2 As part of a plea agreement, Nelson pled no contest to three counts of third-degree sexual assault. Nelson was charged for incidents involving very young teenage girls. In each case, Nelson gave drugs and alcohol to the girls and then sexually assaulted them. The court sentenced Nelson to four years in prison on two counts, to be served consecutively, and an imposed and stayed sentence of five years, subject to five years' probation, on the third count.

¶3 Nelson filed a motion for postconviction relief asserting that he was entitled to withdraw his pleas on the grounds that the pleas were involuntary and his trial counsel was ineffective. The circuit court denied the motion.

¶4 The first issue we consider is which standard applies to the issue of whether Nelson is entitled to withdraw his plea. Nelson argues that the standard to be applied is the "fair and just reason" standard applicable to requests to withdraw pleas before sentencing. *See* ***State v. Canedy***, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991) (a defendant should be allowed to withdraw a guilty plea before sentencing for any fair and just reason unless the prosecution would be substantially prejudiced). Nelson asserts that he sent a memo, pro se, to the trial court prior to his sentencing asking to be allowed to withdraw his plea, and therefore, the fair and just reason standard applies to him.

¶5 The State argues that Nelson's motion should be judged by the "manifest injustice" standard, applicable to requests to withdraw pleas made after sentencing. *See* ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987) (after sentencing, a plea may be withdrawn only if doing so is necessary to

correct a manifest injustice). We conclude that the manifest injustice standard is the applicable standard.

¶6 The memo Nelson sent to the court was sent while Nelson was represented by counsel. *See* ***Robinson v. State***, 100 Wis. 2d 152, 156, 301 N.W.2d 429 (1981). Moreover, it was a memo and not a motion. Most importantly, however, the memo did not seek withdrawal of his plea. At the sentencing hearing which occurred shortly after the memo was filed, Nelson did not mention the memo or his desire to withdraw his plea. Instead, Nelson acknowledged the crimes and expressed remorse for them. We agree with the State that Nelson did not move to withdraw his plea until after sentencing. Consequently, the applicable standard is the manifest injustice standard.

¶7 A defendant has the burden of proving a manifest injustice by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***Booth***, 142 Wis. 2d at 237. The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. ***Bentley***, 201 Wis. 2d at 311.

¶8 Nelson first argues that his pleas were not voluntarily entered. The circuit court found that his plea was voluntarily entered, and we agree. ***State v. Bangert***, 131 Wis. 2d 246, 261-72, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08 (1999-2000), establish the duties of a trial court prior to accepting a plea of guilty or no contest. In this case, the court conducted a thorough colloquy with Nelson before accepting his plea. The court asked Nelson if he understood the nature of the charges, and Nelson responded that he did. The court asked Nelson

if it was his desire to enter the plea, whether he was entering the plea "freely and voluntarily," whether anyone had forced, coerced or threatened him in any way, whether he had discussed the plea with his attorney, and whether he needed any more time to discuss the decision. Nelson responded appropriately to all of these questions.

¶9 The court explained to Nelson what the State would have to prove if the case went to trial and Nelson responded that he understood. The court also explained to Nelson the constitutional rights he was waiving by entering a plea and Nelson again responded that he understood. The court asked if Nelson had taken any drugs, intoxicants or medications prior to coming to court, and Nelson said no. The court asked him if he understood English and what his education had been. The court repeatedly asked if he had discussed the matter with his attorney, to which Nelson responded that he had, or if he had any questions, to which Nelson responded that he did not. Nelson has not established that the circuit court erred when it found that his plea was voluntarily entered.

¶10 Nelson also argues that his trial counsel was ineffective. As stated above, ineffective assistance of counsel may constitute a manifest injustice. ***Bentley***, 201 Wis. 2d at 311. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). There is a strong presumption that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a

"wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. To meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶11 Nelson asserts that his counsel was ineffective because he had not subpoenaed any witnesses for trial. At the postconviction hearing, trial counsel testified that he did not remember whether he had subpoenaed any witnesses. First, Nelson has not established why this constitutes deficient performance. It appears that these witnesses were cooperating and there is no indication that a subpoena was necessary to obtain their appearance at trial. More importantly, Nelson has not explained what these witnesses would have testified to, so he has made no showing of prejudice.

¶12 Nelson also asserts that his counsel was ineffective because he did not speak to certain witnesses. Counsel's testimony at the postconviction hearing flatly contradicts that assertion. Nelson further complains that his counsel relied on an investigator rather than speaking to some witnesses himself. Nelson has not explained why this is deficient performance, nor what these witnesses would have said to establish prejudice.

¶13 Nelson asserts that counsel was ineffective for failing to mention to the court at the sentencing hearing the memo Nelson had sent to the court. The record does not establish, however, that counsel knew about the memo (which was written and sent by Nelson acting pro se). More importantly, however, the matter

was before the court for sentencing and not on a motion to withdraw the plea. Nelson fully acknowledged his guilt at the sentencing and never mentioned anything about the memo or his desire to withdraw his plea. We conclude that Nelson has not established that his counsel was ineffective.

¶14 Nelson also argues that the court improperly used the fact that he had five attorneys as a basis for denying his motion to withdraw his plea. Nelson asserts that the trial court found that he had had conflicts with all of his attorneys, when in fact, three of his attorneys withdrew because of conflicts of interest. The record shows, however, that the court specifically noted that three of Nelson's attorneys withdrew because of conflicts of interest. There is no indication that the trial court misused these facts in any way.

¶15 Nelson has not established a manifest injustice which would entitle him to withdraw his plea. Therefore, we affirm the judgment of conviction and the order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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