**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 27, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2005AP1249-CR** **Cir. Ct. No. 2001CF6022**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD J. PEREKOVICH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and ELSA C. LAMELAS, Judges. *Modified and, as modified, affirmed*.

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

¶1 PER CURIAM. Richard J. Perekovich appeals from a corrected judgment of conviction for first-degree reckless homicide and first-degree reckless

injury both with the use of a dangerous weapon, and from a postconviction order denying his motion for plea withdrawal predicated on the ineffective assistance of trial counsel.[1] The issues are whether trial counsel was ineffective, and if so, whether plea withdrawal was warranted. We conclude that the trial court's factual findings are not clearly erroneous, and that our independent analysis of Perekovich's three ineffective assistance claims, predicated on those facts, reveals no ineffectiveness. Upon remittitur, we direct the trial court clerk to correct the corrected judgment as modified by striking the attempt reference; we affirm the (second) corrected judgment as modified and order.

¶2 The State originally charged Perekovich with first-degree intentional homicide while armed, and an attempt of that same offense resulting from an altercation outside a tavern. Incident to a plea bargain, Perekovich entered no-contest pleas to the reduced charges of first-degree reckless homicide and first-degree reckless injury, in violation of WIS. STAT. §§ 940.02(1) and 940.23(1)(a) (2001-02), both with the use of a dangerous weapon, in violation of WIS. STAT.

[1] The Honorable M. Joseph Donald presided over trial court proceedings through and including the entry of judgment. The Honorable Elsa C. Lamelas presided over postconviction proceedings.

The written corrected judgment mistakenly indicates that Perekovich was convicted of attempted first-degree reckless injury while armed, rather than the completed crime. The plea questionnaire and waiver of rights form, and the transcripts of the plea and sentencing hearings, however, clearly indicate that Perekovich entered a no-contest plea to and was convicted of the completed crime of first-degree reckless injury while armed.

The trial court's oral pronouncements control the written judgment. *See* ***State v. Perry***, 136 Wis. 2d 92, 114-15, 401 N.W.2d 748 (1987). Upon remittitur, we direct the trial court to exercise its discretion on whether a hearing is warranted to strike the attempt and WIS. STAT. § 939.32 (2001-02) from the corrected judgment of conviction for first-degree reckless injury. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶5-6, 239 Wis. 2d 244, 618 N.W.2d 857 (methodology for correcting clerical errors).

§ 939.63 (2001-02).[2] The State recommended a thirty-year period of confinement and did not specify a recommended period of extended supervision. The trial court imposed an aggregate sentence of forty years, comprised of thirty- and ten-year respective periods of confinement and extended supervision.[3]

¶3 Appointed counsel filed a no-merit report, to which Perekovich responded, ultimately resulting in this court's rejection of the no-merit report, dismissal of the appeal, and a remand to the trial court for the filing of a postconviction motion. In his postconviction motion, Perekovich sought to withdraw his no-contest pleas predicated on the alleged ineffective assistance of trial counsel. The trial court held an evidentiary ("***Machner***") hearing at which trial counsel, Perekovich, his mother, and his former wife testified.[4] The trial court found trial counsel credible, referring to his testimony and to transcripts of the plea hearing and the trial court's colloquy with Perekovich, and explained why it determined that trial counsel rendered effective assistance.

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[2] By entering no-contest pleas, Perekovich did not claim innocence, but implicitly acknowledged the sufficiency of the State's evidence to establish his guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (2001-02); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970). The consequences of a no-contest plea are substantially similar to those of a guilty plea. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980). These offenses and all subsequent references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] For the reckless homicide, the trial court imposed a forty-year sentence comprised of thirty- and ten-year respective periods of confinement and extended supervision. For the reckless injury, the trial court imposed a twenty-year concurrent sentence comprised of fifteen- and five-year respective periods of confinement and extended supervision.

[4] An evidentiary hearing to determine trial counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶4 Perekovich appeals from the denial of his plea withdrawal motion, claiming he was the victim of ineffective assistance of trial counsel in three respects: (1) trial counsel had a conflict of interest insofar as once he realized that he would not be fully paid he lost interest in trying the case and "induced" Perekovich to plead to the reduced charges; (2) trial counsel failed to "properly" advise Perekovich of "the availability and feasibility of self-defense"; and (3) trial counsel misrepresented "the probable and potential consequences" of his no-contest pleas, specifically "assur[ing]" him that he would spend "no more than ten to fifteen years [in] prison."

¶5 "To withdraw his plea after sentencing, [the defendant] need[s] to establish by clear and convincing evidence, that failure to allow a withdrawal would result in a manifest injustice." ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citations omitted).

¶6 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (emphasis in ***Wirts***). The necessity to prove both deficient performance and

prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

> ¶7 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. We will not disturb the [trial] court's findings of fact unless they are clearly erroneous. The ultimate determination of whether the attorney's performance falls below the constitutional minimum, however, is a question of law subject to independent appellate review.

***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500 (citations omitted).

¶8 Perekovich characterizes his first ineffective assistance claim as a conflict of interest between trial counsel's duty to zealously defend his client and trial counsel's financial interests: namely, once trial counsel realized that Perekovich could not afford his fee, he lost interest in zealously defending him and instead "induced" him to accept a plea bargain. "In criminal cases, conflict of interest claims involving attorneys are treated analytically as a subspecies of ineffective assistance of counsel." ***State v. Love***, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999) (citing ***Strickland***, 466 U.S. at 691-92).

> [A] defendant must establish by clear and convincing evidence that an actual conflict of interest existed. It is not sufficient that he show that "a mere possibility or suspicion of a conflict could arise under hypothetical circumstances." However, the defendant does not have to show actual prejudice; once he shows an actual conflict he is entitled to relief."

***Id.*** at 69-70 (citing and quoting ***State v. Kaye***, 106 Wis. 2d 1, 8, 315 N.W.2d 337 (1982)).

¶9 Perekovich and his mother testified that trial counsel was optimistic about his defense at the beginning, and Perekovich testified that then "[trial

counsel's] demeanor completely changed," presumably because he knew that the Perekovich family could not afford to pay him the amount he requested before trial. Trial counsel categorically denied that his interest changed once he realized that payment would not continue. In fact, trial counsel had moved to adjourn the case for about three to four months for scheduling reasons.

¶10 The trial court summarized the testimony and found:

> [Trial counsel] testified quite credibly about the manner in which he became involved in the defendant's representation and the manner in which he discharged his obligations to the defendant.
>
> It is clear that [trial counsel] quoted a price to the defendant's family and wished and desired to be paid his fee, but [the trial court] find[s] nothing objectionable about that. And it would be entirely unrealistic to expect that members of the bar have no interest and make no efforts to be paid the fees that they have quoted and to which they are entitled.
>
> The manner in which [trial counsel] represented the defendant in this case is entirely consistent with the seriousness of the charges. [Trial counsel] reviewed the discovery, made copies of the discovery, made it available to Mr. Perekovich. That's clear not only from [trial counsel]'s testimony, but is part and parcel, if not explicitly, certainly implicitly from Mr. Perekovich's testimony as well.
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> It's clear that [trial counsel] met with Mr. Perekovich and discussed with him the evidence that was available to the [S]tate. [Trial counsel]'s efforts did not stop there. He hired an investigator, visited the scene, pursued the investigation in Chicago by checking on victims' records, and measurements taken at the scene, brought the investigator to the jail to meet with the defendant, made efforts to secure the cooperation of this witness who was not cooperative.
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> [The trial court] believe[s trial counsel] to be correct that while he could have, clearly could have subpoenaed this witness, to subpoena a witness who is not cooperative and who won't necessarily say what one wants to hear is certainly not a sure-fire defense.

> [Trial counsel] reviewed the jury instructions with the defendant and explored with him the viability of self-defense. [Trial counsel] explained that he diagramed, has diagramed the homicide offenses, that his explanation includes a description of the elements and the penalties, [and] that the defendant was seeking a reckless charge and obtained it.

¶11 The trial court's factual findings are consistent with the testimony. The trial court was entitled to and did find trial counsel credible. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). These factual findings are not clearly erroneous, and thus, Perekovich has not clearly and convincingly established an actual conflict between trial counsel's duty to zealously represent his client and trial counsel's own financial interests.[5]

¶12 Perekovich's second claim is that trial counsel was ineffective for failing to "properly" advise him of "the availability and feasibility of self-defense." In rejecting this claim, the trial court referred to the plea colloquy during which Perekovich repeatedly acknowledged his understanding that by entering no-contest pleas he would be forfeiting his right to claim self-defense.

¶13 At the postconviction hearing, trial counsel testified extensively on this claim. His principal concern was that Perekovich used excessive force in defending himself: he emptied his gun by firing ten shots. He shot the decedent three times in the back, which would be problematic for a self-defense theory. Trial counsel testified that he discussed self-defense with Perekovich extensively and in fact used that claimed defense in negotiating the plea bargain in which the

[5] Perekovich criticizes the trial court for considering its personal knowledge of trial counsel in rejecting his conflict of interest claim. The trial court's references to its personal knowledge of trial counsel and the prosecutor were limited strictly to its rejection as "ridiculous" of Perekovich's incidental claim that trial counsel "implicitly suggested … a $5,000 bribe to the [prosecutor] … [to] soften [him] up." This bribery claim was not pursued on appeal.

intentional homicide charges were reduced to reckless homicide and injury charges. Trial counsel explained why, in his opinion, the facts supported reckless charges, but not successful self-defense claims. Trial counsel, whom the trial court found credible, testified in knowledgeable detail on the non-viability of self-defense in the context of the facts as explained to him, to refute Perekovich's claims about his purported unawareness of self-defense.

¶14 Perekovich's third claim is that trial counsel misrepresented the consequences of his no-contest pleas, telling him that, despite the State's recommended thirty-year period of confinement, he should not worry because he would "not … get 30 years," but probably more in the ten- to fifteen-year range. Preliminarily, Perekovich does not claim that he did not understand the consequences of his no-contest pleas to the reduced charges, but simply that trial counsel "assured" him that the trial court would impose a ten- to fifteen-year period of confinement, rather than the thirty-year period recommended by the State. The transcript of the plea hearing and Perekovich's signed plea questionnaire and waiver of rights form belie his claim and demonstrate his understanding that the trial court could impose any potential sentences within the statutory maximum penalties for these offenses.

¶15 At the ***Machner*** hearing, Perekovich testified:

> [Trial counsel] did indeed say that the recommendation would be 30 years, which was surprising to me and also that the PSI investigation would be a factor in determining sentence also. But he did tell me that that doesn't necessarily mean that that's what the judge is going to go along with, that once he would present the mitigating factors it was very unlikely that I would receive a 30 year sentence. You're not – don't worry – because obviously I had expressed concern – he stated to me, Don't worry, you're not going to get 30 years here. And after talking to my family members, that was the same thing that [trial counsel] told them.

Perekovich then testified that he said to trial counsel

> Well, if you're saying that I'm not looking at 30 years here, what are you talking about? [Trial counsel] says, Well, if I have to estimate, probably 10 to 15 years.

¶16 The trial court denied this claim, explaining that "[trial counsel] never guaranteed a sentence." Perekovich's own testimony is insufficient to establish his misrepresentation claim. Perekovich claimed to understand that the trial court was not bound by any of the sentencing recommendations and could impose any sentence that did not exceed the maximum potential penalty for these offenses. Perekovich also knew that the State was proposing a thirty-year period of confinement. It is understandable that Perekovich would ask trial counsel for his opinion about how much prison time the trial court would impose, but Perekovich admitted that even when pressed, the most trial counsel could tell him was his "estimate." This is not a misrepresentation claim, even by Perekovich's admission.

¶17 Our review of the postconviction testimony and the trial court's factual findings, which are not clearly erroneous, demonstrate that Perekovich has not established that trial counsel was ineffective. He has not established that trial counsel: (1) had a conflict of interest; (2) failed to inform him of the availability and feasibility of self-defense; or (3) misrepresented the consequences of his no-contest pleas, by assuring him that he would not serve thirty years in confinement for these offenses. His inability to demonstrate trial counsel's ineffectiveness obviates his plea withdrawal claim. We direct the trial court to correct the

corrected judgment of conviction, and we affirm the trial court's (second) corrected judgment, as modified, and its postconviction order.[6]

*By the Court.*—Judgment, as modified, and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

[6] *See* n.1, *supra*.