

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2007

David R. Schanker
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. 2006AP2721

Cir. Ct. No. 1996CF29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROYCE L. MINNICH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rusk County:
JAMES C. BABLER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Royce Minnich appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06.¹ Minnich

¹ References to Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

argues: (1) the State breached the plea agreement when it presented its version of the facts at the sentencing hearing rather than relying on the facts admitted by Minnich at the plea hearing; (2) trial counsel was ineffective for failing to object to the alleged breach; (3) postconviction counsel was also ineffective for not raising this issue; and (4) postconviction counsel's ineffectiveness on this issue provided sufficient reason for not raising the issue in Minnich's prior appeal. We reject Minnich's arguments and affirm.

¶2 Minnich was charged with party to the crime of first-degree intentional homicide and robbery by use or threat of use of a dangerous weapon in the murder of Michael Wojciuch. As part of a plea agreement, Minnich agreed to plead guilty to first-degree intentional homicide in exchange for the State dismissing the armed robbery charge and recommending a cap of twenty years for parole eligibility. Minnich was convicted following his plea. A postconviction motion was denied and his conviction was affirmed by this court on direct appeal. *State v. Minnich*, No. 1998AP537-CR, unpublished slip op. (Wis. Ct. App. Sept. 15, 1998).

¶3 Eight years later, Minnich filed the underlying motion under WIS. STAT. § 974.06, alleging the State breached the plea agreement and his postconviction counsel was ineffective for failing to argue that his trial counsel was ineffective for not objecting to the breach. The trial court denied the motion without reaching the merits of Minnich's claim based on a determination that Minnich's motion was procedurally barred. This appeal follows.

¶4 We need not reach the issue of whether the trial court correctly concluded Minnich was procedurally barred from arguing his trial and postconviction counsel were ineffective because the record conclusively

demonstrates that Minnich is not entitled to relief on the merits. *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). There were two competing versions of events in this case. As we explained in our decision in Minnich's first appeal, it is undisputed that Minnich and his girlfriend, Mary Sheffield, went to Wojciuch's house with a metal crowbar with the intent to rob him. Sheffield and the State alleged that Minnich beat Wojciuch to death with the crowbar. Minnich argued he jumped Wojciuch and scuffled with him on the ground, holding Wojciuch by the shoulders until he became limp and Minnich realized that Sheffield was repeatedly striking Wojciuch with the crowbar.

¶5 Minnich insists the plea agreement required the State to adopt his version of the facts as a factual basis for the plea. Minnich contends the State breached the plea when it presented evidence at the plea hearing to support its version of the facts and based its sentencing argument on that version. The record of the plea hearing conclusively establishes, however, that the plea agreement did not require the State to accept Minnich's version. To the contrary, the record unambiguously establishes the State was free under the plea agreement to present its version of the events at the sentencing hearing and that Minnich understood when he entered the plea that the State would do just that.

¶6 The court's extensive colloquy with Minnich on that point dispels any doubt the State was free under the plea agreement to base its sentencing argument on its version of the facts rather than Minnich's. During its plea colloquy with Minnich, the circuit court noted that during an in-chambers conference with counsel, defense counsel informed the court about the facts to which Minnich would admit. The court also confirmed with Minnich that he was maintaining that he did not strike Wojciuch with the bar but that he was nevertheless responsible for the homicide as a party to the crime.

¶7 The court asked the district attorney if he wanted the court to accept the plea on that basis. The district attorney said yes, but stated that he believed the State “could prove very different activity on Mr. Minnich’s part.” The court explained to Minnich that under his version of the facts, he was guilty of first-degree intentional homicide as party to a crime. The court then made sure that Minnich understood that the State would be free at sentencing to argue its version of events and that if the court did not believe Minnich’s version, it could conclude that Minnich was insufficiently remorseful and take that into account when setting a parole eligibility date.

¶8 Minnich next argues the State’s reliance on its version of the facts at sentencing undercuts its recommendation that the court set a twenty-year parole eligibility date. This argument is untenable given the express understanding at the plea hearing that the State would present its version of the facts at the sentencing hearing to support its argument that the court should impose a twenty-year parole eligibility date.

¶9 Minnich further argues the State’s reliance on facts other than those to which he admitted at the time of his plea placed him in an “untenable position” because he waived his right to present witnesses on his behalf or confront the State’s witnesses when he pled guilty. We are unpersuaded. Minnich was allowed to call witnesses at the sentencing hearing to provide evidence to support his version of events. Indeed, Minnich testified at the sentencing hearing about what occurred. Minnich was not prevented from confronting the State’s witnesses, and in fact cross-examined some of the State’s witnesses, including Sheffield.

¶10 Because the plea agreement did not require the State to base its sentencing argument on the facts admitted by Minnich at the plea hearing, the State did not breach the agreement when it presented evidence at the sentencing hearing to support its version of the facts. Minnich's trial counsel was not ineffective for failing to object to the alleged breach of the agreement, and Minnich's postconviction counsel was not ineffective for failing to raise a claim that trial counsel was ineffective.

By the Court.—Order affirmed.

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

