

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2008

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. 2007AP1397-CR

Cir. Ct. No. 2005CF487

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE J. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Lee J. Davis appeals from a postconviction order denying his motion to withdraw his plea of no contest to a charge of misdemeanor battery because his trial defense attorney was ineffective. Davis contends that his attorney failed to advise him that he did not have a grace period after entering his no contest plea during which time he would retain the right to withdraw his plea, and that the plea record includes an overlooked indication that he was receiving treatment for a mental illness or disorder. We affirm the order.

¶2 The essential facts are undisputed. Davis was initially charged with and bound over on a felony substantial battery charge, contrary to WIS. STAT. § 940.19(2). A jury trial was set for July 17, 2006. On July 13, 2006, Davis accepted a negotiated offer to enter a plea to an amended charge of misdemeanor battery, contrary to § 940.19(1). Davis entered a plea of no contest.

¶3 Davis submitted a Plea Questionnaire/Waiver of Rights form (waiver form) with his no contest plea, signed by himself and his attorney, Matthew Goldin, confirming that Davis understood the constitutional rights that he was giving up by entering the no contest plea. In addition, the waiver form indicated that Davis was forty-eight years old, had a high school diploma or equivalent, understood English, understood the charge of battery, and had not taken any alcohol, medications, or drugs within the last twenty-four hours prior to entering his plea. Davis also checked the waiver form box that indicated he was currently receiving treatment for a mental illness or disorder.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The trial court obtained personal responses from Davis as to his understanding of the rights he was waiving, the elements of the amended offense charged, and the consequences of his plea, along with his satisfaction with Attorney Goldin's representation. Based upon the waiver questionnaire, the plea record, including the supporting factual basis, and Davis' responses, the trial court accepted the no contest plea and adjudicated Davis guilty.

¶5 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was involuntary, or failure of the prosecutor to fulfill the plea agreement. *State v. Krieger*, 163 Wis. 2d 241, 250, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). Davis does not contend that the prosecutor failed to comply with the plea agreement. Nor does Davis challenge the plea colloquy, and our independent review of the colloquy, summarized above, does not reveal any grounds for a challenge.

¶6 Davis seeks to withdraw his plea based upon a claim of ineffective assistance of counsel. In response to Davis' contentions, the trial court held a *Machner*² hearing at which Attorney Goldin and Davis testified. Preliminary to Davis testifying, his appellate defense counsel advised the trial court that Davis did not understand the rights he was waiving because: (1) he had told Attorney Goldin the day before he entered the no contest plea that he wanted to appeal, (2) he thought that he had twenty days after he entered his no contest plea to

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

exercise a right to withdraw the plea and have a jury trial, and (3) no inquiry was made as to Davis receiving treatment for a mental illness or disorder.

¶7 Davis testified that he entered a plea of no contest to the amended charge, rather than guilty, because he was not guilty of the charge and he was going to appeal. Davis said that he recognized his name and the date on the second page of the waiver form, but that he had never seen the first page before. Davis stated that Attorney Goldin had discussed the second page of the waiver form with him, but not the first page. Davis testified that he first told Attorney Goldin of his intention to appeal at Goldin's office on July 12, the day before the plea hearing.

¶8 Davis confirmed the information on the first page of the waiver form as to his age and education level, agreeing that Attorney Goldin had asked him about his age and education level. During cross-examination, Davis also conceded that Attorney Goldin had talked to him about the rights he was waiving as listed on the waiver form and had checked the boxes on the form consistent with his answers. Davis stated that he had entered a plea of no contest previously, that he understood that he was going to be found guilty based upon that plea, and that he would not go to trial on the charge. Davis testified that he understood what was going on when he entered his plea and that he was not suffering from any mental problems at the plea hearing. Davis agreed that he made "a conscious decision to accept a plea offer."

¶9 According to Davis, he told Attorney Goldin that he wanted to appeal before he entered his plea and was convicted. The preparation of the waiver form, the plea colloquy and the plea acceptance all occurred on July 13, 2006, after Davis testified that he had told Attorney Goldin he wanted to

appeal on July 12, 2006. Davis was asked, “[W]hy did you plead no contest if you wanted to go to trial?” His response:

Why’d I—because—I pleaded no contest because [Attorney Goldin] says, “Well, if you go to trial, you can get six, ten years.” So I’m saying, “Well, I got to plead no contest now?” [Attorney Goldin] said, “That’s what I would do.” So that what I did, exactly what I did.

¶10 Davis agreed with the prosecutor that he had made a decision to plead no contest and to be found guilty to take the misdemeanor over the felony charge. Davis testified that Attorney Goldin never explained or discussed his appeal rights with him after his plea and sentence.

¶11 Attorney Goldin testified that he had reviewed the Notice of Right to Seek Postconviction Relief form (PC form) with Davis while he and Davis were still in court. Attorney Goldin testified that he signed the form after he had talked to Davis about postconviction rights, that Davis indicated that he was undecided at that time about seeking postconviction relief, that Goldin had then checked the box acknowledging Davis was undecided, and that both he and Davis signed the dated PC form. He stated that he informed Davis of his postconviction rights after the plea hearing and sentence on July 13, 2006, and had filed the PC form on behalf of Davis. He testified he did not recall counseling Davis on a plea withdrawal prior to Davis entering a plea.

¶12 Attorney Goldin testified that he had checked the box on the first page of the waiver form concerning Davis receiving treatment for a mental illness or disorder and not having any alcohol, medication, or drugs within the previous twenty-four hours based upon Davis’ responses. He stated he had no problems communicating with Davis and that Davis understood the communications. Attorney Goldin stated that he covered with Davis all of the rights that Davis was

giving up by his no contest plea to the amended charge. In response to a question by the trial court, Attorney Goldin stated that he did not recall any reasons to question Davis' competence, and that if he had, he would have brought it to the attention of the court.

¶13 A claim of ineffective assistance of counsel presents mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the trial court's findings about trial defense counsel's actions and the reasons for them unless the findings are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to effective assistance of counsel is ultimately a legal determination which this court decides de novo. *Id.*

¶14 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. A defendant must overcome a strong presumption that counsel acted reasonably within professional norms. Here, the trial court denied the motion to withdraw the no contest plea after concluding:

The most prolific thing [Davis] said today was, "I don't have a very good memory," because, clearly, things he's saying today contradict what happened and what the facts are.

¶15 The trial court found that Davis' testimony that he left after the plea and sentencing without consulting with Attorney Goldin about his postconviction rights, in spite of the existence of the dated PC form with his signature, was not true. Attorney Goldin met his obligation to inform Davis of his postconviction

rights, and was not deficient in that regard. In addition, Davis failed to present an evidentiary basis to withdraw his plea based upon Attorney Goldin's failure to raise his concerns about treatment of Davis for a mental illness and disorder and, as indicated on the waiver form, advised Attorney Goldin that he had not taken any drugs, alcohol or medications within the twenty-hour hours prior to his plea.

¶16 Davis was afforded a *Machner* hearing to address his motion to withdraw his no contest plea to a misdemeanor battery charge based upon ineffective assistance of counsel. The hearing record fails to overcome the strong presumption that counsel, Attorney Matthew Goldin, acted reasonably and within professional norms in his representation of Davis. The record indicates that Goldin, in fact, performed his duties in an exemplary manner. Because Attorney Goldin was not deficient in his performance as defense counsel, we affirm the order of the trial court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

