COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3385-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE J. WROTEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Willie J. Wroten appeals a judgment and an order denying his postconviction motion to withdraw his no contest pleas. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

argues that the circuit court erred in denying his postconviction motion because (1) the circuit court's plea colloquy did not adequately inform him of the constitutional rights he was waiving and the elements of the crimes with which he was charged; (2) his trial counsel was ineffective; and (3) the circuit court relied on inaccurate information in sentencing him. Because we conclude that the circuit court's plea colloquy was adequate, that the representation provided by Wroten's trial counsel did not fall below the representation that a reasonably effective attorney would provide, and that Wroten did not establish that the court relied on inaccurate information in sentencing him, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 From September to December of 1998, Wroten repeatedly violated a harassment injunction by harassing Annie Coaker. Charged with multiple counts in three different informations, Wroten entered no contest pleas on February 3, 1999. Pursuant to a joint recommendation, some charges were dismissed, and Wroten was placed on probation. In the summer of 1999, Wroten violated his probation by slapping Savella Vaughn in the face and verbally abusing her. Wroten's probation rules were modified to include no face-to-face contact with Vaughn, but he absconded and was later arrested at her apartment while intoxicated and screaming obscenities through a window.

¶3 Following this incident, Wroten's probation was revoked. At a January 14, 2000 hearing, he pled no contest to charges stemming from additional harassment of Coaker on June 9-10, 1999. Based on a joint recommendation, the court sentenced him to a total of three years in prison—thirty months for the charges on which he was revoked and six months for the charges stemming from

the June 9-10 incidents. Wroten filed a postconviction motion seeking to withdraw his plea, arguing that it was constitutionally invalid, that his trial counsel was ineffective, and that the court considered inaccurate information at his sentencing. The circuit court denied the motion, and Wroten appeals.

DISCUSSION

Standard of Review.

¶4 Permitting withdrawal of a guilty or no contest plea is a discretionary decision for the circuit court. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698, 708 (1998). Therefore, we will overturn it only if the circuit court erroneously exercised its discretion. ***Id***. We also review the circuit court's sentencing decisions for an erroneous exercise of discretion. ***State v. Johnson***, 158 Wis. 2d 458, 463, 463 N.W.2d 352, 355 (Ct. App. 1990). When we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

¶5 When we review an ineffective assistance of counsel claim, we examine a circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy under the clearly erroneous standard. ***State v. Lindell***, 2000 WI App 180 ¶ 8, 238 Wis. 2d 422, 429, 617 N.W.2d 500, 503. However, whether counsel's performance was defective and whether the defective performance was prejudicial are questions of law, which we review *de novo*. ***Id.***

Plea Withdrawal.

¶6 After sentencing, a defendant has the burden to show by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***Birts v. State***, 68 Wis. 2d 389, 392-93, 228 N.W.2d 351, 353 (1975). If a defendant proves that he did not enter the plea voluntarily, or it was entered without knowledge of the elements of the charge or that the sentence actually imposed could be imposed, or he was denied effective assistance of counsel, a manifest injustice is demonstrated. ***Id.*** at 393, 228 N.W.2d at 353-54.

¶7 Before a no contest plea can be accepted, the circuit court must determine: (1) the extent of the accused's education and general ability to comprehend; (2) the accused's understanding of the nature of the crimes charged and the potential punishments the court could impose; (3) the accused's understanding of the constitutional rights he is waiving; (4) whether promises or threats were made to the accused to obtain his plea; and (5) whether a factual basis exists to support conviction for the crimes charged. ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986). A proper inquiry by the circuit court ensures that a defendant enters his plea knowingly, voluntarily and intelligently. ***Id.***

¶8 One of the bases for Wroten's motion to withdraw his plea[2] is the alleged failure of the circuit court to engage in an on-the-record conversation with him to ensure that he understood the constitutional rights he was waiving and the

[2] In his reply brief, Wroten vehemently claims that he is not trying to withdraw his guilty plea; instead he asks us to vacate it because his constitutional rights were violated. Wroten does not explain the difference between the two concepts, and we are unable to discover one. *See* ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9, 14 (1999). Therefore, despite his characterization, we construe his appeal as an attempt to withdraw his guilty plea.

elements of the crimes. At the January 14, 2000 hearing, the circuit court confirmed that Wroten wanted to plead no contest to the crimes charged, informed him of the elements and maximum sentences for each crime, verified that he had signed the plea agreement and reviewed it with his attorney, confirmed that he understood its contents, and verified that his trial counsel had explained his constitutional rights to him and that he had understood them.[3] The court found an adequate factual basis for the plea based upon the allegations in the criminal complaint. The court then accepted Wroten's plea as having been knowingly, voluntarily and intelligently entered. We conclude that the circuit court did not erroneously exercise its discretion in refusing to allow Wroten to withdraw his plea on this basis.

Ineffective Assistance of Counsel.

¶9 Next, Wroten attempts to withdraw his no contest plea on the ground that his trial counsel was ineffective because she failed to object to the circuit court's refusal to comply with FEDERAL RULE OF CRIMINAL PROCEDURE 11, and she refused to file a notice of appeal or notice of intent to pursue postconviction relief. The right to counsel guaranteed a criminal defendant is the right to the effective assistance of counsel. ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970). To prevail on an ineffective assistance of counsel claim, an appellant must show that counsel's performance was deficient and that that deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Hubert***, 181 Wis. 2d 333, 339, 510 N.W.2d 799, 801 (Ct. App. 1993). The burden of proof of ineffective assistance of counsel is on the appellant. ***State v. Smith***,

[3] The plea agreement is not included in the record. The court had ascertained Wroten's educational background and ability to read in an earlier plea hearing.

207 Wis. 2d 258, 273, 558 N.W.2d 379, 385 (1997). The test for deficient performance is whether counsel's representation fell below the representation that a reasonably effective attorney would provide. ***Strickland***, 466 U.S. at 688. In regard to prejudice, an appellant must prove that counsel's performance was so deficient that, but for this deficient representation, the result of the trial would have been different. ***Id***. at 694. An appellant must prevail on both prongs of the ***Strickland*** test to obtain relief. ***State v. Wirts***, 176 Wis. 2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993).

¶10 We conclude that Wroten has failed to establish ineffective assistance of counsel under ***Strickland***. First, the FEDERAL RULES OF CRIMINAL PROCEDURE do not apply to criminal proceedings in state court. FED. R. CRIM. P. 1; ***Mobley ex rel. Ross v. Meek***, 531 F.2d 924, 926, *rev'd on other grounds*, 429 U.S. 28 (1976). Therefore, there was no reason for Wroten's counsel to object based on Rule 11. Second, his claim that trial counsel refused to file a notice of appeal or a notice of intent to pursue postconviction relief is directly contradicted by the record. On the day of the plea hearing, Wroten's counsel gave him a form advising him of his appellate rights, which Wroten signed. The form indicates that Wroten had not decided at that time whether to file an appeal or postconviction motion. The record also includes a notice of intent to pursue postconviction relief filed twelve days after the plea hearing by Wroten's counsel. Accordingly, we conclude that Wroten has not demonstrated that his trial counsel's representation fell below the level of representation that a reasonably effective attorney would provide and therefore, Wroten was not denied effective assistance of counsel.

Sentencing.

¶11 Wroten also argues that the circuit court erred in sentencing him because it used inaccurate information. A defendant in a criminal case has a constitutional right of due process to be sentenced using accurate information. ***State v. Shimek,*** 230 Wis. 2d 730, 744, 601 N.W.2d 865, 870 (Ct. App. 1999). A defendant "who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***Johnson***, 158 Wis. 2d at 468, 463 N.W.2d at 357.

¶12 Although he does not cite to a specific example in the record, it appears that Wroten bases his argument on the following statement by his attorney during the sentencing hearing:

> I think that this has been a difficult situation for Mr. Wroten given that he and *Miss Vaughn* have an extended—I believe about a fifteen year history between the two of them. Both have restraining orders against each other, and I have no reason to not believe his statement that she was violating hers as well as he violating his, so it's been a little difficult for him to understand the amount of trouble that he's getting in versus the no consequences for *Miss Vaughn*. (emphasis added)

At the time, the court and counsel were addressing Wroten's harassment of Annie Coaker.

¶13 We conclude that Wroten has failed to demonstrate that he is entitled to resentencing because of this statement. He is correct that his counsel twice referred to Ms. Vaughn instead of Ms. Coaker as the victim of his harassment. However, he does not explain how this statement could have affected the sentence he was given, nor does he argue that the court actually relied on his attorney's

misstatement. Therefore, he has not satisfied his obligation under ***Johnson***, and he is not entitled to resentencing.

CONCLUSION

¶14 Because we conclude that the circuit court's plea colloquy was adequate, that the representation provided by Wroten's trial counsel did not fall below the representation that a reasonably effective attorney would provide, and that Wroten did not establish that the court relied on inaccurate information in sentencing him, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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