COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0937-CR
01-0938-CR

Cir. Ct. No. 99-CF-7
99-CF-18

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS T. MEYER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Douglas Meyer appeals a judgment convicting him on his guilty pleas of retail theft as a repeater in Pierce County and possession of burglary tools as a repeater in St. Croix County. He also appeals an order denying his postconviction motion. Meyer argues that he should be allowed to withdraw

his pleas or be resentenced because: (1) the State did not follow the procedure set out in WIS. STAT. § 971.09[1] when it consolidated the cases from two counties; (2) the repeater allegations were not properly pled or proved and Meyer's counsel was ineffective for agreeing to amend the defective information; (3) the trial court failed to warn Meyer that the court did not have to impose the sentence recommended by the parties under the plea agreement; and (4) Meyer's trial counsel was ineffective for her failure to review the presentence investigation report before the sentencing hearing. We reject these arguments and affirm the judgment and order.

¶2 Meyer was charged with felony theft, burglary and misdemeanor theft in Pierce County. He was charged with possession of burglary tools, receiving stolen property and retail theft in St. Croix County. Meyer's trial attorney began negotiations with the district attorneys from both counties, resulting in a plea agreement to consolidate the charges into Pierce County. Meyer agreed to plead guilty to two felonies, one from each county. The State dismissed the remaining charges and recommended four years in prison on the Pierce County charge and probation on the St. Croix County charge. The court sentenced Meyer to sixteen years in prison on the Pierce County charge and two years concurrent on the St. Croix County charge.

¶3 Withdrawal of guilty pleas is committed to the trial court's discretion. *See* ***State v. Clement***, 153 Wis. 2d 287, 292, 450 N.W.2d 789 (Ct. App. 1989). Withdrawal is permitted only when it is necessary to correct a

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

manifest injustice. ***Id.*** Meyer bears the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Rock***, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). Whether his pleas were voluntarily, knowingly and intelligently entered is a question of constitutional fact that this court reviews independently. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1977). This court gives deference, however, to the trial court's findings of evidentiary or historical fact and its assessment of the witnesses' credibility. ***Id.***

¶4 The State followed appropriate procedure when it consolidated the cases from two counties. Meyer contends that the procedure described in WIS. STAT. § 971.09 must be precisely followed. The procedures described in § 971.09 are designed to insure that the defendant and the prosecutors have consented to the consolidation. *See* ***State v. Dillon***, 187 Wis. 2d 39, 48-49, 522 N.W.2d 530 (Ct. App. 1994). Meyer expressly agreed to have the St. Croix County case consolidated with the Pierce County case. Both prosecutors consented. The plea agreement required the consolidation. The parties' failure to precisely follow the sequence of procedures set out in § 971.09 did not deprive the trial court of jurisdiction to accept the plea. *See* ***Peterson v State***, 54 Wis. 2d 370, 378, 195 N.W.2d 837 (1972).

¶5 The St. Croix County information did not allege Meyer's repeater status. His trial attorney did not object to amending the information to add the repeater allegation. Meyer contends that WIS. STAT. § 973.12(1) requires that the repeater allegation be included before acceptance of any plea, including his initial not guilty plea. He contends that his trial counsel was ineffective for failing to object to the amendment. That argument fails for two reasons. First, the repeater statute is not applicable to the St. Croix County offense because the trial court did not impose a sentence in excess of what is otherwise prescribed by law. *See* ***State***

v. Harris, 119 Wis. 2d 612, 619, 350 N.W.2d 633 (1984). The two-year concurrent sentence on the St. Croix County charge could have been imposed without any repeater allegation. Therefore, any error in pleading or proving the repeater allegation on the St. Croix County charge is moot. *See* ***Warren v. Link Farms***, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). Second, after the parties filed their briefs, this court held that WIS. STAT. § 973.12 does not prohibit amending an information after a plea has been entered as part of a plea agreement. *See* ***State v. Peterson***, 2001 WI App 220, ¶2, ___ Wis. 2d __, 634 N.W.2d 893. It follows that Meyer's trial counsel was not ineffective and Meyer was not prejudiced by her failure to object to the amendment as set out in the plea agreement.

¶6 Meyer also contends that the Pierce County repeater allegation was not adequately pled or proved because the information did not identify the prior convictions upon which it was based and Meyer did not admit the prior crimes. An information alleging repeater status must give the defendant notice of a penalty enhancement. *See* ***State v. Gerard***, 189 Wis. 2d 505, 514, 525 N.W.2d 718 (1995). The law does not require that the underlying offenses and their dates be identified in the information. At the plea hearing, the trial court described the penalty for each of the offenses including the additional "six years because of the repeater allegation" before Meyer pled guilty. In addition, the prior offenses and the dates of conviction were included in the presentence investigation report. That constitutes sufficient proof of the prior convictions to allow sentencing as a repeat offender. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 257, 513 N.W.2d 631 (Ct. App. 1994). There is no basis for challenging the manner in which the repeater allegations were pled or proved as to either offense.

¶7 Meyer has not established any prejudice from the trial court's failure to inform him that the court was not bound by the parties' agreed-upon sentencing recommendation. As the trial court noted, the language of the plea agreement itself suggests that the court was not bound by the parties' agreement. The agreement uses the terms "recommended sentence" and "sentence recommendation," suggesting that the trial court was not bound to accept the parties' recommendation. The word "recommendation" itself suggests the possibility that the sentencing court might not follow the parties' advice.

¶8 Finally, the record does not support Meyers' allegation that his counsel failed to adequately review the presentence investigation report. His counsel informed the court that she read it when she received it and again in preparation for the sentencing hearing. The sentencing hearing includes Meyers' correction of a claimed error in the report. Meyers' counsel referred to parts of the report during the sentencing hearing. As the arbiter of the witnesses' credibility, the trial court reasonably discounted Meyers' self-serving testimony that his attorney never reviewed the report before sentencing. In addition, Meyer makes no threshold showing that any of the trial court's sentencing findings rested on erroneous information from the report. Therefore, he has not met his burden of showing deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

By the Court.—Judgment and order affirmed.

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