COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1124-CR **Cir. Ct. No. 01 CM 4281**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO D. HARRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Reserve Judge and CARL ASHLEY, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Mario D. Harrell appeals from a judgment and an order denying his postconviction motion for a hearing pursuant to ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981), to determine whether trial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

counsel was ineffective for failing to advise him of his right to substitute judges, and to withdraw his guilty plea accordingly. Harrell claims that the trial court should have granted his postconviction motion because the right to substitute judges is a statutorily guaranteed right afforded to defendants to exercise unquestioned and, therefore, his trial counsel was ineffective in not mentioning it to him. Because the trial court did not err when it denied his postconviction motion, this court affirms.

I. BACKGROUND

¶2 On November 22, 1999, Harrell got into an argument with his sister at their residence. During the course of the argument, Harrell threatened to burn down the house. When police arrived on the scene, Harrell was still yelling loudly, shouting and slamming doors. When the police informed Harrell that they were going to take him into custody, Harrell locked himself in the bathroom. When police officers opened the door to the bathroom, he resisted arrest and shut the door on an officer's hand, causing a laceration, pain and swelling. Even after Harrell was sprayed by an officer with P.O. spray, he continued to resist arrest, and was able to get out of the bathroom and flee the residence. Officers chased Harrell for several blocks before they were able to locate him and place him in custody.

¶3 Harrell was charged with one count of battery as a habitual criminal, one count of obstructing or resisting an officer as a habitual criminal, and two counts of use of a telephone as a habitual criminal. On July 30, 2001, the date that the trial was supposed to commence, a reserve judge was presiding over the court. Harrell and his counsel accepted a pretrial negotiation and pleas were taken. Harrell was then sentenced by the reserve judge.

¶4 Subsequently, Harrell brought a postconviction motion before the trial court seeking a hearing pursuant to ***Machner*** to determine whether trial counsel was ineffective for failing to advise him of his right to substitute judges under WIS. STAT. § 971.20(5) (1999-2000). Harrell argues that he expressed concerns over the reserve judge presiding at trial, but then pled guilty pursuant to an offer of modification of the charges. The trial court (i.e., the judge regularly assigned to that court) denied the motion by written decision and order. Harrell now appeals.

II. DISCUSSION

¶5 Harrell contends the trial court erred in not granting his postconviction motion. He argues that the right to substitute a judge is statutorily guaranteed to defendants to exercise unquestioned, and although it is a nonjurisdictional issue, which is ordinarily waived when a person enters a guilty plea, ***State v. Damaske***, 212 Wis. 2d 169, 567 N.W.2d 905 (Ct. App. 1997), Wisconsin law is silent upon whether counsel is ineffective for failing to inform the defendant that he or she even has that right.

¶6 Our standard of review when reviewing cases involving a question of law is *de novo*. ***State v. Zimmerman***, 185 Wis. 2d 549, 554, 518 N.W.2d. 303 (Ct. App. 1994).

¶7 This case comes to this court after Harrell entered guilty pleas. As explained in ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994): "A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). The right to a substitution of judge is not a jurisdictional

defect or defense. Therefore, by entering pleas of guilty, Harrell waived his right to substitution of judge.

¶8 Nonetheless, Harrell argues that the pleas were manifestly unjust. He does not argue that his pleas were manifestly unjust because they were not knowingly and intelligently given, ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995); rather, his argument focuses on whether he suffered manifest injustice because his counsel was ineffective for failing to inform him of his right to substitution of judge. After reviewing the record of this case, this court cannot conclude that manifest injustice resulted and thus, the trial court did not err in denying Harrell's postconviction motion.

¶9 The trial court correctly noted that in order to withdraw a guilty plea after sentencing, clear and convincing evidence of manifest injustice must be shown. ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). The manifest injustice test may be met by establishing the ineffective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Under ***Strickland v. Washington***, 466 U.S. 668 (1984), to determine whether an attorney's actions constitute ineffective assistance, a defendant must satisfy a two-part test. ***Id.*** at 694. He must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Id.***

¶10 As the court stated in ***Washington***, 176 Wis. 2d at 214:

> The mere assertion of a claim of "manifest injustice," in this case the ineffective assistance of counsel, does not entitle a defendant to the granting of relief or even a hearing on a motion for withdrawal of a guilty plea. A conclusory allegation of "manifest injustice," unsupported by any factual assertions, is legally insufficient.

¶11 The affidavit of Harrell contains no factual assertion which would entitle him to a hearing because he failed to allege facts to show that the failure to advise him about the substitution statute caused him actual prejudice. Although there is no requirement that all operative facts of the alleged ineffective assistance of counsel be set forth, Harrell must provide enough facts to lead the trial court to conclude that an evidentiary hearing is necessary. Harrell failed to do so, and the trial court properly denied his motion without hearing.[2]

By the Court.—Judgment and order affirmed.

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

[2] If prejudice is not shown by the defendant, as is the case here, the court need not decide whether trial counsel's actions were deficient.