COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2010

A. John Voelker
Acting 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 Nos. 2009AP3084
2009AP3085
2009AP3086

Cir. Ct. Nos. 2007CF14
2007CF176
2007CF266

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUINTIN D. SMITH,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Quintin D. Smith appeals from judgments convicting him of possession of burglarious tools and three counts of felony bail jumping and of various misdemeanors. He also appeals from an order denying his postconviction motion to withdraw his no-contest pleas. We agree that Smith did not establish that a manifest injustice would result if plea withdrawal were not allowed. We affirm.

¶2 On January 16, 2007, the State filed a criminal complaint against Smith. While out on bail, the State brought two additional cases against him, one in July and one in November 2007. All three cases grew out of situations where Smith was behaving suspiciously in a subdivision plagued by daytime burglaries and in which he did not reside.

¶3 Smith ultimately was charged with a total of eighteen counts in the three cases, nine felonies and nine misdemeanors. His total maximum exposure was approximately sixty-four years. The State offered to reduce Smith's exposure by approximately thirty-seven years if he would plead no contest to four felonies and six misdemeanors.[1] The State produced a chart at the plea hearing setting forth the various counts and describing the terms of the negotiated agreement.

¶4 Smith indicated he had questions about the recommended penalties. The court granted a recess and directed defense counsel to "take as much time as Mr. Smith needs." Upon reconvening, this colloquy ensued:

[1] The felony counts were possession of burglarious tools and three counts of bail jumping. The misdemeanor counts were carrying a concealed weapon, resisting or obstructing an officer and four counts of receiving stolen property worth $2500 or less.

> THE COURT: …. Mr. Mitchell [defense counsel], what's the status?
>
> MR. MITCHELL: Judge, I believe we are going forward. My client had a mix-up on consecutive and concurrent. I believe we're straightened out on that, Judge.
>
> THE COURT: Mr. Smith, is that a correct statement?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And your questions were satisfactorily answered for you?
>
> THE DEFENDANT: Yes, Your Honor.

¶5 The court accepted Smith's no-contest pleas. About three and a half weeks after the plea hearing, Smith was hospitalized for four days. He was diagnosed with ulcerative colitis and started on appropriate treatment. On December 11, 2008—twenty-three months after the first criminal complaint was filed—the court imposed an eighteen-year sentence.

¶6 Smith then filed a postconviction motion seeking to withdraw his no-contest pleas. He argued that he was severely ill at the plea hearing due to suffering for over eight months with the undiagnosed and untreated effects of ulcerative colitis and so did not fully comprehend the proceedings. He also asserted that the attorney who represented him from January 2007 through March 12, 2008 rendered ineffective assistance by repeatedly failing to attend calendared court appearances, requesting continuances in others, and failing to file the speedy trial demand Smith said he requested.

¶7 The nurse practitioner who treated Smith at the gastroenterology clinic a month after his discharge from the hospital testified at the postconviction motion hearing. She testified that, based on Smith's description to her of his

prehospitalization symptoms, his health was "definitely compromised" and that the judgment of someone that ill "may" be affected but she could not say whether it was "to the point of disorientation."

¶8 The trial court acknowledged that Smith indicated at the plea hearing that he did not feel well and that the plea questionnaire bore the notation "stomach medication, upset stomach." The court further noted:

> [C]learly he was asking appropriate questions, complicated questions as far as consecutive versus concurrent and how the agreement that he was basing his plea on had been explained to him. A break was taken.
>
> ….
>
> [H]e could have been feeling poorly, but it's not borne out by what I saw in court, or I would have stopped the proceedings and had him checked out or come back on another day. I've done that in the past.
>
> ….
>
> And the other thing that's very significant is that [defense counsel] offered Mr. Smith the opportunity to hold off and he would have come in and asked for a different date, but he was concerned that the State would withdraw the plea offer; and Mr. Smith wanted to accept the benefit of that plea agreement and opted to proceed that day.

¶9 In regard to Smith's claim that his counsel rendered ineffective assistance, the trial court found that defense counsel's erratic attendance due to obligations in other courts "f[e]ll below the expectation of a reasonable practitioner." It concluded, however, that Smith did not demonstrate prejudice because it was reasonable strategy not to file a speedy trial demand for a person on bail. Further, Smith's acquisition of new charges while out on bail could not be laid at his counsel's feet. The court denied the motion.

¶10 On appeal, Smith seeks to withdraw his no-contest pleas on the same two bases. A defendant wishing to withdraw a no-contest plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶11 A plea that is not voluntarily entered violates due process and is a manifest injustice. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). A defendant can allege that a plea is invalid due to a deficiency in the plea colloquy, *see* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), or to something extrinsic to the plea colloquy, *see* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Smith's challenge is of the latter type.

¶12 Smith contends his medical condition hindered his ability to fully grasp the State's offer and the plea proceedings. Whether a plea is knowing, intelligent and voluntary is a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. We uphold the trial court's findings of historical or evidentiary facts unless they are clearly erroneous but review constitutional issues independently. ***Id.***

¶13 Smith testified at the postconviction motion hearing that the food-poisoning-like symptoms he began suffering in February 2008 progressed to frequent bloody diarrhea and a twenty-pound weight loss in two weeks. His ulcerative colitis went undiagnosed, and therefore improperly treated, until a month after the plea hearing. He testified that on the morning of his plea hearing he awoke "[v]ery tired, physically and mentally," and told an officer at the jail that

he was having a flare-up of bloody stools and "felt a little dizzy." He also told the jail nurse he felt disoriented and dizzy and was passing an "extreme amount of blood" in his stool. Smith testified that he told Mitchell, his successor counsel, that he did not feel well, and Mitchell responded that they could postpone the plea hearing but could not guarantee that the State's offer would remain in place.

¶14 Smith contends that although he asked a number of questions and was allowed a recess to further consult with his counsel, he was unable to understand the recommended consecutive/concurrent structure proposed by the State. He claims that he entered his pleas out of fear of losing the State's offer and the desire to get to a place where he could address his severe illness.

¶15 The record belies Smith's contention. The court found that he asked "appropriate" and "complicated" questions. He expressly confirmed that his "mix-up" on consecutive and concurrent got straightened out and that his questions were answered to his satisfaction. The court also found that Smith's decision to press on so as to preserve the plea agreement was a strategic move. Finally, the court noted that Smith was diagnosed and treated between the October plea hearing and his December 11, 2008 sentencing, yet he did not assert before being sentenced that he wished to withdraw his plea. He first raised the challenge when he filed his postconviction motion in September 2009.

¶16 Smith does not argue that these findings are clearly erroneous or specify what it is he did not understand about the consecutive/concurrent sentencing structure proposed by the State. Conclusory allegations are insufficient to support a post-sentencing plea withdrawal. *See* ***Levesque v. State***, 63 Wis. 2d 412, 418-19, 217 N.W.2d 317 (1974).

¶17 Smith also asserts that plea withdrawal is necessary to avert a manifest injustice because he entered his pleas as a result of his first counsel's ineffective assistance in failing to proceed diligently and to demand a speedy trial. *See* ***Bentley***, 201 Wis. 2d at 311. To demonstrate ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant proves deficient performance by showing that counsel's performance fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. He or she proves prejudice by showing "'that there is a reasonable probability that, but for [] counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" *See* ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

¶18 Attorney James Toran began representing Smith in these matters when he was first charged in January 2007. Smith was sentenced in December 2008. He recites a litany of delays often occasioned by Toran's failure to appear at calendared events and requests for significant postponements.

¶19 Smith's essential grievance stems from his claim that Toran failed to file a speedy trial demand. Smith contends he asked Toran to file the demand on July 24, 2007, the day he posted bail on his second case. He asserts that Toran later assured him that it was taken care of. In fact, no demand was filed. Smith argues that he was prejudiced because, had Toran followed through, his first two cases would have been disposed of before the State issued the charges in his third case on November 26, 2007. The latter charges increased his exposure by twenty-five years. He claims the hefty potential sentence was a significant factor in his decision to plead.

¶20 Toran testified at the postconviction motion that Smith never asked him to file a speedy trial demand and that, in any event, he generally does not file a speedy trial demand for a defendant like Smith who is out of custody on bail. The trial court found this to be a reasonable strategic decision. Nonetheless, we construe the court's comments about Toran's seeming lack of regard for scheduled appearances as a finding of deficient performance.

¶21 The court expressly concluded, however, and we agree, that Smith did not establish prejudice. Smith faced an additional twenty-five years' imprisonment because he accrued additional charges while on bail. Counsel is not responsible for the consequences flowing from Smith's deliberate actions. Based on the record before us, we cannot say that Smith has carried the heavy burden of showing that plea withdrawal is necessary to correct a manifest injustice. *See* ***McCallum***, 208 Wis. 2d at 473.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).