

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2003

Cornelia G. Clark
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. 02-2791-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-253

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHANE M. KRINGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: C.A. RICHARDS and EDWARD F. VLACK, Judges. *Affirmed.*

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

¶1 PER CURIAM. Shane Kringen appeals a judgment of conviction for battery to a peace officer. He first argues that the trial court erred by denying his motion to withdraw a guilty plea because: (1) there was a deficient plea colloquy and (2) Kringen had ineffective assistance of counsel based on

inadequate information regarding the plea, as well as his attorneys' failure to investigate. Second, Kringen argues the court erred by failing to honor his request for a new attorney. We reject Kringen's arguments and affirm the judgment and order.

BACKGROUND

¶2 Kringen was involved in a single-car rollover at a park in the Village of Somerset on July 29, 2000. The village police chief, who was in an unmarked car and not in uniform at the time, attempted to arrest Kringen. Kringen struck the police chief in the face, breaking the chief's nose, which required stitches. Kringen also struck other officers and resisted arrest both at the scene and at the hospital where he was taken for a blood test. Kringen had slurred speech and an odor of alcohol at the time of his arrest. Kringen was charged with two counts of battery to a peace officer; five counts of resisting an officer; and one count each of battery, disorderly conduct and criminal damage to property, all as a repeat offender.

¶3 Kringen filed a motion to suppress statements. He also filed a motion for an MRI exam because Kringen alleged that he suffered a head injury in the accident. Initially, Kringen's theory of defense was that he could not recall parts of the incident and that his head injuries caused him to act abnormally. He believed an MRI could possibly confirm this theory. Kringen's attorney later informed the court there was a conflict in strategy, and another attorney took over the case. At a subsequent hearing, Kringen requested new counsel because he said his attorney did not adequately investigate the case. He also stated there was a lack of communication.

¶4 With his third attorney, Kringen reached a plea agreement to plead no contest to battery of a peace officer. The other counts were dismissed and read in. The court ordered a pre-sentence investigation, and the State agreed to recommend no more than three years in prison.

¶5 After the plea hearing, Kringen's third attorney filed a motion to withdraw because he stated he had misrepresented the plea agreement to Kringen. He stated he believed Kringen was pleading to a ten-year felony without a repeat offender enhancement, when in fact he pled to a sixteen-year felony with the repeater enhancement. The attorney argued he lost Kringen's trust and that Kringen wanted a new attorney. The court held open a ruling on the motion.

¶6 At sentencing, Kringen renewed his motion to allow his attorney to withdraw, citing the misrepresentation as well as duress and verbal abuse in forcing Kringen to accept the plea agreement. The court denied the motion as well as Kringen's motion to withdraw his guilty plea.

¶7 The court then proceeded to sentencing. It took into account the presentence report, which recommended five to eight years in prison, as well as the State's recommendation of three years. The court also considered Kringen's six prior felony convictions and sentenced Kringen to five years in prison plus three years' extended supervision.

¶8 Kringen filed postconviction motions. An evidentiary hearing was held beyond sixty days after the motion was filed, contrary to WIS. STAT. § 809.30(2)(h).¹ After the hearing, the court decided that because the hearing was

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

not held within sixty days of filing the motions, the motions must be dismissed. Kringen appeals.

DISCUSSION

1. Sufficiency of the plea colloquy

¶9 Kringen argues that the court erred by denying his motion to withdraw his guilty plea. Prior to sentencing, a motion to withdraw a guilty plea should be freely allowed if the defendant presents a “fair and just reason” to justify the withdrawal. *State v. Garcia*, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). “But ‘freely’ does not mean automatically. A fair and just reason is ‘some adequate reason for defendant’s change of heart ... other than the desire to have a trial.’” *Id.* (citation omitted).

¶10 While the “fair and just” reason test is a liberal one, the defendant must still demonstrate a “genuine misunderstanding of the plea’s consequences” or “haste and confusion in entering the plea” or “coercion on the part of trial counsel.” *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). It is within the trial court’s discretion to determine whether a defendant’s reason adequately explains his or her change of heart. *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We uphold a discretionary decision if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. *Id.*

¶11 The trial court found that Kringen was adequately informed and intelligently, knowingly and voluntarily entered his guilty plea. However, Kringen maintains there was an insufficient plea colloquy regarding the presence of the repeat offender status as part of the plea. Kringen argues he thought he was

pleading to a ten-year felony without the repeater enhancement when he was actually pleading to a sixteen-year felony with the repeater enhancement. Kringen contends the court did not adequately ask him about his plea or whether he was stipulating to a prior conviction as part of the plea. Consequently, Kringen maintains there was a misunderstanding as to the plea's consequences.

¶12 However, the plea waiver form, which Kringen signed, specifically stated that the maximum penalty was sixteen years in prison and/or a \$10,000 fine. Additionally, Kringen stated he was pleading no contest to count one, which was entitled "Battery of a Peace Officer, Repeater." In fact, the transcript of the plea hearing shows that Kringen was notified correctly of the charge. The court asked Kringen: "To the count as set forth in Count 1, battery of a police officer, as a repeater, to that charge, Mr. Kringen, how do you plead." Kringen responded, "No contest, your honor." If Kringen was not aware that he was being charged as a repeater, he was certainly notified of it at this point.

¶13 The court additionally questioned Kringen's attorney regarding whether he had discussed the elements of the crime and the possible sentence with Kringen. Kringen's attorney replied that he had done so. Again, if his attorney was confused as to the presence of the repeater enhancer, Kringen was made aware of the repeater when the court asked Kringen for his plea. Neither Kringen nor his attorney expressed any confusion during the court's questioning.

¶14 Kringen has not offered any fair and just reason why he should be allowed to withdraw his guilty plea. It was therefore a proper exercise of the trial court's discretion to deny Kringen's motion.

2. Ineffective assistance of counsel

¶15 Kringen argues he received ineffective assistance of counsel because his attorney misrepresented the plea offer and because his attorneys failed to adequately investigate alternative defenses. As a result, Kringen contends he should have been allowed to withdraw his guilty plea.

¶16 Kringen's postconviction motion regarding ineffective assistance was denied because the hearing was not held within sixty days of filing the motion, as required by WIS. STAT. § 809.30(2)(h). Kringen does not argue that his motion was erroneously dismissed. We therefore could affirm on that basis alone. However, we conclude that we may affirm on the merits as well.

¶17 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.* at 697.

¶18 We review the circuit court's findings of fact regarding counsel's conduct under a clearly erroneous standard. *State v. Pitsch*, 124 Wis. 2d 628,

633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. *State v. Tulley*, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807. Here, Kringen's postconviction motion was dismissed pursuant to WIS. STAT. § 809.30(2)(h). However, the court did conduct an evidentiary hearing on Kringen's motion while it took the issue of timeliness under advisement. We therefore look to the court's findings at Kringen's sentencing as well as testimony from the postconviction hearing to determine whether to uphold the court's ruling on this issue.

¶19 Kringen first argues he received ineffective assistance of counsel because his attorney did not explain the elements of the crime to which he was pleading, or the maximum penalty that could be imposed. The trial court considered whether Kringen was in fact misinformed when it denied Kringen's motion to withdraw his plea at sentencing. The court determined that Kringen was informed orally in court as well as in the plea questionnaire regarding the maximum penalty he could receive.

¶20 Both Kringen and his attorney told the court at sentencing that they had discussed the plea and had ample time to do so. Additionally, Kringen's attorney testified at the postconviction hearing that, although he did not remember going through the plea waiver form with Kringen, he has a consistent practice of doing so. He testified that because the form referred to a term of sixteen years, his practice would have been to write that number down and tell Kringen the figure. Therefore, the record supports the conclusion that Kringen's attorney's performance was not deficient in this regard.

¶21 Second, Kringen argues he received ineffective assistance of counsel because his attorneys collectively failed to investigate alternate defenses. He maintains his attorneys failed to ensure that an MRI was ordered, and also that his attorneys did not do enough to contact witnesses. Kringen points out that his original theory of defense was that his injuries caused him to act abnormally, and that he could not remember some things that occurred during the incident. Consequently, Kringen argues his attorneys failed to make a reasonable investigation of possible defenses and instead pushed him into a plea agreement.

¶22 Testimony by Kringen's attorneys at the postconviction hearing fails to support Kringen's claims. The first attorney testified that the original defense was to focus on Kringen's injuries and loss of memory. However, at the preliminary hearing Kringen stated he did remember what happened. The attorney stated that to continue with the defense would have been inconsistent, and therefore the MRI was no longer necessary. This attorney also testified that he did not investigate other witnesses because Kringen did not provide him with any names of people to contact and he himself knew of none.

¶23 We cannot say that any actions taken by the first attorney were deficient. It was reasonable for the attorney to determine he could not proceed with an inconsistent defense. Further, an attorney is not expected to investigate witnesses when a defendant does not provide the attorney with names. *State v. Hubanks*, 173 Wis. 2d 1, 26-27, 496 N.W.2d 96 (Ct. App. 1992).

¶24 The second attorney testified that he did not investigate because he was fired before he had the chance to hire an investigator, and he was not given any names of people to contact. He further stated that he did not believe

Kringen's defenses were likely to prevail with a jury. Again, this attorney's actions were not deficient.

¶25 Kringen's third attorney was never asked about MRIs or investigation at the hearing. There is therefore no evidence to suggest his actions were deficient.

¶26 Because Kringen has not proved that any of his three attorneys' actions were deficient, he cannot show that he received ineffective assistance of counsel. Although our focus here is on the attorneys' performance, Kringen also failed to satisfy the prejudice prong because he has not shown that any of the alleged errors were so serious as to render his conviction unreliable.

3. Request for a new attorney

¶27 Finally, Kringen argues the trial court erred by denying his request for a new attorney. When deciding whether to grant or deny a request for substitution of counsel with the associated request for a continuance, the circuit court must balance a defendant's constitutional right to counsel of choice against society's interest in the prompt and efficient administration of justice. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988).

¶28 Several factors assist the court in balancing the relevant interests: the length of delay requested; whether there is competent counsel presently available to try the case; whether other continuances have been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory. *Id.* We review the circuit court's decision

using the erroneous exercise of discretion standard. *State v. Kazee*, 146 Wis. 2d 366, 371-72, 432 N.W.2d 93 (1988).

¶29 Here, the trial court focused on the reasons for the delay. It determined that Kringen's desire for a new attorney was motivated by his desire to withdraw his plea. Because the court had already determined that Kringen would not be allowed to withdraw its plea, it denied Kringen's motion. However, Kringen argues the court failed to inquire into his complaints regarding his claims that his attorney misrepresented the plea agreement. He therefore claims that he essentially lost his ability to be defended and should be allowed to withdraw his plea as a result.

¶30 As our supreme court stated in *Lomax*, in order to justify a substitution of counsel, a defendant must show evidence of incompetence or conflict. *Lomax*, 146 Wis. 2d at 361. If the defendant is unable to make this showing, the court may conclude that the request is a ploy to disrupt the trial process, and full inquiry is not necessary. *Id.* Kringen was unable to show any deficiency in his attorney's performance that would justify a substitution. All Kringen's motions, including the motion to substitute counsel, appear to be nothing more than attempts to withdraw his guilty plea. The court therefore properly exercised its discretion by determining that Kringen's request was not for legitimate reasons.

By the Court.—Judgment and order affirmed.

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

