**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 28, 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 No. 2009AP2932-CR** **Cir. Ct. No. 2007CF4022**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**REGINALD FIONNA BALDWIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and PATRICIA D. McMAHON, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Reginald Fionna Baldwin, *pro se*, appeals from a judgment of conviction entered upon his guilty pleas to two felonies. He also

appeals from a postconviction order denying his motion for plea withdrawal.[1] He claims that his pleas were not entered knowingly, intelligently, and voluntarily, and that he received ineffective assistance from his trial counsel. We affirm.

## BACKGROUND

¶2 We take the facts underlying the charges from the criminal complaint. Acting on an informant's tip advising of an impending drug transaction, City of Milwaukee police conducted surveillance on August 16, 2007, near a residence at 3610 N. 10th Street. Police saw a person later identified as Pharon Witherspoon enter the rear of that residence and then saw someone drive a Honda Accord to the front of the residence. Moments later, police saw a man subsequently identified as Baldwin leave the residence with a black plastic bag and get into the passenger seat of the Honda. As officers neared the vehicle, Baldwin fled on foot. Police retrieved the black plastic bag from the Honda and discovered a large quantity of cocaine inside. Police arrested Baldwin and determined that he lived at 3610 N. 10th Street. Police searched his home and found a gun under a mattress. Baldwin stated that he "would take credit" for the gun. The State charged Baldwin with committing two crimes, both as a habitual criminal: (1) possessing with intent to deliver more than forty grams of cocaine as a second or subsequent offense; and (2) possessing a firearm as a felon.

¶3 Baldwin retained private counsel and resolved the case with a plea bargain. He pled guilty to modified charges of possessing more than forty grams

[1] The Honorable Jeffrey A. Kremers presided over the pretrial, plea, and sentencing proceedings, and entered the judgment of conviction. The Honorable Patricia A. McMahon denied Baldwin's postconviction motion.

of cocaine with intent to deliver and possessing a firearm as a felon, and the State recommended a global disposition of six years of initial confinement and three years of extended supervision. The circuit court sentenced Baldwin to five years of initial confinement and four years of extended supervision for the firearms offense. The circuit court imposed and stayed a twelve-year sentence for the drug offense and ordered Baldwin to serve a consecutive term of probation.

¶4 Baldwin's appellate rights lapsed when he did not timely file a notice of intent to pursue postconviction relief, but this court granted his *pro se* motion to extend the applicable appellate deadline. Baldwin then moved for plea withdrawal. The circuit court denied his motion without a hearing, and this appeal followed.

## DISCUSSION

¶5 A defendant who wishes to withdraw a guilty plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. An involuntary plea and the ineffective assistance of trial counsel are two of the factual scenarios that may constitute a manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). Baldwin alleges both.

¶6 We begin by describing the governing standards of review. Whether a guilty plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact that we review under a mixed standard. *See* ***State v. Hoppe***, 2009 WI 41, ¶61, 317 Wis. 2d 161, 765 N.W.2d 794. "We accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous.

We independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.*** (footnotes omitted).

¶7 A defendant claiming ineffective assistance of trial counsel must show that counsel performed deficiently and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance." ***Id.*** at 690. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. The defendant must satisfy both components of the ***Strickland*** test and failure to make a sufficient showing as to one component ends the inquiry. *See* ***id.*** at 697.

¶8 A defendant's postconviction motion "must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" ***State v. Allen***, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433 (citation omitted, brackets in ***Allen***). The circuit court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***Id.***, ¶12 (footnote omitted). We determine *de novo* whether a motion alleges facts that, if true, would entitle a defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). With these principles in mind, we turn to the issues.

¶9 Baldwin claims that his guilty pleas were not entered knowingly, intelligently, and voluntarily because: (1) his trial counsel misled him by advising

him that the State would recommend three years of initial confinement and three years of extended supervision in exchange for his guilty pleas; and (2) his trial counsel made false promises that he "would receive the Earned Release Program" and "be home between 18-24 months [sic]."[2] The record demonstrates that Baldwin is not entitled to relief.

¶10 Baldwin signed a guilty plea questionnaire and waiver of rights form, and the circuit court established before accepting his guilty pleas that he understood the form and signed it freely and voluntarily. The form includes a handwritten description of the parties' plea bargain—Baldwin would plead guilty to possessing cocaine with intent to deliver and to possessing a firearm as a felon, and in exchange, the State would move to dismiss the penalty enhancers and recommend a "total penalty" of six years of initial confinement and three years of extended supervision. The parties also recited these terms on the record at the outset of the plea hearing. Baldwin told the circuit court that he had not been promised anything else to induce his pleas and that he had not been threatened.

¶11 The circuit court reviewed the maximum penalties for the offenses and explained that it was not bound by the parties' sentencing recommendations or the plea bargain. Baldwin confirmed his understanding that the circuit court had discretion to impose any sentence up to the maximum allowed by statute.

[2] The earned release program is a substance abuse treatment program administered by the Department of Corrections. *See* WIS. STAT. § 302.05 (2007-08). Successful completion of the program shortens an inmate's period of initial confinement but the overall length of the sentence does not change because the unserved period of initial confinement is converted to a period of extended supervision. *See* § 302.05(3)(c)2. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶12 The plea colloquy reflects that Baldwin understood at the time of his pleas the recommendations that the State would make, the maximum penalties that he faced, and the circuit court's freedom to impose those maximum penalties. The information Baldwin received during the plea hearing overrides any misstatements that trial counsel may have made before the hearing began. *See* ***Bentley***, 201 Wis. 2d at 319.

¶13 A defendant who asserts that matters extrinsic to the guilty plea proceeding undermine the plea must present specific, nonconclusory information showing why the plea was not voluntary. *See* ***State v. Basely***, 2006 WI App 253, ¶10, 298 Wis. 2d 232, 726 N.W.2d 671. To meet that burden here, Baldwin places substantial reliance on statements made during the sentencing proceeding. At the outset of that hearing, the circuit court reviewed the terms of the plea bargain and stated: "the State was prepared to recommend a total sentence of six years, three years of initial confinement and three years of extended supervision; is that correct?" Baldwin's reliance on these remarks is misplaced. First, the circuit court's inquiry at the time of the sentencing hearing does not suggest, let alone demonstrate, that Baldwin misunderstood anything at the time of the earlier plea hearing. Second, the State and trial counsel both told the circuit court that it was not correct and reiterated the State's promise to recommend six years of initial confinement and three years of extended supervision. The circuit court then asked Baldwin if the lawyers accurately stated the promised recommendation, and Baldwin answered, "yes sir."

¶14 We are satisfied that Baldwin offers nothing to undermine his acknowledgements in open court during the plea colloquy that he knew and understood the consequences of his guilty pleas. Accordingly, we reject

Baldwin's claim that he is entitled to withdraw his pleas because he misunderstood their consequences.[3]

¶15 Baldwin also claims that his trial attorney's ineffective assistance left him with no choice except to plead guilty. This allegation requires Baldwin to demonstrate that his trial attorney in fact performed ineffectively. Therefore, we turn to his specific claims of ineffective assistance of counsel.

¶16 Baldwin asserts that his trial counsel coerced his waiver of the preliminary examination. The record conclusively refutes the claim. Baldwin signed a form stating that he wished to waive the preliminary examination. He confirmed in open court that he signed the waiver form, that he understood the rights that he was giving up, and that he had not been threatened or promised anything to induce his waiver. His self-serving and conclusory allegation of coercion does not entitle him to any relief. *See* ***Allen***, 274 Wis. 2d 568, ¶12.

¶17 Next, Baldwin makes a series of allegations that his trial counsel performed ineffectively regarding "Rommel Reed" who, Baldwin states, "could have proven his innocence." According to Baldwin, Reed was the owner and driver of the Honda that police observed in front of Baldwin's home on August 16, 2007. Baldwin contends that his trial counsel's failure to preserve Reed's

[3] In a separate section of his brief, Baldwin asserts that he "has a constitutional right to be presence [sic] at all plea hearings." Baldwin apparently believes that he is in some way aggrieved because he was in the back of the courtroom during the final pretrial conference held three weeks before his guilty plea. At the outset of the pretrial conference, his attorney stated: "[counsel appears] on behalf of Mr. Baldwin who is present in the back of the courtroom." The record is clear that Baldwin in fact was present. The circuit court questioned him directly to determine whether he understood the time and date of the next hearing, and Baldwin responded affirmatively. We reject as nonsense Baldwin's claim that he was not present for a plea hearing because he was present in the back of the courtroom three weeks earlier.

testimony during pretrial proceedings denied Baldwin the opportunity to challenge law enforcement's stop of the Honda. Baldwin asserts that Reed's testimony would have "combat[ted] the credibility of the police officers [claiming] that [Baldwin] was seen entering into Reed's car carrying a black bag." Baldwin also asserts that his trial counsel should have undermined Reed's credibility by investigating "plea concessions" that Reed received.

¶18 Baldwin's vague and somewhat inconsistent allegations about Reed are not tethered to any material facts. The record does not establish that Reed exists, let alone that he played a role in any of the relevant events or that he received something of value from the State in exchange.[4] Further, Baldwin offers only his own optimistic assertion that Reed would have provided exculpatory testimony, the exact substance of which Baldwin does not describe. Baldwin's allegations are inadequate to support a claim of ineffective assistance of counsel. *See* ***id.***

¶19 Baldwin next contends that his trial counsel performed ineffectively by not pursuing suppression motions. Such a claim requires a showing that the motions would have succeeded. ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). Baldwin does not make that showing.

¶20 Baldwin repeatedly states that his trial counsel performed ineffectively by failing to move to suppress the cocaine found in the Honda, but he offers no basis on which trial counsel could have mounted a successful challenge to the stop and search of that car. His substantive arguments are limited to

[4] Reed is not mentioned in the complaint or in the portions of the police reports that Baldwin submitted with his postconviction motion.

contentions that his trial counsel's "failure to subpoena Reed denied [Baldwin] an opportunity to effectively challenge the initial Terry stop" and that trial counsel "failed to subpoena Reed so that the 9 ounces [of cocaine] that w[ere] inside of his car ... could be proven [to belong to] Reed." We have already explained that Baldwin's arguments regarding Reed are conclusory and insufficient to sustain a claim of ineffective assistance of counsel. We decline to develop alternative bases for Baldwin's contention that his trial counsel performed ineffectively by failing to challenge the stop and search of the vehicle. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶21 Baldwin claims that his trial counsel was ineffective by failing to seek suppression of the gun on the ground that police searched his home without a warrant or consent. The record conclusively shows that he cannot obtain relief on this ground. First, his postconviction submission included a letter from his trial counsel showing that counsel investigated Baldwin's claims that the police improperly searched his home, and the results of the investigation did not support his position. According to the letter, Baldwin "backed off" his claim when confronted with the information that counsel uncovered, and counsel did not pursue suppression of the gun any further. An attorney's strategic decision following reasonable investigation is "virtually unchallengeable" in the context of an ineffective assistance claim. *See* ***Strickland***, 466 U.S. at 690. Second, and perhaps more importantly, at sentencing Baldwin admitted to the circuit court: "I gave them [the police] permission to search my home." Consent to search is a well-established exception to the requirement that police searches be conducted pursuant to a search warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385.

¶22 Baldwin claims that his trial counsel was ineffective by failing to seek suppression of his custodial statements because, he says, the police questioned him even though he "requested that his counsel be presence [sic] during all interviews." This is the epitome of a conclusory assertion. It is wholly inadequate to support a postconviction claim. *See* ***Allen***, 274 Wis. 2d 568, ¶12.

¶23 Next, Baldwin asserts that his trial counsel's spouse is a Milwaukee police officer, and that the marriage created a conflict of interest. Conflict of interest claims in criminal cases are analyzed as a form of ineffective assistance of counsel. ***State v. Love***, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999). To prevail, the defendant must show by clear and convincing evidence that "counsel had an actual conflict of interest." ***Id.*** at 71. In ***Love***, the supreme court cited with approval the seventh circuit's definition of an actual conflict of interest: "'the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests.'" ***Id.*** at 71-72 n.5 (citations and one set of quotation marks omitted). When the defendant established an actual conflict of interest, prejudice is presumed. ***Id.*** at 71.

¶24 Here, Baldwin did not allege facts showing that his trial counsel had an actual conflict of interest.[5] Nothing in the record suggests that trial counsel's spouse had any involvement in investigating the charges against him or stood to

[5] Baldwin does not point to any evidentiary support in the record for his allegation that his trial counsel was married to a police officer. This alone defeats a conflict of interest claim premised on such an allegation. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. Nonetheless, the State addressed the claim in the circuit court proceedings and the circuit court adopted the State's analysis, so we briefly review the issue here for the sake of completeness.

gain professionally from any adverse outcome to Baldwin as a result of the prosecution.

¶25 Baldwin failed to demonstrate that his trial counsel was ineffective in any respect before the circuit court entered a judgment of conviction in this case. Accordingly, he has not shown that his attorney's performance constitutes a manifest injustice necessitating plea withdrawal.

¶26 Baldwin also attempts to undermine his convictions by raising claims that are not cognizable as allegations of manifest injustice. He asserts, for example, that the State lacked sufficient evidence to convict him, that he has standing to challenge the stop and search of the Honda, and that police officers arrested him on a hunch without reasonable suspicion or a warrant. He cannot pursue such allegations. "[A] guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea."[6] ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). We have rejected Baldwin's claim that his pleas were involuntary. No jurisdictional error is alleged or shown.

¶27 Finally, Baldwin asserts that his trial counsel was ineffective after his conviction and sentencing by failing to file a timely notice of intent to pursue postconviction relief. *See* WIS. STAT. RULE 809.30(2)(b). Baldwin shows no prejudice from any alleged deficiency, because he obtained a complete remedy when this court granted his *pro se* motion to extend the filing deadline pursuant to

[6] The supreme court recently noted that the effect of a guilty plea more accurately is labeled a forfeiture rather than a waiver of the right to appeal particular issues. *See* ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

WIS. STAT. RULE 809.82(2)(a). *See* ***State v. Quackenbush***, 2005 WI App 2, ¶17, 278 Wis. 2d 611, 692 N.W.2d 340 (remedy when counsel is allegedly ineffective by failing to file a notice of intent to pursue postconviction relief is an extension of the time for filing the notice). As this opinion demonstrates, he has had a full opportunity to exercise his appellate rights.

¶28 We agree with the circuit court's conclusion that Baldwin's allegations do not merit an evidentiary hearing. Accordingly, we affirm.

*By the Court.*—Judgment and order affirmed.

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