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

**May 25, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-1474-CR** **Cir. Ct. No. 01CF004715**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIE W. HENDERSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO and MARTIN J. DONALD, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] The Honorable John J. DiMotto entered the judgment of conviction. The Honorable Martin J. Donald proceeded over the postconviction proceedings.

¶1 PER CURIAM. Willie W. Henderson, *pro se*, appeals from a judgment convicting him of one count of first-degree reckless homicide, as a party to the crime, in violation of WIS. STAT. §§ 940.02(1) and 939.05 (2001-02).[2] He also appeals from an order denying his postconviction motion. Henderson essentially contends that: (1) his plea was not voluntarily, intelligently, and knowingly entered; (2) he should be allowed to withdraw his guilty plea because his trial counsel was ineffective for a myriad of reasons, and the trial court erred in not holding a hearing; and (3) he was denied the effective assistance of appellate counsel. Because his plea was entered voluntarily, intelligently, knowingly and willingly; Henderson failed to establish a manifest injustice warranting the withdrawal of his guilty plea, thus no hearing was necessary; and neither counsel was ineffective, we affirm.

## I. BACKGROUND.

¶2 According to the criminal complaint, on March 30, 2001, Henderson and three other men "shot up" a house on North 38th Street in Milwaukee, resulting in the death of Efrain Diaz. Approximately five months later, Henderson and two of the other men confessed to police detectives after being advised of their ***Miranda***[3] rights. The shooting was apparently part of a plan to scare the landlord after he evicted and allegedly threatened the mothers of two of the men and to scare the new tenants-drug dealers who were stealing their customers.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶3 Henderson waived his right to a preliminary hearing, and the court bound him over for trial. The information was immediately filed, charging Henderson with one count of first-degree reckless homicide, as a party to a crime, while armed.[4] Henderson waived the formal reading of the information and pled not guilty. At a scheduling conference shortly thereafter, the following exchange occurred:

> THE COURT: These cases are here today for a scheduling conference. I assume we are going to need final pretrial and jury trial dates?
>
> [ASSISTANT DISTRICT ATTORNEY]: Yes, though at least two of the defendants have indicated there is a strong possibility of resolution.

Several months later, at the final pretrial, the following exchange occurred during discussion regarding the trial date and any potential projected guilty pleas:

> THE COURT: … Now as to Willie Henderson?
>
> [DEFENSE COUNSEL]: Your Honor, on Tuesday I spent some time at the jail speaking with Mr. Henderson. There has been a plea negotiation that has been offered to him. This morning Mr. Williams and I had some more discussions, and Mr. Henderson is wavering. He's considering taking the plea, he's considering going to trial.
>
> My suggestion is that we actually set this matter for a projected plea on December 21st. I will relay the additional information that Mr. Williams has given me this morning to Mr. Henderson. And if he chooses not to actually enter a plea on that date, he can indicate that to the court, and I can be adequately prepared to do his jury trial on the 7th.

[4] As three defendants were in this case, the information charged and the preliminary hearing and scheduling conference involved all three. As this appeal only concerns Henderson, however, we will largely limit the discussion to his case.

¶4 On December 21, 2001, Henderson appeared with counsel for a plea hearing before the trial court. At that time, in exchange for Henderson's pleading guilty to first-degree reckless homicide, the State requested withdrawal of the "while armed" charge. The court obliged, and the State then recommended a sentence "in the area of 15 years of confinement." Defense counsel confirmed the accuracy of the negotiations and the State's recommendation.[5]

¶5 The trial court conducted a plea colloquy with Henderson. The trial court ensured that Henderson understood the nature of the charge and the maximum penalty for the offense. It discussed the plea questionnaire and waiver of rights form, which was appended with copies of standard jury instructions for first-degree reckless homicide, possessing a dangerous weapon, and party to a crime charges. The trial court inquired as to whether Henderson signed the questionnaire, whether his attorney read everything to him, and whether he understood all of the information on the forms. He responded affirmatively to all inquiries. The trial court then addressed the constitutional rights that would be given up by way of a guilty plea, including the right to remain silent, the right against self-incrimination, the right to "see and cross-examine the State's witnesses," the right to testify and to call witnesses to testify on his behalf, the right to a jury trial and an unanimous verdict, the right to a court trial, and the right to make the State prove his guilt beyond a reasonable doubt; Henderson confirmed that he understood. The trial court went over the elements of the crime, informed

[5] It appears from the record that the "while armed" charge may have been included on the plea questionnaire before the start of the plea hearing. As such, defense counsel requested that the plea questionnaire be amended to reflect the fact that the charge had been withdrawn. However, the trial court had already amended the plea questionnaire after the State requested the withdrawal of the charge.

Henderson that the trial court was not bound by any negotiations or recommendations for sentencing, and confirmed that no promises or threats influenced Henderson's plea. The court asked Henderson whether he was satisfied with his attorney and her performance and whether he understood what was going on; he replied in the affirmative.

¶6 The assistant district attorney, defense counsel, and the trial court then discussed the possibility of a "withdrawal" defense:

> [ASSISTANT DISTRICT ATTORNEY]: Judge, counsel and I have had discussions. At one point Mr. Henderson was concerned about the defense of withdrawal, and we've discussed that. Counsel and I have discussed that, and counsel, I believe, has discussed it with Mr. Henderson. Mr. Henderson fired three shots –
>
> THE COURT: Right.
>
> [ASSISTANT DISTRICT ATTORNEY]: In this matter. And perhaps after those three shorts were fired, he might have decided to withdraw, but clearly the law is clear that you have to withdraw before.
>
> THE COURT: Before.
>
> [ASSISTANT DISTRICT ATTORNEY]: Before any activity begins. And you have to notify everyone else of your withdrawal, which I don't believe Mr. Henderson did. But that has been explored by counsel and Mr. Henderson.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Judge, and that is a correct and accurate statement. I was intending to put that on the record.
>
> THE COURT: Sure.
>
> [DEFENSE COUNSEL]: And we have discussed that, that defense, and what the evidence would show if this case were taken to trial and whether or not that that would be a valid defense under the circumstances.

¶7 The trial court asked defense counsel whether she was satisfied that Henderson understood (1) all of the elements of the crime, (2) all of the possible, applicable defenses, (3) that the withdrawal defense would not be available because of his conduct, and (4) the rights he was giving up; she responded affirmatively. She also noted that she "carefully" went over the elements with him because of the fact that he cannot read or write. The trial court determined that Henderson was entering his plea freely, voluntarily, and intelligently. After finding that the complaint provided a sufficient factual basis for the acceptance of the guilty plea, the trial court found Henderson guilty of first-degree reckless homicide.

¶8 Henderson was subsequently sentenced to thirty-three years, consisting of eighteen years of initial confinement and fifteen years of extended supervision. He filed a motion for postconviction relief requesting the withdrawal of his guilty plea or, in the alternative, resentencing. The motion was denied. He now appeals.[6]

## II. ANALYSIS.

*A. Henderson's plea was knowingly, voluntarily, and intelligently entered.*

¶9 Generally, "[a] guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). As such, we will address Henderson's allegations of

[6] Although Henderson's postconviction motion alternatively sought resentencing, he has not pursued that route on appeal.

trial court error and trial counsel's alleged ineffectiveness only insofar as they relate to his motion seeking the withdrawal of his guilty plea.

¶10 "The withdrawal of a guilty plea is not a 'right,' but is addressed to the sound discretion of the trial court and will be reversed only for an [erroneous exercise] of that discretion." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). After sentencing, the defendant is required to show a "manifest injustice" in order to be entitled to plea withdrawal. ***Id.*** at 235; ***State v. Nawrocke***, 193 Wis. 2d 373, 378, 534 N.W.2d 624 (Ct. App. 1995). That showing must be by clear and convincing evidence, and the burden of proof is on the defendant. *See* ***State v. Rock***, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). "The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." ***Nawrocke***, 193 Wis. 2d at 379.

¶11 While "[a] plea [that] is not knowingly, voluntarily[,] or intelligently entered is a manifest injustice[,]" ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995), Henderson's contention that his plea was not voluntarily, intelligently, and willingly entered because the plea colloquy did not conform to the "procedures set forth under" ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987) lacks merit. Moreover, his argument that he "clearly had no understanding of the nature of the charges[,]" because trial counsel never explained what "party to a crime" means and did not read the plea questionnaire to him, is belied by the record.[7]

[7] Henderson also makes some reference to the "while armed" charge in his argument. However, since that charge was dropped as part of the plea negotiation, we will not attempt to discern his argument in that regard.

¶12 "On appellate review, the issue of whether [the defendant's] plea was voluntarily, knowingly, and intelligently entered is a question of constitutional fact." ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). "We review constitutional questions independent of the conclusion of the lower courts[, but w]e will not upset the [trial] court's findings of evidentiary or historical facts unless they are clearly erroneous." ***Id.***

¶13 First, ***Moederndorfer*** held that the trial court need not conduct a personal colloquy with the defendant regarding the waiver of constitutional rights. 141 Wis. 2d at 826-27. Instead, the trial court may refer to "some portion of the record or some communication between defense counsel and defendant." ***Id.*** at 827. Indeed, "[a]ny … of these alternatives is proper so long as the alternative used exhibits defendant's knowledge of the constitutional rights waived." ***Id.*** In ***Moederndorfer***, the trial court referred to a three-page form, which detailed each constitutional right and required the defendant to initial each paragraph if understood "to show defendant's knowledge of the rights being waived." ***Id.*** ***Moederndorfer*** in no way requires this practice; it is simply one means by which a trial court can show that the defendant understood the rights being waived. Here, the trial court conducted an oral colloquy with Henderson to confirm his knowledge of the constitutional rights he was waiving. That was certainly sufficient.

¶14 Second, Henderson's claims that he "clearly informed the judge that counsel hadn't read the plea questionnaire to him" and that he had no understanding of the nature of the charges and the rights he was waiving are wholly contradicted by the record. As indicated above, the plea colloquy was thorough, and Henderson gave no indication that he did not understand what he was doing. Furthermore, contrary to Henderson's contention, the party to a crime

charge was explained to him. Henderson has failed to establish any flaw in the plea colloquy affecting the voluntary, intelligent, and willing nature of his plea.

*B. Henderson was not denied the effective assistance of counsel.*

¶15 The supreme court "has recognized that the 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996); *see* ***Rock***, 92 Wis. 2d at 558-59. In ***Hill v. Lockhart***, 474 U.S. 52 (1985), the United States Supreme Court concluded that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." ***Id.*** at 58. Under ***Strickland v. Washington***, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***id.*** at 687; *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687. Thus, in order to show prejudice, "the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (quoting ***Hill***, 474 U.S. at 59).

¶16 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, "[t]he

questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Id.*** Finally, if the defendant fails to meet either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697.

¶17 Henderson first contends that his trial counsel was ineffective for failing to object to the trial court's jurisdiction when the trial court did not find probable cause on the record during the preliminary hearing. However, Henderson *waived* the preliminary hearing, both orally and in writing. In doing so, he waived his right to have the State establish probable cause. Indeed, the trial court informed him:

> THE COURT: You are collectively and each one of you waiving your right to a preliminary hearing? I will define for you what I believe to be the definition of preliminary hearing and ask you whether or not you want to waive it. A preliminary hearing consists of the State proving two things: one, that a felony was committed within Milwaukee County and two, that probably each of you were involved. Is this what you want to waive? …
>
> ….
>
> THE COURT: Mr. Henderson?
>
> DEFENDANT HENDERSON: Yes, Your Honor.
>
> THE COURT: The Court finds that the defendants each of them have freely and voluntarily waived their right to a preliminary hearing. They have done so without threats, coercion, or intimidation and each with a[n] understanding of what a preliminary hearing is designed to accomplish.
>
> The Court accepts each one of the waivers and binds them over for trial.

Although Henderson appears to argue that, regardless of his waiver, WIS. STAT. § 970.03(7), (9), and (4)(b) require the trial court to find probable cause and "set forth specific findings for the bind over," he fails to explain why. Section 970.03 concerns the procedures and requirements of a preliminary hearing. Henderson waived his preliminary hearing; as such, these procedures and requirements do not apply. Henderson conceded probable cause and has not provided us with any relevant case law—as there is none—indicating that his trial counsel should have objected to the court's jurisdiction regardless of his waiver. Thus, trial counsel's performance was not deficient in this manner.

¶18 Henderson also insists that his trial counsel was ineffective for failing to file a motion to suppress statements that he allegedly informed counsel were coerced as a result of police brutality and threats. He contends, in a conclusory manner without any specific allegations of threats or brutality, that his confession was beaten out of him and "was very untrue."[8] We are unpersuaded.

¶19 As noted by the trial court, Henderson gave a statement to police after being advised of his ***Miranda*** rights. He does not provide us with any information or details regarding these claims of police brutality or threats from which we can conclude that trial counsel was ineffective for failing to pursue a suppression motion. Furthermore, a review of the record indicates that while trial

[8] The only specific "facts" Henderson included in his argument are unrelated to the police brutality contention, as they concern the statements of other "witnesses" regarding who they believed to be involved in the crime.

Furthermore, the affidavit Henderson refers to in his reply brief is not a part of the appellate record. The affidavit is dated July 14, 2003, and was clearly not before the trial court when it issued the May 8, 2003 order denying Henderson's postconviction motion. As such, we will not consider it.

counsel did inform the court that Henderson had requested that she file a suppression motion, the reasons given were quite different from what Henderson is now alleging. Indeed, trial counsel explained at sentencing that Henderson wanted to file a motion to suppress his statement because he is illiterate, and he signed the statement even though he could not read it. After researching the issue, trial counsel concluded that illiteracy is not a legal ground for suppressing a statement.[9] As such, we cannot conclude that trial counsel was ineffective for failing to file a motion to suppress. More importantly, by pleading guilty Henderson knowingly gave up his right to challenge the admissibility of his statements at trial or pursue any other defenses.

¶20 Additionally, Henderson contends that his trial counsel was ineffective for failing to investigate his alibi. He essentially argues that he told trial counsel that he was home with his girlfriend at the time of the shooting, and that one of the co-defendants gave a false confession implicating Henderson in the crime.[10] He insists that a presumption of prejudice should apply in this case because "counsel's actions 'entirely' failed to subject the State [sic] case to reasonable and meaningful adversarial testing[.]" We disagree. First, Henderson has not provided any evidence corroborating his claim that he was home with his girlfriend. Second, Henderson and two other co-defendants confessed to the crime and gave consistent accounts of the incident. Third, by entering a guilty plea, he

[9] In a completely unrelated portion of his brief, Henderson asserts, without explaining, that "[o]bviously counsel had not researched enough, as Minnick v. Mississippi (cite omitted) addressed that very issue." As he provides no citation, we can only guess that Henderson is referring to ***Minnick v. Mississippi***, 498 U.S. 146 (1990). However, that case does not concern illiteracy.

[10] For the latter portion of this statement, Henderson again cites the July 14, 2003 affidavit. We will not consider it.

has given up the defense that he was not present at the shooting. Further, we note that at sentencing Henderson expressed remorse for his involvement.

¶21 The trial court was entitled to rely upon Henderson's confessions of guilt and representations that he was involved in the crime, as nothing in the record indicates otherwise. His conclusory allegations are not enough; Henderson has pointed to nothing in the record to substantiate his contention that trial counsel was ineffective for failing to investigate an alibi defense.

¶22 Next, Henderson asserts that his trial counsel was ineffective for making a court appearance and allowing the prosecutor to inform the court that Henderson was willing to plead guilty to the charges, while failing to ensure that the defendant was present in the courtroom. Henderson insists that he was unaware of any plea negotiations at that time and "was vehemently opposed to counsel making any … agreements." That may be so, but a review of the record indicates that the assistant district attorney stated only that "at least two of the defendants have indicated there is a strong possibility of resolution." He never indicated *which* two defendants were nearing a resolution. Nothing more was said in that regard; there is no indication in the record that trial counsel made any representations to the trial court concerning Henderson's willingness to plead guilty.

¶23 Furthermore, Henderson misinterprets the statute he cites in support of his argument that his statutory and constitutional rights were violated when he was not present at the hearing. WISCONSIN STAT. § 971.04 provides, in relevant part:

> **Defendant to be present.** (1) Except as provided in subs. (2) and (3), the defendant shall be present:
> (a) At the arraignment;
> (b) At trial;
> (c) During voir dire of the trial jury;
> (d) At any evidentiary hearing;
> (e) At any view by the jury;
> (f) When the jury returns its verdict;
> (g) At the pronouncement of judgment and the imposition of sentence;
> (h) At any other proceeding when ordered by the court.

The scheduling conference at issue does not fall under any of those categories. Contrary to Henderson's contentions, § 971.04(h) does not mean that when a hearing is ordered by the court, the defendant must be present. It simply means that the defendant is required to appear if his or her presence is ordered by the court. That was not the case here; Henderson's presence was never ordered by the court. As such, Henderson's claim of ineffective assistance in this regard fails, as trial counsel's performance was neither deficient, nor prejudicial.

¶24 Also, Henderson argues that his trial counsel was ineffective for providing him with false information regarding the "proper factors" that are required to withdraw a guilty plea. He contends that this issue "involves misrepresentation by trial counsel to deceive or trick defendant into not withdrawing his guilty plea by 'falsely' asserting factors that would justify allowing him to withdraw the guilty plea under a New Factor." Henderson argues that, at the guilty plea hearing, trial counsel said that she informed Henderson that there were only three ways "to convince the court to allow him to withdraw a guilty plea." According to Henderson, she informed him that he would have to wait until a co-defendant, Telus Rockett, was caught; he would have to provide more information to the police regarding other crimes; and he would then have to testify against Rockett. Henderson is mistaken.

¶25 First, the events to which Henderson refers occurred at sentencing, not at the guilty plea hearing. Furthermore, from a review of the record and the trial court's order, it becomes clear that trial counsel was referring to the potential for resentencing should any of the three possibilities materialize, not the standard for withdrawing a plea. In fact, the record also appears to indicate that the "fair and just reason" standard for pre-sentencing plea withdrawal, *see* ***State v. Libke***, 60 Wis. 2d 121, 208 N.W.2d 331 (1973), was discussed. After defense counsel was given some time to discuss plea withdrawal with Henderson, the following exchange occurred:

> THE COURT: Okay. So you actually have discussed with him the ins and outs of attempting to withdraw a plea and what a fair and just reason is. And based on your discussions with him. It is his decision to go forward with sentencing today?
>
> [DEFENSE COUNSEL]: That is correct, [J]udge.
>
> THE COURT: Is that true, sir?
>
> [HENDERSON]: Yes, Your Honor.

In its order denying Henderson's postconviction motion, the trial court concluded: "The record of the sentencing hearing shows that the defendant's decision to proceed to sentencing was his own. The courts finds the defendant's claim that counsel provided him with false information in order to persuade him to abandon a motion to withdraw his plea to be without sufficient support and wholly contradicted by the record." We agree. Furthermore, Henderson has failed to allege, and we are unable to discern, any basis upon which we could conclude that the motion would have been successful. As such, he has failed to establish trial counsel's ineffectiveness in this regard.

*C. The trial court properly denied Henderson's motion without an evidentiary hearing.*

¶26 Henderson further contends that the trial court erred when it failed to grant his request for an evidentiary hearing "because the motion alleged facts which, if true, would entitle … Henderson to relief." He also insists that the trial court failed to address his motion seeking an evidentiary hearing and failed to conclude that the allegations were meritless. We disagree.

¶27 In reviewing a trial court's refusal to hold an evidentiary hearing on a motion to withdraw a guilty plea, we employ a two-part test with two different standards of review: (1) "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing[, and w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Bentley***, 201 Wis. 2d at 310. (2) "However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***[ ***v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)." ***Bentley***, 201 Wis. 2d at 310-11. Discretionary determinations are subject to the erroneous exercise of discretion standard. ***Id.*** at 311. The three factors enumerated in ***Nelson*** are: (1) "if the defendant fails to allege sufficient facts in his motion to raise a question of fact"; (2) if the defendant "presents only conclusionary allegations"; or (3) "if the record conclusively demonstrates that the defendant is not entitled to relief." 54 Wis. 2d at 497.

¶28 In light of the analysis above and our review of the record, we conclude that Henderson's motion failed to allege sufficient facts which, if true, would entitle him to relief. He has not provided objective factual assertions to

support his contention that he would have pled differently; conclusory allegations are not enough. *See* ***Bentley***, 201 Wis. 2d at 313. Henderson makes broad claims of being coerced to plead guilty by defense counsel and confessing as a result of police brutality, but offers no objective factual assertions in support of those contentions. Indeed, both Henderson's and his counsel's statements under oath belie his claims. Henderson has not provided "facts that allow the reviewing court to meaningfully assess his … claim." ***Id.*** at 314.

¶29 Thus, the trial court did not erroneously exercise its discretion when it denied Henderson's motion without an evidentiary hearing. The trial court concluded that the record demonstrated no basis for relief: "In sum, the court finds no manifest injustice in the record that would warrant withdrawal of the defendant's plea or any legal basis for resentencing or other postconviction relief." We agree and conclude that the trial court properly decided the motion without a hearing.

*D. Henderson was not deprived of the effective assistance of appellate counsel.*

¶30 Finally, Henderson contends that he "'badly' wanted his appeal to be filed," and "counsel of record had failed to timely start the process, and in attempting to cover his err, attempted to file a late No Merit Report." The record tells another story.

¶31 The record indicates that Henderson decided to proceed *pro se* after appellate counsel informed him that he would be filing a no merit report. When appellate counsel withdrew, he filed a motion with this court requesting an extension of time for Henderson to file a *pro se* postconviction motion or notice of appeal. That motion was granted and Henderson's deadline was extended. Henderson apparently missed the extended filing deadline and later sought an

extension. That too was granted. Although there appears to have been some confusion regarding deadlines and filings, in regard to any deadlines that may have been missed, we agree with the trial court that appellate counsel's performance cannot be deemed deficient for failing to do something that Henderson was obligated to do. Henderson was advised of the no merit report appeal procedure and the potential consequences and risks of proceeding *pro se*. Henderson chose to proceed *pro se*, and appellate counsel withdrew from the case at his request. He cannot be faulted for that. Furthermore, Henderson's appellate rights were not prejudiced by any delay that may have resulted. 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.