COURT OF APPEALS
DECISION
DATED AND RELEASED

August 30, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1478-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERT STEVEN WINFREY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Albert Steven Winfrey appeals pro se from a judgment convicting him of retail theft as a habitual offender, contrary to §§ 943.50(1m) and (4)(b) and 939.62, STATS., after a no contest plea. Winfrey also appeals from the order denying his postconviction motion to withdraw his plea and modify his sentence. We affirm.

The information charged Winfrey with retail theft, battery and robbery arising out of an incident in which Winfrey attempted to take six coats

from a department store without paying for them. The battery charge arose out of a struggle with the store's security guard. Winfrey pled no contest to felony retail theft as a repeat offender and the battery and robbery charges were dismissed. The State was free to argue at sentencing. After receiving a six-year sentence, Winfrey brought pro se motions to withdraw his plea and modify his sentence. Those motions were denied, and Winfrey appeals.

Winfrey argues that he did not receive effective assistance from his trial counsel. This claim is waived for lack of a proper record. In order to obtain appellate review of an ineffective assistance of trial counsel claim, trial counsel must testify in the trial court and explain his or her conduct in the course of the representation. ***State v. Krieger***, 163 Wis.2d 241, 253, 471 N.W.2d 599, 603 (Ct. App. 1991). In the absence of a proper record, we have nothing to review. ***Id***. at 254, 471 N.W.2d at 603.

Winfrey complains that the trial court did not arrange for trial counsel to appear at his postconviction motion hearing. However, Winfrey cites no authority for the proposition that it was the trial court's responsibility to assure counsel's presence at the hearing, and we have located none. None of Winfrey's various postconviction motions asked the trial court to require counsel's presence at the hearing.[1] The burden was on Winfrey to seek counsel's presence at the hearing. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

Even though it is waived for lack of a proper record, Winfrey's ineffective assistance claim is undermined by his repeated expressions of satisfaction with trial counsel. Winfrey twice stated at the plea hearing that he was satisfied with the representation he had received. At sentencing, Winfrey apologized to trial counsel, apparently acknowledging that she had correctly advised him on the legal issues in his case.

[1] One of Winfrey's motions cites ***State v. Krieger***, 163 Wis.2d 241, 471 N.W.2d 599 (Ct. App. 1991), which clearly states that trial counsel's testimony is required to support a claim of ineffective assistance. ***Id***. at 253, 471 N.W.2d at 603. Winfrey had available to him the information regarding the proper procedure for challenging trial counsel's effectiveness.

Winfrey next claims that the State breached a plea agreement offered to him prior to the preliminary examination. This claim is waived because Winfrey subsequently pled no contest after confirming that the earlier plea offer had been withdrawn. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984) (a no contest plea waives the right to raise nonjurisdictional defects and defense). At his plea hearing, Winfrey argued that the State committed itself to the earlier plea agreement. The State responded that the offer was withdrawn. After further consultation with counsel and questioning from the court, Winfrey entered a no contest plea. The record is clear that Winfrey pled no contest even though he may have believed that an earlier plea offer should have remained available to him. A defendant waives the right to object to an alleged breach of a plea agreement when he or she fails to object and proceeds to sentencing after the basis for the claimed error becomes known. ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989).

Even if this claim were not waived, we would hold that it lacks merit. At the outset of the preliminary examination, the State informed the court that Winfrey had agreed to waive the preliminary examination and enter a plea. In exchange, the State agreed not to recommend a specific sentence. However, if Winfrey did not accept the agreement, the State would charge him as a repeat offender. The plea agreement would have permitted a maximum sentence of two years for retail theft and nine months for battery. Counsel stated that Winfrey wished to accept the plea offer. Winfrey then asked numerous questions about the meaning of the plea offer. During Winfrey's inquiries, the State withdrew the offer and the preliminary examination was held.

A prosecutor has great latitude in offering and withdrawing plea proposals. ***State v. Beckes***, 100 Wis.2d 1, 7-8, 300 N.W.2d 871, 874-75 (Ct. App. 1980). Absent deliberate abuse of the opportunity to make and withdraw plea proposals, a prosecutor may withdraw from a plea bargain at any time before the defendant pleads guilty or otherwise detrimentally relies on the bargain. ***Id***. Winfrey did not ask the trial court to make a finding as to the basis for the offer's withdrawal or whether he had detrimentally relied on it.[2]

[2] We do not address Winfrey's complaint about trial counsel's performance at the preliminary

Because Winfrey has waived or failed to preserve any issue relating to the plea bargain offered and withdrawn by the State, we need not address his claim that the trial court should have allowed him to withdraw his no contest plea because the earlier plea agreement was breached.

Winfrey also argues that he was inappropriately sentenced as a repeat offender because the repeater allegation in the information does not refer to a specific count. For this proposition, Winfrey cites ***State v. Coolidge***, 173 Wis.2d 783, 496 N.W.2d 701 (Ct. App. 1993). Winfrey's reliance upon ***Coolidge*** is misplaced.

Coolidge involved the application of § 973.12(1), STATS., which allows a defendant to be sentenced as a repeater if the defendant admits his or her prior conviction or the State proves it. The ***Coolidge*** court concluded that the defendant's prior conviction had not been established by admission or other proof. Therefore, the trial court erroneously sentenced the defendant as a repeater. ***Coolidge***, 173 Wis.2d at 796, 496 N.W.2d at 708. The allegations in the information were not relevant to this particular question.

It is clear that Winfrey was sentenced as a repeater. Winfrey was convicted of retail theft (a Class E felony) as a repeater contrary to §§ 943.50(1m) and (4)(b), STATS. The maximum sentence was two years. *See* § 939.50(3)(e), STATS. However, Winfrey's sentence could be enhanced by six years if he had a prior felony conviction. *See* § 939.62(1)(b), STATS. Winfrey received a six-year sentence.

We next examine whether the requirements of § 973.12(1), STATS., were met. At the plea hearing, Winfrey twice acknowledged that he was convicted on May 28, 1992, in Waukegan, Illinois of the felony offense of unlawful use of a weapon by a convicted felon. The conviction was of record and unreversed, § 939.62(2), STATS., although Winfrey argued that it was unjustified. At sentencing, Winfrey acknowledged that he had a 1992 felony conviction which made him a repeat offender under Wisconsin law. *See*

(..continued)
examination because the claim is not properly preserved for appellate review. *See* ***Krieger***, 163 Wis.2d at 253-54, 471 N.W.2d at 603.

§ 939.62(2) (a defendant is a repeat offender if the defendant was convicted of a felony during the five-year period immediately preceding the commission of the crime for which the defendant is being sentenced). Winfrey's admission satisfied the requirements of § 973.12(1). *See* ***State v. Goldstein***, 182 Wis.2d 251, 255-57, 513 N.W.2d 631, 633-34 (Ct. App. 1994). Therefore, the trial court properly sentenced Winfrey as a repeater.

By the Court.—Judgment and order affirmed.

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