COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

No. 94-1972

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ABEL SILVA,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Abel Silva appeals, *pro se*, from an order denying his § 974.06, STATS., postconviction motion. Silva was convicted of one count of felony murder, party to a crime, contrary to §§ 943.32(1)(b)(2), 940.03, and 939.05, STATS. Silva claims: (1) that the trial court erred in refusing to allow him to withdraw his no contest plea; (2) that the State violated the terms of the plea agreement, which justifies plea withdrawal; (3) that he received ineffective assistance of trial counsel; (4) that he received ineffective assistance of appellate

counsel; (5) that a new factor exists requiring sentence modification; (6) that his sentence was unduly harsh; and (7) that the interests of justice require sentence modification. Because we resolve each claim in favor of supporting the order, we affirm.

I. BACKGROUND

Following seventeen-year-old Silva's wavier into adult court, a criminal complaint was filed charging him with one count of felony murder for killing Michael Pettis during an armed robbery, and one count of armed robbery involving victim Mark Dunham. The maximum potential penalty for the felony murder charge was forty years (twenty years for felony murder and twenty years for the underlying armed robbery), and the maximum potential penalty for the armed robbery charge was twenty years. Silva agreed to plead no contest to the felony murder count in exchange for dismissal of the armed robbery count. Pursuant to the plea agreement, both sides would be free to argue for whatever sentence they deemed appropriate.

The trial court accepted Silva's no contest plea at a hearing on August 9, 1993, and dismissed the armed robbery count. Silva was sentenced on September 24, 1993. The State argued for the imposition of the maximum forty-year sentence. The trial court imposed a thirty-eight- year sentence. Silva did not file a postconviction motion or a direct appeal. Instead, he sought postconviction relief pursuant to § 974.06, STATS. The trial court summarily denied the motion, concluding that Silva's claims were devoid of merit and conclusively refuted by the record. Silva now appeals.

II. DISCUSSION

A. Withdrawal of Plea.

Silva first contends that he should be allowed to withdraw his no contest plea because he did not knowingly, voluntarily and intelligently enter this plea. Postconviction plea withdrawal can be granted only where withdrawal of the plea is necessary to correct a manifest injustice. ***State v.***

Booth, 142 Wis.2d 232, 235-37, 418 N.W.2d 20, 21-22 (Ct. App. 1987). Whether a defendant has made such a showing is a discretionary determination and will not be upset unless the trial court erroneously exercised its discretion. ***Id.*** at 237, 418 N.W.2d at 22.

Silva argues that he did not understand the effect of pleading no contest. The record conclusively refutes his contentions. Silva told the trial court at the time of his plea that he understood the felony murder charge to which he was pleading. The transcript from the plea hearing demonstrates that the trial court fully informed Silva of the rights he was waiving by his plea and of the maximum potential forty-year sentence that could be imposed. Silva told the trial court that he discussed his rights with his attorney, that he understood his rights, and that he understood the consequences of his plea. Further, Silva completed a guilty plea questionnaire and waiver form with his attorney wherein he stated that he was voluntarily and intelligently entering his plea. Accordingly, the trial court did not erroneously exercise its discretion in denying Silva's motion to withdraw his plea.

B. Plea Agreement.

Next, Silva contends that the State breached the plea agreement by recommending a forty-year sentence when the State agreed to recommend only a twenty-year sentence. It is clear from the record that the State complied with the provisions of the plea agreement put on the record in this case. The plea agreement was simple: Silva would plead no contest to the felony murder charge in exchange for dismissing the armed robbery count and each side could argue freely with respect to length of sentence. This is exactly what happened in this case. If the State actually agreed at some point to recommend a twenty-year sentence, then Silva should have objected at the sentencing hearing when the State requested the maximum sentence available for felony murder. Accordingly, the record does not support Silva's claim that the State violated the plea agreement.

C. Ineffective Assistance of Trial Counsel.

Next, Silva claims that his trial counsel did not provide him with effective assistance. Specifically, Silva argues that his counsel was ineffective because he did not file any pretrial motions, he did not file any discovery motions; he did not investigate the State's allegations; he did not discuss going to trial; and he was a "divorce lawyer."

A valid claim of ineffective assistance of trial counsel requires an allegation of both deficient performance and resulting prejudice from counsel's actions or inactions. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985). Although Silva argues that his trial counsel's performance was deficient, he does not explain how that performance prejudiced him. He does not allege what motions should have been filed, what effect such motions may have had, what would have been discovered if discovery motions were pursued or what an investigation would have revealed. Accordingly, the trial court's conclusion that Silva failed to allege a valid ineffective assistance claim was correct.

D. Ineffective Assistance of Appellate Counsel.

Next, Silva claims that he did not receive effective assistance of appellate counsel because his trial attorney refused to file a direct appeal. We summarily reject this claim because it is not cognizable in a § 974.06, STATS., motion. *See* ***State v. Knight***, 168 Wis.2d 509, 519, 484 N.W.2d 540, 544 (1992).

E. Sentence Modification.

Next, Silva claims that he is entitled to sentence modification either on the grounds that a new factor exists or that his sentence was unduly harsh. This argument stems from Silva's discovery that his co-defendants received only eight- and nine-year sentences for the crime.

We summarily reject Silva's "new factor" contention because this kind of claim is not cognizable under a § 974.06, STATS., motion. *See* ***State v. Flores***, 158 Wis.2d 636, 640, 462 N.W.2d 899, 900 (Ct. App. 1990), *overruled on other grounds by* ***Knight***, 168 Wis.2d 509, 484 N.W.2d 540. Further, the thirty-

eight-year sentence imposed was within the maximum potential sentence available and, therefore, was not unduly harsh. *See* ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) (a sentence within the limits of the maximum is not so disproportionate to the offense committed so as to shock the public sentiment or offend reasonable judgment).

F. Interests of Justice.

Finally, Silva claims that he is entitled to a new trial in the interests of justice. This argument is contained in a one sentence paragraph. He does not explain why justice requires a reversal and we see nothing in the record to grant Silva's request. Accordingly, we must reject this claim as well. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-647, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may decline to address issues that are inadequately briefed; arguments that are not supported by legal authority will not be considered).

By the Court.—Order affirmed.

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