

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

January 11, 1996

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.

**NOTICE**

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

**No. 94-3183**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DONALD ZYWICKI, JR.,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Wood County:  
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Donald Zywicki, Jr., appeals from an order denying postconviction relief. The issue is whether Zywicki was denied due process of law because his arraignment did not comply with § 971.05, STATS. We conclude no errors occurred in the arraignment. We affirm.

Zywicki initially challenged the arraignment in a postconviction motion under § 974.06, STATS. Arraignment is governed by § 971.05, STATS. Section 971.05(3), STATS. provides:

The district attorney shall deliver to the defendant a copy of the information in felony cases and in all cases shall read the information or complaint to the defendant unless the defendant waives such reading. Thereupon the court shall ask for the defendant's plea.

Zywicki contends that he was denied due process of law because the prosecutor failed to personally hand him the information and then read it to him, as required by § 971.05(3), STATS. However, the transcript of the arraignment belies Zywicki's factual contentions. Zywicki's trial counsel advised the trial court that "[his] client has also received a copy [of the information]." Counsel assured the court that he "reviewed the complaint [with Zywicki] and would waive its reading of the information." The trial court then engaged in a colloquy with Zywicki about the charges, his constitutional rights and the applicable penalty provisions.

Zywicki erroneously believes that waiver of the requirements of § 971.05(3), STATS., can only be accomplished by the defendant personally, rather than by counsel. Zywicki is wrong.<sup>1</sup> Moreover, Zywicki does not explain why he failed to advise the trial court at the arraignment that he wanted the information read to him, rather than listening to his counsel waive the reading and then personally confirming to the trial court that he had no questions about the proceedings. Even if error occurred, and it did not, he has waived the right to raise them on appeal. *Bies v. State*, 53 Wis.2d 322, 325, 193 N.W.2d 46, 48 (1972) (citing *Bridges v. State*, 247 Wis. 350, 375, 19 N.W.2d 862, 862 (1945)).<sup>2</sup>

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<sup>1</sup> Zywicki's reliance on the *La Fond* dissent is misplaced. *La Fond v. State*, 37 Wis.2d 137, 145-46, 154 N.W.2d 304, 308 (1967) (Heffernan, J., dissenting). Zywicki confuses his rights under § 971.05(3), STATS., with those basic decisions which must be made by the defendant personally, rather than by defendant's counsel. E.g., *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (Burger, J., concurring); Commentary to the ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (1980).

<sup>2</sup> Zywicki erroneously contends that the waiver rule of *Bridges* and *Bies* is inapplicable because these cases predate the effective date of § 971.05(3), STATS. Section 971.05(3) mandates certain procedures. It does not preclude waiver of those procedures.

Further, even if Zywicki's contentions were correct, he must demonstrate how the claimed deficiencies resulted in prejudice.<sup>3</sup> *Bies*, 53 Wis.2d at 325, 193 N.W.2d at 48. He fails to allege how handing him the information personally and reading it to him (after his counsel had reviewed it with him) would have mattered, since he entered a not guilty plea.<sup>4</sup>

Moreover, Zywicki failed to provide a sufficient reason for not raising the arraignment issue in his original postconviction motion, as required by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185-86, 517 N.W.2d 157, 164 (1994). In any event, the arraignment issue lacks a jurisdictional or constitutional basis, and therefore is not cognizable under § 974.06, STATS. *State v. Nicholson*, 148 Wis.2d 353, 360, 435 N.W.2d 298, 301 (Ct. App. 1988) (a postconviction motion under § 974.06 cannot be used as a substitute for an appeal, or to reach procedural errors which do not reach constitutional or jurisdictional statute). That he proceeds pro se does not avoid the applicability of *Escalona* or *Nicholson*.

*By the Court.* – Order affirmed.

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

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<sup>3</sup> Zywicki does not allege prejudice. Instead he claims that these alleged failures compromise the integrity of the system.

<sup>4</sup> Zywicki was found guilty by a jury. Zywicki also claims that these errors amount to ineffective assistance of trial counsel. Because he has not even alleged prejudice, he is not entitled to a *Machner* hearing. See *State v. Carter*, 131 Wis.2d 69, 78, 389 N.W.2d 1, 4 (1986) (the court will summarily deny a motion alleging only conclusory allegations); *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).