

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 2, 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. 95-0063-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**GLEN BLANKE,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Glen Blanke appeals from a judgment convicting him of felony car theft and from a postconviction order. The issues are whether the trial court erroneously exercised its discretion in denying his motion for plea withdrawal and whether Blanke received ineffective assistance of trial counsel. We conclude that the trial court properly exercised its discretion and that its explanation of the sentencing options and Blanke's criminal history demonstrate that he did not receive ineffective assistance of counsel. Therefore, we affirm.

Blanke escaped from a minimum security prison and stole a truck. When the truck ran out of gas and began to have engine problems, Blanke parked it in a driveway and stole another vehicle.

Blanke pled guilty to escape, contrary to § 946.42(3), STATS., and to operating a vehicle without the owner's consent ("felony car theft"), as a party to the crime and as a repeater, contrary to §§ 943.23(2), 939.05 and 939.62, STATS. The trial court imposed a three-year sentence on the escape conviction and a two-year consecutive sentence on the felony car theft conviction. Both sentences were imposed consecutive to one another and consecutive to a fifteen-year sentence Blanke was then serving.

We rejected a no merit report and directed appellate counsel to pursue postconviction relief on the felony car theft conviction. *State v. Blanke*, No. 94-1515-CR-NM (Wis. Ct. App. Oct. 19, 1994). We were concerned that the factual basis for the guilty plea more appropriately supported misdemeanor, rather than felony, car theft. *Id.*

In his postconviction motion, Blanke moved to withdraw his plea and claimed ineffective assistance of trial counsel. The trial court denied the motion and Blanke appeals.

A postconviction motion to withdraw a guilty plea should be granted only when necessary to correct a manifest injustice. *State v. Duychak*, 133 Wis.2d 307, 312, 395 N.W.2d 795, 798 (Ct. App. 1986). The defendant must show a manifest injustice by clear and convincing evidence. *State v. Washington*, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993).

Felony car theft is defined as the "intentional tak[ing] and driv[ing] any vehicle without the consent of the owner ...." Section 943.23(2), STATS. However, the felony charge is reduced to a misdemeanor if the violator "abandons a vehicle without damage within 24 hours ...." Section 943.23(4),

STATS., 1991-92.<sup>1</sup> Blanke stipulated to the trial court's use of the amended complaint as a factual basis for his guilty plea, but there was an allegation that the truck was discovered shortly thereafter and there was no allegation of damage. Consequently, the inquiry was whether there was a sufficient factual basis to support a conviction for felony, rather than misdemeanor, theft.

The postconviction court concluded that abandonment requires an intentional act. Blanke testified that it was easier to steal another vehicle than to get gasoline for the truck. The trial court did not consider Blanke's conduct intentional because he testified that the truck "wouldn't run anymore, so they had no choice but to leave the vehicle." The trial court also concluded that the vehicle was damaged because "[it was] having engine problems."

We review an order denying a motion for plea withdrawal for an erroneous exercise of discretion. *State v. McKnight*, 65 Wis.2d 582, 593, 223 N.W.2d 550, 556 (1974). Abandonment requires the voluntary relinquishment of possession. *State v. Olson*, 106 Wis.2d 572, 587, 317 N.W.2d 448, 455-56 (1982). The *Olson* court rejected the abandonment defense because Olson relinquished the vehicle only to avoid apprehension. *Id.* at 586-87, 317 N.W.2d at 455. One also must abandon the intent to commit the crime, as well as relinquishing the vehicle. The trial court's conclusion, that Blanke did not abandon the truck, is consistent with *Olson* because Blanke admitted that he relinquished the truck only to facilitate the continuation of his crime. *See id.*

Because abandonment is an affirmative defense, rather than an element of the crime, the complaint "need not allege the failure to abandon the vehicle undamaged within a twenty-four-hour period..." *Id.* at 584, 317 N.W.2d at 454. Consequently, there was a sufficient factual basis to support a guilty plea to felony car theft under § 943.23(2), STATS., and we conclude that the trial court properly exercised its discretion in denying Blanke's postconviction motion.

---

<sup>1</sup> Section 943.23(4), STATS., 1991-92, was repealed by 1993 Wis. Act 92, § 7, effective December 25, 1993. Because this incident occurred before the effective date, we apply the statute as it then existed. Consequently, all references are to the 1991-92 statutory section.

Blanke also claims that he received ineffective assistance of trial counsel because he failed to discuss or investigate the affirmative defense of abandonment without damage, which would merely have reduced the offense from a felony to a misdemeanor. Blanke claims that had he known of the availability of this affirmative defense, he would not have pled guilty. Trial counsel testified that he did not believe that this affirmative defense was viable.

To prevail on an ineffective assistance claim, Blanke must show that trial counsel's performance was deficient and prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Without concluding that counsel's performance for failing to discuss this defense was deficient, the trial court analyzed why the failure to raise this defense was not prejudicial. Because Blanke admitted that he took and drove the truck without the owner's consent, had he prevailed on the abandonment without damage defense, the charge of felony car theft would merely have been reduced to a misdemeanor under § 943.23(4), STATS. Blanke would have been subject to a three-year sentence irrespective of whether this was a misdemeanor or a felony because he is a repeater. *See* § 939.62(1)(a), STATS. The trial court concluded that if the charge had been a misdemeanor, it would have imposed the same two-year sentence, which was within its discretion and less than the maximum sentence it could have imposed. Although being a convicted felon has more serious consequences than being a misdemeanant, the trial court concluded that Blanke had not shown prejudice because he had been convicted previously of multiple felonies.

We agree with the trial court that Blanke has not shown prejudice. Because he has not done so, we do not address whether trial counsel's performance was deficient.

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

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