

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 12, 1995

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, 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. 95-0654-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LONDELL DALLAS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed.*

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

PER CURIAM. Londell Dallas appeals from the judgment of conviction for three counts of armed robbery, party to a crime, and from the trial court order denying his motion for postconviction relief. He argues that the trial court erred in denying his motion to withdraw his guilty plea. He also argues that his sentence was unduly harsh. We affirm.

On February 14, 1994, the juvenile court entered an order granting the State's petition for waiver of jurisdiction on five charges of armed robbery, party to a crime, and operating a motor vehicle without the owner's consent. Dallas's trial counsel in the juvenile court proceeding failed to advise Dallas of his right to appeal the order waiving jurisdiction.

On May 3, 1994, Dallas pled guilty to three charges of armed robbery, party to a crime. Dallas had a different lawyer in the adult court proceedings who also failed to inform Dallas that, by pleading guilty, he was waiving his right to appeal the juvenile court order waiving jurisdiction. On June 24, 1994, the trial court sentenced Dallas. On December 28, 1994, Dallas moved the trial court to withdraw his guilty plea.

In his postconviction motion Dallas maintained that when he entered his guilty pleas he was unaware that he was waiving his right to appeal the juvenile court order waiving jurisdiction. Thus, he contended, both his trial attorneys had provided ineffective assistance of counsel. Denying Dallas's postconviction motion, the trial court concluded "beyond a reasonable doubt that the Court of Appeals would have found that the juvenile court properly exercised its discretion in waiving jurisdiction," and, therefore, "that Dallas has not established that counsel's performance in this case prejudiced his defense."

On appeal, Dallas maintains that "a guilty plea entered without the knowledge that in so doing the defendant waives appellate rights is, as a matter of law, not a knowing and voluntary plea." Therefore, he contends, "the 'harmless error' rule does not apply to a motion to withdraw a guilty plea where the defendant is able to establish that he was *actually* operating under a misapprehension as to his rights." (Emphasis in original.) Accordingly, Dallas argues, the trial court erred in denying him an evidentiary hearing at which he would have had the opportunity to establish that he was actually operating under such a misapprehension.

A motion to withdraw a guilty plea after sentencing is addressed to the discretion of the trial court. See *Nelson v. State*, 54 Wis.2d 489, 496, 195 N.W.2d 629, 632 (1972). A trial court's discretionary determination will be upheld on appeal if it is "consistent with the facts of record and established legal principles." *Lievrouw v. Roth*, 157 Wis.2d 332, 358-359, 459 N.W.2d 850,

859-860 (Ct. App. 1990). A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that the plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent *manifest injustice*. *Birts v. State*, 68 Wis.2d 389, 392-393, 228 N.W.2d 351, 353 (1975).

Generally, a guilty plea waives all nonjurisdictional defects and defenses, *see State v. Bangert*, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). However, a defendant who pleads guilty while assuming that he or she has preserved the right to appeal has not pled in a knowing or voluntary manner. *State v. Riekkoff*, 112 Wis.2d 119, 128, 332 N.W.2d 744, 749 (1983). Thus, under *Riekkoff*, Dallas ordinarily would be permitted to withdraw his plea. We may, however, consider the merits of his argument in order to determine whether the trial court appropriately denied his motion to withdraw his guilty plea. *See State v. Kazee*, 192 Wis.2d 213, 220, 531 N.W.2d 332, 335 (Ct. App. 1995) (appeals court can relieve defendant of waiver of right to appeal resulting from guilty plea and consider merits of waived claim).

In *Kazee*, the defendant also challenged the trial court's denial of his motion to withdraw his plea after sentencing. *Kazee*, 192 Wis.2d at 217, 531 N.W.2d at 334. When entering his *Alford* plea, *Kazee* had attempted to preserve his right to appeal from the trial court's earlier denial of his motion to change his not guilty plea to a special plea of not guilty by reason of mental disease or defect. *Id.* at 218-219, 531 N.W.2d at 334. We considered the merits of his claim despite what otherwise would have been a waiver by virtue of his *Alford* plea. We noted that the defendant has the burden "to demonstrate why the change of plea is appropriate," and that *Kazee* had failed to "show a basis for a plea raising the defense of not guilty by reason of mental disease or defect." *Id.* at 222-223, 531 N.W.2d at 336.

Similarly, in this case, Dallas maintains that he should have been allowed to withdraw his guilty plea because he did not realize that his plea waived the right to appeal the juvenile court waiver order. We agree with the State, however, that "the record in this case nevertheless conclusively demonstrates that Dallas is not entitled to relief." Indeed, in this case, we need

not prolong the discussion by detailing the substantial basis for the juvenile court's order waiving jurisdiction because, as the State points out, "Dallas has not argued on this appeal ... that the circuit court was wrong in concluding that he would not have been successful on appeal of the order waiving him into adult court." Thus, even assuming that both of Dallas's trial attorneys were deficient for failing to advise him of his appellate rights, the trial court correctly concluded that there was no prejudice. To establish *manifest injustice* requiring withdrawal of his guilty plea, Dallas would have had to have at least alleged that his appeal of the waiver order would have been meritorious. Instead, he has neither suggested that the juvenile court erroneously ordered waiver, nor argued that the adult court erroneously concluded that this court would have found a reasonable basis for the waiver. Accordingly, we conclude that the record conclusively establishes that Dallas has failed to carry his burden to permit withdrawal of his guilty pleas.

Dallas also appeals the trial court's denial of his motion to modify his sentence. The trial court sentenced Dallas to twenty-four years in prison and twenty years of probation, consecutive, with a twenty year consecutive stayed sentence. Dallas argues that the sentence was unduly harsh because the trial court gave undue emphasis to the fact that he had recently committed five armed robberies in Texas. As a result, Dallas contends, the trial court "failed to adequately consider the other relevant sentencing factors," including the fact that he was sixteen years old, had no experience in the adult prison system, that he was not the gunman in the robberies, and that he "is a bright young man who is likely to respond to rehabilitative efforts in prison." Dallas also notes that the sentence he received exceeded the sentencing guideline matrix.

Denying his motion for sentence modification, the trial court acknowledged that it "was most affected by the defendant's commission of these crimes only eleven days after his last court appearance in Texas for five armed robberies in that state." The trial court noted, however, that it had examined Dallas's character, his psychological background, his level of remorse, and the aggravated nature of the robberies. The trial court also noted that it had "carefully explain[ed] why defendant's character and background did not significantly mitigate this particular activity," and its reasons for exceeding the sentencing guidelines. The trial court concluded that there was no basis for modification of sentence.

The trial court exercises discretion in sentencing, and, on appeal, review is limited to determining if discretion was erroneously exercised. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to be considered by the trial court are the gravity of the offense, the character of the offender, and the need to protect the public. *Id.* at 427, 415 N.W.2d at 541. An erroneous exercise of discretion occurs if the trial court fails to state on the record the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. *Id.* at 428, 415 N.W.2d at 542. The weight to be given to each of the factors, however, is for the trial court to determine. *Id.* The trial court is presumed to have acted reasonably, and the defendant bears the burden of showing unreasonableness from the record. *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). A trial court retains discretion to modify a sentence even in the absence of new factors. *Jones v. State*, 70 Wis.2d 62, 72-73, 233 N.W.2d 441, 447 (1975). A trial court may review its own sentence to determine whether it is unduly harsh or unconscionable. *State v. Wuensch*, 69 Wis.2d 467, 479-480, 230 N.W.2d 665, 672-673 (1975). A departure from the sentencing guidelines, however, does not provide the basis for appellate review of sentencing. See *State v. Halbert*, 147 Wis.2d 123, 132, 432 N.W.2d 633, 637 (Ct. App. 1988).

In this case, the record reflects the trial court's consideration of the required sentencing criteria. The trial court carefully explained the basis for its decision and, understandably, was impressed by the fact that eleven days before committing the armed robberies for which he was sentenced, he had been adjudicated delinquent in Texas on four counts of armed robbery and one count of car theft. Further, for those Texas offenses, Dallas had been placed on intensive probation with a judicial review date pending in Texas at the time he committed the armed robberies in Milwaukee. We see nothing unduly harsh or improper in the trial court's sentence or its denial of Dallas's motion for sentence modification.

By the Court. – Judgment and order affirmed.

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