COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 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, STATS.

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

No. 95-1128-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE ROBERT WIEGERT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed in part, and cause remanded with directions.*

FINE, J. Dale Robert Wiegert appeals from a judgment convicting him of battery, *see* § 940.19(1), STATS., on his no-contest plea, and from the trial court's denial of his motion for postconviction relief. He raises three issues: he claims that his conviction is void because there was an unreasonable delay between his warrantless arrest and his initial appearance; he contends that he was denied effective assistance of trial counsel; and he asserts that the trial court's award of restitution to the victim was improper. We affirm on the first two issues, and remand with directions on the third.

Wiegert was arrested on Saturday, November 7, 1992, between 1:20 a.m. and 1:55 a.m. He had his initial appearance on Monday, November 9, 1992. He claims that this was a violation of § 970.01, STATS., which requires that every person arrested "be taken within a reasonable time before a judge," and ***County of Riverside v. McLaughlin***, 500 U.S. 44, 57 (1991), which established forty-eight hours as the presumptively reasonable time within which a person arrested without a warrant must be brought before a judicial officer for a determination of probable cause. The forty-eight hour rule applies in Wisconsin. ***State v. Koch***, 175 Wis.2d 684, 696, 499 N.W.2d 152, 159 (1993). Assuming without deciding that the *de minimis* delay here was a ***Riverside*** violation, the law is clear that, contrary to Wiegert's argument, the trial court did not thereby lose competency to adjudicate the case. ***State v. Golden***, 185 Wis.2d 763, 769, 519 N.W.2d 659, 661 (Ct. App. 1994). We affirm on this issue.

Wiegert's ineffective-assistance-of-counsel claim is premised on two contentions: first, he argues that trial counsel were ineffective because they did not seek dismissal of the criminal complaint as a result of the alleged ***County of Riverside*** violation; second, he argues that the trial court should have permitted him to withdraw his no-contest plea because one of his trial lawyers allegedly told him that he could plead "no contest" and still seek dismissal of the case on appeal based on the alleged ***County of Riverside*** violation. The trial court denied Wiegert's postconviction motion without an evidentiary hearing.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to establish a violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.***, 466 U.S. at 687. Whether the lawyer's performance was deficient and, if so, whether the deficient performance was prejudicial, are legal issues that we decide independent of the trial court's determination. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). We need not analyze counsel's performance if it is clear that any alleged deficiencies did not prejudice the defendant. ***Strickland***, 466 U.S. at 687; ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). Further, the trial court need not hold an evidentiary hearing if the allegations of fact would not, if true, entitle the defendant to relief. ***State v. Washington***, 176 Wis.2d 205, 214–216, 500 N.W.2d 331, 335–336 (Ct. App. 1993).

The premise underlying Wiegert's two-pronged contentions of ineffective assistance of counsel is that he was entitled to have the battery charge dismissed because of the alleged violation of ***County of Riverside***. As we have seen, however, dismissal of the complaint is not the remedy for a ***County of Riverside*** violation. Accordingly, the trial court appropriately denied without an evidentiary hearing Wiegert's postconviction motion alleging ineffective assistance of counsel. We affirm on this issue.

Wiegert's final contention is that the trial court erred in ordering restitution. In passing sentence, the trial court noted that the victim had indicated that he lost three days from work, and ordered restitution for that and other "out-of-pocket" expenses of the victim "in an amount to be determined." Wiegert claims that this was error because restitution was not requested by the State.

A trial court must order restitution unless it "finds substantial reason not to do so." Section 973.20(1), STATS. There is no need for the State to first request restitution. The trial court here, however, did not follow the statute. Where the amount of restitution is unknown at the time of sentencing, as it was here, the trial court must, if the defendant does not consent to reference of the disputed restitution issues to an arbitrator, either adjourn sentencing "for up to 60 days pending resolution of the amount of restitution" under § 970.20(13)(c)2, STATS., or refer the disputed restitution issues per § 970.20(13)(c)4, STATS. This matter is remanded to the trial court with directions to invoke the procedures set forth in § 970.20(13)(c)4.

By the Court.—Judgment and order affirmed in part, and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.