

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

November 20, 1996

**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. 95-2275-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ADAN CASTELLANO,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed and cause remanded with directions.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Adan Castellano appeals pro se from a judgment convicting him of being party to the crime of first-degree reckless homicide<sup>1</sup> and aggravated battery and from an order denying his postconviction motion to

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<sup>1</sup> The judgment of conviction erroneously indicates that Castellano was convicted of second-degree reckless homicide. As will be discussed later in this opinion, the judgment shall be amended on remand.

withdraw his no contest pleas on the grounds that trial counsel was ineffective and Castellano misunderstood the plea agreement's homicide charge. We reject Castellano's claims and affirm.

Plea withdrawal after sentencing is discretionary with the trial court unless the defendant establishes that a relevant constitutional right was denied. *State v. Rock*, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979). A plea may be withdrawn if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *Id.*

Castellano's postconviction motion seeking plea withdrawal claimed that he was coerced by counsel into entering no contest pleas and that counsel was ineffective because he did not clarify the degree of reckless homicide to which Castellano had agreed to plead.

Castellano proceeded pro se at the postconviction motion hearing. Castellano's trial counsel, John Ward, testified that he was hired by Castellano's parents. Ward recommended accepting a plea agreement offered by the State<sup>2</sup> because, in counsel's professional judgment, Castellano was likely to be convicted by a jury of first-degree intentional homicide and other charges. Ward testified that Castellano rejected the plea offer several times before trial.

On the first day of trial, Castellano and counsel met for approximately two hours to discuss the plea offer and review discovery materials. Ward was prepared to go to trial had Castellano again rejected the plea offer. However, Castellano decided to accept the plea agreement in consultation with and at the recommendation of counsel. Castellano's aunt, father and mother testified that Ward urged them to advise Castellano to accept the plea agreement.

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<sup>2</sup> The plea agreement required pleading no contest to first-degree reckless homicide and aggravated battery and dismissal of a robbery charge.

Castellano did not offer sworn testimony or subject himself to cross-examination by the State.<sup>3</sup> Rather, he argued that his pleas were not voluntary because Ward pressured him and his family to accept the plea offer. Castellano further holds counsel responsible for what he contends is his confusion regarding the degree of reckless homicide to which he had agreed to plead. Pointing to Ward's statement at the plea hearing that Castellano would plead to second-degree reckless homicide and the guilty/no contest plea questionnaire and waiver of rights form's reference to second-degree reckless homicide,<sup>4</sup> Castellano contends he intended to plead to second-degree reckless homicide, not first-degree.

The trial court reviewed the plea colloquy and found that Castellano's no contest pleas were entered knowingly, intelligently and voluntarily. The crimes and their elements were explained to him. The court found that counsel provided effective representation and that counsel's advice to take the plea agreement was sound in light of the evidence against Castellano and the fact that Castellano had proposed to present false alibi testimony.<sup>5</sup> In the absence of a manifest injustice, the court declined to permit Castellano to withdraw his no contest pleas.

We conclude the trial court properly exercised its discretion in declining to permit Castellano to withdraw his no contest pleas because

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<sup>3</sup> Castellano argues on appeal that because he proceeded pro se and the State did not object to his argument, his argument should have the force of evidence. Argument is not evidence. See *Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis.2d 792, 795-96, 239 N.W.2d 97, 99 (1976). It was Castellano's burden to put on evidence in support of his plea withdrawal claim. See *State v. Rock*, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979). He did not do so.

<sup>4</sup> This reference is scratched out and first-degree reckless homicide is inserted nearby.

<sup>5</sup> The trial court also remarked that it would not be to Castellano's benefit to permit him to withdraw his pleas because he would likely be convicted of first-degree intentional homicide based upon the information adduced at the postconviction motion hearing. The trial court's comment is speculative. Had the trial court not stated other reasons for declining to permit Castellano to withdraw his no contest pleas, this comment would not necessarily support the court's exercise of discretion.

Castellano did not show either that trial counsel was ineffective or any other manifest injustice. See *Bentley*, 201 Wis.2d at 311, 548 N.W.2d at 54.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id.* at 127, 449 N.W.2d at 847-48. An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541-42 (1992).

In the absence of testimony from Castellano, the trial court's findings regarding counsel's conduct are supported by Ward's testimony and are not clearly erroneous.

On the question of whether Ward misled the court and Castellano regarding the degree of reckless homicide, we conclude that the totality of the record confirms that Castellano was fully informed at the plea colloquy that he was entering a no contest plea to first-degree reckless homicide. Although Ward initially stated that the plea agreement involved second-degree reckless homicide, the district attorney stated that the amended information charged first-degree reckless homicide. Ward agreed with that recitation. The court then closely questioned Castellano as to his understanding of the plea agreement and the related proceedings. The court specifically informed Castellano that before he could be convicted of first-degree reckless homicide, the State would have to prove the elements of that crime, which the court listed. The court also confirmed that no one had threatened Castellano or made any promises to him to induce him to accept the plea agreement.

Although Ward misspoke at the outset of the plea hearing, Castellano was advised on at least two subsequent occasions during the plea

colloquy that he was entering a plea to first-degree reckless homicide. Castellano had numerous opportunities to inform the court that he did not understand or agree to the homicide charge. At the sentencing hearing six weeks after he entered his no contest pleas, the court discussed the crimes for which Castellano would be sentenced and referred to the first-degree reckless homicide charge. Castellano did not advise the court that he misunderstood the homicide charge.

We note that the judgment of conviction indicates that Castellano was convicted of second-degree reckless homicide. As is clear from our previous discussion, Castellano pled no contest to and was convicted of first-degree reckless homicide. Although we affirm the judgment of conviction and the order denying postconviction relief, we remand the matter to the trial court to amend the judgment of conviction to reflect that Castellano was convicted of first-degree reckless homicide.

*By the Court.*—Judgment and order affirmed and cause remanded with directions.

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