COURT OF APPEALS
DECISION
DATED AND RELEASED

June 25, 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, 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. 95-2526-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

QUENTIN ANTONIO CARSON,

Defendant-Appellant.

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

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

PER CURIAM. Quentin Antonio Carson, *pro se*, appeals from a judgment convicting him of two counts of armed robbery, as party to a crime. *See* §§ 943.32(1)(b) and (2), and 939.05, STATS. He also appeals from an order denying him postconviction relief. On appeal, Carson argues: (1) that his conviction should be vacated because he did not affirmatively enter any guilty

pleas; (2) that the State breached its plea bargain by failing to advocate for probation; and (3) that he received ineffective assistance of counsel. We affirm.

On November 16, 1993, Carson was charged with two counts of first-degree recklessly endangering safety, as party to a crime; two counts of armed robbery, as party to a crime; and two counts of false imprisonment, as party to a crime. On May 13, 1994, in exchange for the State's agreement to dismiss four of the counts, Carson completed and signed two guilty plea questionnaire and waiver of rights forms that indicated he was pleading guilty to the two counts of armed robbery, as party to a crime. Carson then appeared before the trial court and the following exchange occurred:

QSo, you're going to plead guilty to two counts of armed robbery, is that correct?

AYes.

QAnd all the other charges are going to be dismissed?

AThat's right.

The trial court then informed Carson what the maximum penalties were for two counts of armed robbery, party to a crime, and had the following exchange:

QKnowing all of that, do you wish to continue with your pleas of guilty to these two counts of armed robbery?

AYes.

The trial court, however, did not proceed to directly ask Carson how he wished to plead. Thereafter, Carson was sentenced to consecutive twenty-year sentences on each of the armed robbery counts.

Carson filed a motion for postconviction relief, arguing that his conviction was void because he never directly entered a guilty plea, that the

State breached the plea bargain, that the sentence imposed was an erroneous exercise of discretion, and that he received ineffective assistance of counsel. The trial court rejected all of Carson's arguments and denied his motion for postconviction relief without a hearing.

First, Carson argues that he never affirmatively pled guilty because the trial court never directly questioned him on whether he wanted to plead guilty. Section 972.13(1), STATS., allows a judgment of conviction to "be entered upon ... a plea of guilty...." Section 972.13(1), however, does not indicate how a defendant is to make such a plea nor does it mandate an exact line of questioning by the court or what type of terminology should be used by a defendant wishing to plead guilty. Here, as noted, the trial court engaged Carson in an exchange regarding Carson's desire to plead guilty by first asking him whether he was going to plead guilty. Carson stated "yes." The trial court then asked Carson whether he still wished to plead guilty after learning of the possible penalties involved. Carson, again, answered "yes." The trial court, however, did not proceed with a direct question regarding how Carson wished to plead. Although a more precise question would have been more effective in order to guarantee direct evidence of a guilty plea, the exchange between Carson and the trial court adequately indicated Carson's desire to plead guilty and that he did, in fact, enter guilty pleas.

Next, Carson argues that the State breached its plea bargain, stating that the prosecutor failed to advocate for probation with respect to one of the robbery counts. There was, however, no objection by defense counsel regarding the allegedly breached plea bargain before the court proceeded to sentencing and, accordingly, this issue is waived. *See* ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989) ("the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing").

Finally, Carson raises an ineffective-assistance-of-counsel claim regarding defense counsel's failure to raise an objection on the State's alleged breach of the plea bargain. The trial court denied Carson's postconviction motion on this issue without a ***Machner*** hearing.[1] We review a trial court's

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (1979).

decision on whether to hold a ***Machner*** hearing under the two-part test enunciated in ***State v. Bentley***, No. 94-3310-CR (Wis. May 22, 1996):

> "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." (Citation omitted.) "However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***" [***v. State***, 54 Wis.2d 489, 497–498, 195 N.W.2d 629, 633 (1972).]

Id., slip op. at 6. The motion must raise an issue of fact regarding whether trial counsel's performance was deficient and, if so, whether the deficient conduct prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, Carson must show both that his attorney's performance was deficient and that such performance prejudiced his defense. ***Id***.

Prior to sentencing, the State agreed, in a letter to Carson's previous counsel, to recommend consecutive probation on one of the two counts of armed robbery but also indicated that it would recommend that Carson should be incarcerated for a substantial amount of time on the other armed robbery count:

> Just so that this is technically correct, my negotiation letter to Robin Shellow [previous defense counsel], dated December 3rd, included pleas to some other offenses.
>
> ....
>
> However, the negotiation in that letter states that the defendant -- the State would recommend that the defendant be incarcerated for a substantial period of time.
>
> ....

> I would recommend, on the fourth count, which is armed robbery, that he receive a consecutive sentence, but that it be stayed in favor of consecutive probation.

A review of the record indicates that the State followed through on its plea bargain during the sentencing hearing:

> The State's agreed to recommend, and this was in a letter dated December 3rd, 1993 to prior counsel, that the State would recommend that the defendant be incarcerated for substantial period of time.
>
> ....
>
> The first two counts, and now the third count, which is armed robbery, that he receive a consecutive sentence, but that that be stayed in favor of consecutive probation.

The State's recommendation during sentencing was in accord with the plea bargain made with Carson's previous counsel. Carson, therefore, has failed to establish prejudice under ***Strickland***.

By the Court.—Judgment and order affirmed.

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