COURT OF APPEALS
DECISION
DATED AND RELEASED

July 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, 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. 95-2567-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY MURRAY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions*.

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

FINE, J. Anthony Murray appeals from a judgment convicting him of three counts of armed robbery contrary to § 943.32(1)(b) & (2), STATS. He also appeals the denial of his postconviction motion to withdraw his guilty plea based on the alleged ineffective assistance of counsel. He argues that the trial court erred in denying his request for an evidentiary hearing on his

motion.[1] He also argues that his guilty plea was not entered knowingly, voluntarily and intelligently. We affirm in part and reverse in part.

Murray was charged with four counts of armed robbery. Prior to trial, Murray agreed to plead guilty to three counts under a plea bargain to dismiss the fourth count. Murray was sentenced on each count to thirty years, to run concurrently. The trial court ordered the parole eligibility date to be set at the mandatory release date, which was two-thirds of the sentence imposed. *See* § 973.0135(2), STATS.[2] Murray filed a motion for postconviction relief seeking an order to vacate the judgment and to withdraw his guilty pleas on the grounds that his trial counsel failed to sufficiently advise him regarding his parole eligibility. Specifically, Murray argued that his pleas were not knowingly and voluntarily entered because he was not informed that the trial court could set a parole eligibility date equal to that of the mandatory release date. Murray also argued that trial counsel was ineffective for refusing to withdraw his guilty pleas prior to sentencing. Finally, Murray argues that trial counsel was ineffective for failing to file a request for substitution against Judge Sykes. The trial court denied Murray's postconviction motion without a hearing, concluding that Murray failed to allege sufficient facts to warrant a hearing.

---

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

[2] Section 973.0135(2), STATS., provides:

Except as provided in sub. (3), when a court sentences a prior offender to imprisonment in a state prison for a serious felony committed on or after April 21, 1994, the court shall make a parole eligibility determination regarding the person and choose one of the following options:

(a) The person is eligible for parole under s. 304.06 (1).

(b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (1) and may not set a date that occurs later than two-thirds of the sentence imposed for the felony.

"The Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, voluntary, and intelligent." ***State v. Bangert***, 131 Wis.2d 246, 266, 389 N.W.2d 12, 20 (1986). After sentencing, a defendant wishing to withdraw his guilty plea must show by clear and convincing evidence that the plea was not voluntarily entered and that withdrawal is necessary to correct a manifest injustice. ***State v. Woods***, 173 Wis.2d 129, 136, 496 N.W.2d 144, 147 (Ct. App. 1992). Trial courts have considerable discretion in their post-sentencing plea-withdrawal decisions. ***State v. Canedy***, 161 Wis.2d 565, 579–580, 469 N.W.2d 163, 169 (1991). We will uphold the trial court's findings of fact on such matters unless they are clearly erroneous. ***State v. Johnson***, 193 Wis.2d 382, 387, 535 N.W.2d 441, 442 (Ct. App. 1995). The trial court reasonably found that Murray's guilty pleas were knowingly, voluntarily and intelligently made. First, the record reflects that the trial court carefully questioned Murray about his decision to plead guilty. Murray had consulted with his attorney and filled out a plea questionnaire. The trial court discussed with Murray the nature of the charges and the potential penalties. The trial court stated:

> I have also drawn counsel's attention in chambers to the new statute which was enacted last year effective April 21st of 1994 which requires me under the circumstances presented by this case to set a parole eligibility date if I sentence the defendant to a prison term on any of these counts. It is [§] 973.0135[, STATS.,] and applies where the individual who has committed a serious felony within the definition of that statute, when an armed robbery is a serious felony within the definition of that statute....

After the trial court's recitation of the above, counsel for Murray stated that he had explained to Murray that it is within the trial court's discretion to allow the standard parole eligibility date to be used or to set a deferred date. Murray acknowledged that he understood the parole consequences of his pleas. We conclude that the record reflects a knowing, voluntary and intelligent plea.

Next, Murray argues that he received ineffective assistance of counsel because his trial counsel did not inform him of the parole consequences

of his plea. The trial court determined that Murray's postconviction motion failed to allege sufficient facts to warrant a hearing on his claim.

We review a trial court's 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).][3]

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, Murray must show both that his attorney's performance was deficient and that such performance prejudiced his defense. ***Id.***

We agree with the trial court that Murray failed to raise an issue of fact in connection with his ineffective-assistance-of-counsel claim on the parole-eligibility matter that would warrant an evidentiary hearing. Murray's postconviction motion alleged that he was not informed that the trial court could set a parole eligibility date equal to that of the mandatory release date or two-thirds of his sentence. To the contrary, as noted, the record indicates that Murray was advised by the trial court of the parole consequences of his pleas. Murray, therefore, has not established prejudice. Murray's allegation that his

---

[3] In ***Nelson***, the supreme court stated that "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis.2d 489, 497–498, 195 N.W.2d 629, 633 (1972).

trial counsel did not explain the parole consequences of his plea is thus insufficient to warrant a ***Machner*** hearing.

Murray also claims that trial counsel was ineffective for refusing to withdraw his guilty pleas prior to sentencing. The State does not address this issue. Although under ordinary circumstances this would be a confession of error by the State, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979), Murray has failed to even make a colorable claim for relief on this issue.

Prior to sentencing "a defendant should be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced." ***Canedy***, 161 Wis.2d at 579–580, 469 N.W.2d at 169 (citation omitted). A "fair and just reason" requires that the defendant demonstrate, by a preponderance of the evidence, that there is an "adequate reason for the defendant's change of heart" other than "the desire to have a trial." ***Id.***, 161 Wis.2d at 583–584, 469 N.W.2d at 170–171. Murray has failed to set forth a fair and just reason for withdrawal, and thus has not satisfied the prejudice prong of ***Strickland***. We, therefore, find these allegations insufficient to warrant a ***Machner*** hearing.

Finally, Murray argues that trial counsel was ineffective for failing to file a motion to substitute based upon Judge Sykes's alleged bias. Again, the State does not address this issue. If Murray's allegations are true, his counsel may have been ineffective, and he may be able to establish prejudice. Thus, under this circumstance, the State's failure to address Murray's argument regarding judicial bias is a confession of error. *See* ***Charolais Breeding Ranches***, 90 Wis.2d at 109, 279 N.W.2d at 499. Accordingly, we remand to the trial court for a ***Machner*** hearing.

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

Publication in the official reports is not recommended.

No. 95-2567-CR (CD)

SCHUDSON, J. (*concurring in part; dissenting in part*). I concur in the majority's rejection of most of Murray's arguments. I disagree, however, with the majority's decision to reverse for a ***Machner*** hearing on Murray's claim that he was denied the effective assistance of counsel by virtue of his attorney's failure to file a motion for substitution.

The majority notes that the State failed to address this issue in its brief to this court. I assume, however, that the State failed to do so because Murray failed to specifically address this issue. In his brief, Murray notes that his postconviction motion alleged ineffective assistance for numerous reasons including his lawyer's failure "to file a substitution request." His brief also quotes fourteen paragraphs from his postconviction motion including the two that did relate to the substitution issue. His brief also includes the full fifteen paragraph motion as an appendix. On the substitution issue, that's it.

Also in Murray's appendix, however, is the trial court's decision denying Murray's postconviction motion. On this issue, the trial court wrote:

> Finally, Murray claims that his counsel was ineffective for failing to investigate and file a request for substitution of judge on the grounds that I would be prejudiced against him. He asserts that I was upset with him in another case because a victim refused to proceed against him in a battery case. The case was a misdemeanor, Case No. 2-301412, wherein three separate, nonsubstantive appearances occurred before me. On March 2, 1993, nothing significant happened, and I adjourned the case for further proceedings and for a review of a no contact order. On March 8, 1993, the victim requested that the no contact order be lifted; I ordered the no contact order modified to "no violent contact" based on her request. On June 24, 1993, I issued a bench warrant for the defendant when he failed to appear for trial. Subsequently, I rotated to the felony division. On February 22, 1994, the Hon. Thomas R. Cooper, upon a motion by the state, presumably due to problems with the victim testifying against

> Murray, dismissed the case against Murray. I was not involved in this proceeding.
>
> I find that there was nothing defense counsel could have investigated relating to potential bias on my part. I had no substantive involvement in Case No. 2-301402, other than to modify the terms of the no contact order at the request of the victim and the defendant. I had no recollection of the defendant when he came before me in F-942915 and F-943936, and I did not dismiss the case due to the victim's failure to testify against Murray. Counsel's acts were not deficient in this respect, nor do they afford a basis for sentence modification as the defendant requests.

Murray offers no argument disputing the facts or challenging the findings in these trial court comments. On this issue as well as others, "Murray has failed to even make a colorable claim for relief." *See* majority slip op. at 6. Thus, the majority's inconsistent application of ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979), is perplexing.

Therefore, I conclude that Murray has abandoned any argument on this issue or, at the very least, has failed to brief it adequately. Murray has provided no

basis on which a ***Machner*** hearing is required. Accordingly, on this issue, I respectfully dissent.