**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

October 10, 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. 95-2903-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**WALTER E. CLINE,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Sauk County: JOHN W. BRADY, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Walter Cline appeals from a judgment convicting him on fourteen counts of third-degree sexual assault. He also appeals from an order denying his motion for postconviction relief. The issue is whether Cline should receive a new trial because he received ineffective assistance from trial

counsel. Because Cline failed to prove that counsel's omission prejudiced him, we affirm.

Six days before Cline's trial, the prosecutor offered to recommend a seven- to eight-year prison sentence, and drop nine counts, if Cline pled no contest to the remaining five counts. Cline refused the proposal, instead offering to plead no contest if extortion charges were substituted for sexual assault counts. The prosecutor refused Cline's counteroffer and the case went to trial. The jury convicted him on all fourteen counts, and he received a thirty-year prison sentence.

At the time of trial, Cline was serving probation for a 1985 sexual assault conviction in Texas. At the postconviction hearing on Cline's ineffective assistance of counsel motion, Cline testified that he wanted to know the effect of a Wisconsin sexual assault conviction on his Texas probation status before he agreed to plead no contest. The Texas conviction carried a maximum penalty of ninety-nine years, and Cline stated his fear that Texas would have revoked his probation and sentenced him to the equivalent of a life sentence based on his Wisconsin conviction.

Consequently, the day after the prosecutor's offer, counsel tried once to call the Texas prosecutor in Cline's case, but could not reach him. Counsel did not try again and did not receive a return call from Texas until well after the trial. As it turned out, Cline's Texas probation was revoked. With a joint recommendation from the prosecutor and Cline for a five-year prison term, the trial court in Texas imposed a six-year term concurrent with the Wisconsin sentence.

Cline argued that had he known that Texas authorities would agree to a relatively lenient approach to his revocation, he would have accepted the prosecutor's plea bargain and avoided the thirty-year sentence. Counsel's failure to obtain that information on his behalf was therefore, in his opinion, ineffective and prejudicial. The trial court disagreed, resulting in this appeal.

To prove ineffective assistance of counsel, the defendant must show not only that counsel's performance was deficient, but that counsel's

errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. ***Id***. at 642, 369 N.W.2d at 719. Whether counsel's representation was deficient and whether it was prejudicial to the defendant are questions of law. ***Id***. at 634, 369 N.W.2d at 715.

Cline failed to establish that he was prejudiced when counsel failed to contact the Texas prosecutor. Cline's argument has two essential premises: that he would have accepted the proposed plea bargain had he known of the Texas prosecutor's intentions, and that those intentions were benign. However, the trial court expressly found, as a matter of credibility, that Cline never intended to plead no contest to sexual assault because he believed he could convince the jury that the sexual contact with the victim was consensual. That credibility determination is not subject to review. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Without a finding that Cline would have pled no contest with additional information, he cannot demonstrate prejudice from counsel's failure to provide that information.

As for the second premise, the Texas prosecutor testified that he was willing to recommend a shorter, concurrent sentence in Texas only after Cline received his thirty-year sentence here. Had he received a shorter Wisconsin sentence, the prosecutor might have recommended a longer one in Texas. Again, Cline has not shown prejudice because he has not shown that what counsel might have learned from Texas would have induced him to plead no contest.

*By the Court*.—Judgment and order affirmed.

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