COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-0599-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAWRENCE EARL PARKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Lawrence Earl Parks appeals from an order denying his motion to modify his sentence, following his conviction after he pled guilty to one count criminal trespass to dwelling, contrary to § 943.14, STATS., and one count theft, contrary to §§ 943.20(1)(a) & (3)(a), STATS. Parks claims: (1) he

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

was denied due process of law when the State amended the information from one count burglary, contrary to § 943.10(1)(a) STATS., to one count criminal trespass to dwelling and one count theft with the addition of the habitual criminality penalty enhancer; and (2) he received ineffective assistance of trial counsel. Because Parks was not denied due process of law, and because he failed to raise his claim of ineffective assistance of counsel in his postconviction motion, this court affirms.

I. BACKGROUND

On January 15, 1997, Lawrence Earl Parks pled guilty as an habitual offender, in accordance with § 939.62, STATS., to the charges of criminal trespass to a dwelling, contrary to § 943.14, STATS., and theft, contrary to §§ 943.20(1)(a) & (3)(a), STATS. Parks' guilty plea was entered knowingly, intelligently, and voluntarily as part of a plea bargain with the State. The offer by the State was that the initial charge of burglary would be amended to two lesser counts as an habitual offender in exchange for a guilty plea to the amended charges. Parks accepted the terms of the plea agreement and pled guilty to the lesser charges. The trial court accepted his guilty pleas to the amended information and sentenced Parks accordingly. The trial court denied his postconviction motion. Parks now appeals.

II. DISCUSSION

It is difficult to understand exactly what Parks is asserting in his brief so we have addressed his most salient arguments.

A. Due Process.

Parks asserts that his due process rights were violated when: (1) the original information charging him with burglary was amended to two separate

counts with the habitual criminality penalty enhancer; and (2) the amendment itself exposed him to double jeopardy prohibited by the Fifth Amendment of the United States Constitution. This court rejects both assertions.

1. Amendment of Information.

Parks argues that amending the original information violated his right to due process because it did not include the penalty enhancer for habitual criminality.

Section 971.29(1), STATS., provides: "A complaint or information may be amended at any time *prior* to arraignment *without* leave of the court" (emphasis added). Furthermore, an amendment is permissible "before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial, and the opportunity to defend." ***State v. Webster***, 196 Wis.2d 308, 318, 538 N.W.2d 810, 814 (Ct. App. 1995) (citations omitted). Here, the information was amended, with leave of court, before Parks had entered a plea to the original charge of burglary. The amendment was done as a condition to a plea of guilty to lesser charges. Parks was informed of the plea bargain by his attorney the day before the guilty plea hearing and he then knowingly, intelligently, and voluntarily pled guilty to the amended charges the following day at the plea hearing. The information was amended before Parks entered his plea which, under the reading of the law, could have been done without the court's permission.

Due to the circumstances set forth in the record, the State did not know if Parks would accept its offer until the day before the plea hearing. This is why the State even asked leave of the court to allow the amendment on the day of the plea hearing. The trial court rightfully permitted the amendment because

Parks was aware of the change in the charges and he had come prepared to plead guilty to them that same day as part of his agreement with the assistant district attorney.

The amendment did not prejudice Parks' right to notice, right to a speedy trial, or deny him an opportunity to defend. Parks retained all of his constitutional rights until he knowingly, intelligently, and voluntarily plead guilty to the amended charges. *See* ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980) ("a guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea").

The record shows that Parks understood the amended charges and that he voluntarily and understandingly pled guilty to them. His plea effectively waived any challenges he may have had to the amended information.

2. The amendment exposed Parks to double jeopardy.

Parks next argues that he was exposed to double jeopardy when the State amended the original information, particularly because it did not include the habitual-criminality enhancer. This argument is without merit because Parks was never convicted of the original charge of burglary and, therefore, was never put "in jeopardy" a second time.

"The prohibition against double jeopardy is not triggered until 'jeopardy attaches' in the proceedings." ***State v. Petty***, 201 Wis.2d 337, 361, 548 N.W.2d 817, 826 (1996). Furthermore, jeopardy means that a defendant is exposed to the risk of being found guilty or innocent. *See* ***id.*** at 361, 548 N.W.2d at 826. Parks was never in such a position because he had not been convicted of

the original charge of burglary nor had the burglary charge been dismissed. The original information was amended as part of the plea agreement he made with the State. The addition of the habitual criminality enhancer was part of that deal. In exchange for a guilty plea to lesser charges, the State amended the original information to reflect the new charges and Parks voluntarily and understandingly plead guilty to those charges.

To further illustrate the double jeopardy protection and how it would apply to this instance, Parks cannot now be charged and tried with the initial burglary charge because he has already plead guilty to the amended charges. *See* ***id.*** at 362, 548 N.W.2d at 826 ("where there is no trial, jeopardy attaches upon the court's acceptance of a guilty or no contest plea"). Therefore, this court concludes that the amendment of the information did not expose Parks to double jeopardy.

B. Ineffective Assistance of Counsel.

Parks claims that he did not receive effective assistance of counsel. Because Parks did not raise this claim with the trial court, this court cannot review the issue.

The failure to raise the ineffective assistance of counsel issue in a postconviction motion waives such right. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979); *see also* ***State v. Mosley***, 201 Wis.2d 36, 48, 547 N.W.2d 806, 811 (Ct. App. 1996). The record shows that Parks did not raise this issue in his postconviction motion. He has waived such right and is now precluded from raising it on appeal.

By the Court.—Order affirmed.

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