COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-3246-CR
00-0417-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOE J. DAVIS,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER and DAVID M. BASTIANELLI, Judges. *Affirmed.*

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

¶1 PER CURIAM. Joe J. Davis appeals from the judgment of conviction and the order denying his motion for postconviction relief. The issue

on appeal is whether Davis was timely tried under the Interstate Agreement on Detainers Act and whether his counsel was ineffective for failing to timely raise the deadline contained within that act. We conclude that Davis waived his objection to the timeliness of trial when he pled guilty, and that he was not prejudiced by counsel's failure to raise the issue. We therefore affirm.

¶2 This case has a rather complicated procedural history. Davis was charged with one count of conspiracy to commit armed robbery and one count of attempted first-degree intentional homicide. The State brought Davis to Wisconsin from Illinois, where he was imprisoned, pursuant to the Interstate Agreement on Detainers Act. *See* WIS. STAT. § 976.05 (1997-98).[1] He made his initial appearance in Wisconsin in October 1997. The Agreement on Detainers law requires that the person brought to this State pursuant to the act shall be brought to trial within 180 days "after the prisoner has caused to be delivered" to the appropriate court and prosecuting officer a notice and a request for speedy disposition. Section 976.05(3)(a). Davis argues that the district attorney accepted custody of him on September 23, 1997, and that this is the date from which the 180-day trial deadline in the statute begins to run.

¶3 At the arraignment on December 14, 1997, the court offered defense counsel trial dates of February 2 and 15, 1998. Defense counsel was not available for trial either date and wanted some additional time to file a motion challenging the preliminary hearing. The court scheduled the trial for March 2, 1998. Davis's counsel made the motion challenging the preliminary hearing in January and the court remanded the case for a continued preliminary hearing. This was held on

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

February 20, 1998, and Davis was once again bound over and arraigned. Trial was set for March 30, 1998. On that date, the court adjourned the trial to May because of congestion in its calendar. In April, Davis's first trial counsel moved to withdraw because of a breakdown in communication with his client. New counsel was appointed.

¶4 In May 1998, Davis, by his second counsel, filed a motion to dismiss all the criminal charges with prejudice because the State had not brought him to trial within 180 days as required by statute. By an order dated June 22, 1998, the court denied the motion on the ground that there was not any evidence in the record that Davis had provided the required notice. The court rescinded this order the next day when defense counsel showed the court that there was such evidence in the record. By an order dated July 2, 1998, the court again denied the motion, finding that Davis had waived his right to trial within 180 days. Sometime after this, Davis's second counsel withdrew for health reasons and a third attorney was appointed to represent him.

¶5 Davis then pled no contest to one count of conspiracy to commit robbery, which resulted in a substantial reduction in his potential sentence. The court sentenced him to six years in prison consecutive to the Illinois sentence he was currently serving.

¶6 Davis filed a motion to withdraw his no contest plea and dismiss the criminal action with prejudice because the State had not complied with the 180-day time limit of the Agreement on Detainers Act. Davis alleged that his first trial counsel was ineffective for failing to timely make a motion for a speedy trial or for failing to move to dismiss once the deadline had passed. The court held a hearing on the motion and denied it from the bench. Davis filed a notice of appeal from

the judgment of conviction and from the July 2, 1998, order denying his motion to dismiss for lack of jurisdiction. This appeal is appeal no. 99-3246-CR. Meanwhile, Davis filed a second postconviction motion again seeking an evidentiary hearing on his claim of ineffective assistance of counsel. The court again denied this motion in a written order dated January 31, 2000. Appeal no. 00-0417-CR is from that order. This court consolidated the two appeals.

¶7 Davis first argues that he was not brought to trial within the speedy trial provision of the Agreement on Detainers Act. He claims, therefore, that the court lacked jurisdiction to convict and sentence him. We conclude that Davis waived the issue when he pled no contest.

¶8 Generally, a guilty or no contest plea waives all nonjurisdictional defects and defenses. *See* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995). Davis argues that the 180-day deadline represents a matter of subject matter jurisdiction. We disagree. A Wisconsin circuit court has subject matter jurisdiction over criminal cases and matters brought before it pursuant to the Interstate Agreement on Detainers Act.

¶9 Further, a guilty plea, properly entered, will waive a defense based upon the right to a speedy trial. *See* ***Hatcher v. State***, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978). If a defendant may waive the generic right to a speedy trial, then he or she may also waive the speedy trial right established in the Agreement on Detainers Act. When Davis pled no contest, he waived any defense he had based on the failure of the State to bring him to trial under these deadlines.

¶10 Davis also argues that he is entitled to have a hearing on his ineffective assistance of counsel claims. He argues that his first trial counsel was ineffective for not bringing a motion to dismiss based on a violation of the speedy

trial provision of the Agreement on Detainers Act. He is not asking to withdraw his plea.[2] Rather, he is asserting that because counsel was ineffective for failing to raise this, then the case must be dismissed with prejudice under WIS. STAT. § 976.05(5)(c).

¶11 The standard of review applicable to an order of the circuit court denying a request for an evidentiary hearing is two part. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (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. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** at 310 (citations omitted). A circuit court may refuse to hold an evidentiary hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief …." ***Id.*** at 309-310 (citations omitted). This determination is reviewed under the erroneous exercise of discretion standard. *See* ***id.*** at 311.

¶12 In this case, the circuit court concluded that Davis was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel because the court found that Davis was not entitled to the relief he requested. Specifically, the court found that since Davis still had a right to appeal the Detainers Act speedy trial issue, he had not been prejudiced by his counsel's failure to raise it. The parties did not argue to the court that Davis had waived this argument when he entered the no contest plea. Since Davis waived this issue, he lost any appellate

[2] He initially asked to withdraw his plea but withdrew that request before the circuit court.

rights he had. We agree with the circuit court's conclusion that Davis was not prejudiced, however, but for a different reason. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (this court may affirm the result reached by the circuit court but for a different reason).

¶13 In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by it. *See* ***Bentley***, 201 Wis. 2d at 312.[3] Davis argues that his first trial counsel was ineffective because he did not bring a motion to receive a trial within the 180-day deadline early on in the proceedings. We conclude that Davis is not able to establish that he was prejudiced by this. Since we are deciding this on the basis that Davis has not suffered any prejudice, we do not reach the question of whether counsel's performance was deficient.[4]

[3] Davis argues that the trial court erred because it focused on prejudice and did not decide whether counsel's performance was deficient. He argues that the court must first decide whether there was deficient performance. Davis is wrong. We need not address both components of the analysis if the defendant makes an inadequate showing on one. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

[4] Davis argues that his first counsel's performance was deficient because he did not insist on a timely trial and did not object once the deadline had passed. It is difficult to see how we could conclude that counsel's performance was deficient for failing to insist on the deadline. The first trial date set by the court was within the 180-day time period. This date was postponed when Davis's counsel challenged the preliminary hearing on the basis of inadmissible evidence. Counsel was successful on this motion. As a result, a new preliminary hearing was held and the trial date was moved back. Had counsel not challenged the preliminary hearing but gone to trial within the 180-day time period, he could have been found ineffective for failing to challenge the preliminary hearing. It would be difficult to conclude that counsel's performance was deficient because his action in bringing a successful challenge to the preliminary hearing caused a delay in the trial date. Further, Davis's second counsel did move to dismiss on these grounds once the deadline had expired and the court found that Davis had waived the deadlines. Davis has not explained why his first counsel was ineffective for not making the motion between the time the deadline expired and he moved to withdraw (a period of about a month).

¶14 The record establishes that the court was prepared to go to trial within the 180-day time period, but that defense counsel was not. These time limits may be waived by conduct, and an express personal waiver on the record is not required. *See* ***State v. Aukes***, 192 Wis. 2d 338, 345, 531 N.W.2d 382 (Ct. App. 1995). Had counsel insisted upon the speedy trial right, the court could have scheduled it during the 180-day period. Further, under the statute the court can extend the time for cause. *See* WIS. STAT. § 976.05(3)(a). Certainly the court would have done this when it rescheduled the March trial date for May as a result of congestion in its own calendar. Davis has not established that he was prejudiced by the delay.

¶15 Moreover, Davis asserts only that the delay caused him to lose his right to a speedy trial under the statute. Since the time limits may be waived, Davis must assert some reason other than the fact that they were waived as causing him prejudice. The State asserts that the only potential prejudice is that he would have gone to trial rather than accept the plea. However, in order to establish this prejudice Davis must "do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." ***Bentley***, 201 Wis. 2d at 313. Davis has not offered any reason why he would rather have gone to trial. Since Davis has not established that he was prejudiced by the delay, the circuit court properly found that he was not entitled to a hearing on his claim of ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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