COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1803 **Cir. Ct. No. 1997CF970080**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE DERRICK WINGO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer[1] and Kessler, JJ.

¶1 PER CURIAM. Andre Derrick Wingo appeals from an order denying his postconviction motions. The issues are whether Wingo is entitled to:

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

(1) postconviction deoxyribonucleic acid ("DNA") testing; (2) withdrawal of his ***Alford*** plea to third-degree sexual assault; and/or (3) a new trial for trial counsel's ineffectiveness for failing to conduct discovery, and because of newly discovered evidence.[2] We conclude that Wingo is not entitled to postconviction relief because: (1) there is not now and never was any physical evidence to test; (2) neither the absence of physical evidence nor the collateral consequence of sex offender registration constitutes a manifest injustice necessary for post-sentence plea withdrawal; and (3) trial counsel was not ineffective for failing to discover nonexistent physical evidence when the prosecution against Wingo depended upon the testimony of Wingo's former girlfriend, and the lack of physical evidence does not constitute newly discovered (non)evidence. Therefore, we affirm.

¶2 Wingo was charged with battery, aggravated battery, second-degree sexual assault and kidnapping of his then live-in girlfriend for a three-day incident that occurred in October of 1996. Incident to a plea bargain, Wingo entered ***Alford*** pleas to the reduced charges of third-degree sexual assault and substantial battery. The trial court imposed and stayed a five-year prison sentence in favor of a five-year probationary term.[3] This court affirmed the judgment in a no-merit appeal in which Wingo elected not to respond. *See* ***State v. Wingo***, No. 98-0780-CR-NM, unpublished slip op. (Ct. App. June 23, 1998). Wingo has filed numerous postconviction motions since that time; all have been denied.

[2] An ***Alford*** plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970); *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

[3] The imposed and stayed sentence was for the sexual assault. The trial court also imposed a four-year sentence for the substantial battery, to run concurrent to a sentence Wingo was already serving.

¶3 In 2007, Wingo moved for postconviction discovery and DNA testing, plea withdrawal, and a new trial predicated on the alleged ineffective assistance of trial counsel and newly discovered evidence. The trial court denied the motions.[4]

¶4 Wingo moved for postconviction discovery for what he thought would be the physical evidence collected at the hospital from the victim, and for DNA testing on that evidence. The State responded to the motion, stating:

> no evidence was collected at the hospital from the victim….If the defendant is in possession of some report indicating that evidence was collected from the victim at the hospital and turned over to the police, the defendant should provide that information….Absent receipt of such information, there is no evidence that can be subjected to any DNA testing.
>
> …The defendant and the victim … were boyfriend and girlfriend and they lived together. Accordingly, DNA is not relevant to the issue of identity. The facts upon which the defendant was convicted [testimony from the victim] are set forth in the criminal complaint and the preliminary hearing transcript. Those facts provided the factual basis for the defendant's pleas.

¶5 The trial court denied the motion, explaining that

> [t]he fact that physical evidence was not collected from the victim for sexual assault analysis does not constitute "exculpatory" evidence. The evidence against the defendant was from the victim's own lips. She herself provided a statement to the police and was prepared to testify at the defendant's trial.…The witness's statement was sufficient to constitute[] the State's entire case at trial; it would not have been necessary to produce physical or DNA evidence of the sexual act.

[4] Wingo filed multiple motions seeking relief. The motions were interrelated, and the trial court denied them in one consolidated order.

¶6 This prosecution was predicated on the victim's testimony. Her report of what happened is in the criminal complaint, and she testified against Wingo at the preliminary hearing. The victim testified that Wingo repeatedly assaulted her and would not let her leave the house for two to three days. Consequently, there was no physical evidence appropriate for DNA testing.[5] We affirm the trial court's denial of Wingo's claim for postconviction DNA testing as the facts clearly indicated that there is not now and never was any evidence to test.

¶7 Wingo also seeks to withdraw his ***Alford*** plea to the sexual assault because the law has changed since he entered his plea, in that the offense to which he pled is now a "sexually violent offense" and he must now register as a sex offender. Preliminarily, Wingo seeks to apply the "fair and just reason" standard for plea withdrawal;[6] however, the applicable standard is that failure to allow plea withdrawal must result in a "manifest injustice." *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836.

¶8 Wingo's reason for seeking plea withdrawal is that when he entered his ***Alford*** plea to third-degree sexual assault in 1997, in violation of WIS. STAT. § 940.225(3) (amended Dec. 2, 1995), that crime was not a sexually violent offense pursuant to WIS. STAT. § 980.01(6)(a) (1995-96), and did not require him to register as a sex offender. *See* WIS. STAT. § 973.048 (eff. June 1, 1997). Wingo alleged that he did not know that he was entering a plea that would require him to

[5] The prosecutor referred to "two items of possible evidentiary value … collected during the investigation of this offense: a 96/97 pocket calendar/planner and … note paper from [a] day planner."

[6] If a defendant seeks plea withdrawal before sentencing, the applicable standard is that the defendant need only show "a fair and just reason" for plea withdrawal. *See* ***State v. Nelson***, 2005 WI App 113, ¶11, 282 Wis. 2d 502, 701 N.W.2d 32.

register as a sex offender. Not advising a defendant of the requirement to register as a sex offender is a collateral consequence of a plea. *See* ***State v. Bollig***, 2000 WI 6, ¶27, 232 Wis. 2d 561, 605 N.W.2d 199. Failing to advise a defendant of a collateral consequence of a plea does not invalidate an otherwise valid plea. *See* ***State v. Myers***, 199 Wis. 2d 391, 394-95, 544 N.W.2d 609 (Ct. App. 1996). Although Wingo contends that we should instead allow him to withdraw his plea pursuant to ***State v. Nelson***, 2005 WI App 113, 282 Wis. 2d 502, 701 N.W.2d 32, ***Nelson*** is distinguishable because that involved presentence plea withdrawal, which involves the lesser "fair and just" standard, and was a direct (as opposed to a collateral) attack on the judgment of conviction. *See* ***id.***, ¶3.

¶9 Wingo also moves for a new trial, claiming that his trial counsel was ineffective for failing to seek discovery from the State, and on the basis of newly discovered evidence. We briefly reiterate why these claims are subsumed in our rejection of Wingo's previously addressed claims.

¶10 As the State's response to Wingo's current motion indicates, there was no physical evidence to produce. Wingo has not shown that trial counsel was ineffective for failing to obtain evidence that never existed.

¶11 Wingo contends that the lack of physical evidence was exculpatory, in that had the State disclosed to him that it had no physical evidence linking him to the sexual assault he would not have entered an ***Alford*** plea because the State could not have proven his guilt. First, Wingo's reason does not meet the manifest injustice standard. He was charged on the basis of his then girlfriend's statements. They were in the complaint; she testified against him at the preliminary hearing. Her testimony was sufficient to convict him. *See* ***State v. Dahlk***, 111 Wis. 2d 287, 305, 330 N.W.2d 611 (Ct. App. 1983). Second, Wingo claims that the State's

failure to produce what he characterizes as exculpatory evidence, and his trial counsel's failure to discover that there was no physical evidence are somehow newly discovered. We reject these claims of failure to produce and newly discovered evidence when such evidence did not and does not exist, and its nonexistence fails to demonstrate whether Wingo committed the charged sexual assault.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).