COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1128-CR **Cir. Ct. No. 2003CF5982**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER VELAZQUEZ-PEREZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, JEFFREY A. WAGNER, and JEFFREY C. CONEN, Judges. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Alexander Velazquez-Perez appeals an order by Milwaukee County Circuit Court Judge Jeffrey C. Conen (hereinafter referred to as "the ***Machner***[1] court") denying his motion to withdraw his guilty pleas on grounds of ineffective assistance of postconviction counsel. Velazquez-Perez entered guilty pleas to felony murder-armed robbery and armed robbery by use of force, as a party to a crime. In the first of two motions to withdraw his pleas, he alleged his pleas were not entered knowingly, understandingly, and voluntarily because he did not understand the maximum penalties he faced by entering his pleas. Specifically, he alleged that trial counsel misinformed him that the maximum time he could serve in prison was fifty-five years, when in fact he could be ordered to serve ninety-five years. He also alleged that Milwaukee County Circuit Court Judge Mary M. Kuhnmuench (hereinafter referred to as "the circuit court") did not inform him during the plea colloquy of the maximum period of incarceration. An evidentiary hearing was held on Velazquez-Perez's motion before Milwaukee County Circuit Court Judge Jeffrey A. Wagner (hereinafter referred to as "the plea withdrawal court"), at the conclusion of which the court denied the motion. Attorney Lew Wasserman (hereinafter referred to as "postconviction counsel") represented Velazquez-Perez at the plea withdrawal hearing. Appellate counsel filed a second motion to withdraw Velazquez-Perez's pleas alleging ineffective assistance of postconviction counsel and seeking a ***Machner*** hearing. A ***Machner*** hearing was held on the second plea withdrawal motion, consisting of one day of testimony and a separate hearing consisting of oral arguments. The ***Machner*** court denied the motion.

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

¶2 The issues we address on appeal are: (1) whether this court has jurisdiction over this appeal; (2) whether postconviction counsel provided ineffective assistance of counsel at the plea withdrawal hearing; and (3) whether the ***Machner*** court erroneously exercised its discretion in rejecting Velazquez-Perez's offers of proof, and denying Velazquez-Perez's request for the opportunity to present additional evidence at an evidentiary hearing, consisting of the continuation of his direct examination of postconviction counsel, his own testimony, and the testimony of other witnesses who would testify on his behalf. For the reasons that follow, we affirm the ***Machner*** court's order denying Velazquez-Perez's motion to withdraw his plea.

BACKGROUND

¶3 Velazquez-Perez was charged with felony murder-armed robbery and armed robbery, use of force, party to a crime. He entered guilty pleas to both charges at a plea hearing held on December 15, 2003. Certified court interpreter Dawn Maldonado translated for Velazquez-Perez at the plea hearing. After conducting a plea colloquy, the court accepted Velazquez-Perez's guilty pleas and found him guilty on both counts. A judgment of conviction was entered.

¶4 Prior to sentencing, trial counsel hired psychologist Joseph L. Collins, Ed.D., to conduct a presentence evaluation of Velazquez-Perez. In his February 9, 2004 report, Dr. Collins noted:

> [Velazquez-Perez] helplessly asserted a request for perhaps a ten-year [sentence]. He mentioned that his counsel has indicated that he could face 55 years in prison. In a sense of despair, [Velazquez-Perez] indicated, "If I got 55 years, I'd die in prison."

Collins reported that Velazquez-Perez had been raised in Puerto Rico and had taken English classes in school. Dr. Collins' examination revealed that Velazquez-Perez had reading and word recognition skills at a 5.3 grade level, with math skills at a 3.9 grade level.

¶5 Velazquez-Perez was sentenced to fifty years of imprisonment on the felony murder charge (thirty-five years of initial confinement and fifteen years of extended supervision). On the armed robbery charge, Velazquez-Perez was sentenced to twenty years (ten years of initial confinement and ten years of extended supervision), to run concurrently with his felony murder sentence.

POSTCONVICTION PROCEDURAL HISTORY

¶6 Through postconviction counsel Thomas Voss,[2] Velazquez-Perez moved to withdraw his guilty pleas on October 12, 2004. In that motion, Velazquez-Perez contended that his pleas were not knowingly, understandingly, and voluntarily entered because he was not aware that the maximum sentence he could receive would be ninety-five years. In support, he argued there were three reasons for why he failed to understand the maximum penalties. First, trial counsel provided ineffective assistance by misinforming him that the maximum period of incarceration he faced was fifty-five years, consisting of fifteen years on the felony murder charge and forty years on the armed robbery charge. Second, during the plea hearing, the interpreter spoke too fast and in an unfamiliar dialect or idiom, causing Velazquez-Perez to have difficulty understanding both the plea

[2] Velazquez-Perez was represented at various stages of this case by six attorneys, four of whom are relevant to this appeal. We refer to Attorney Mark Pecora as "trial counsel," Attorney Voss by his name, Attorney Lew Wasserman as "postconviction counsel," and Attorney David Leeper as "appellate counsel."

questionnaire and the plea colloquy, as they were interpreted to him. Third, the circuit court's plea colloquy was defective in that it failed to "adequately address the defendant to determine that he understood the potential punishment for the charges to which he was pleading." He further alleged that, had he been aware of the correct potential penalties, he would not have pled guilty to the charges and would have proceeded to trial.

¶7 In an order dated the following day, the circuit court denied the motion without an evidentiary hearing. The court ruled that Velazquez-Perez's responses to the plea colloquy indicated that he did understand the maximum penalties and that he was adequately apprised, both by his attorney and the court, of the maximum penalties he faced upon conviction.

¶8 Velazquez-Perez filed a notice of appeal on November 4, 2004, and Attorney Voss filed a no-merit report on March 2, 2005. This court rejected the no-merit report, reversed the circuit court, and remanded for an evidentiary hearing on Velazquez-Perez's claim that he did not understand the maximum penalty he faced due to the interpreter's speaking too fast and to her unfamiliar dialect or idiom. *See* ***State v. Velazquez-Perez,*** No. 2004AP2965, unpublished slip op. ¶4 (WI App May 31, 2007).

¶9 Attorney Lew Wasserman was appointed new postconviction counsel for Velazquez-Perez and represented him at the December 2007 and April 2008 hearings on his postconviction motion to withdraw his guilty pleas on the grounds of ineffective assistance of trial counsel for misinforming Velazquez-Perez of the maximum penalties and a failure to understand the court interpreter. At the conclusion of the plea withdrawal hearing, the circuit court denied the motion. The court found that Velazquez-Perez was advised by trial counsel,

interpreter Dawn Maldonado, and the circuit court of the maximum penalties, that he understood the maximum penalties, and that Velazquez-Perez had entered his guilty pleas knowingly, intelligently and voluntarily. Velazquez-Perez appealed.

¶10 Appellate counsel David Leeper was appointed and obtained permission from this court to withdraw the notice of appeal as premature. In December 2008, Velazquez-Perez filed a second motion to withdraw his guilty pleas. In this postconviction motion, Velazquez-Perez reasserted and incorporated all the claims from his initial postconviction motion to withdraw his guilty pleas, and added a claim of ineffective assistance of counsel against postconviction counsel. Velazquez-Perez requested that a second ***Machner*** hearing be held. Velazquez-Perez requested this hearing to provide him with an opportunity to prove that both his trial counsel and postconviction counsel were ineffective, and to show that he did not understand the maximum penalty he was facing at the time he pled guilty, therefore entitling him to withdraw his pleas in the interest of justice.

¶11 On June 19, 2009, the ***Machner*** court held an evidentiary hearing (a second ***Machner*** hearing) on the sole question of whether postconviction counsel's representation was ineffective. The only testimony elicited at this hearing was from postconviction counsel. The court ended the hearing and continued it to another date to allow appellate counsel an opportunity to review and organize the evidence he intended to introduce on a second day of the hearing.

¶12 Approximately four months later, Velazquez-Perez, through appellate counsel, filed two "amendments" to his December 2008 plea withdrawal

motion. In the first "amendment,"[3] among other things, Velazquez-Perez asked the ***Machner*** court to accept several offers of proof pursuant to WIS. STAT. § 901.03. The offers of proof included his own proffered testimony and the proffered testimonies of trial counsel, Dr. Collins, Maldonado, Dorcas Lopez (the mother of two of Velazquez-Perez's children who had translated for him in meetings with trial counsel prior to the day of the plea hearing), and linguist expert Christina Green. Velazquez-Perez also provided the court with two alternative proposed pre-hearing orders to clarify the scope of the remainder of the ***Machner*** hearing or any second hearing on the motion to withdraw his guilty pleas. On September 14, 2009, Velazquez-Perez filed a second "amendment" to the

[3] This "amendment" to the December 2008 plea withdrawal motion specifically adds the following claims:

(1) a ***Bangert*** challenge to the adequacy of the plea colloquy due to the court's alleged failure to "address[ ] the issues of education or general comprehension in any way" or to "assess in any meaningful way Velazquez-Perez's capacity to understand the issues at the hearing," noting the alleged inaccuracy of the education portion of the plea questionnaire. *See* ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08.

(2) a ***Bangert*** challenge to the adequacy of the plea colloquy due to the court's failure to "[e]stablish the defendant's understanding of the … range of punishments to which he is subjecting himself by entering a plea," including failing to explain the difference between consecutive and concurrent sentences, or adding up the maximum years of imprisonment, i.e., ninety-five years.

(3) a claim that postconviction counsel failed to establish at the beginning of the plea withdrawal hearing that the State had the burden of proof under ***Bangert*** to show by clear and convincing evidence that Velazquez-Perez did in fact understand the maximum penalties he faced.

(4) a claim that a motion to withdraw pleas can also be analyzed under ***Nelson/Bentley*** and pursuant to the supreme court's holdings in ***Brown/Hoppe***. *See* ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906; ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). Thus, the circuit court should have allowed Velazquez-Perez to introduce evidence extrinsic to the plea colloquy at the ***Machner*** hearing on postconviction counsel's effectiveness.

December 2008 motion. In the second "amendment," Velazquez-Perez made an additional argument based upon the presentence investigation report and Dr. Collins' report. He also alleged an additional allegation of ineffectiveness of counsel against postconviction counsel: specifically, that postconviction counsel failed to raise a factual mistake in the plea questionnaire with regard to Velazquez-Perez's education level.

¶13 The continued hearing was eventually held on December 21, 2009. The ***Machner*** court heard arguments from both parties concerning, among other issues, whether another evidentiary hearing should be held and whether the offers of proof were relevant. The State objected to the offers of proof on relevancy grounds and asserted that it was not necessary to hold another evidentiary hearing because postconviction counsel's testimony on the first day of the ***Machner*** hearing was sufficient for the court to rule on Velazquez-Perez's motion.

¶14 On April 13, 2010, the ***Machner*** court issued a decision without further hearing, finding that postconviction counsel's performance was not deficient with respect to the three issues raised in the December 2008 plea withdrawal motion. The court did not address the issues Velazquez-Perez raised in the two "amendments" to the December 2008 motion.

¶15 Velazquez-Perez now appeals his judgment of conviction, the May 2, 2008 order denying his motion for plea withdrawal, and the April 13, 2010 order denying his December 2008 plea withdrawal motion, as "amended." Additional facts, as necessary, are set forth in the discussion below.

DISCUSSION

¶16 We organize our discussion of the issues as follows. We first address the State's contention that this court lacks jurisdiction to address the plea withdrawal court's May 2, 2008 order denying Velazquez-Perez's motion to withdraw his plea, and the judgment of conviction, and conclude that we have jurisdiction. Thereafter, we determine whether the circuit court's plea colloquy is properly before this court, and we conclude that it is not. We then turn to Velazquez-Perez's contention that postconviction counsel rendered ineffective assistance, and conclude that Velazquez-Perez has not shown prejudice from any of postconviction counsel's alleged deficiencies. Finally, we address and reject Velazquez-Perez's contentions that the ***Machner*** court erroneously exercised its discretion by not considering his offers of proof and by not holding another evidentiary hearing so that he and other witnesses could testify on his behalf. We begin with the State's contention that we lack jurisdiction.

I. Jurisdiction

¶17 The State argues that this court lacks jurisdiction to review the plea withdrawal court's May 2, 2008 order denying Velazquez-Perez's motion to withdraw his guilty pleas and his judgment of conviction. The State contends the time to appeal the order denying his plea withdrawal motion has expired under WIS. STAT. § 808.04(1) and therefore we have no jurisdiction. The State points out that the timeframe for appealing under § 808.04(1) is thirty days and the instant postconviction motion was filed on December 16, 2008, well past the time to file an appeal. We reject the State's argument for the following reasons.

¶18 Velazquez-Perez, by postconviction counsel, filed a "premature" notice of appeal before appellate counsel was appointed. Once appellate counsel

was appointed, we permitted Velazquez-Perez to withdraw the notice of appeal and extended the deadline for him to file either a postconviction motion or a new notice of appeal under WIS. STAT. RULE 809.30. We set December 17, 2008, as the deadline for Velazquez-Perez to file either of these documents. Velazquez-Perez filed the instant postconviction motion on December 16, 2008.

¶19 We conclude we have jurisdiction over the plea withdrawal court's May 2, 2008 order denying Velazquez-Perez's motion to withdraw his guilty pleas and the judgment of conviction. We have the statutory authority to extend or reduce the time periods set forth under WIS. STAT. ch. 809. *See* WIS. STAT. RULE 809.82(2)[4]; ***State v. Sutton***, 2012 WI 23, ¶15, 339 Wis. 2d 27, 810 N.W.2d 210. In this case, we expressly allowed Velazquez-Perez an extension of time to file his appeal and/or request postconviction relief under WIS. STAT. RULE 809.30 and Velazquez-Perez met the deadline we set for filing his postconviction motion.[5] Accordingly, we proceed to consider this appeal.

[4] WISCONSIN STAT. RULE 809.82 provides, in pertinent part:

> (2) ENLARGEMENT OR REDUCTION OF TIME. (a) Except as provided in this subsection, the court upon its own motion or upon good cause shown by motion, may enlarge or reduce the time prescribed by these rules or court order for doing any act, or waive or permit an act to be done after the expiration of the prescribed time.

[5] We also observe that the State incorrectly cites WIS. STAT. § 808.04(1) as the statute governing the time for appealing a judgment of conviction or an order in a criminal case. Section 808.04(1) applies to appealing civil judgments or orders. The statutes governing the time to file appeals in criminal matters are WIS. STAT. RULE 809.30 and WIS. STAT. RULE 809.82(2).

II. Plea Colloquy

¶20 Velazquez-Perez argues the circuit court's plea colloquy was inadequate under WIS. STAT. § 971.08 because the court failed to inform him of the potential penalties he faced and failed to personally address Velazquez-Perez to ascertain the level of education he had achieved. We do not reach these issues because we conclude, for the reasons that follow, that the adequacy of the court's plea colloquy is not properly before this court.

¶21 As we explained, we rejected a no-merit report that was filed with this court after the circuit court denied his motion to withdraw his pleas. We then remanded the case for an evidentiary hearing on Velazquez-Perez's motion. Pertaining to the court's plea colloquy, we observed in our decision that "[t]he transcript of the plea hearing shows that the court clearly stated the maximum penalty for each count and asked Velazquez-Perez if he understood the penalty for that count, and that he responded both times affirmatively through the interpreter." ***State v. Velazquez-Perez***, No. 2004AP2965, unpublished slip op. ¶4 (WI App May 31, 2007). The State takes these comments as a ruling on the circuit court's plea colloquy. Velazquez-Perez ignores this passage and instead reads the following as concluding that the plea colloquy was defective:

> We cannot say that the plea colloquy record is sufficiently strong to conclude that no evidence at a hearing could possibly result in a factual finding that Velazquez-Perez did not understand the penalty.

Velazquez-Perez misconstrues this sentence. Read in proper context, this sentence refers to the lack of clarity in the hearing transcript as to whether Velazquez-Perez understood the court interpreter when she interpreted the part of the court's plea colloquy explaining the maximum penalties for each felony count. This was not

an expression of concern regarding the court's plea colloquy in general or with respect to the court informing Velazquez-Perez of the maximum penalties, in particular.

¶22 A careful reading of the no-merit decision shows that our reference in paragraph four to the circuit court's plea colloquy was simply in the context of providing background on Velazquez-Perez's motion and explaining the circuit court's decision denying Velazquez-Perez's motion to withdraw his plea. We did conclude, however, that Velazquez-Perez's motion was "sufficient to require an evidentiary hearing on his claim that his plea was not entered knowingly, voluntarily, and intelligently because he did not understand the maximum penalty." ***Id.***, ¶7. Significantly, we did not conclude that the part of Velazquez-Perez's motion alleging that the court's colloquy was inadequate was sufficient to warrant an evidentiary hearing. It is also notable that our remand directions do not mention the adequacy of the plea colloquy as an issue to be addressed at the evidentiary hearing. Accordingly, we conclude that the proper reading of the no-merit decision in this case is that we decided that the court's plea colloquy was either adequate or that Velazquez-Perez's motion did not sufficiently allege deficiencies in the court's plea colloquy.

¶23 There are two additional reasons supporting our conclusion that the adequacy of the plea colloquy is not properly before this court. First, contrary to postconviction counsel's testimony at the ***Machner*** hearing that he did not cross-examine court interpreter Maldonado because he abandoned the court interpretation issue and instead pursued a challenge to the adequacy of the circuit court's plea colloquy, the plea colloquy was not addressed at the plea withdrawal hearing. Although postconviction counsel briefly touched on the plea colloquy at the hearing, he did not seriously argue that the colloquy was defective and the plea

withdrawal court apparently did not believe the issue was before it. Second, Velazquez-Perez's appellate counsel did not raise a challenge to the plea colloquy in his December 2008 motion seeking a new plea withdrawal hearing. The subject was raised for the first time in his motions to "amend" the December 2008 motion.

¶24 Therefore, for the above reasons, we conclude that the adequacy of the circuit court's plea colloquy is not properly before this court. Consequently, we do not address any of Velazquez-Perez's arguments related to the plea colloquy, including any direct arguments that the plea colloquy was defective and that postconviction counsel was ineffective by not arguing to the plea withdrawal court that the plea colloquy was defective. We now turn to Velazquez-Perez's claim that postconviction counsel was ineffective.

III. Ineffective Assistance of Counsel

¶25 To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶26 If we conclude the defendant has not proved one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent

assistance." ***Id.*** at 690. In other words, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88. There is a strong presumption that a defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-34, 246 Wis. 2d 648, 630 N.W.2d 752. To show prejudice, the defendant must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694.

¶27 We begin our analysis by clarifying the issues we will address. In his December 2008 motion to withdraw his guilty pleas, Velazquez-Perez reasserted the allegations in his original motion to withdraw his pleas and added allegations that postconviction counsel provided ineffective assistance in three respects: (1) counsel did not interview and cross-examine Maldonado; (2) counsel failed to call Dr. Collins to testify about the report he prepared for Velazquez-Perez's sentencing hearing; and (3) counsel failed to meet with and communicate with Velazquez-Perez regarding the issues of the case and to prepare Velazquez-Perez for the plea withdrawal hearing.

¶28 On appeal, however, Velazquez-Perez argues that postconviction counsel was ineffective in six respects. Nevertheless, we address only the three allegations raised in his December 2008 motion. We do not address the other issues Velazquez-Perez argues in his appellate brief because those claims were brought in the two "amendments" to his December 2008 motion which, as we explained, were filed approximately four months after the first day of the ***Machner*** hearing, without the apparent approval of the ***Machner*** court. Moreover, as we indicated, the ***Machner*** court did not address the additional

allegations of ineffective assistance of postconviction counsel raised in the two "amendments" in its decision denying Velazquez-Perez's motion and Velazquez-Perez does not argue that the court erred by not addressing them.

¶29 Turning now to Velazquez-Perez's three claims of ineffectiveness of postconviction counsel Velazquez-Perez alleged in his December 2008 plea withdrawal motion, we assume without deciding that postconviction counsel's performance was deficient with respect to these claims. Thus, we consider the second prong under ***Strickland***—whether counsel's deficient performance prejudiced Velazquez-Perez—and conclude that Velazquez-Perez has not demonstrated prejudice.

A. Postconviction Counsel's Failure to Communicate with and Prepare Velazquez-Perez for the Plea Withdrawal Hearing

¶30 On appeal, Velazquez-Perez argues that postconviction counsel failed to ask him what he believed were the maximum penalties he faced at the time of the plea hearing. Velazquez-Perez does not fully develop an argument on this issue in this part of his brief. Even if we considered the listing in his reply brief of the various ways by which counsel allegedly failed to become knowledgeable of the facts and issues related to Velazquez-Perez's alleged failure to understand the maximum penalties he faced, all Velazquez-Perez does is enumerate those failures without further elaboration. Because Velazquez-Perez does not present a fully developed argument on this issue, let alone discuss how he was prejudiced, we reject this argument.

B. Postconviction Counsel's Failure to Have Dr. Collins Testify About His Report

¶31 On appeal, Velazquez-Perez argues postconviction counsel was ineffective because he never contacted Dr. Collins and did not seek to admit

Dr. Collins' presentence evaluation report of Velazquez-Perez at the plea withdrawal hearing. The purpose of the report, Velazquez-Perez contends, was to support his claim that he did not understand that he was facing ninety-five years in prison. According to Velazquez-Perez, the report shows that he told Dr. Collins that he was facing fifty-five years in prison, not ninety-five years.

¶32 We fail to see how the report would have helped Velazquez-Perez at the plea withdrawal hearing. Dr. Collins evaluated Velazquez-Perez after the plea hearing at which the prosecutor and trial counsel stipulated to a sentencing recommendation of fifty-five years for the felony murder charge—forty years of initial incarceration and fifteen years of extended supervision—and forty years on the armed robbery charge, with twenty-five years of initial incarceration and fifteen years of extended supervision. The recommendation was to run the sentences concurrently. Thus, assuming Velazquez-Perez would serve his entire sentence for felony murder in prison, which is a possibility under Wisconsin's bifurcated sentencing scheme,[6] his declaration to Dr. Collins that he could be confined in prison for fifty-five years is consistent with the sentencing recommendation.

¶33 Moreover, the two sentences in the report that Velazquez-Perez relies on as supporting his claim that he did not understand that he could serve ninety-five years in prison do not support his claim. The two sentences are: "He mentioned that his counsel has indicated that he could face 55 years in prison. In a sense of despair, Alexander indicated, 'If I got 55 years, I'd die in prison.'" Neither sentence reflects a lack of understanding that his cumulative sentence,

[6] *See* WIS. STAT. § 973.01.

assuming the court ordered the two sentences to be served consecutively, would amount to ninety-five years. Dr. Collins does not state in his report that Velazquez-Perez did not understand the maximum penalties he faced if convicted. Accordingly, we conclude Velazquez-Perez has not shown that postconviction counsel's failure to admit into evidence Dr. Collins' report or to have Dr. Collins testify at the plea withdrawal hearing was prejudicial.

C. Postconviction Counsel's Failure to Interview the Court Interpreter

¶34 Velazquez-Perez argues on appeal that postconviction counsel should have interviewed court interpreter Dawn Maldonado and cross-examined her on the second day of the plea withdrawal hearing, and that his failure to do so was ineffective. The State argues that Velazquez-Perez has failed to prove that postconviction counsel was ineffective for failing to cross-examine Maldonado. We agree with the State.

¶35 Maldonado testified at the plea withdrawal hearing. The State conducted her direct examination and postconviction counsel did not cross-examine Maldonado. Velazquez-Perez submitted to the ***Machner*** court an offer of proof of what Maldonado would have testified on cross-examination. We have reviewed that offer of proof and find no meaningful difference between Maldonado's testimony at the plea withdrawal hearing and her testimony in the offer of proof. Stated differently, we see nothing in Maldonado's offer of proof that had a reasonable probability of affecting the outcome of the plea withdrawal hearing.

¶36 At the plea withdrawal hearing, Maldonado testified that she believed Velazquez-Perez appeared to understand her interpretation of the court's plea colloquy, "[b]ecause his responses were consistent with the questions that

were being asked." She testified that she would have interpreted the court's words "exactly," that is, she "would have interpreted everything that the court said and everything the defendant said." Maldonado also testified that, if Velazquez-Perez "seemed not to indicate what [she was] interpreting," she would have stopped the hearing and informed the court that he did not understand her. Notably, she testified that Velazquez-Perez never told her that he did not understand her or wanted her to speak in a different dialect. Relying on these key parts of Maldonado's testimony, the court found Maldonado to be credible and discredited Velazquez-Perez's testimony that he did not understand Maldonado.

¶37 Maldonado's offer of proof adds nothing more to her testimony at the plea withdrawal hearing. And in his appellate brief, Velazquez-Perez does not suggest Maldonado would have offered additional testimony that would have impacted the outcome of the hearing. Because Velazquez-Perez has not shown that postconviction counsel's failure to interview or cross-examine Maldonado was prejudicial, we conclude counsel was not ineffective for failing to do so.

IV. Errors by the Machner Court

¶38 Velazquez-Perez contends that the ***Machner*** court erred in restricting the evidence that could be introduced at the hearing.[7] Specifically, he argues that the ***Machner*** court erred by not allowing him to complete his direct

[7] As we have indicated, following the first day of the hearing, Velazquez-Perez filed two "amendments" to his December 2008 motion. The "amendments" supplemented his original claims of ineffective assistance of postconviction counsel and included offers of proof from several witnesses, including Velazquez-Perez, which Velazquez-Perez asked the circuit court to consider in determining whether to hold a second day of the ***Machner*** hearing, or at least to consider in deciding whether postconviction counsel was ineffective. The court summarily rejected the offers of proof on the basis that the testimony from these witnesses was "irrelevant and a waste of the court[']s time."

examination of postconviction counsel, by denying his right to testify on his behalf, and by preventing him from putting on testimony from other unspecified witnesses.[8] He also maintains that his own offer of proof establishes that (1) postconviction counsel never talked with him about trial counsel, about Maldonado or problems with her interpretation, about Dr. Collins, or about Dorcas Lopez who interpreted for him when he met with trial counsel, (2) never called or visited him at the prison, and (3) never obtained an interpreter to communicate directly with him. We reject this argument for two reasons.

¶39 First, with regard to Velazquez-Perez's offer of proof, we see from this offer that his testimony would have essentially mirrored his testimony at the plea withdrawal hearing, which the plea withdrawal court implicitly rejected on credibility grounds. Velazquez-Perez provides no reason for us to believe that his testimony at the ***Machner*** hearing, which we must assume would have been consistent with his offer of proof, would have mattered there. Second, as it turns out, none of his testimony, or the testimony of the other witnesses he wanted to call, had a reasonable probability of affecting the outcome of the plea withdrawal hearing. As we concluded in rejecting Velazquez-Perez's arguments that postconviction counsel was ineffective for failing to interview and cross-examine Maldonado and to have Dr. Collins testify regarding his report, Velazquez-Perez

[8] We assume that Velazquez-Perez refers to Maldonado, trial counsel, Dorcas Lopez, and expert Green because they are the only witnesses for which he submitted offers of proof. In this part of his argument, however, he does not specifically identify the witnesses he intended to call to testify.

has not shown that had this evidence been admitted, there is a reasonable probability that the outcome would have been different.[9]

CONCLUSION

¶40 For the foregoing reasons, we conclude this court has jurisdiction over this appeal. In addition, assuming, without deciding, postconviction counsel's performance was deficient, we conclude Velazquez-Perez has not shown he was prejudiced by counsel's deficient performance. We further conclude that the ***Machner*** court properly limited the evidence at the hearing. We therefore affirm the ***Machner*** court's order denying Velazquez-Perez's second motion to withdraw his guilty pleas.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports

[9] Velazquez-Perez also challenges certain evidentiary rulings excluding evidence he sought to admit. We do not address these challenges separately. It is sufficient to say that the ***Machner*** court did not erroneously exercise its discretion in excluding the evidence Velazquez-Perez asserts should have been admitted. The evidence he sought to admit was either irrelevant to whether postconviction counsel was ineffective (e.g., a letter that Velazquez-Perez sent to counsel *after* the ***Machner*** hearing), or lacked foundation for its admissibility (e.g., a question seeking an expert opinion from postconviction counsel regarding interpretation). Moreover, Velazquez-Perez does not explain how admitting this evidence would have affected the outcome of the hearing.