COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 17, 1995

NOTICE

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.

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

Nos.94-2810-CR-NM
94-2811-CR-NM
95-0771-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. KONSHAK,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel J. Konshak appeals from judgments convicting him of the misdemeanor offenses of exposing his genitals to a child in violation of § 948.10, STATS., and neglecting a child in violation of § 948.21, STATS. (Court of Appeals case no. 94-2810-CR-NM). He also appeals from judgments convicting him of two felony counts of first degree sexual assault of

a child in violation of § 948.02(1), STATS., and one misdemeanor count of causing a child to expose his genitals in violation of § 948.10. (Court of Appeals case No. 94-2811-CR-NM). In addition, he has appealed from an order denying his motion for postconviction relief from all of the judgments. (Court of Appeals case No. 95-0771-CR-NM).

Konshak's appellate counsel, Attorney Joseph M. Norby, has filed a no merit report and supplemental no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967).[1] Konshak was served with a copy of both the original report and the supplement, and has filed a response addressing both. Upon consideration of the reports and response and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. We therefore affirm the judgments and order and relieve Attorney Norby of further representation of Konshak on appeal.

The judgments of conviction were based upon Konshak's no contest pleas, and were entered as part of a plea agreement in which numerous other charges were dismissed. It is well-established that a no contest plea, voluntarily and understandingly made, constitutes a waiver of all non-jurisdictional defects and defenses. ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). However, an exception exists for challenges to trial court orders denying motions to suppress evidence or determining that statements of the defendant are admissible. Section 971.31(10), STATS.

The no merit reports and response address the following issues: (1) whether the trial court erroneously admitted in evidence a statement given by Konshak to police in July 1992; (2) whether the trial court erroneously exercised its discretion by denying Konshak's pre-sentencing motion to withdraw his no contest pleas; and (3) whether the trial court erroneously exercised its discretion by denying Konshak's post-sentencing motion to withdraw his no contest pleas. Counsel's no merit reports also address the issue of whether the trial court properly exercised its discretion in sentencing

[1] The supplemental no merit report was ordered by this court.

Konshak, and whether Konshak is entitled to relief from his sentences based on new factors.

Konshak's response raises three additional issues: (1) whether the no merit reports submitted by appellate counsel are defective because they fail to set forth the facts and legal arguments which support Konshak's appeals; (2) whether the no merit reports should be rejected because appellate counsel failed to provide Konshak with a complete copy of the record, including any discovery materials and supplementary investigatory results in his possession; and (3) whether trial counsel rendered ineffective assistance of counsel when she failed to request an *in camera* inspection of the counseling records of the alleged victims in this case. None of these issues have arguable merit.

Konshak moved to suppress his statement to police on the ground that it was involuntary. In determining whether a statement was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police. ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). This determination requires a consideration of the totality of the circumstances surrounding the statement, requiring the court to balance the personal characteristics of the defendant against the pressures imposed upon him by police to induce him to respond to questioning. ***Id.*** at 236, 401 N.W.2d at 765-66. While evidence that police are taking subtle advantage of a person's personal characteristics may be a form of coercion, ***State v. Xiong***, 178 Wis.2d 525, 534, 504 N.W.2d 428, 431 (Ct. App. 1993), there must be some affirmative evidence of improper police practices deliberately used to procure a confession, ***Clappes***, 136 Wis.2d at 239, 401 N.W.2d at 767.

Following an evidentiary hearing on Konshak's motion, the trial court made findings of fact and determined that the statement was voluntary. The trial court's factual findings regarding the circumstances surrounding the statement cannot be disturbed unless they are clearly erroneous. ***Xiong***, 178 Wis.2d at 531, 504 N.W.2d at 430. We independently review the facts as found

to determine whether any constitutional principles have been offended. ***Clappes***, 136 Wis.2d at 235, 401 N.W.2d at 765.

Konshak argued at the hearing that his statement was coerced and involuntary based on the length of the questioning, which began in an interview room at the police department at approximately 3:30 p.m. and terminated at 10:15 p.m. He also argued that he was not told that he was free to leave, and that the environment was coercive based on his emotional condition and because he was a single parent concerned for his young children. It was undisputed that the police had come to Konshak's home to ask him to accompany them to the police station for questioning, and that he went with them after writing a note to an adult neighbor, asking that person to continue watching his children until he returned. The neighbor was watching the children at a neighborhood park when Konshak left with police.

In determining that Konshak's statement was voluntary, the trial court found, as conceded by Konshak at the suppression hearing, that he was properly advised of his ***Miranda*** rights before making his statement, and understood and waived them. The trial court also noted that Konshak never asked to stop the questioning, despite conceding in his testimony that he understood that he could do so. While noting that Konshak had been diagnosed as suffering from depression, the trial court found that there was no evidence that this condition affected his statement in any way. In addition, while recognizing that Konshak was concerned for his children, the trial court also found that when he inquired about them, the interviewing officer honestly told him that they were being cared for, albeit it was undisclosed to Konshak that they were in the care of someone other than the neighbor with whom he left them.

The trial court found Konshak's testimony regarding threats to be incredible, and disbelieved his testimony that the interviewing officer told him that she would do what she could to get him home to his children if he told her what she wanted to hear and admitted the allegations. While recognizing that the interview was lengthy, the trial court also noted that the length alone did not render Konshak's statement involuntary, particularly since he began giving his statement within three hours of when the questioning began.

The trial court's determination that the length of the interview, standing alone, was not coercive is supported by the evidence that Konshak was offered and accepted coffee and cigarettes, was allowed to use the rest room, and appeared alert and did not complain of tiredness. The trial court's finding that no threats were made is also supported by the testimony of the interviewing officer, who testified that no promises or threats were made, and that, contrary to Konshak's testimony, he was never told that he could not leave. Based on the evidence and the trial court's factual findings, no arguable basis exists for challenging the trial court's order denying the suppression motion.

There is also no arguable basis for challenging the trial court's denial of Konshak's presentencing motion to withdraw his no contest pleas. Konshak entered his no contest pleas on June 21, 1993, and filed a motion to withdraw them almost two months later on August 19, 1993. In his motion he alleged that he was innocent of the crimes charged, and believed that his children were unduly influenced by social services into making false allegations against him. He alleged that he entered the pleas only because he was emotionally confused at the time and wanted to save his children from the trauma of having to testify at trial. He stated that his mind was now clearer, and he recognized that saving his children from the trauma of testifying was not a reason to enter the pleas. He provided no other reasons or testimony in support of his motion.

We will sustain a trial court's denial of a motion to withdraw a no contest plea unless the trial court erroneously exercised its discretion. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the defendant's plea. ***Id.*** However, "freely" does not mean automatically. ***Id.*** A fair and just reason is some adequate reason for the defendant's change of heart other than the desire to have a trial. ***Id.*** at 861-62, 532 N.W.2d at 117. An assertion of innocence, while important, is not dispositive. ***Dudrey v. State***, 74 Wis.2d 480, 485, 247 N.W.2d 105, 108 (1976). The burden is on the defendant to prove a fair and just reason

by the preponderance of the evidence. ***Garcia***, 192 Wis.2d at 862, 532 N.W.2d at 117.

The trial court concluded that Konshak failed to set forth a fair and just reason for withdrawal, and that withdrawal would substantially prejudice the prosecution. It found that there was no credible evidence to support a claim that Konshak misunderstood any part of the plea proceeding. It further found that the reasons given by Konshak were in reality merely an expression of a desire for trial.

Because the trial court's finding that Konshak understood what he was doing when he entered his no contest pleas is not clearly erroneous, its conclusion that no fair and just reason existed to withdraw the pleas must be upheld. *See* ***id.*** at 863, 532 N.W.2d at 118. In finding that Konshak's claim of confusion was incredible, the trial court noted that Konshak had fourteen-and-a-half years of schooling, including recent college enrollment. While acknowledging that Konshak was taking Prozac for depression at the time of the pleas, it also noted that he had testified in previous proceedings that the drug did not affect his ability to understand the proceedings or his attorney's questions. It also considered his statements at the plea hearing confirming his understanding of the constitutional rights he was waiving and the trial court's role in the plea proceeding. In addition, the trial court found that Konshak had a great deal of time to discuss the no contest pleas with his attorney, including extra time on the day the pleas were entered.

The trial court's determination that Konshak understood the plea proceedings is supported by the record, including the no contest plea colloquy and the plea questionnaire and waiver of rights form executed by Konshak. Absent a showing that Konshak misunderstood the nature or consequences of his pleas, the trial court properly found that his claim of confusion was incredible, and that he failed to meet his burden of proving that a fair and just reason existed for withdrawal of his pleas. *See* ***State v. Canedy***, 161 Wis.2d 565, 585-86, 469 N.W.2d 163, 171-72 (1991).[2] As noted by the trial court, Konshak's

[2] While Konshak stated in his motion that he believed his children were unduly influenced by social service agents into making false charges against him, he did not present any evidence or argument in support of this allegation, nor even discuss it at the hearing on his presentencing motion

allegations regarding emotional confusion merely demonstrated that he had changed his mind about wanting a trial, which was not a sufficient reason for permitting withdrawal of the pleas, even before sentencing. *See* ***id.*** at 583, 469 N.W.2d at 170-71.[3]

Konshak's claim that the trial court erroneously exercised its discretion by denying his post-sentencing motion to withdraw his no contest pleas is also without arguable merit. After appointment of appellate counsel, Konshak moved to withdraw his pleas, alleging that they were unknowingly entered because the trial court failed to explain the elements of the offenses to him, and the elements were not set forth in the plea questionnaire. He also alleged that his trial attorney failed to inform him of the elements of the offenses, and rendered ineffective assistance of counsel by failing to ascertain that he understood them.

A defendant who files a motion to withdraw his no contest pleas after sentencing is entitled to withdraw them as a matter of right if he demonstrates that he did not understand the elements of the crimes to which he pled. ***Garcia***, 192 Wis.2d at 864, 532 N.W.2d at 118. In addition, pursuant to § 971.08(1), STATS., when accepting a no contest plea, trial courts are statutorily required to address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. ***Garcia***, 192 Wis.2d at 865, 532 N.W.2d at 118. However, a violation of § 971.08(1) is not itself constitutionally significant. ***Garcia***, 192 Wis.2d at 865, 532 N.W.2d at 119.

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to withdraw his pleas. He also never claimed that he obtained information after entry of his no contest pleas which changed his beliefs as to whether undue influence had been exerted. Absent evidence that the children were influenced to make false allegations and that Konshak was unaware of such information when he entered his no contest pleas, these unsupported allegations provided no basis for withdrawal of the pleas.

[3] Because there is no arguable merit to challenging the trial court's determination that Konshak failed to show a fair and just reason for withdrawing his no contest pleas prior to sentencing, we need not reach the issue of whether the State would have been substantially prejudiced by withdrawal. *See* ***State v. Garcia***, 192 Wis.2d 845, 861 n.7, 532 N.W.2d 111, 117 n.7 (1995).

If a defendant establishes that the trial court did not determine on the record at the plea hearing that he understood the nature of the crimes charged, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Id.*** The State may utilize the entire record to show that the defendant entered a valid plea, may examine the defendant or his counsel to shed light on his knowledge and understanding, and may look to the plea questionnaire form signed by the defendant. ***Id.*** at 866, 532 N.W.2d at 119.

At the hearing at which Konshak entered his no contest pleas, the trial court did not explain the elements of the offenses to Konshak. The plea questionnaire executed by Konshak also failed to set forth the elements of the offenses. However, at the evidentiary hearing held on Konshak's postconviction motion, his trial counsel testified that she reviewed the charges with him on the day he entered the no contest pleas to insure that he understood which counts would be the subjects of the pleas. She testified that she went through the elements of the offenses and the potential penalties very carefully on the day of the pleas, and read each paragraph of the plea questionnaire to Konshak, asking him if he understood or had any questions before proceeding. She also testified that she had many meetings and telephone conferences with Konshak during the year between the filing of the initial charges and entry of the no contest pleas, and that she reviewed all of the charges with him as they were filed, including reviewing the statute books with him. She further testified that she reviewed the elements of the offenses with Konshak on numerous other occasions, discussing defenses and what the State would have to prove.

Trial counsel's testimony was consistent with the answers given by Konshak when entering his no contest pleas, indicating that he had gone over all of the charges with his attorney, and understood what the State would have to prove before he could be found guilty of those counts. It was also consistent with the representations made by Konshak on the plea questionnaire and waiver of rights form signed by him.

After hearing the testimony at the postconviction hearing, the trial court found that Konshak's trial attorney was credible when she testified that she explained the elements of the offenses to Konshak. The trial court also considered Konshak's discussions with a psychiatrist who evaluated him for purposes of determining whether he was competent and whether any basis existed for a defense based on mental illness. It found that those discussions, as well as arguments made in court during the course of the trial court proceedings, indicated that Konshak knew what he was being charged with and what the elements of those offenses were. The trial court also reiterated the findings it made at the hearing on Konshak's original motion to withdraw his pleas, determining that the pleas were knowingly, voluntarily and understandingly made, and that Konshak had excellent representation by trial counsel.

Based on the finding that trial counsel explained the elements of the offenses to Konshak, as well as the representations made by Konshak in the no contest plea colloquy and questionnaire, no basis exists to conclude that Konshak entered his pleas without knowledge of the nature of the charges to which he was pleading. Since the record also indicates that Konshak was aware of the potential penalties for the charges and the constitutional rights he was waiving, and that a factual basis existed for the pleas, no arguable basis exists for concluding that he was entitled to withdraw his pleas.

Attorney Norby's original no merit report also addresses whether the trial court acted within the scope of its discretion in sentencing Konshak to consecutive ten-year prison terms for the sexual assault convictions, and concurrent nine-month terms for the misdemeanor convictions. In addition, Attorney Norby discusses whether any basis exists to modify the sentences based on new factors. Counsel has properly analyzed these issues, and has correctly determined that they provide no arguable basis for further appellate proceedings.

The additional issues raised in Konshak's response provide no grounds for rejecting the no merit reports and determining that further appellate proceedings are appropriate. Konshak argues that his trial counsel was ineffective for failing to request an *in camera* review of the counseling

records of the victims, who apparently began receiving counseling after the initial charges against Konshak were made. To establish ineffective assistance of trial counsel, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for measuring an attorney's performance is the reasonableness of counsel's challenged conduct under the particular facts of the case, viewed as of the time of counsel's conduct. ***State v. Hubert***, 181 Wis.2d 333, 339, 510 N.W.2d 799, 801 (Ct. App. 1993). Courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 340, 510 N.W.2d at 802.

Konshak presents no arguable basis for concluding that his trial attorney acted unreasonably by failing to request an *in camera* review of the counseling records. To be entitled to an *in camera* review of treatment or counseling records, a defendant must make a preliminary showing that the files contain evidence material to his defense. ***State v. S.H.,*** 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990). The preliminary showing must establish that the records are relevant and may be necessary to a fair determination of the defendant's guilt or innocence. *See* ***State v. Shiffra***, 175 Wis.2d 600, 610, 499 N.W.2d 719, 723 (Ct. App. 1993). The defendant must establish some basis for his claim that the record being sought will contain material evidence. ***Pennsylvania v. Ritchie***, 480 U.S. 39, 58 n.15 (1987).

Konshak contends that an *in camera* review of the victims' counseling records was necessary to search for potentially exculpatory materials, including signs of manipulation by therapists. However, he does not specify what counseling records exist, when they were created, or which of the numerous child witnesses they involve. In addition, nothing cited by him provides any basis for believing that any exculpatory evidence or evidence of manipulation would be found in any records.[4] The mere fact that child

[4] Konshak cites to four pages of the May 25, 1993 preliminary hearing transcript to support his argument. In one of the pages referred to by Konshak, his trial attorney interrupted her initial questioning of K.K., a seven-year-old witness, and stated that she would:

> like to place on this record that the witness is looking and maybe getting cues from people behind me. She's obviously responding to something by her facial expressions. If there's anybody who is seated in this

witnesses are involved does not constitute a preliminary showing that their counseling records would contain evidence of witness manipulation, and that the records are therefore material to the defense. Moreover, even if the preliminary hearing transcript is deemed to show some inconsistent statements or confusion on the part of some of the children, their testimony, standing alone, provides no indication that any material evidence would be found in their counseling records.

Even in regard to K.K., the transcript pages relied on by Konshak provide no basis for concluding that his trial attorney unreasonably failed to seek an *in camera* review of her counseling records. The transcript contains no discussion of any counseling records. Trial counsel's concern that K.K. might be looking at people in the courtroom and her request that no one give cues to K.K. did not even reveal who K.K. was allegedly looking at, much less give rise to an inference that her counseling records might reveal that she was manipulated into making false charges against Konshak. Similarly, K.K.'s assent to trial counsel's representations concerning her desire to tell the district attorney or social workers what they wanted to hear does not provide a basis for concluding that her counseling records would themselves contain evidence of manipulation or other material evidence. Consequently, no arguable basis has been shown for concluding that Konshak's trial counsel acted unreasonably by failing to request them.

Konshak also argues that the no merit reports should be rejected because they fail to adequately set forth the facts of record and law which support an appeal, and because Attorney Norby failed to provide him with a complete copy of the record. Neither of these claims has merit. Counsel's no

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> area who is giving her cues, I would like them to be admonished not to be smiling, not to use facial or hand gestures.

In the other pages cited by Konshak, his trial attorney asked K.K. whether she wanted to make the district attorney and a certain social worker happy, to which K.K. answered "yes." K.K. then also answered affirmatively when trial counsel said, in reference to the social worker:

> And she's happy when you answer questions and say the things she wants to hear, right?

merit reports set forth the legal issues potentially raised by this appeal, the facts and law applicable to them, and his conclusion that the appeal lacks arguable merit. He thus complied with the ***Anders*** requirement of filing a brief referring to anything in the record that might arguably support the appeal, as well as RULE 809.32(1), STATS., which requires that an attorney cite the principal cases, statutes, and facts of record which support his conclusion that the appeal is meritless. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 439-40 (1988). Counsel's explanation of the basis for his conclusion that the appeal lacks merit did not deprive Konshak of any constitutional right. *See* ***id.*** at 443.

We also discern no basis for rejecting the no merit reports based on counsel's failure to provide Konshak with copies of everything in the record. ***Anders*** requires that the defendant be served with a copy of counsel's no merit brief and given an opportunity to respond, but imposes no requirement for service of a complete copy of the record. ***Anders***, 386 U.S. at 744. Moreover, as revealed by the transcript references in Konshak's response, he was served with copies of all of the transcripts which were material to this appeal, including the transcripts of the suppression hearing, the no contest plea hearing, the hearings on his motions to withdraw his pleas, and the preliminary hearing transcript related to the charges underlying Court of Appeals case No. 94-2811-CR-NM.

While Konshak objects that he did not receive certain other transcripts, a review of the record reveals that they pertained to the initial appearances and arraignments, as well as to a motion to sever and the preliminary hearing on the charges underlying Court of Appeals case No. 94-2810-CR-NM. Those transcripts appear immaterial to the appeal, some because they dealt with uncontested procedural matters and the others because any issues raised in them were waived by entry of Konshak's no contest pleas. *See* ***Bangert***, 131 Wis.2d at 293, 389 N.W.2d at 34; *see also* ***State v. Webb***, 160 Wis.2d 622, 636, 467 N.W.2d 108, 114 (1991) (holding that a defendant who claims error occurred at the preliminary hearing may obtain relief only prior to conviction). Since the transcripts Konshak received apprised him of the issues material to this appeal, no basis exists to conclude that he was deprived of any right by counsel's failure to provide him with additional material.

Our independent review of the record reveals no other potential issues. Therefore, we affirm the judgments and order and relieve Attorney Joseph M. Norby of further representing Konshak on this appeal.

By the Court.—Judgments and order affirmed.