COURT OF APPEALS
DECISION
DATED AND RELEASED

October 2, 1996

No. 95-2395-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GORDEN V. PEMRICH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Green Lake County: LEWIS MURACH, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Gorden V. Pemrich appeals from his convictions for one count of attempted sexual assault of a child and six counts of sexual assault of a child by hand-to-vagina or hand-to-buttock sexual contact. Pemrich pled guilty to the charges and received one three-year and six seven-year consecutive sentences, for a total of forty-five years in the Wisconsin State Prisons. Pemrich's counsel has filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967). Pemrich received a copy of the report and has filed a response.

Counsel's no merit report raises three possible arguments: (1) the plea procedures were inadequate; (2) the pleas lacked a factual basis; and (3) the sentence was excessive. Pemrich's response raises at least nine issues, including the State's right to charge multiple offenses, the adequacy of the arraignment, defects in the presentence investigation report, and the adequacy of trial and appellate counsel. Upon review of the record, we are satisfied that the no merit report properly analyzes the issues it raises, and we therefore will not address them further. We also reject the issues Pemrich raises in his response.

First, Pemrich's guilty plea waived all defects before the plea except jurisdictional defects, *see* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986), including any problems with the multiple charges, the arraignment and the adequacy of trial counsel on those matters. *See* ***Smith v. Estelle***, 711 F.2d 677, 682 (5th Cir. 1983). Pemrich has alleged nothing that transpired before the plea amounting to a jurisdictional defect. As a result, Pemrich's guilty plea operated to cure every trial court defect he has raised in his response. Pemrich's guilty plea constituted an exchange of uncertainty for a degree of certainty in terms of the outcome of the proceedings. As part of that exchange, he forfeited his right to make further challenges to pre-plea proceedings.

Moreover, Pemrich's plea reversed the presumption of innocence, ***State v. Koerner***, 32 Wis.2d 60, 67, 145 N.W.2d 157, 160-61 (1966), and he has raised no issue that merits a reexamination of his guilt. Trial and appellate courts must ignore every defect in pleading, procedure and the proceedings that does not affect the substantial rights of the parties. *See* ***State v. Weber***, 174 Wis.2d 98, 109, 496 N.W.2d 762, 767 (Ct. App. 1993). The same standard applies to actions by defense counsel. Such actions cause no prejudice unless they affect substantial rights. *See* ***Herman v. Butterworth***, 929 F.2d 623, 628 (11th Cir. 1991). Here, Pemrich raises procedural defects or substantive issues that do not bear upon substantial rights or substantially undermine his plea's fundamental factual basis. Litigants may not use ineffective counsel claims to prolong substanceless proceedings on the basis of such issues.

Likewise, Pemrich has not shown that the issues he now raises contributed to his decision to plead guilty. Litigants may withdraw pleas on a postjudgment basis if they were not intelligently and voluntarily entered. ***State v. James***, 176 Wis.2d 230, 236-37, 500 N.W.2d 345, 348 (Ct. App. 1993). This rule

rests on the premise that whatever misapprehensions plea makers may have had must concern their substantial rights. The misunderstanding must have advanced a manifest injustice. ***State v. Woods***, 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). Otherwise, plea makers could withdraw their pleas on the basis of immaterial misunderstandings. Here, Pemrich raises procedural defects that have not affected substantial rights or substantive issues that have not undermined the plea's fundamental factual basis. In sum, he has not shown a manifestly unjust misunderstanding.

Nonetheless, we briefly address one argument on the merits of his conviction. Pemrich cites § 948.025(1), STATS., as invalidating his conviction. This statute makes someone guilty of a Class B felony if he or she commits three or more violations of § 948.02(1) or (2), STATS., within a specified period of time involving the same child. According to Pemrich, this statute required the State to charge him with one offense rather than separate offenses if they occurred within a "specified period of time." Pemrich misreads § 948.025(1). The statute augments, not restricts, the State's power against sexual offenders. It permits a more general charge whenever the State can prove separate sexual assaults but not their exact places, times or nature. In that instance, the State may charge three or more assaults within a specified time frame as one collective felony, and all jurors need not agree on which acts constitute the offenses as long as they all agree on the number of offenses. Conversely, if the State can prove the exact times, places and nature of the incidents, it may charge them separately. Here, the State did identify the time, place and nature of each assault and thereby had no need to apply § 948.025.

We next reject Pemrich's claim that the presentence investigation report (PSI) contained erroneous information that had a negative impact on the length of his sentence. Pemrich alleges several problems with the PSI's preparation and substance, such as the following: (1) the author never interviewed one of the victims; (2) the author did not comply with the State's PSI regulations; (3) the report quotes Pemrich out of context; (4) the PSI misattributed the emotional and other harm the victims suffered to Pemrich's sexual assaults when such damage actually arose from other causes; and (5) the PSI understated Pemrich's compliance with treatment programs he had undergone as a result of his 1985 sexual assault conviction. For example, the PSI reported that sexual assaults prompted the victims to move to other communities; Pemrich states that other factors brought about the move. The PSI reported that Pemrich declined to participate in treatment programs related

to his 1985 sex conviction; Pemrich states that matters beyond his control limited his participation.

Pemrich and his trial counsel identified several PSI problems at the sentencing hearing. At that time, the trial court noted Pemrich's objections, with the implication that it would take the alleged discrepancies into account to the extent that they might ultimately have an influence on Pemrich's sentence. In the final analysis, everything Pemrich has mentioned, both in terms of omissions and falsehoods, had no significant role in his sentence. The trial court based Pemrich's sentence primarily on the public's need for protection, the seriousness of his offenses, the frequency of their occurrence, the self-evident harm to the victims, the shortcomings in Pemrich's character, and the victims' inability to defend themselves. These were all relevant factors. ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984).

From the facts of the offenses to which Pemrich had pled guilty, the trial court saw the risk he was posing to young girls and the public's need to end this risk. The trial court considered Pemrich a young girl predator, in part from the statements he had made about the incidents, but also from Pemrich's acts themselves and his prior history. Even if Pemrich's claims of some PSI inaccuracies were true, they would have not altered the fundamental concerns underlying his sentence or compelled the trial court to issue a lesser one. Pemrich's acts, as much as his words, revealed his predatory nature, made his incarceration necessary, and justified the trial court's lengthy sentence. His acts, together with his past record, spoke for themselves and supplied the trial court with a sufficient basis for a forty-five year sentence. Under the circumstances, the trial court was fully justified in according the public's need for protection a prominent role in Pemrich's sentencing.

Finally, Pemrich claims that the trial court was biased at sentencing. He cites the fact that the trial court signed the sentencing matrix form one week before Pemrich's sentencing. The trial court apparently signed the form before it postponed the original sentencing hearing by one week. This does not show prejudice. The trial court proceedings enjoy a presumption of regularity. *See* ***State ex rel. La Follette v. Circuit Court of Brown County***, 37 Wis.2d 329, 344, 155 N.W.2d 141, 149 (1967). We may presume that the trial court predated the form as a clerical matter in anticipation of the hearing before the court became aware of the need to reschedule it. We have no reason to infer

from the trial court's form-dating process that it was guilty of bias. Accordingly, we adopt the no merit report, affirm the conviction and discharge Pemrich's appellate counsel of his obligation to represent Pemrich further in this appeal.

By the Court.—Judgment affirmed.