COURT OF APPEALS
DECISION
DATED AND RELEASED

October 2, 1996

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.

NOTICE

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

No. 95-3298-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD BEISER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

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

PER CURIAM. Richard Beiser appeals from his two convictions for delivery of cocaine as a repeater, having pled guilty to the charges. Beiser's counsel has filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967). Beiser received a copy of the report and has filed a response. Counsel's no merit report raises five possible arguments: (1) the plea lacked an adequate factual basis; (2) trial counsel ineffectively failed to pursue an entrapment defense; (3) the prosecutor committed misconduct at the sentencing hearing; and (4) the sentence was excessive.

In his response, Beiser primarily addresses the entrapment issue and briefly raises several other points. Upon review of the record, we are satisfied that the no merit report properly analyzes the issues its raises. With the exception of the entrapment issue, we will not discuss these further. We also conclude that Beiser's response raises no issues of arguable merit for an appeal. Accordingly, we adopt the no merit report, affirm the conviction and discharge Beiser's appellate counsel of her obligation to represent Beiser further in this appeal.

Beiser's pro se entrapment defense argument supplies no basis for further proceedings. First, this issue does not show a manifest injustice, which all litigants must show in order to withdraw a plea. ***State v. Truman***, 187 Wis.2d 622, 625, 523 N.W.2d 177, 178 (Ct. App. 1994). Beiser personally spoke at sentencing. He gave the trial court a host of mitigating factors by which he sought to explain the drug transactions, such as the fact that he was taking medication at the time of the drug deals, that he was not thinking clearly, and that he was working sixteen-hour days, six days per week. He also mentioned that he knew the informant and that the informant offered him drugs first. He attributed the drug deals to poor judgment. Although Beiser now claims that the informant made 200 telephone calls before Beiser agreed to sell him drugs, Beiser never mentioned these 200 telephone calls at sentencing.

Beiser's failure to mention those calls at that time is strong circumstantial evidence that such telephone calls never took place. *See* ***Booth v. Frankenstein***, 209 Wis. 362, 370, 245 N.W. 191, 193-94 (1932). Moreover, the sheer magnitude of the allegation exposes its inherent improbability. Virtually no one would contact a drug dealer 200 times in an unsuccessful attempt to obtain drugs. Trial courts, and therefore also postconviction counsel, have no obligation to further examine allegations that are inherently improbable. *See* ***United States v. Ramos-Rascon***, 8 F.3d 704, 708 n.3 (9th Cir. 1993); ***United States v. Saunders***, 973 F.2d 1354, 1359 (7th Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993); *see also* ***Lazarus v. American Motors Corp.***, 21 Wis.2d 76, 84, 123 N.W.2d 548, 552 (1963); ***State v. Peters***, 192 Wis.2d 674, 689, 534 N.W.2d 867, 873 (Ct. App. 1995). Such claims furnish no basis to set aside validly entered guilty pleas.

In addition, Beiser's criminal predisposition would have made an entrapment defense futile. Even if Beiser could show that the informant

induced him to commit the crime, the prosecutor would be able to negate the defense by showing that Beiser was predisposed to commit the crime. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 8-9, 492 N.W.2d 381, 384 (Ct. App. 1992), *cert. denied*, 509 U.S. 929 (1993). The prosecution could have easily made such a showing. Beiser had prior drug convictions and a lengthy criminal record. Beiser gives no indication of how he would have neutralized the effect of these convictions as they affected his entrapment defense. In all probability, they would have dealt the final blow to Beiser's already inherently improbable claim that 200 informant telephone calls entrapped him into the drug deal. In short, Beiser may not set aside his guilty plea on the basis of his entrapment claim.

Beiser's other pro se issues likewise require no further proceedings. He states that his trial counsel incompetently failed to seek disclosure of any agreement the informant may have had with the prosecution, failed to seek disclosure of the informant's criminal record, failed to discuss all plea negotiations with Beiser, and failed to file a trial memorandum on mitigating factors. Beiser's plea waived most of these matters. *See* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). He was aware that his plea would waive defenses and the right to examine witnesses. Further, Beiser has not adequately described how these alleged defects materially changed the outcome of his plea and sentencing or would have materially changed the outcome of a trial had one taken place. At the postconviction stage, Beiser may not rely on vague allegations. *See* ***State v. Saunders***, 196 Wis.2d 45, 49-50, 538 N.W.2d 546, 548-49 (Ct. App. 1995); ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1389 (1995).

Moreover, Beiser's plea reversed the presumption of innocence, *see* ***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, Beiser 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, Beiser 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 made. ***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. *See* ***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, Beiser 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. Accordingly, Beiser's appellate counsel is discharged of further representing Beiser in this matter.

By the Court.—Judgment affirmed.