COURT OF APPEALS
DECISION
DATED AND RELEASED

November 5, 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. 96-0085-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRIN L. BRITT,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Darrin Britt, *pro se*, appeals from an order denying him postconviction relief. Britt raises the following arguments: (1) that the trial court erred in denying his motion to withdraw his ***Alford*** plea because the State did not file an amended information to the reduced charge of felony murder; (2) that his Sixth Amendment rights were violated by the Milwaukee Police during questioning; (3) that he was not informed of the nature of felony murder; (4)

that trial counsel was ineffective for allegedly placing biased jurors on the jury; (5) that the trial court violated his right to effective assistance of counsel by refusing to allow his attorney to withdraw prior to trial; (6) that trial counsel was ineffective for failing to inform him that an ***Alford*** plea is the same as a guilty plea for conviction purposes; (7) that the identification procedure utilized by the Milwaukee Police was unduly suggestive; (8) that the State failed to establish probable cause at the bindover; (9) that the enactment of the "three strikes" law is a new factor justifying resentencing; (10) that the trial court improperly considered his juvenile record when sentencing him; (11) that appellate counsel was ineffective; and (12) that the trial court erred in denying his request for an evidentiary hearing on his postconviction motion.[1] We affirm.

On January 7, 1992, Britt was charged with first-degree intentional homicide while armed and armed robbery, both as party to a crime. *See* §§ 940.01(1), 939.63, 939.05, and 943.32(1)(b) & (2), STATS. On August 3, 1992, after trial began, trial counsel advised the trial court that Britt wanted him to withdraw from the case. The trial court denied the request, finding insufficient grounds to allow withdrawal in the middle of trial. Later that day, Britt entered an ***Alford*** plea to a reduced charge of felony murder. *See* §§ 940.03 and 943.32(1)(b)2, STATS. Sentencing was set for September 29, 1992. On September 17, 1992, Britt filed a motion to withdraw his ***Alford*** plea. On the sentencing date, however, Britt withdrew his motion to withdraw his ***Alford*** plea and proceeded with sentencing. Britt was sentenced to thirty-five years in prison.

On May 22, 1995, Britt filed a postconviction motion requesting that he be allowed to withdraw his ***Alford*** plea, have the charge of armed robbery dismissed, and receive an evidentiary hearing on his ineffective-assistance-of-counsel claims. The trial court denied his motion without a hearing. Britt then filed a supplemental postconviction motion alleging that his ***Alford*** plea was void because an amended complaint was never filed as to the reduced charge of felony murder, and that trial counsel was ineffective for advising him to enter a plea to an offense with which he was never charged. That motion was also denied by the trial court.

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

The entry of an ***Alford*** plea is an admission of factual guilt. *See* ***State v. Garcia***, 192 Wis.2d 845, 856-857, 532 N.W.2d 111, 115 (1995). Therefore, an appeal from a sentence following an accepted ***Alford*** plea is severely limited. *See* ***Menna v. New York***, 423 U.S. 61, 62-63 n.2 (1975). The entry of an ***Alford*** plea waives all non-jurisdictional defects in the proceeding and all non-jurisdictional defenses to the charges, including claims of constitutional violations arising prior to entry of the plea. *See* ***State v. Washington***, 142 Wis.2d 630, 635-636, 419 N.W.2d 275, 277 (Ct. App. 1987). Thus, the scope of our review is limited to any points of error challenging the voluntary and understanding nature of the plea, jurisdictional defects that occurred before the entry of the plea, jurisdictional defects that occurred after the entry of the plea, and matters that occurred after the entry of the plea.

Upon consideration of the foregoing, Britt has waived the following non-jurisdictional and constitutional arguments by entering his ***Alford*** plea: (1) that he should be permitted to withdraw his ***Alford*** plea because an amended information was not filed; (2) that his Sixth Amendment rights were violated; (3) that trial counsel was ineffective for allegedly placing biased jurors on the panel; and (4) that the trial court violated his right to effective assistance of counsel by refusing to permit his attorney to withdraw prior to trial.

Britt also asserts that he received ineffective assistance of counsel because he was not advised by trial counsel that an ***Alford*** plea is the same as a guilty plea for conviction purposes. The trial court determined that Britt's postconviction motion failed to allege sufficient facts to warrant a hearing on this ineffective-assistance-of-counsel claim. We review a trial court's decision on whether to hold a ***Machner*** hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing....
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson*** [***v.***

> ***State***, 54 Wis.2d 489, 497–498, 195 N.W.2d 629, 633 (1972).]

Id., 201 Wis.2d at 310, 548 N.W.2d at 53 (citation omitted). To prevail on this argument, Britt must show that: (1) his trial counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because representation is not constitutionally ineffective unless both elements are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993), we may dispose of an ineffective-assistance-of-counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). The standard for the element of prejudice is whether "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Here, Britt has failed to show prejudice. His argument, that trial counsel did not advise him that an ***Alford*** plea is the same as a guilty plea for purposes of conviction, could not prejudice his defense because the trial court advised Britt of the plea consequences as did the plea questionnaire. Britt's allegation that his trial counsel did not explain to him the consequences of his plea is thus insufficient to warrant a ***Machner*** hearing.

Britt also argues that he should be permitted to withdraw his ***Alford*** plea because he was not informed of the nature of felony murder. After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A plea is manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. ***State v. Giebel***, 198 Wis.2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995). In order to assure that a plea is so entered, the trial court is obligated by § 971.08(1)(a), STATS., to ascertain that a defendant understands the nature of, and potential punishment for, the charge and that a factual basis exists for a finding of guilt. ***State v. Bangert***, 131 Wis.2d 246, 260-261, 389 N.W.2d 12, 20 (1986). To withdraw a plea, a defendant must first make a *prima facie* showing of noncompliance by the trial court, and allege that he or she did not understand the information that "should have been provided at the plea hearing." ***Id.***, 131 Wis.2d at 274, 389 N.W.2d at 26.

The trial court ruled that Britt had not alleged sufficient facts to entitle him to postconviction relief. We agree. Britt signed a very extensive plea

questionnaire, which indicated the charge of felony murder carried with it a forty-year maximum period of incarceration. A completed plea questionnaire is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis.2d 823, 827-828, 416 N.W.2d 627, 629-630 (Ct. App. 1987). Further, the record reveals that the trial court conducted an oral colloquy with Britt and ascertained that he understood that by pleading guilty pursuant to an ***Alford*** plea, that the trial court could sentence him to the maximum despite any plea recommendation. We conclude that the record reflects a knowing, voluntary and intelligent plea.

Britt also argues that the identification procedure utilized by the Milwaukee Police was unduly suggestive. The record indicates, however, that Britt never filed a motion to suppress prior to the entry of his plea; therefore, this issue was waived. *See* § 971.31(2), STATS.; ***Madison v. State***, 64 Wis.2d 564, 572-573, 219 N.W.2d 259, 262-263 (1974) (a claim of a constitutional right will be deemed waived unless timely raised in the trial court).

Further, Britt argues that there was insufficient evidence to order a bindover following his preliminary hearing. "[A] defendant who claims error occurred at his preliminary hearing may only obtain relief before trial." ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991), *cert. denied*, 502 U.S. 889 (1991). Here, Britt failed to challenge the bindover before trial; he may not challenge the bindover now.

Britt also claims that the trial court erred in not allowing him to withdraw his ***Alford*** plea because of the enactment of the "three strikes" law. *See* § 939.62(2m)(b), STATS. He argues that the enactment of the "three strikes" law is a new factor that frustrated the purpose of his pleading to felony murder because the purpose of his plea was to avoid being exposed to a life sentence and that the "three strikes" law exposes him to the possibility of being sentenced to life in prison for the next crime he commits. Britt misapplies the "new factor" test. An analysis under the "new factor" test requires a request for sentence modification. *See* ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Here, Britt seeks to withdraw his plea. The enactment of the "three strikes" law does not rise to the level of "manifest injustice," which all litigants must show in order to withdraw a plea after sentencing. *See* ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). As the State

points out, Britt will never be subject to penalty under the "three strikes" law unless he commits another crime.

Britt also claims that the trial court erroneously exercised its discretion by giving primary consideration to his juvenile record when it sentenced him. This appeal is from the denial of his postconviction motion brought pursuant to § 974.06, STATS. "A sec. 974.06 proceeding[] may properly challenge the authority to impose sentence but cannot be used to challenge a sentence because of an alleged [erroneous exercise] of discretion" when a sentence is within the statutory maximum. ***Smith v. State***, 85 Wis.2d 650, 661, 271 N.W.2d 20, 24–25 (1978). Here, Britt received a thirty-five year sentence, well within the forty-year maximum set by statute. This issue raised by Britt, therefore, is not cognizable under § 974.06.

Further, Britt claims that the trial court erred in failing to consider his claim of ineffective assistance of appellate counsel. The trial court held that such a claim could not be considered in a postconviction proceeding. We agree. *See* ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992) (claims of ineffective assistance of appellate counsel are not cognizable in a motion for postconviction relief; such claims should be presented in a petition for writ of habeas corpus in the appellate court).

By the Court. – Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.