COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

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.

No. 96-2135-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID WOMBLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. David Womble appeals from an order denying postconviction relief from a judgment convicting him on two counts of forgery. The court entered the conviction on Womble's guilty plea. In his postconviction motion, Womble sought to withdraw that plea because he entered it involuntarily, and with ineffective assistance of trial counsel. The sole issue is whether the trial

court erroneously exercised its discretion by denying Womble's motion. We affirm on that issue.

In exchange for Womble's plea, the State dismissed other charges against him. The parties also agreed to jointly recommend a seven-year prison sentence. At the plea hearing, Womble affirmatively stated that he understood the charges and their elements, and the consequences of his plea. When asked if he had any questions for the court or anything he did not understand, Womble answered "no." The trial court did not inform Womble of the potential punishment, as § 971.08(1), STATS., requires, or that the trial court was not bound by the terms of the plea bargain.

At sentencing, Womble took responsibility for at least one of the forgeries, and acknowledged that he deserved imprisonment for it. He also offered restitution to his victim. Notwithstanding the jointly recommended sentence, the trial court imposed concurrent ten-year prison terms on Womble, consecutive to a sentence Womble was already serving on a parole violation.

At the hearing on Womble's postconviction motion to withdraw his plea, Womble asserted his innocence on one of the two charges. He also testified that he was under the influence of drugs at the plea hearing, and was not aware that he might receive a sentence greater than the recommended seven years. He also stated that he was confused and under pressure because the State had unlawfully revoked his parole.

He further testified that counsel never alerted him to the possibility of a longer sentence, and never discussed the merits of his case with him. Trial counsel testified to the contrary on both points, and defended herself against assertions by Womble's postconviction counsel that she did not adequately

investigate the charges. The trial court found that Womble was not telling the truth in any of his postconviction testimony, and that other evidence showed that he was aware that the trial court might impose a sentence longer than seven years. Relief was denied, resulting in this appeal.

To withdraw a guilty plea after sentencing, the defendant must show a manifest injustice if withdrawal is not allowed. ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). Whether to allow withdrawal is discretionary, and we will reverse only for an erroneous exercise of discretion. ***Id***. at 237, 418 N.W.2d at 22. An involuntarily entered plea will constitute a manifest injustice. ***Id***. at 238, 418 N.W.2d at 22. A plea entered without effective assistance of counsel may also be a manifest injustice. ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993). Where the defendant has shown that the trial court failed to follow the procedures set forth in § 971.08, STATS., or other mandatory procedures imposed by the Supreme Court, the State has the burden to show by clear and convincing evidence that the defendant's plea was knowing, voluntarily and intelligent despite the inadequacy of the plea proceeding. ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986).

The record shows by clear and convincing evidence that Womble knew he could receive a sentence in excess of the recommended seven years, despite the trial court's failure to advise him of that fact at the plea hearing. Trial counsel testified that she warned Womble of that possibility before he entered the plea, and the trial court deemed that testimony credible. Additionally, the court noted that Womble sent the court a letter after entering his plea, but before sentencing, in which Womble acknowledged that the court was not bound by the plea agreement. As to whether Womble was ever advised of the maximum penalties, Womble acknowledged at the plea hearing that he was aware of the

contents of the complaint, which included a statement that the maximum penalty for the crimes charged was ten years and a $10,000 fine.

Womble failed to show that his plea was otherwise involuntarily entered. The trial court heard Womble testify to an impaired and confused mental state, and deemed that testimony incredible in its entirety. That credibility determination is not subject to review. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Without benefit of that testimony, Womble has only his unequivocal statements from the plea hearing that he fully understood the proceeding.

Womble also failed to prove that counsel ineffectively represented him or that her representation prejudiced him. The trial court found that Womble lied when he testified that counsel did not properly advise him. As for her alleged failure to properly investigate the facts, the record contains no proof that any further investigation would have changed the outcome of this case. The facts of record suggest overwhelming evidence of guilt. Womble did not offer proof, nor for that matter allege, that further investigation would have revealed exculpatory evidence. When seeking relief based on ineffective assistance of counsel, the defendant bears the burden of showing both that his counsel was ineffective, and that the ineffectiveness was prejudicial. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Womble failed to meet his burden on either issue.

By the Court.—Order affirmed.

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