COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2797-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN B. POST,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Steven B. Post appeals a judgment of conviction and orders denying his postconviction motions. He raises numerous issues. We affirm.

¶2 Pursuant to ***Alford*** and no-contest pleas, Post was convicted of four felonies in connection with a fifteen-hour incident at a motel in which he resisted being taken into custody. After entry of the judgment of conviction, Post moved to withdraw his pleas. The court held an evidentiary hearing and wrote a detailed order denying the motion. Post appealed. At Post's request, we allowed him to file an additional postconviction motion in the trial court, which was denied without an evidentiary hearing. Post appeals from the judgment and both orders.[1]

¶3 Post argues that he should be allowed to withdraw his pleas because of a trial court ruling which denied his request to discharge his second appointed attorney on the day set for jury selection. Post entered his pleas later that day. Post argues that the trial court's ruling was erroneous and that he felt forced to plead by the ruling, and therefore he should be allowed to withdraw his plea.

¶4 Post cites no case law holding that a trial court's allegedly erroneous pre-trial ruling can be a basis to withdraw a plea. Such an approach would circumvent the guilty-plea waiver rule which states, with certain exceptions not presented here, that a valid plea of guilty or no contest waives nonjurisdictional defects and defenses, including violations of constitutional rights before the plea. *See* ***State v. Damaske***, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997). We decline to circumvent the waiver rule in this fashion and do not consider the argument further as a basis to withdraw the pleas. If Post's pleas are valid, the attorney substitution issue is waived.

[1] The appendix to Post's brief in this court includes a copy of the trial court decision which is annotated with someone's handwritten responses to the court's analysis. We recognize that these annotations may not have been made by counsel, or if they were, may not have been made specifically for viewing by this court. However, regardless of their origin, the appendix should not include written remarks which are essentially argument.

¶5 Post also argues that he should be allowed to withdraw his pleas because his trial counsel was ineffective in two ways. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *See* ***id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A defendant seeking to withdraw pleas based on ineffective assistance of counsel must allege that he would have pled differently if counsel had not been ineffective, and this allegation must be supported by objective factual assertions which allow the reviewing court to meaningfully assess the claim. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996).

¶6 Post's first argument is that counsel was ineffective by predicting that if Post pled he would receive a total sentence of less than five years. The trial court found that it was deficient performance for trial counsel to have predicted this sentence length. In the proposed plea, the maximum total sentence was forty-six years, and that was the term the State was intending to request. The trial court sentenced Post to twenty-eight years. However, the court concluded that Post was not prejudiced by the prediction because he did not rely on it in making his decision to plead.

¶7 Post argues that the court erred in finding that he did not rely on the prediction. We conclude that the finding is sufficiently supported by the evidence. The court relied in part on Post's own postconviction testimony in which he stated at one point that he did not believe counsel's prediction when it was made. The

court noted that although Post tried to back away from that answer, "his demeanor made clear that his original answer was the truth." Although there also may be evidence that would support the finding Post desires, none of it is so compelling as to make the court's actual finding clearly erroneous. Accordingly, we agree with the court's conclusion that Post was not prejudiced by the deficient sentence prediction.

¶8 Post also argues that his trial counsel was ineffective in failing to file certain pre-trial motions. One of those motions would have been to sever the three counts of felon in possession of a firearm from the remaining five charges, with the goal of preventing the jury from finding out about Post's earlier felony conviction. To withdraw a plea based on ineffective assistance of counsel, the defendant must allege that if counsel's performance had not been deficient, the defendant would not have entered the plea. *See* ***Bentley***, 201 Wis. 2d at 313-14. Post does not direct us to any such allegation about a motion to sever or to any supporting testimony in the postconviction record. Therefore, we have reviewed his motions for that information. The issue was not raised at all in the first motion. In a second motion, he asserted in a cursory fashion that he would not have pled. In the accompanying memorandum he conceded that prejudice is "harder to pin down," and argued that had severance occurred, his and his trial counsel's outlook "might have been substantially brighter," affecting his plea decision.

¶9 We conclude this is an insufficient allegation of prejudice. First, it is highly speculative whether the trial court would have granted severance. But even if severance were granted, the best Post can allege is that it "might" have brightened his "outlook." This is far from being a firm allegation that he would not have pled. Therefore, this portion of the second motion was properly denied without a hearing.

¶10 Post also argues that his attorney should have challenged one of the statutes he was charged with violating on vagueness and overbreadth grounds. The State argues that this issue was waived by Post's pleas, but the State then also concedes that conviction under a vague or overbroad statute might be a manifest injustice warranting withdrawal of the pleas. The net result is that the State concedes that, one way or another, we must review the merits of Post's argument.

¶11 The charge in question was for failure to comply with an officer's attempt to take a person into custody, WIS. STAT. § 946.415 (1997-98).[2] Post expressly limits his vagueness and overbreadth argument to the second element of the crime, provided in § 946.415(2)(b). That element requires that the defendant retreat or remain in a building or place and, through action or threat, attempt to prevent the officer from taking him or her into custody. However, as the State argues, it is not persuasive for Post to argue that only one element of a crime is vague or overbroad. Instead, each element must be viewed in the context of the others and the whole, because it is the whole crime for which the defendant has been convicted. If the analysis were conducted element-by-element, it would be impossible to write criminal statutes for simple crimes such as theft, in which one element is simply the taking and carrying away of movable property. *See* WIS. STAT. § 943.20(1)(a). However, when we view all the elements of § 946.415 together, we are satisfied that the statute is not vague or overbroad.

¶12 Post also made several other arguments about ineffective assistance of counsel. However, these arguments were not presented as a basis to withdraw his pleas, and therefore they are waived by the valid pleas.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

By the Court.—Judgment and orders affirmed.

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