COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP171 **Cir. Ct. No. 2000CF411**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLO U. MORALES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marlo U. Morales appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. He claims the trial court

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

erred in denying his motion without conducting an evidentiary hearing. Because the trial court did not err in summarily denying Morales's motion, we affirm.

BACKGROUND

¶2 On January 25, 2000, eleven-year-old Laticia T. was taken to the hospital regarding a possible sexual assault. Laticia indicated that Morales, her mother's boyfriend at the time, had forced her to have sexual intercourse with him, most recently on January 21, 2000. She indicated he had also sexually assaulted her several times in the fall of 1999.

¶3 In a statement to police, Morales admitted that he had sexual intercourse with Laticia on five occasions. He claimed, however, that the incidents were consensual and without force. Morales was charged with two counts of sexual assault of a child. The first count related to acts that occurred between September 1, 1998, and January 20, 2000. The second count related to the sexual assault that occurred between January 21, 2000, and January 22, 2000. After much procedural wrangling, Morales entered ***Alford***[2] pleas to both counts.

¶4 The trial court sentenced Morales to a forty-year indeterminate sentence on the first count because the acts preceded the effective date of the truth-in-sentencing law. The trial court also sentenced him to a concurrent sixty-year determinate sentence on the second count, with forty years of initial confinement and twenty years' extended supervision.

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

¶5 Morales's appellate counsel filed a no-merit report, and Morales responded to the report. This court accepted the no-merit report and affirmed the judgment. Subsequently, Morales filed a WIS. STAT. § 974.06 motion, *pro se*, seeking plea withdrawal, alleging that he received ineffective assistance of counsel because his counsel failed to advise him about, object to, or raise the issue that the trial court did not explain to him that a determinate sentence meant he would serve the entire initial confinement portion of his sentence without good time or parole. The trial court summarily denied the motion. Morales now appeals.

DISCUSSION

¶6 Morales argues that the trial court erred when it summarily denied his postconviction motion raising ineffective assistance of counsel. He contends he is entitled to a hearing on his claim of ineffective assistance of counsel, and plea withdrawal due to the trial court's failure to explain during his plea hearing that he would be serving "day for day" the sentence imposed. The trial court ruled that his argument did not apply to count one, which preceded the application of the truth-in-sentencing law and that Morales waived his right to raise this issue with respect to count two. We agree.

¶7 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

¶8 An attorney's performance is not deficient unless he or she makes errors so serious that counsel is not functioning as the "counsel" guaranteed the

defendant by the Sixth Amendment. ***Id.*** at 687. To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance "actually had an adverse effect on the defense." ***Id.*** at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. ***Id.***

¶9 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of a defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶10 As most pertinent to this case, a trial court is not obligated to conduct a hearing every time a defendant alleges ineffective assistance of counsel. The trial court need not hold a hearing if the defendant fails to allege sufficient facts in the motion, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v.***

Allen, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶11 Morales asserts that his plea was not entered knowingly because counsel did not advise him that he would be serving the entire portion of the determinate sentence. He claims that he is entitled to a hearing on this claim as well. In order to obtain a hearing on a plea withdrawal allegation, the defendant bears the burden of making a *prima facie* showing that his plea was accepted without the trial court's conformance with WIS. STAT. § 971.08(1)(a) or other mandatory procedures. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant makes a sufficient showing, the burden shifts to the state to prove at an evidentiary hearing despite the statutory violation, that the plea was entered knowingly, voluntarily and intelligently. ***Id.*** Thus, in order to obtain an evidentiary hearing on his claim of plea withdrawal, Morales had to make a *prima facie* showing that a violation occurred during his plea hearing.

¶12 The trial court, however, did not even reach the merits of the issue because the record conclusively demonstrated that Morales waived his right to raise this issue. As noted in the postconviction order, Morales's argument does not apply to the sentence imposed on count one because the truth-in-sentencing law did not apply to count one. Thus, we confine our review to the second count.

¶13 In rejecting Morales's argument, the trial court relied on ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), which prohibits a defendant from seeking collateral review of a constitutional claim that could have been raised as part of the direct appeal, unless a sufficient reason is set forth explaining why the issue was not raised during the first appeal. ***Id.*** at 185-86.

¶14 We could, as the trial court did, dispose of this case on the basis of ***Escalona-Naranjo***. We recently recognized that the procedural bar under ***Escalona-Naranjo*** is applicable when a defendant's postconviction motion and direct appeal were resolved via the no-merit procedure pursuant to WIS. STAT. § 809.32. ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Application of ***Escalona-Naranjo*** to a no-merit case is appropriate as long as the no-merit procedures were in fact followed, and carry "a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." ***Tillman***, 281 Wis. 2d 157, ¶20.

¶15 Here, the no-merit procedures were in fact followed and provided the requisite "sufficient degree of confidence." The record demonstrates that Morales's attorney filed a no-merit report as his direct appeal in this case. Morales was afforded and, in fact, did respond to the no-merit report. He did not raise, in that response, the issues he raises in this appeal. Further, he fails to offer any sufficient reason why he did not raise the issue in his response to the no-merit report. This is not a case where the defendant sat idly by, relying on his counsel to raise all appellate issues. Morales was actively involved in objecting to the no-merit response. He wanted to dismiss his appellate attorney and proceed *pro se*. He had the opportunity, via his response to the no-merit report, to raise any and all issues he believed to be meritorious. *See* WIS. STAT. § 974.06(4). Based on the foregoing, we conclude that ***Escalona-Naranjo*** applies to this case and that Morales is procedurally barred from raising the issues presented in this appeal.

¶16 Moreover, Morales's argument fails on the merits as well. Morales's entire claim rests with the fact that the trial court failed to explain to him the effects of a sentence under the truth-in-sentencing law. He argues that he did not know the sentence imposed would not be subject to good-time credit or

parole, and that he did not know that he would be serving "day for day" the sentence imposed. This same issue was recently resolved in ***State v. Plank***, 2005 WI App 109, ___ Wis. 2d ___, 699 N.W.2d 235. In ***Plank***, we held that a defendant is not entitled to withdraw his plea even if the trial court fails to inform him that, under truth-in-sentencing, he was ineligible for parole or good-time credit. ***Id.***, ¶¶12-17. We reached that determination after concluding that this information was a collateral, rather than a direct, consequence of the plea. ***Id.***, ¶¶13, 17. A trial court is expected to inform a defendant of all the direct consequences of a plea, but is not required to inform him of all the collateral consequences of a plea. ***Id.***, ¶13.

¶17 Thus, because Morales's complaint is that the trial court did not inform him about a *collateral* consequence of his plea—that there is no parole or good-time under truth-in-sentencing—his argument is without merit. Morales's misunderstanding about the truth-in-sentencing law is not a basis for plea withdrawal. Therefore, the trial court did not err in failing to inform Morales of the "day for day" effect of truth-in-sentencing, his trial counsel was not ineffective for failing to raise this issue, and there was no reason for the trial court to conduct an evidentiary hearing on his postconviction motion raising this issue.

By the Court.—Order affirmed.

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