COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP495-CR **Cir. Ct. No. 2004CF6412**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. COUNTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID A. HANSHER, WILLIAM SOSNAY, and DENNIS R. CIMPL, Judges.[1] *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

[1] The Honorable David A. Hansher entered the judgment. The Honorable William Sosnay denied Counts's first postconviction motion to withdraw his plea. The Honorable Dennis R. Cimpl denied Counts's second postconviction motion to withdraw his plea.

¶1 FINE, J. William F. Counts appeals a judgment entered after he pled no contest to two counts of armed robbery, party to a crime, *see* WIS. STAT. §§ 943.32(2) and 939.05. His plea was entered under ***North Carolina v. Alford***, 400 U.S. 25 (1970), which says that it is okay for a defendant to accept conviction even though he or she protests innocence, ***id.***, 400 U.S. at 32–37. He also appeals postconviction orders denying, without holding a hearing, Counts's requests to withdraw his plea. Counts argues he should be allowed to withdraw his pleas because his lawyer gave him ineffective representation by: (1) not filing a timely notice of alibi; and (2) not seeking dismissal of the charges against him because of an alleged violation of his right to a speedy trial. We affirm.

I.

¶2 On November 9, 11, and 17, 2004, there were three armed robberies, and Counts was arrested for them on November 18, 2004. The next day he was placed in custody on a probation hold in an unrelated case. On November 24, 2004, Counts was charged with three counts of armed robbery as party to a crime. After his initial appearance and preliminary examination on the armed robberies, a scheduling conference was set for January 4, 2005. From that time until March 16, 2005, several plea-hearing dates were adjourned because Counts's lawyer was trying to work out a plea bargain between Counts and the prosecutor. On March 16, Counts's lawyer told the circuit court that plea negotiations were unsuccessful. The circuit court then admonished Counts about "stringing this case out … only for your own advantage." A final pretrial hearing was set for June 13, 2005 (later rescheduled to July 26, 2005) and the trial date was set for August 8, 2005.

¶3 Counts's probation in the other case was revoked and, on June 29, 2005, he was reconfined to serve one year and six months in that case. On July

26, 2005, at what was scheduled to be the final pretrial hearing in this case, Counts's lawyer asked to withdraw telling the circuit court that "it is impossible for me and Mr. Counts to work together and to communicate." The circuit court permitted the withdrawal and the case was adjourned to August 23, 2005, to allow new counsel adequate time to prepare. The matter was adjourned again to September 22, 2005, so Counts could file a suppression motion. At a pretrial conference on November 11, 2005, Counts rejected the State's final plea offer and made his first speedy-trial demand. A jury trial was scheduled for December 12, 2005. On December 7, 2005, the State filed a motion to adjourn because a person it said was a key witness was unavailable. In response, on December 12, 2005, the circuit court told the parties that it was involved in a homicide trial and that Counts's trial would thus have to be reset. A pretrial conference was set for March 17, 2006, with the new jury trial set for May 15, 2006. On the pretrial date, Counts's lawyer asked to withdraw from the case because of personal and family health issues. Counts did not object, saying that his case "is delicate so I [would] rather have someone who could devote all their attention toward it."

¶4 The case was set for a status conference on April 4, 2006. On that date, the case was adjourned to April 18, 2006, because a new lawyer from the public defender's office had not yet been appointed. Once the appointment was made, the case was again adjourned to April 27, 2006, at the lawyer's request because he had a conflict in his calendar. On that date, both Counts's lawyer and the State requested that the May trial date be adjourned. Counts's lawyer renewed the speedy-trial demand on April 27, 2006. A pretrial hearing was then set for June 29, 2006, and the trial was scheduled for July 17, 2006.

¶5 At the pretrial hearing on June 29, Counts filed a notice of alibi for the first time, saying that Awilda Pagan "may testify" that "at the time [of] the

crimes … [Counts] was at an apartment" in a different part of Milwaukee. The State also asked for a brief adjournment because one of the victims would not be available on July 17, and the victim was needed to prove the State's case in one of the robberies. The circuit court gave Counts the option of keeping the July 17, 2006 trial date without the alibi witness, or granting a short adjournment to July 31, 2006, in order to give the State an opportunity to investigate the alibi defense. *See* WIS. STAT. § 971.23(8)(a) (notice of alibi must be filed thirty days or more before the trial). Counts elected to keep the trial date and forgo the alibi defense. The State withdrew its request for an adjournment and elected to pursue only two of the armed robbery counts.

¶6 After Counts rejected a proposed plea bargain on July 11, 2006, the case was set for trial on July 18, 2006. On that date, Counts entered his ***Alford*** plea to two counts of armed robbery as party to a crime.

II.

¶7 Counts argues that the circuit court erred when it denied his motions to withdraw his plea without holding a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), on his claims that his trial lawyer gave him ineffective representation by not: (1) filing a timely notice of alibi, and (2) seeking dismissal of the charges because of an alleged speedy-trial violation. There was no error.

¶8 When a defendant seeks to withdraw a guilty or no contest plea after sentencing, he must prove "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. James***, 176 Wis. 2d 230, 236–237, 500 N.W.2d 345, 348 (Ct. App. 1993). The manifest-injustice test is satisfied

if the defendant's plea was the result of the ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213–214, 500 N.W.2d 331, 335 (Ct. App. 1993).

¶9 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show 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.***, 466 U.S. at 694. "'[B]oth the performance and prejudice components ... are mixed questions of law and fact.'" ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985) (citation omitted). The circuit court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether the attorney's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

¶10 Counts has not shown that a ***Machner*** hearing was warranted because the Record conclusively shows that Counts's lawyer did not give him ineffective representation. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437 (Circuit court has discretion to deny a postconviction motion for a ***Machner*** hearing "if the motion does not raise facts

sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.").

A. *Alibi.*

¶11 As we have seen, Counts contends that his trial lawyer gave him ineffective representation because the lawyer did not, Counts argues, timely file the notice of alibi. The notice of alibi was filed on June 29, 2009, eighteen days before the trial was to begin. As we have also seen, WIS. STAT. § 971.23(8)(a) requires that a notice of alibi be filed thirty days or more before the start of a trial. The Record conclusively shows Counts is not entitled to relief.

¶12 First, Counts did not tell his lawyer about the alleged alibi witness until just before the lawyer filed the notice. Thus, whatever delay there was in filing the notice of alibi was his fault and not the fault of the lawyer. Second, Counts has not linked what he says the proposed testimony of the alibi witness would have been with his decision to plead no contest to the two charges—significantly, his notice only claims that the witness "may testify" that Counts was somewhere else. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (defendant seeking to withdraw a plea must provide a specific explanation of why, but for the alleged error, he would have gone to trial rather than entered the plea).

B. *Speedy Trial.*

¶13 Counts argues his lawyer ineffectively represented him by not seeking dismissal of the charges because of an alleged violation of his right to a speedy trial. The Record conclusively shows, however, that Counts's speedy-trial right was not violated.

¶14 In considering a speedy-trial claim, we apply a balancing test and examine the conduct of the State and the defendant to determine if the defendant's right to a speedy trial was violated. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The test involves several factors: the length of the delay, the reason for the delay, the defendant's timely assertion of the speedy-trial right, and any actual prejudice to the defense from the delay. ***Ibid.***

¶15 The length of time between when Counts was charged and the final trial date was twenty months, which is presumptively prejudicial. *See* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992) (a twelve-month delay between charging and trial is considered presumptively prejudicial: "unreasonable enough to trigger the ***Barker*** enquiry"). Presumptive prejudice, however, does not establish *actual* prejudice; rather, it "triggers further review of the allegation under the other three ***Barker*** factors." ***State v. Lemay***, 155 Wis. 2d 202, 212–213, 455 N.W.2d 233, 237 (1990).

¶16 As we have seen, the reasons for the delays and repeated adjournments are primarily attributed to Counts. From January of 2005 to March of 2005, the case was delayed because Counts was considering accepting conviction. After three months, Counts said he did not want to do that. The circuit court opined that Counts was manipulating the system. At the initial final pretrial hearing, Counts's lawyer asked to withdraw because he had problems communicating with Counts. Thus, the delay between July of 2005 and November of 2005 was not caused by the State. Counts's new lawyer made a speedy trial demand on November 11, 2005, and the case was set for trial on December 12, 2005. Shortly before the trial, although the State asked to adjourn the trial because of its problems getting a witness, the circuit court had to bump Counts's trial because of its calendar congestion. In March of 2006, Counts's lawyer withdrew

for personal health reasons and Counts did not object. From March until April of 2006, the delay was related to getting Counts a new lawyer and the lawyer's need to prepare properly. This, too, was not the State's fault. Counts's lawyer then requested an adjournment of the May of 2006 trial date and the July 17, 2006 trial date was set. This delay, too, was not the fault of the State. After twenty months and initially refusing to accept any plea bargains, Counts entered his ***Alford*** pleas in July of 2006.

¶17 Counts was responsible for most of the delays he now claims deprived him of his right to a speedy trial. Further, Counts has not shown that he was prejudiced by the twenty-month delay in this case. The speedy-trial right protects three interests: (1) "oppressive pretrial incarceration"; (2) "anxiety and concern of the accused;" and (3) impairment of the ability of the defendant to mount a defense. *See* ***Barker***, 407 U.S. at 532. While waiting for the trial in this case, Counts was incarcerated in another case. Thus, the first factor—oppressive pretrial incarceration is not applicable. Although he alleges that the delay caused him stress, he does not show that the delay hindered his defense—loss of witnesses or evidence, faded recollection, or anything else. *See* ***State v. Leighton***, 2000 WI App 156, ¶23, 237 Wis. 2d 709, 724, 616 N.W.2d 126, 136. He has also not shown that his decision to plead no contest was the result of the delay.[2]

[2] Counts argues that he decided to plead no contest because he could not present his alibi defense. As we have seen, Counts rejected the circuit court's offer to allow the alibi witness to testify if Counts agreed to postpone the trial for two weeks to give the State its right to investigate. As we have also already seen, Counts was then incarcerated on another case at the time, so any contention that he was pressured by being locked up to relinquish the alibi defense would be frivolous.

¶18 We affirm.

By the Court.—Judgment and orders affirmed.

Publication in the official reports is not recommended.