COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2281 **Cir. Ct. No. 2003CF1016**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREEMAN EARL BELL, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Freeman Earl Bell, Jr., appeals from an order denying his pro se WIS. STAT. § 974.06 (2007-08),[1] postconviction motion to

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

withdraw his guilty plea. He argues that he was entitled to the appointment of counsel under WIS. STAT. § 974.03(3)(b), that he has sufficient reasons why his claims were not previously raised, that he was denied the effective assistance of trial counsel because counsel failed to meet with and interview him, induced his plea by misrepresenting that he would receive the same sentence as a codefendant, and failed to investigate grounds to suppress evidence, that his right to due process was violated by the prosecutor's failure to disclose a police interview report, and that his postconviction counsel abandoned him. We reject his claims and affirm the order denying his motion for postconviction relief.

¶2 Bell entered a guilty plea to party to the crime of armed robbery with use of force arising from a 2003 bank robbery.[2] Bell was appointed postconviction counsel after sentencing. A motion for postconviction relief sought sentence modification. The motion was denied on March 2, 2006, and no appeal was taken.

¶3 In June 2008, Bell filed a pro se motion for postconviction relief under WIS. STAT. § 974.06. Three times he moved for the appointment of counsel. Three times the trial court declined to appoint counsel. In May 2009 Bell filed two motions to amend his postconviction motion. An evidentiary hearing was conducted on Bell's motion during which postconviction counsel, trial counsel, and Bell testified. The trial court denied Bell's motion concluding that his claims were not supported by the facts. The specific findings by the trial court will be set forth as necessary to address Bell's claims.

[2] Six other charges, including one count of attempted first-degree intentional homicide and three counts of first-degree recklessly endangering safety, were dismissed as part of the plea agreement.

APPOINTMENT OF COUNSEL

¶4 Bell has no constitutional right to the appointment of counsel for a WIS. STAT. § 974.06 motion. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998). Section 974.06(3)(b), provides: "If it appears that counsel is necessary and if the defendant claims or appears to be indigent, [the court shall] refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977." Here the trial court did not make a determination of whether a referral should be made. It offered Bell the chance to ask the state public defender to provide representation and Bell indicated that he wanted to pursue a request by personal letter to the state public defender. The state public defender refused to appoint counsel for Bell.

¶5 Bell argues that upon the state public defender's refusal to appoint counsel, the trial court erroneously exercised its discretion not appointing counsel itself. *See* ***State v. Lehman***, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987) ("The trial court has the authority to appoint counsel whenever in the exercise of its discretion it deems such action necessary."). When there is no constitutional right to the appointment of counsel, "[a] court may use its inherent discretionary authority to appoint counsel in furtherance of the court's need for the orderly and fair presentation of a case." ***Joni B. v. State***, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996). *See* ***State ex rel. Chiarkas v. Skow***, 160 Wis. 2d 123, 137-38, 465 N.W.2d 625 (1991) (the trial court's inherent authority to appoint counsel is not based on an individual's constitutional right to counsel, but rather based on the need to serve the interests of the trial court).

¶6 When the trial court addressed Bell's first motion for the appointment of counsel, Bell had already filed a lengthy postconviction motion

which included a detailed discussion of five issues in factual context. Attached to the postconviction motion were letters Bell purportedly sent to his postconviction counsel identifying at least one issue he thought should be pursued and a letter to the state public defender's office explaining his complaints about postconviction counsel. Bell had also filed a motion for the appointment of counsel, motion for subpoenas to be issued to trial and postconviction counsel, and a motion to produce himself for personal appearance at the hearing. The trial court had determined that Bell's postconviction motion was sufficient to entitle him to a ***Machner***[3] hearing. Based on its examination of Bell's pleadings the trial court found it clear that Bell had an idea about what he felt was not done by trial counsel and how he was deprived of his right to representation. This was tantamount to a finding that the court would not have difficulty in understanding Bell's claims without the advocacy of counsel.

¶7 Bell's second motion for the appointment of counsel argued he needed counsel because he had limited access to the law library and a learning disability, no high school education, and limited knowledge of the law.[4] In addressing the second motion for the appointment of counsel the trial court recognized that the ***Machner*** hearing would provide Bell an opportunity to flesh

[3] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] Bell's pleadings and his memorandum in law in support of the motion for the appointment of counsel belied any of those difficulties. We recognize that like so many inmates, Bell relied on the assistance of a "jail-house lawyer" in crafting his court filings. Although Bell's WIS. STAT. § 974.06 motion mentioned that he had been assisted by a jail-house lawyer in recognizing his claims after the time for appeal, he did not reveal that his pleadings had been drafted by the jail-house lawyer. Bell created a fiction by representing the writing of his jail-house lawyer to be his own and prevented the court from knowing the true nature of his ability for self-representation. Bell could not simultaneously create a fiction about his ability to identify and address the issues he wanted to raise and claim a need for appointed counsel.

out the record and that his former attorneys would provide helpful information. The court found that it had a sufficient understanding of what issues Bell wanted to raise and it was satisfied that Bell would be able to ask questions of the attorneys to bring the necessary information to light.

¶8 A third motion for the appointment of counsel was filed before the evidentiary hearing. The motion indicated that Bell has only a sixth-grade reading level. For the first time the motion acknowledged that Bell had been assisted by "inmate law clerks" in preparing motions filed with the court. Bell suggested that because others had prepared his motions, he was unfamiliar with the legal ramifications of his claims.[5] When the motion was heard, the trial court asked Bell if anything had changed between the filing of his third motion for the appointment of counsel and the court's last denial. Bell replied that he had added new issues to amend his postconviction motion and had filed a motion to compel postconviction counsel to turn over discovery. The changes did not cause the trial court to reconsider its previous denial of counsel. Once again the court recognized that the presence of both trial and postconviction counsel at the evidentiary hearing would answer questions about what happened.

¶9 In addressing all of Bell's motions for the appointment of counsel the trial court found that the appointment of counsel was not necessary for the court's need for an orderly and fair presentation of the case. The court applied the proper standard. The court properly exercised its discretion in refusing to appoint counsel for Bell on his WIS. STAT. § 974.06 motion.

[5] The motion was filed May 6, 2009, and the evidentiary hearing was set for June 26, 2009. For the first time just weeks before the hearing, Bell cast aside the fiction he had created about his ability to identify and address the issues.

SUFFICIENT REASON

¶10 Under WIS. STAT. § 974.06(4), Bell must establish a sufficient reason why the claims in his § 974.06 motion were not raised in his first postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (all grounds for relief must be raised in a defendant's original, supplemental or amended motion); ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 274, 441 N.W.2d 253, 254 (Ct. App. 1989) ("[A] prisoner's failure to assert a particular ground for relief in an initial postconviction motion bars the prisoner's assertion of the ground in a later motion, in the absence of justification for the omission."). Bell advances the absence of a personal and knowing waiver of the issues and the abandonment by and ineffectiveness of his postconviction counsel as sufficient reason why his claims were not raised in his first postconviction motion.[6] We need not address his arguments because the trial court did not impose the procedural bar to Bell's claims. The trial court conducted a ***Machner*** hearing and ruled on the merits without considering whether Bell had advanced a sufficient reason.

INEFFECTIVE TRIAL COUNSEL

> ¶11 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland*** [***v. Washington***, 466 U.S. 668,] 687

[6] The State suggests that Bell's claim that his postconviction counsel was ineffective is superfluous and need not be addressed because Bell had no direct appeal and need not overcome the procedural bar set forth in WIS. STAT. § 974.06(4). *See* ***State v. Allen***, 2010 WI 89, ¶40, 328 Wis. 2d 1, 786 N.W.2d 124 ("A defendant who has not filed a § 974.02 motion or pursued a direct appeal is not burdened with the requirement of giving a sufficient reason why the claims being raised were not raised before."). Bell invoked the postconviction appeal procedure under § 974.02 and WIS. STAT. RULE 809.30, by filing a notice of intent to pursue postconviction relief. He filed a postconviction motion for relief albeit limited to sentence modification.

> [(1984)]. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove constitutional prejudice, "the 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.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694).
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> Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate determination of whether the attorney's performance falls below the constitutional minimum, however, is a question of law subject to our independent review. ***Id.***

State v. Cooks, 2006 WI App 262, ¶¶33-34, 297 Wis. 2d 633, 726 N.W.2d 322.

A. Consultation and promises.

¶12 Bell argues that his trial counsel failed to interview him about the case and did not visit Bell a sufficient number of times so as to meaningfully consult with him. He also claims that trial counsel induced his plea by promising that he would receive the same sentence as a codefendant.

¶13 There was conflicting testimony on these points. Although trial counsel could not specify the dates he visited Bell in jail, he testified that there

was a long initial consultation in the visiting room and visits on more than one occasion. He also indicated he took phone calls from Bell. Counsel denied having promised Bell that he would receive the same sentence as a codefendant and summarized how he would have explained it was likely a similar sentence would result but that Bell would have been told it was entirely the sentencing judge's decision and depended on other sentencing factors. Bell testified that he never once had an opportunity to talk to his trial counsel in private and that he only talked with counsel for brief moments in the bull pen right before court appearances. Bell also testified that he never actually discussed the merits of the case or his statement to police with trial counsel. He said counsel basically did not do anything on his behalf. He said he was led to believe that he would receive a sentence of ten years.

¶14 The trial court found trial counsel's testimony more credible than Bell's. "The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous." ***State v. Lukensmeyer***, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987). It concluded that the facts did not support Bell's claims. Implicitly this was a finding that trial counsel had visited and consulted with Bell an adequate number of times.[7] The court specifically found that as an experienced trial attorney, trial counsel would not have promised Bell the same sentence as a codefendant.

[7] That Bell produced visitor slips from the jail that did not include trial counsel's name did not render trial counsel's testimony incredible. Trial counsel indicated that he did not recall being asked to sign visitor slips at the jail. Cross-examination of Bell suggested that the visitor's slips Bell obtained from the jail related to visits during visitor hours and not attorney visits at other times.

¶15 The trial court further observed that the plea colloquy established that Bell was informed that there was no guarantee of a particular sentence. Additionally, that counsel misjudged the likely sentence is not a basis for an ineffective assistance of counsel claim. ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Bell's claim that trial counsel was ineffective for failing to visit and consult with him and in promising a certain sentence fails.

B. Failure to investigate and move for suppression.

¶16 Bell was riding in a vehicle stopped by police in Marathon County and items used in the bank robbery were seized from the vehicle. The stop was based on a cigarette butt being tossed from the driver's window. Bell believes the stop was the result of racial profiling as the officers were looking for a dark skinned African-American man, for an unrelated crime.

¶17 At one point in his police interrogation Bell told the investigating officer that he did not want to talk anymore and that the officer should "come back tomorrow and maybe we can talk."[8] After further questioning, Bell later gave a statement to police. Bell believes his confession was coerced in violation of his right to remain silent and the requirement that the police terminate the interrogation upon invocation of that right. *See* ***State v. Goetsch***, 186 Wis. 2d 1, 7-8, 519 N.W.2d 634 (Ct. App. 1994) (defendant's declaration to police that "I don't want to talk about this anymore," in the context of the entire interrogation, was an exercise of his right to remain silent and the interrogation should have ceased).

[8] Bell's postconviction motion asserts that he said this to the officer. No sworn affidavit asserts it. No evidence was offered that it was said.

¶18 Bell contends that his trial counsel was ineffective because counsel did not investigate the circumstances of a vehicle stop and Bell's statement to police and then file a motion to suppress. Trial counsel testified that he discussed with Bell the possibility of moving to suppress evidence and Bell's statement and that he was willing to file those motions if Bell wanted to. That counsel considered Bell's claim that the vehicle stop was pretextual was demonstrated by counsel's recollection that Bell would not accept that the stop could be based on the tossing of the cigarette butt. Trial counsel advised Bell that he did not believe the motions would make any difference. The trial court found that it was Bell's decision not to move to suppress. Once Bell made that decision, trial counsel was not obligated to pursue suppression. *See* ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996) (a defendant cannot complain that counsel was ineffective for complying with the ethical obligation to follow the defendant's decision).

¶19 Bell alleges that trial counsel failed to read the discovery material produced in Marathon county cases arising from the stop. Since trial counsel offered to file suppression motions, trial counsel had sufficient information to decide that an arguably meritorious motion for suppression could be filed. "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." ***McMann v. Richardson***, 397 U.S. 759, 770 (1970). By his plea, Bell accepted the risk that counsel's evaluation of the likelihood of success of the suppression motion was wrong.

¶20 Even if trial counsel did not have a full grasp of the factual circumstances of the vehicle stop, Bell cannot establish prejudice from the failure to move to suppress. In the case of Bell's codefendant, Courtney Cobbs, this court

addressed a claim that the vehicle stop was unconstitutional. ***State v. Courtney Leon Cobbs***, 2007AP501-CR, unpublished slip op. at 2-3 (Wis. Ct. App. Jan. 23, 2008). We held that there was a legally permissible basis for the stop. ***Id.*** at 3. The same result was reached in Cobb's appeal from Marathon county convictions based on the same vehicle stop.[9] *See* ***State v. Courtney L. Cobbs***, 2007AP380-CR, 2007AP440-CR, unpublished slip op. at 3-4 (Wis. Ct. App. Jan. 15, 2008). There was no basis to suppress evidence seized as a result of the vehicle stop and Bell was not denied the ineffective assistance of counsel on that point.

¶21 Bell also fails to establish prejudice relating to counsel's performance in respect to Bell's allegedly coerced confession. Again trial counsel had sufficient information to offer Bell the opportunity to move to suppress the confession. Counsel's determination of arguable merit does not necessarily mean the motion would have been successful.

¶22 An expression of the right to remain silent only requires the cessation of questioning when the expression is unequivocal. *See* ***State v. Markwardt***, 2007 WI App 242, ¶¶35, 36, 306 Wis. 2d 420, 742 N.W.2d 546 ("invocation of the right to remain silent must be unequivocal and unambiguous to be effective," "there is no invocation of the right to remain silent if *any* reasonable competing inference can be drawn"). Bell's assertion that he did not want to talk anymore was not an unequivocal assertion of the right to remain silent because he invited the possibility of talking further with police the next day. Leaving open the possibility of further conversation was important because the investigating

[9] As a result of the vehicle stop, Bell was convicted of possession of a short-barrelled shotgun found in the vehicle. Bell did not challenge the stop in his appeal of that conviction. *See* ***State v. Freeman E. Bell***, 2006AP1428-CR, unpublished slip op. (Wis. Ct. App. Jan. 9, 2007).

officer informed Bell that he only was available that day to talk since he could not stay overnight in Marathon county. Bell did not again attempt to terminate questioning when supplied with that information. Within the entire context of the interrogation competing inferences exist from Bell's assertion and consequently, the police were not required to stop the interrogation. *See* ***id.***, ¶36. Counsel's advice about a motion to suppress the confession as likely not being successful was reasonable and Bell is not prejudiced by trial counsel's performance on this point.

¶23 We acknowledge Bell's contention that the confession was the only evidence against him and had it been suppressed, he would have insisted on a trial. Bell points out that the State's witness list only included the two police officers who heard his confession and bank personnel who could not identify him. Bell's reliance on the State's witness list as establishing that no other evidence would have been offered at trial is misplaced. The witness list he cites was filed the same day as the criminal complaint and at the very early stage of the prosecution. There is no indication that the State would have been precluded from filing an amended witness list as the prosecution progressed and Bell's confession was suppressed. Items used in the robbery were recovered from the vehicle in which Bell was a passenger. The criminal complaint reports the statement of Bell's cousin that Bell and his codefendant Cobbs planned a bank robbery. Where other available evidence is compelling and places the defendant in significant risk of conviction, there is no reasonable probability that, but for the error with respect to the suppression of evidence, the defendant would have refused to plead and would have insisted on going to trial. *See* ***State v. Semrau***, 2000 WI App 54, ¶26, 233 Wis. 2d 508, 608 N.W.2d 376.

PROSECUTORIAL DUE PROCESS VIOLATION

¶24 Bell's claim that the prosecutor failed to disclose exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), relates to the interview report of the police interrogation. Bell argues that the prosecution failed to turn over the investigating officer's interview report which showed that during the interrogation Bell invoked his right to remain silent. The interview report has subsequently been destroyed and Bell's attempt to obtain it from a codefendant failed. Whether the prosecution violated a defendant's right to due process under ***Brady*** is a question of constitutional fact that we review independently. *See* ***State v. DelReal***, 225 Wis. 2d 565, 571, 593 N.W.2d 461, 464 (Ct. App. 1999).

¶25 "***Brady*** requires production of information which is within the exclusive possession of state authorities." ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979); *see also* WIS. STAT. § 971.23(1). Information that during the interrogation Bell said he did not want to talk anymore was not exclusively within the possession of the prosecution. *See* ***State v. Armstrong***, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983) (evidence not in exclusive possession of the State when the defendant has knowledge and access to the evidence). Bell himself knew he had made that statement. He could relate it and whatever else occurred during the interrogation to his attorney. The interview report served only to document the spoken word. Bell had access to the investigating officer to ascertain what occurred during the interrogation. "Exclusive control will not be presumed where the witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question him." ***Sarinske***, 91 Wis. 2d at 36.

¶26 We recognize that in ***State v. Sturgeon***, 231 Wis. 2d 487, 498-99, 605 N.W.2d 589 (Ct. App. 1999), the State was held to be in exclusive possession of information that in police interviews Sturgeon had denied any knowledge of the intended criminal enterprise of his co-actors.[10] In ***Sturgeon*** the court observed that the defense's failure to question the police officer about exculpatory statements made during interview was excusable because the scope of the preliminary hearing and the suppression hearing did not provide an opportunity to elicit the officer's confirmation that exculpatory statements were made. ***Id.*** at 499-500. Here Bell elected to not pursue a motion to suppress his confession and gave up the opportunity to have the police officer corroborate the known fact that he told the officer that he did not want to talk anymore.

¶27 Additionally, ***Sturgeon*** involved direct exculpatory evidence—Sturgeon's denials that he was aware of the intended crime. The court stated, "we see a marked difference between a defendant's exculpatory version of an event presented to his lawyer and the fact that the prosecution has in its exclusive possession evidence which independently corroborates that version." ***Id.*** at 500. Bell's claim relates only to information about what occurred during the interview to produce his confession. The information does not directly bear on his guilt or innocence and is not exculpatory. *See* ***State v. Harris***, 2004 WI 64, ¶12 n.9, 272 Wis. 2d 80, 680 N.W.2d 737. ***Sturgeon*** does not apply here. The prosecution was

[10] The information was the personal knowledge of the police chief who was present during Sturgeon's initial police interview and a written report, not originally turned over by police to the prosecution because it related to other cases, of an interview police conducted of Sturgeon at his school a few days after the initial police interview. ***State v. Sturgeon***, 231 Wis. 2d 487, 493-94, 501, 605 N.W.2d 589 (Ct. App. 1999).

not required to disclose the interview report and did not violate Bell's right to due process.

INEFFECTIVE POSTCONVICTION/APPELLATE COUNSEL

¶28 Bell contends that his postconviction counsel was ineffective for not investigating and discovering the issues which trial counsel failed to pursue and asserting trial counsel's ineffectiveness. We need not address this particular claim because trial counsel was not ineffective.

¶29 Bell also contends that after the postconviction motion was denied, postconviction counsel abandoned Bell and did not file a requested no-merit appeal. This aspect of postconviction counsel's performance really falls within the purview of this court under ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 793, 799-800, 565 N.W.2d 805, 809 (Ct. App. 1997), *criticized on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900, *opinion clarified*, 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424. Our review is aided by the fact-finding that has already been conducted by the trial court about what appointed counsel did or did not do. *See* ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶30, 269 Wis. 2d 810, 676 N.W.2d 500 (where a defendant claims to have not consented to counsel's closing the file without further court action an evidentiary hearing may be required to resolve the dispute).

¶30 At the outset we make clear that it is not the law in Wisconsin that postconviction or appellate counsel must file a formal motion to withdraw in every case in which a defendant decides to forego a postconviction motion or an appeal. Such a requirement was rejected by the supreme court in ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994). Appointed counsel does not

render ineffective assistance of counsel simply by closing the defendant's file without first obtaining court permission to withdraw. ***Ford***, 269 Wis. 2d 810, ¶31.

¶31 The trial court found that Bell did not communicate to appointed counsel a desire for a no-merit appeal. It found appointed counsel presented Bell with an option letter and Bell never responded. These findings are not clearly erroneous. Trial counsel testified that following the March 2, 2006 postconviction motion hearing she gave Bell an options letter which gave Bell the opportunity to request a no-merit appeal. When counsel forwarded a copy of the order denying the postconviction motion to Bell she also referred Bell to the options letter and the twenty-day deadline for proceeding further. Although Bell attached to his motion an original handwritten letter dated March 17, 2006 in which Bell told counsel to "go [a]head and file the no-merit report," the trial court could determine that the letter was never sent or was produced at some later date in anticipation of litigation. The trial court found counsel's testimony that she never received correspondence requesting a no-merit appeal credible. Based on the findings of fact, we conclude that Bell was not denied the effective assistance of appointed appellate counsel. A defendant may agree with appellate counsel's assessment that an appeal has no merit and may voluntarily forego an appeal. ***Flores***, 183 Wis. 2d at 617.

CONCLUSION

¶32 A plea may be withdrawn if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *See* ***id.*** Bell has not

established that he was denied the effective assistance of counsel or any other reason for plea withdrawal.

By the Court.—Order affirmed.

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