

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2014

Diane M. Fremgen
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. 2013AP2342-CR

Cir. Ct. Nos. 2011CF2240

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE L. HOLMES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Lawrence Holmes appeals judgments of conviction for felony stalking (as a repeater) and misdemeanor victim intimidation, as well as an order denying his postconviction motion for plea withdrawal. Holmes sought to withdraw his pleas based on the alleged ineffectiveness of his trial counsel for

failing to pursue a motion to dismiss misdemeanor charges filed against him, including the misdemeanor charge to which he pled. We conclude that Holmes failed to demonstrate that he suffered any prejudice and, therefore, affirm.

BACKGROUND

¶2 On December 1, 2011, a criminal complaint was filed charging Holmes with: (1) felony stalking; (2) two counts of battery; (3) criminal trespass; (4) violation of a domestic abuse restraining order; and (5) three counts of intimidation of a victim. All charges except for the first were misdemeanors and all counts were charged as repeaters. *See* WIS. STAT. § 939.62(1)(b) (2011-12).¹

¶3 Pursuant to WIS. STAT. § 971.11,² commonly referred to as the Intrastate Detainer Act, Holmes requested a prompt disposition of the charges.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² WISCONSIN STAT. § 971.11 provides in relevant part:

(1) Whenever the warden or superintendent receives notice of an untried criminal case pending in this state against an inmate of a state prison, the warden or superintendent shall, at the request of the inmate, send by certified mail a written request to the district attorney for prompt disposition of the case....

(2) If the crime charged is a felony, the district attorney shall either move to dismiss the pending case or ... shall bring the case on for trial within 120 days after receipt of the request subject to [WIS. STAT. §] 971.10.

(3) If the crime charged is a misdemeanor, the district attorney shall either move to dismiss the charge or bring it on for trial within 90 days after receipt of the request.

....

(continued)

The district attorney's office received Holmes' request on July 20, 2012. In a letter dated August 11, 2012, an assistant district attorney notified the circuit court that on July 20, 2012, her office had received a request for prompt disposition of the charges against Holmes and that per the assistant district attorney's calculations, the case should be set for trial no later than November 16, 2012, which was 120 days following the date of the receipt of the request.

¶4 On November 14, 2012, Holmes' trial counsel moved the circuit court to dismiss the misdemeanor charges—counts two through eight. Counsel argued that WIS. STAT. § 971.11(3) requires that misdemeanor charges be brought to trial within ninety days after receipt of a request for prompt disposition of those charges and that because more than ninety days had passed, those charges must be dismissed. Counsel also argued that dismissal of the misdemeanor charges should be with prejudice because counts two through five—two counts of battery, and one count each of criminal trespass and violation of a domestic abuse restraining order—had been previously brought, dismissed, and then refiled. See *State v. Holmes*, 2011CM1043; and *State v. Holmes*, 2011CM2062.

¶5 The next day, November 15, 2012, with no action taken on Holmes' motion to dismiss, Holmes pled no contest, pursuant to a plea agreement, to felony stalking and one count of misdemeanor intimidation of a victim. In exchange for Holmes' plea, the State agreed to a joint recommendation to the circuit court of a sentence of nine months in jail on the misdemeanor charge and three years'

(7) If ... [the case] is not brought on for trial within the time specified in sub. (2) or (3) the case shall be dismissed unless the defendant has escaped or otherwise prevented the trial

probation on the felony charge. The court accepted the joint recommendation and sentenced Holmes accordingly.

¶6 On July 29, 2013, Holmes moved the circuit court to withdraw his pleas on the basis of ineffective assistance of counsel. Holmes argued that his trial counsel provided incorrect legal advice that Holmes would lose his motion to dismiss the misdemeanor charges and that the incorrect advice induced him to enter the plea agreement. Holmes further argued that he was prejudiced because dismissal of the misdemeanor counts “should have” been with prejudice.

¶7 The circuit court denied Holmes’ ineffective assistance motion without an evidentiary hearing. The court determined that Holmes failed to make a showing that he had suffered any prejudice from any deficient performance of his trial counsel. The court observed that under the plea agreement, Holmes received only probation for the stalking charge in exchange for jail time on one of the misdemeanor charges, which the court stated was “a pretty good deal” and “very favorable to [Holmes who] ... could have been facing a significant amount of time in prison” for the stalking charge. The court further stated that even if the misdemeanor charges had been dismissed, the court would have dismissed those charges without prejudice, which would have given the State the opportunity to refile those charges. Holmes appeals.

DISCUSSION

¶8 Holmes contends the circuit court erred in denying, without a hearing, his postconviction motion to withdraw his pleas.

¶9 A circuit court has discretion to deny a postconviction motion without an evidentiary hearing if the motion is insufficient on its face or if the

record conclusively demonstrates that the movant is not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334. Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing on the relief requested presents a question of law, which we review de novo. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, an evidentiary hearing must be held. *Id.* If the motion does not, or if the allegations in the motion are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has the discretion to either grant or deny a hearing. *Id.* We review the circuit court's determination to grant or deny a hearing if one is not required under the erroneous exercise of discretion standard. *Id.*

¶10 Holmes' motion to withdraw his pleas is based on the alleged ineffectiveness of his trial counsel.³ To succeed on his motion, Holmes must have demonstrated that his trial lawyer's performance was deficient in that it fell below an objective standard of reasonableness, and that he was prejudiced by that deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Prejudice is established if the defendant is able to demonstrate that there is a reasonable probability that but for counsel's error, the results of the proceeding would have been different. *Id.* In the context of a plea, a defendant must demonstrate prejudice by showing that, but for the trial lawyer's errors, the defendant would not have pled guilty and would have instead insisted on a trial. *See State v. Jackson*, 229 Wis. 2d 328, 343, 600 N.W.2d 39 (Ct. App. 1999). The

³ A defendant who seeks to withdraw his or her plea after sentencing must demonstrate, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *State v. Krieger*, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). The ineffectiveness of counsel may constitute a manifest injustice. *Id.*

issues of deficiency and prejudice present questions of law that we review de novo. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to prove one component of the analysis, we need not address the other. *Strickland*, 466 U.S. at 697.

¶11 For the reasons discussed below, we conclude that Holmes did not allege sufficient facts to demonstrate that he was prejudiced by his trial lawyer's failure to pursue the motion to dismiss.

¶12 Holmes alleged in his postconviction motion that his trial lawyer had “no strategic reason” for failing to litigate the motion to dismiss the misdemeanor charges against him because doing so would have resulted in the dismissal of those charges. Holmes' argument was based on his assertion that the misdemeanor charges were subject to the ninety-day time limit in WIS. STAT. § 971.11(3), not the 120-day time limit of § 971.11(2), and that the charges should have been brought for trial on or before October 18, 2012. Holmes argued that because the charges were not brought for trial by that date, dismissal of those charges would have been mandatory. Holmes further alleged that he was prejudiced because if the charges had been dismissed, dismissal with prejudice “would have been appropriate and justified,” which would have put him in “a very different bargaining position” when determining whether to negotiate with the State or proceed to trial on the stalking charge.

¶13 Holmes bore the burden of raising sufficient facts that would establish that he was prejudiced by his trial lawyer's failure to pursue the motion to dismiss. When a case is not brought for trial within the time periods set forth in WIS. STAT. § 971.11, a circuit court has the discretion to dismiss the case with or without prejudice. *State v. Davis*, 2001 WI 136, ¶5, 248 Wis. 2d 986, 637 N.W.2d

62. In his postconviction motion, Holmes' assertion that he suffered prejudice is premised on his contention that the misdemeanor charges would have been dismissed with prejudice, in which case the State would not be able to refile those charges against Holmes. *See id.*, ¶19 (when charges are dismissed without prejudice for failing to apply with time constraints under WIS. STAT. § 971.11, the State may refile those charges).

¶14 In *Davis*, the supreme court stated that when a circuit court exercises its discretion to dismiss a criminal case with or without prejudice because the case was not timely brought to trial under WIS. STAT. § 971.11, a circuit court should take into consideration the following nonexclusive factors:

the reasons for and the length of the delay in bringing the criminal case on for trial; whether the nature of the case makes it unreasonable to expect adequate preparation within the statutory time period; an accused's conduct contributing to the delay; an accused's waiver of the statutory right to prompt disposition; the harm to an accused resulting from the delay, such as anxiety and concern; the effect of the delay on an accused's legal defenses; the effect of the delay on the programs and movement within the institutions available to an accused; the effect of the delay on the orderly rehabilitation process of an accused within the Department of Corrections; the effect of the delay on an accused's concurrent sentencing possibilities; the effect of the delay on an accused's possible transfer to a less secure facility; the effect of the delay on an accused's opportunity for parole; the effect of the delay on the transfer of the accused to another institution; the effect of the delay and dismissal on the public interest in the prompt prosecution of crime; and the effect of the delay and dismissal on the victim.

Davis, 248 Wis. 2d 986, ¶29.

¶15 Holmes' motion contends that, in light of the *Davis* factors, the misdemeanor charges *would have* been dismissed with prejudice because: (1) the case had been pending since December 1, 2011; (2) four of the seven

misdemeanor charges had been previously filed and dismissed by the State before being reissued in the present case; (3) the charges are not overly complicated; (4) he did not contribute to any delay in bringing the charges to trial; and (5) he suffered harm in that his probation was revoked in a separate case “for the same alleged conduct that supported the charges in this case,” he had anxiety over the matter, and he was unable to take advantage of having his sentences run concurrent “in any meaningful manner.” However, we conclude that Holmes’ assertion that dismissal would have been with prejudice does not rise above the level of speculation.

¶16 The circuit court stated that it had reviewed the *Davis* factors and that it would not have dismissed the misdemeanor charges with prejudice had the motion to dismiss been pursued. Although Holmes argues that the circuit court “should have” dismissed the charges with prejudice, he does not argue that dismissal of those charges without prejudice would be an erroneous exercise of the court’s discretion. In order to be an erroneous exercise of the court’s discretion, no reasonable judge could reach the conclusion that the circuit court stated it would have reached. *See State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). We conclude that such a discretionary determination would be supported under the *Davis* factors by the record in this case and, therefore, Holmes’ assertion is speculative, at best. Below, we briefly explain why dismissal without prejudice would have been proper.

¶17 The record makes clear that the State believed that because of the felony charge, the case as a whole, as opposed to separate charges, needed to be brought for trial within 120 days. *See WIS. STAT. § 971.11(2)*. The delay in bringing the case for trial following Holmes’ request for prompt disposition was thus attributable to differing interpretations of the law. There is no indication that

the nature of the case would require additional time to prepare, or that Holmes contributed to any delays, nor is there any indication that he waived his right to the prompt disposition of the case. Holmes asserts that he suffered harm because his probation in another criminal matter was revoked because of the conduct underlying this case. However, even if the misdemeanor charges had been resolved at an earlier date, his conduct for the felony charge would have remained. Holmes asserts that he suffered anxiety, but does not elaborate on how that anxiety manifested or how it affected him. Holmes does not assert that any delay in resolving the misdemeanor charges affected his defense, the programs and movement available to him within the Department of Corrections, his rehabilitation process, any possible transfer to less secure facilities, his opportunity of parole, or possible transfers to a different institution. Holmes asserts that the delay affected his ability to have his sentences run concurrent “in any meaningful manner,” but does not provide an explanation on how or why that is the case. Holmes also asserts that this case had been pending for close to one year at the time Holmes filed his motion to dismiss, but does not explain why that length of time in this case justifies dismissal with prejudice.

¶18 We conclude that under these facts, the dismissal without prejudice of the misdemeanor charges would be a proper exercise of a circuit court’s discretion and, therefore, Holmes’ allegation that the misdemeanor charges would have been dismissed with prejudice is nothing more than conjecture.

¶19 Furthermore, as pointed out by the circuit court, the sentence Holmes received under the terms of his plea agreement was substantially less than what he faced for the felony alone. Felony stalking is a Class I felony, which is punishable by three and one-half years’ imprisonment. *See* WIS. STAT. §§ 940.32(2), 939.50(3)(i). Because the felony was charged as a repeater, Holmes

also faced a possible increase in the maximum term of imprisonment of not more than two years or four years, depending on whether his prior convictions were misdemeanors or felonies. WIS. STAT. § 939.62(1)(b). Furthermore, he was subject to sentencing to the Wisconsin state prisons. *See* WIS. STAT. § 973.02 (a sentence of more than one year must be to the Wisconsin state prisons). Holmes asserts in his postconviction motion that had the misdemeanor charges been dismissed, his bargaining position would have been “distinctly different.” However, he does not assert that he would have received better terms in a plea agreement with the State, nor does he assert that the facts would have been such that he would have gone to trial rather than enter into a plea agreement.

¶20 For the above reasons, we conclude that Holmes failed to raise sufficient facts that establish he suffered prejudice from his trial lawyer’s failure to pursue the motion to dismiss, and that the circuit court did not err in denying Holmes’ motion without a hearing.

CONCLUSION

¶21 For the reasons discussed above, we affirm the order of the circuit court denying Holmes’ postconviction motion and the judgments of conviction.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

