

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 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. 2014AP30
STATE OF WISCONSIN**

Cir. Ct. No. 2002CF97

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY E. SVEA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL K. MORAN, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Timothy Svea appeals an order denying his WIS. STAT. § 974.06¹ motion to withdraw his guilty plea. He contends his trial counsel

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

was ineffective for failing to consider or discuss possible defenses.² Because Svea's motion lacked sufficient specificity to establish ineffective assistance of counsel, we affirm the order.

¶2 In 2002, Svea entered guilty pleas to second-degree sexual assault of a child, fourth-degree sexual assault of a child, false imprisonment, and five counts of exposing genitals to a child. Pursuant to a plea agreement, the State dismissed numerous similar offenses and agreed to a joint sentence recommendation of concurrent terms of probation totaling twenty years, and one year in jail as a condition of probation. After Svea admitted his guilt and expressed remorse, the court imposed the agreed-upon sentence. Svea has completed the terms of probation for all of the offenses except the second-degree sexual assault.

¶3 Nearly eleven years after his plea and sentencing, Svea filed a motion to withdraw his guilty plea. On appeal, he focuses on his trial counsel's failure to consider or discuss possible defenses. To be entitled to a hearing, Svea's motion (as supplemented by his letter) must show he is entitled to relief by providing sufficient detail regarding who, what, where, when, why and how. *See State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Because his motion contained only conclusory allegations, the court properly denied the motion without a hearing.

² Svea's postconviction motion raised other issues regarding the plea that he does not pursue on appeal. The claim of ineffective assistance of counsel was not made in Svea's motion, but was briefly mentioned in a letter to the circuit court that is not a part of the record on appeal. The State includes a copy of the letter in the appendix to its brief. The State contends Svea forfeited his claim of ineffective assistance of counsel. We will follow the circuit court's lead and consider the letter as part of the motion.

¶4 Svea's motion established neither deficient performance nor prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance may be determined or substantially influenced by the defendant's own statements or actions. *Id.* at 691. Because Svea admitted his guilt and has not identified any potential defense, his attorney reasonably pursued the generous plea agreement.

¶5 Svea contends his counsel's failure to discuss possible defenses is "per se deficient." However, his motion does not identify any potentially viable defense. The letter suggests a possible defense of not guilty by reason of mental disease or defect (NGI). The letter contains no discussion of the factual basis for that defense. It identifies no mental disease or defect at the time the crimes were committed. It does not allege, much less show, a lack of substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *See* WIS. STAT. § 971.15(1). The only evidence regarding Svea's mental state consisted of affidavits from himself, his father and a friend addressing his mental state after the charges were brought, not while the crimes were being committed. Svea's failure to identify any facts that would support an NGI defense defeats any claim that his counsel performed deficiently by not exploring that defense.

¶6 Svea's motion also fails to allege sufficient facts to establish prejudice from his counsel's failure to consider an NGI plea. To show prejudice, he must identify supporting facts which, if true, would establish a reasonable probability that, but for counsel's failure to discuss the NGI defense, Svea would not have agreed to plead guilty and would have gone to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Svea offers no explanation for why he would

have rejected the generous plea agreement had his counsel discussed NGI or any other unidentified defense.

By the Court.—Order affirmed.

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

