COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2593-CR **Cir. Ct. No. 2012CF3318**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL ANDERSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Daniel Anderson, Jr., appeals a judgment convicting him of two counts of child enticement. He also appeals an order granting in part and denying in part his postconviction motion. He argues that he received ineffective assistance of trial counsel because his lawyer did not move to

dismiss the charges against him on the ground that his right to a speedy trial had been violated. We affirm.

¶2 We first address the State's argument that Anderson waived his right to argue that he received ineffective assistance of counsel by entering a guilty plea. The State cites the well-established guilty plea waiver rule, which provides that a guilty or no-contest plea waives all nonjurisdictional defects and defenses, including claimed constitutional violations. *See* ***State v. Oakley***, 2001 WI 103, ¶23, 245 Wis. 2d 447, 629 N.W.2d 200. It is equally well-established, however, that a plea may be withdrawn after sentencing when there is a manifest injustice. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A manifest injustice occurs when a defendant is denied the effective assistance of counsel. ***Id.*** The State asks this court to extend the guilty-plea-waiver rule to bar claims of ineffective assistance of counsel that are not directly related to a defendant's entry of a plea. As we recently explained in ***State v. Williams***, No. 2015AP2337-CR, unpublished slip. op. (WI App Jan. 18, 2017), the State has not persuaded us that it is necessary to extend the application of the guilty-plea-waiver rule. Therefore, we conclude that Anderson's claim that he received ineffective assistance of counsel is not waived by his guilty plea.

¶3 Turning to the merits, a defendant is guaranteed the right to a speedy trial by the United States constitution. ***Barker v. Wingo***, 407 U.S. 514, 515 (1972). To determine whether a defendant's right to a speedy trial has been violated, courts must use a balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 530. Courts should consider four primary factors: (1) whether the defendant asserted the right to a speedy trial; (2) the length of the delay; (3) the reason for the delay; and (4) the prejudice to the defendant. ***Id.*** However, "none of the four factors … [is] either a necessary or

sufficient condition to the finding of a deprivation of the right of speedy trial." ***Id.*** at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." ***Id.***

¶4 A defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citations omitted). To demonstrate prejudice, a "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." ***Strickland***, 466 U.S. at 694. If a court concludes that the defendant has not proven one prong of the ***Strickland*** test, it need not address the other prong. *See* ***id.*** at 697. Whether a lawyer's actions are deficient and whether the defendant was prejudiced by his lawyer's deficient actions are questions of law. ***Nielson***, 247 Wis. 2d 466, ¶14.

¶5 Anderson's claim that he received ineffective assistance of trial counsel fails because he has not shown that he was prejudiced. Under ***Strickland***, Anderson must show that there is a reasonable probability that the result of the proceeding would have been different but for his lawyer's failure to inform him that he could move to dismiss on the ground that his right to a speedy trial had been violated. *See* ***Nielsen***, 247 Wis. 2d 466, ¶13. However, Anderson does not explain *why* he would have moved to dismiss, rather than accept the plea agreement offered by the prosecutor, pursuant to which six felony charges and one misdemeanor charge against him were dropped. Anderson received a substantial benefit from the State in exchange for his plea, greatly reducing his criminal

exposure. Because Anderson has not explained why he would have opted for a motion to dismiss, which may or may not have been successful, over the certain benefit he received from the plea agreement, we conclude that Anderson has not shown that the result of the proceeding would have been different but for his lawyer's failure to inform him that he could file a motion to dismiss on a speedy trial ground.

¶6 Alternatively, Anderson's argument could be construed as an assertion that he would not have pled guilty if his trial counsel had *successfully* asserted his speedy trial rights *and the charges had been dismissed*. Of course, there would have been no need to plead guilty if there were no pending charges. This line of argument is unavailing because it skips the critical first question—whether Anderson would have been willing to take the risk to forgo the plea agreement he was offered in favor of a motion to dismiss that may or may not have been successful.

¶7 In sum, Anderson has not shown that but for his counsel's omission, the result of the proceeding would have been different. Because Anderson has not shown that he was prejudiced, we reject his claim that he received ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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