COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2778-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. FOWLER,

Defendant-Appellant.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Terry L. Fowler was convicted of burglary, following his no-contest plea. Fowler appeals from the trial court's denial of his motion to withdraw his plea and his motion for reconsideration of the trial court's order denying his motion to withdraw his no-contest plea. We affirm.

Fowler was prosecuted for the November 7, 1993, burglary of a bank building. According to the criminal complaint, he was seen running from the bank and getting on a county bus. Police stopped the bus and apprehended Fowler after he fled from the bus. Stolen money from the bank was recovered from the rear steps of the bus and from the area where Fowler was apprehended.

On April 25, 1994, after the completion of jury selection and as opening statements were about to begin, the prosecutor advised the court that an officer had just presented him with bank surveillance camera photos of which neither the prosecutor nor defense counsel had been aware. Although the photos are not contained in the record on appeal, there is no dispute that the photos showed Fowler as the perpetrator. After a brief recess, Fowler changed his plea to no-contest.

Five months later, Fowler moved to withdraw his plea, alleging that it "was entered in haste and under circumstances of a coerced plea. (Prior to commencement of trial, surprise evidence was produced by the State; and a plea was entered under coerced circumstances.)." Fowler also moved to withdraw his plea alleging that he "lacked understanding regarding the elements of the offense charged." In his motion, Fowler stated that he "also reserves the right to request a ***Machner*** hearing regarding the issue of denial of effective assistance of counsel,... in the event the testimony regarding withdrawal of the plea raises an issue of ineffective representation."[1]

The trial court denied his motion, explaining:

> It is true a police officer produced pictures of the defendant perpetrating the crime at the eleventh hour. It is undeniable that this factor may have caused the defendant to reconsider his plea. However, the defendant affirmatively stated, by virtue of the Guilty Plea Questionnaire and Waiver of Rights

[1] Fowler also moved to modify his sentence. On appeal, however, he has not pursued any issue related to his sentence.

> Form and in response to the court's inquiry, that he was *not* threatened or coerced to give up his rights and or to enter a plea of no contest. The defendant has failed to raise a question of fact with regard to this issue; the record conclusively demonstrates that he is not entitled to relief in this respect.

(Emphasis in original.) The trial court also quoted the plea colloquy establishing that Fowler acknowledged his understanding of the elements of burglary with specific reference to the date and location of the offense to which he was pleading no contest.

Fowler moved for reconsideration and submitted an affidavit in which he alleged that after the surveillance photos were produced, he "requested from ... trial counsel that an adjournment be sought due to the surprise evidence, but no request for adjournment was made," and that he believed his "plea was entered in haste under circumstances of coercion." The trial court concluded that "[t]he affidavit adds nothing to what was previously asserted by counsel" and denied the motion for reconsideration.

Fowler argues that the trial court erred in denying his motion to withdraw his guilty plea without holding an evidentiary hearing regarding whether "his plea was coerced because surprise evidence produced at the last moment contributed to entry of his plea in haste under the circumstances," and in denying his motion without a ***Machner*** hearing to determine whether counsel was ineffective for failing to request an adjournment when the photos were produced. We conclude, however, that the trial court was correct.

A trial court must grant a defendant's request to withdraw a guilty or no contest plea after sentencing only if the defendant establishes by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. ***State v. Woods***, 173 Wis.2d 129, 136, 496 N.W.2d 144, 147 (Ct. App. 1992). Withdrawal of a guilty plea after sentencing may be based on ineffective assistance of counsel. *See* ***State v. Washington***, 176 Wis.2d 205, 213-214, 500 N.W.2d 331, 335 (Ct. App. 1993).

A defendant in a criminal case has a right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Ludwig***, 124 Wis.2d 600, 606, 369 N.W.2d 722, 725 (1985). To establish ineffective assistance, a defendant must demonstrate that counsel's performance was both deficient and prejudicial. ***Strickland***, 466 U.S. at 687; ***Ludwig***, 124 Wis.2d at 607, 369 N.W.2d at 725. Generally, an evidentiary hearing at which trial counsel testifies regarding the alleged deficient performance is required for the trial court's consideration of an ineffective assistance of counsel claim. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908, (Ct. App. 1979). Such a hearing, however, is not automatic:

> The mere assertion of a claim of "manifest injustice," in this case the ineffective assistance of counsel, does not entitle a defendant to the granting or relief or even a hearing on a motion for withdrawal of a guilty plea. A conclusory allegation of "manifest injustice," unsupported by any factual assertions, is legally insufficient....
>
> ... [I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing.

State v. Washington, 176 Wis.2d 205, 214-215, 500 N.W.2d 331, 335-336 (Ct. App. 1993) (quoting ***Nelson v. State***, 54 Wis.2d 489, 497-498, 195 N.W.2d 629, 633 (1972)). Where, as here, a trial court refused to hold a ***Machner*** evidentiary hearing we independently review the defendant's motion "to determine whether it alleges facts sufficient to raise a question of fact." ***State v. Toliver***, 187 Wis.2d 346, 360-361, 523 N.W.2d 113, 118 (Ct. App. 1994).

In this case the trial court correctly concluded that Fowler had failed to advance any claim or factual assertion that would warrant an evidentiary hearing. Although he asserted that "the plea was entered in haste and under circumstances of a coerced plea," he never alleged that his plea was coerced. Needless to say, when Fowler was confronted with "caught-in-the-act" photos, his sense of being under "coerced circumstances" was

understandable. Fowler does not, however, offer any argument or authority to suggest that being confronted with overwhelming evidence presents a situation that is unlawfully coercive.

Similarly, Fowler failed to present any factual allegation, argument, or authority to establish that counsel's alleged failure to request an adjournment was deficient performance. The folly of Fowler's argument is revealed in his reply brief to this court in which he contends that "if the request for adjournment by trial counsel had been made, a trial would have taken place instead of a conviction by a plea." Does he assume that the motion for adjournment would have been granted, leading to postponement of the trial? Fowler does not say. After all, the jury had been selected and the parties were ready for trial. Fowler does not argue that an adjournment would have been granted. Thus, Fowler implicitly is maintaining that counsel was ineffective for failing to bring a motion for adjournment that would have been denied. That is absurd. Moreover, although Fowler offered this rather dubious argument in his reply brief, he never alleged in his postconviction motion or affidavit that, but for counsel's alleged failure to request an adjournment, he would *not* have pled no-contest. The trial court correctly declined to hold a ***Machner*** hearing.

Fowler also argues that the trial court erred in relying "solely on the plea questionnaire as a basis that [his] plea was entered voluntarily," and that the trial court erred in determining that he understood the elements of burglary. These arguments also have no merit.

To succeed, a challenge to a guilty or no contest plea must first establish, at a minimum, that the guilty plea colloquy was deficient, thus rendering an involuntary or unintelligent plea. *See* ***State v. Bangert***, 131 Wis.2d 246, 265-266, 389 N.W.2d 12, 22 (1986). In this case, the record belies Fowler's claim. The plea questionnaire further establishes that Fowler's plea was not coerced and, in combination with the plea colloquy, refutes his assertion that he did not understand the elements of the crime. The trial court advised:

> Mr. Fowler, you are charged with one count of burglary from this incident that occurred on November 7, 1993. It's alleged that you intentionally entered a building at 10859 West Bluemound Road in

> the City of Wauwatosa without the consent of the person in lawful possession of that building and with intent to steal from that building.

Fowler responded that he understood the charge and what the State would have to prove. Counsel confirmed that Fowler was "entering his plea freely, voluntarily, intelligently with full understanding of the nature of the charge."

The trial court provided a direct statement of the elements as they applied to the specific charge against Fowler. As the State points out, it is ironic that Fowler complains that the trial court failed to recite the burglary elements or jury instruction in a general, non-specific manner. As the State also points out, Fowler "never alleged just what it was he did not understand." Thus, we again conclude that the trial court correctly denied Fowler's motion without an evidentiary hearing.

By the Court. – Orders affirmed.

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