

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1755-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JASON J. SIMONIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Jason Simonis appeals his conviction for two counts of first-degree sexual assault, having pled no contest to the charges. Simonis argues that his trial counsel supplied him ineffective assistance by failing to inform him before arraignment of his statutory right to substitute judges. Simonis states that he pleaded no contest rather than face a judge who in earlier

proceedings promised to punish Simonis severely if the judge ever saw him again. Simonis also states that he would have gone to trial had he been able to try his case before another judge. He pleaded no contest simply to reduce his prison exposure before a trial judge whom he thought he could no longer remove from the case. To prevail on an ineffective assistance of counsel claim, Simonis must show both deficient performance by counsel and prejudice from such performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We conclude that Simonis' claims do not satisfy the two-pronged *Strickland* standards, and we therefore affirm his conviction.

First, Simonis evidently received untimely notice of who would be the trial judge, and this automatically extended the time for him to request substitution beyond arraignment. *See Tinti v. Waukesha County Cir. Ct.*, 159 Wis.2d 783, 789, 464 N.W.2d 853, 855 (Ct. App. 1990). Simonis therefore could have made a timely substitution request. While unsure of the exact substitution deadlines, counsel testified that he spoke with Simonis immediately after arraignment about substitution. He told Simonis that he was satisfied with the trial judge and saw no need to remove him. The trial court could accept counsel's testimony as revealing that Simonis understood that he could still remove the trial judge. Simonis never tried to exercise this substitution and therefore suffered no prejudice in a *Strickland* sense.

Second, Simonis has made no showing of actual bias by the trial judge. This is a prerequisite to an ineffective counsel claim on a substitution issue. *See State v. Damaske*, 212 Wis.2d 169, 199-201, 567 N.W.2d 905, 918-19 (Ct. App. 1997). Under the *Strickland* standards, violation of Simonis' substitution rights does not automatically entitle him to vacation of the plea and trial on the merits. *Id.*

Third, Simonis made no showing that a trial would result in a favorable outcome on the sexual assault charges. This was also a prerequisite to vacating his plea on an ineffective assistance of counsel claim. See *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985). This means that Simonis needed to make some showing of innocence on the sexual assault charges in order to vacate the plea under a *Strickland* ineffective assistance of counsel claim. Simonis made an inadequate showing to refute the evidence of guilt already in the record.

Fourth, Simonis acquired pre-plea knowledge of substitution rights and could have claimed ineffective trial counsel sometime before the plea. That was the time to object to counsel's performance, not after the plea. Cf. *United States v. Coffin*, 76 F.3d 494, 497-98 (2d Cir. 1996). Simonis never objected, and we question, without deciding, whether this kind of defect survived his plea; no contest pleas waive nonjurisdictional defects. See *State v. Bangert*, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). In short, Simonis has not stated a valid claim of ineffective trial counsel.

By the Court.—Judgment and order affirmed.

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

