COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1833-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY POSTON,

DEFENDANT-APPELLANT.

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

FINE, J. Gregory Poston appeals, *pro se*, from a judgment, entered on his guilty plea, convicting him, as a habitual criminal, of obstructing or resisting a law-enforcement officer. *See* §§ 946.41(1) & 939.62, STATS. The record and briefs, as with many *pro se* appeals, are confusing. Although Poston also sought, unsuccessfully, an order from the trial court modifying his thirty-six

month sentence, the document that Poston filed as his notice of appeal purports to appeal the judgment of conviction only.

This appeal concerns the offense underlying the habitual-criminal penalty enhancer, Poston's 1988–1989 conviction and sentence for injury by conduct regardless of life, which, for some reason not clear in the record, the criminal complaint and Information in this action characterize as a "November 25, 1996" conviction for "attempt first degree murder," although the complaint later gives a date of February 9, 1989. It may be that the complaint was worded poorly, as many criminal complaints are.[1]

Poston asserts two claims on this appeal. First, he contends that his guilty plea in 1988 to the crime of injury by conduct regardless of life was not knowing, apparently because that crime is not a lesser-included offense of attempted first-degree murder. *See* ***Randolph v. State***, 83 Wis.2d 630, 641, 266 N.W.2d 334, 339 (1978). Second, he contends, in essence, in a document before us described by Poston as an "amended brief" that the penalty enhancement part of his sentence should be vacated because of the mischaracterization in the criminal

[1] The underlying case was Milwaukee County Circuit Court case number F-880031. A copy of the judgment of conviction that Poston has supplied to us, and of which we may take judicial notice even though it is not in the appellate record, *see* RULE 902.01, STATS., reveals that Poston was convicted on January 5, 1988, and was sentenced on February 9, 1989. Nevertheless, at the plea hearing in this case, Poston agreed with the trial court's statement that Poston was "convicted of attempted first degree murder on February 9th, 1989." (Capitalization omitted.) At the sentencing hearing in this case, both the State and Poston's lawyer agreed that Poston's conviction was for injury by conduct regardless of life, not attempted first-degree murder. Poston did not ask to withdraw his guilty plea at that time.

complaint and the Information, and at the plea hearing, of the underlying crime as attempted first-degree murder.[2] We affirm.

1. Poston pled guilty to injury by conduct regardless of life in 1988, and was sentenced in 1989 to a term not to exceed nine years. A defendant may not withdraw a guilty plea after imposition of sentence unless he or she establishes by "clear and convincing evidence" that there has been a "manifest injustice." *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). Not only was this issue not presented to the trial court, *see* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (ordinarily, we will not consider arguments raised for first time on appeal), but Poston's brief on appeal asserts nothing that could remotely be considered as requiring withdrawal of his 1989 guilty plea to prevent or correct a "manifest injustice."

2. Section 939.62, STATS., subjects a person convicted of a crime to increased punishment if he or she has, within the applicable time period, been previously "convicted of a felony." Section 939.62(1) & (2), STATS. As seen in footnote number 1, Poston agreed with the trial court's statement at the plea hearing that Poston was "convicted of attempted first degree murder on February 9th, 1989." (Capitalization omitted.) At the sentencing hearing in this case, however, both the State and Poston's lawyer agreed that Poston's conviction was for injury by conduct regardless of life. Absent a showing how he was prejudiced by the mischaracterization of the underlying repeater-allegation (under

[2] Poston also alleges that his trial lawyers were ineffective, both in connection with his 1988 guilty plea to injury by conduct regardless of life, and his guilty plea in this case. These issues were not raised before the trial court, and there has been no evidentiary hearing as required by ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979). Moreover, Poston's ineffective-assistance-of-counsel claims are conclusory only and will not be further addressed. *See* ***State v. Bentley***, 201 Wis.2d 303, 313–318, 548 N.W.2d 50, 54–57 (1996).

the facts of this case, the penalty enhancement is the same for both crimes, *compare* § 939.62(1) & (2), STATS., *with* § 939.62(2m), STATS.), a mischaracterization with which he agreed, the errors in the complaint and Information are not grounds for re-sentencing. *See* § 971.26, STATS.[3]; ***State v. Petty***, 201 Wis.2d 337, 347–348, 548 N.W.2d 817, 820–821 (1996) (absent a litigant's innocent mistake, judicial estoppel applies in the court's discretion to prevent a party from deliberately taking two inconsistent positions).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[3] Section 971.26, STATS., provides:

> **Formal defects.** No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.