COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1999

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.

Nos. 97-3161-CR
97-3162-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY W. WILLIAMS,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Brown, Anderson and Mawdsley,[1] JJ.

PER CURIAM. Johnny W. Williams appeals pro se from judgments of conviction of party to the crime of battery by a prisoner, two counts

[1] Circuit Judge Robert G. Mawdsley is sitting by special assignment pursuant to the Judicial Exchange Program.

of first-degree recklessly endangering safety, resisting or obstructing an officer, and possession of cocaine as a repeat drug offender.[2] He also appeals from orders denying his postconviction motion for sentence modification. Williams claims that he was denied the effective assistance of trial and appellate counsel, that there was insufficient evidence to support the first-degree endangering safety convictions, that he should have been allowed to withdraw his no contest plea, and that the sentencing court erroneously exercised its discretion. We reject his claims and affirm the judgments and the orders.

Williams was arrested and charged after he pointed a handgun at police officers. The officers had observed Williams walking with the gun at his side and pulled their unmarked squad car to a stop. As the officers exited the vehicle, Williams pointed the gun and pulled the trigger. The gun did not fire. Williams then fled, discarding the gun along the way. After his arrest, he was found to have nine packages of crack cocaine.[3]

Williams entered a no contest plea. He was sentenced to a total of thirty-two years of imprisonment. After a notice of intent to file postconviction relief was filed, Assistant State Public Defender Martha K. Askins was appointed to represent Williams. An order denying Williams' postconviction motion for

[2] The battery by a prisoner conviction included a habitual criminality enhancer. With the exception of the possession conviction, each remaining count for which Williams was convicted included an enhancer for habitual criminality and use of a dangerous weapon.

[3] The battery by a prisoner conviction arose out of an incident that occurred while Williams was held in the Racine county jail. That case was consolidated with the already pending case. Williams does not make an argument specifically related to his no contest plea to that charge.

sentence modification was filed on November 21, 1996. Nearly a year later, Williams filed pro se notices of appeal.[4]

Williams first contends that Askins was ineffective for not pursuing an appeal or filing a no merit report under RULE 809.32, STATS. A claim that counsel failed to commence an appeal under either RULE 809.30, STATS., or RULE 809.32 should be raised by a ***Knight***[5] petition in this court. *See* ***State ex rel. Smalley v. Morgan,*** 211 Wis.2d 795, 800, 565 N.W.2d 805, 808 (Ct. App. 1997). Generally, we will not act in the absence of a proper petition.[6] *See* ***State v. Speese***, 191 Wis.2d 205, 227, 528 N.W.2d 63, 72 (Ct. App. 1995), *rev'd on other grounds*, 199 Wis.2d 597, 545 N.W.2d 510 (1996).

State ex rel. Flores v. State, 183 Wis.2d 587, 617, 516 N.W.2d 362, 372 (1994), teaches that a defendant may voluntarily forego an appeal or no merit report after consultation with counsel. Williams' motion to extend the time for filing the notices of appeal indicates that Askins discussed the option of a no merit report with him. Williams did not timely activate the no merit report procedure which would have required Askins' continued representation.[7] Rather, Williams moved to bring a pro se appeal "out-of-time." *See* ***id.*** at 618, 516 N.W.2d at 372.

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[4] The notices of appeal were filed on October 17, 1997. This court's order of November 12, 1997, extended the time for filing the pro se notices of appeal.

[5] ***State v. Knight***, 168 Wis.2d 509, 522, 484 N.W.2d 540, 545 (1992) (to bring a claim of ineffective assistance of appellate counsel, a defendant must petition the appellate court that heard the appeal for a writ of habeas corpus).

[6] The State does not press the procedural default in Williams' claim of ineffective appellate counsel but rather argues that the claim lacks merit in its entirety.

[7] Williams' motion to extend the time to file the notices of appeal did not seek to require Askins to proceed with a no merit appeal. Williams stated his belief that he could later appeal if he retained counsel and that he had not intended to waive his right to appeal.

Self-representation is also a viable option when a defendant disagrees with counsel's suggestion that an appeal has no merit. By filing the pro se notices of appeal, Williams elected to proceed pro se. Having taken that route, and having been allowed an appeal, Williams cannot now claim appellate counsel failed to perform.

In this appeal, Williams argues that he should be allowed to withdraw his plea. He correctly acknowledges that this claim is waived because it was not raised before the trial court in his postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 678, 556 N.W.2d 136, 137-38 (Ct. App. 1996). Williams claims that Askins was ineffective for causing this waiver. A claim that appointed counsel has failed to do something in the trial court during the postconviction motion stage cannot be addressed for the first time by this court. *See* ***id.*** at 680-81, 556 N.W.2d at 138-39.

We turn to the grounds Williams advances to support withdrawal of his plea: (1) the ineffective assistance of trial counsel, (2) an insufficient factual basis for the recklessly endangering safety convictions, and (3) his protestation of innocence. Although these issues are not properly before this court, the State does not argue waiver. The State contends that the existing record is sufficient to conclusively show that Williams' claims lack merit and it would serve no purpose to require Williams to return to the trial court to pursue such claims. We agree.

The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the

time of counsel's conduct. *See* ***Pitsch***, 124 Wis.2d at 636-37, 369 N.W.2d at 716. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

The prejudice prong focuses on whether counsel's constitutional ineffective performance affected the outcome of the plea. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). To satisfy the prejudice prong, the defendant must show that but for counsel's errors, there is a reasonable probability that the defendant would have pleaded not guilty and gone to trial. *See* ***id.*** When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848.

Williams first argues that trial counsel never objected to the multiplicitous form of the original charges. The complaint charged Williams with attempted first-degree homicide along with two counts of first-degree recklessly endangering safety. Prior to the preliminary hearing, trial counsel argued that the charges were multiplicitous since Williams pulled the trigger when the gun was pointed at only one officer. The information charged attempted first-degree homicide with respect to the officer at whom Williams pointed the gun and first-

degree recklessly endangering safety with respect to the other officer present at the scene. The multiplicity problem was cured long before Williams entered his plea.[8]

Williams also claims that trial counsel failed to inform Williams that he could not be charged with possession of cocaine both as a repeat drug offender under § 161.48, STATS., 1993-94, and as a habitual offender under § 939.62, STATS. The information did not charge Williams as a habitual offender under both statutes. At the plea hearing, the trial court separately addressed the fact that Williams was charged as a habitual drug offender on the possession charge.

With the charges correctly made in the information, Williams' contention that he entered his plea without knowing that certain aspects of the charges had to be reduced without plea bargaining is without foundation. When Williams entered into his plea agreement, he was not facing multiplicitous charges. Trial counsel had no basis to challenge the charges, and, therefore, Williams' plea was not affected by any failure by trial counsel.

Williams maintains that he did not pull the trigger and that he never intended to harm anyone but merely wanted to frighten away whomever was approaching him from the unknown car. From this, he contends that there was insufficient evidence to support the "utter disregard" element of first-degree recklessly endangering safety. *See* WIS J I—CRIMINAL 1345. Where a trial court has found a sufficient factual basis to support a plea, we will not disturb that finding unless clearly erroneous. *See* ***State v. Harrington***, 181 Wis.2d 985, 989,

[8] Williams fails to recognize that the attempted first-degree homicide charge and first-degree recklessly endangering safety charge arose out of acts directed at different individuals. Because his conduct was directed at two people, Williams' suggestion that the charges are multiplicitous because first-degree recklessly endangering safety is a lesser included offense of attempted first-degree homicide lacks merit.

512 N.W.2d 261, 263 (Ct. App. 1994). The factual basis need not be established beyond a reasonable doubt. *See* ***Spinella v. State***, 85 Wis.2d 494, 499, 271 N.W.2d 91, 94 (1978), *overruled on other grounds by* ***State v. Bartelt***, 112 Wis.2d 467, 334 N.W.2d 91 (1983). A sufficient factual basis exists if Williams' conduct reflected an indifference to the life of others. *See* ***State v. Weso***, 60 Wis.2d 404, 410, 210 N.W.2d 442, 445 (1973).

The factual basis for the convictions came from the complaint and the evidence at the preliminary hearing. It was reported that as the officers exited their vehicle, Williams turned toward them and pointed his handgun in the direction of both officers. Williams then directed the gun at one of the officers and pulled the trigger. The distance between Williams and the officers was reported to be about twenty to twenty-five feet. The gun was found to contain ammunition. Williams indicated to the officers that he thought the gun would fire. Attempting to fire a loaded handgun at two persons within close range is conduct evincing an utter disregard for life. *See* ***State v. Barksdale***, 160 Wis.2d 284, 290, 466 N.W.2d 198, 201 (Ct. App. 1991).

Williams' contention that he did not pull the trigger and that he was justified in attempting to defend himself against what he believed to be a gang-related attack does not detract from the factual basis for the convictions. They are simply matters of disputed fact which Williams chose not to have resolved by a trial. Similarly, Williams' consistent claim of innocence does not invalidate his plea. He chose not to test his claim of innocence by going to trial. An assertion of innocence alone cannot support a plea withdrawal, particularly when the claim of innocence is not any different than it was at the time the plea was entered. No basis exists for permitting Williams to withdraw his no contest plea.

The final issue is whether Williams' sentence resulted from a proper exercise of discretion. *See* ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991) (sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an erroneous exercise of discretion). We begin with the presumption that the trial court acted reasonably and the appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. *See* ***State v. Petrone***, 161 Wis.2d 530, 563, 468 N.W.2d 676, 689 (1991).

Williams argues that the sentencing court improperly relied upon an assumption that Williams reacted by pointing the gun because he was trying to protect his drug trafficking business. He claims that there is no evidence that he was protecting a drug business and that the sentencing court merely jumped to a "stereo-typical" basis for sentencing.

From the record and presentence investigation report before the sentencing court, it was a reasonable inference that Williams was trying to protect his drugs. The sentencing court noted that since leaving high school, Williams had been selling drugs to support himself. Williams acknowledged that he had purchased the handgun just weeks before the incident. He was carrying nine packages of cocaine when he pointed the gun at the officers. The unfortunate reality is that with increasing frequency drug dealers possess firearms and use them for protection. Williams was not sentenced on the basis of inaccurate information.

Further, even if we were to believe Williams' contention that he was merely trying to protect himself from a gang attack, the sentencing court's reliance on the perception that Williams was protecting his drug business was but a small

factor in the sentence imposed. Indeed, that factor was not even mentioned until the court considered the possession conviction. The entire sentence was based on the proper consideration of the three primary sentencing factors: the gravity of the offense, the character of the offender, including his or her rehabilitative needs and the interests of deterrence, and the need for protecting the public. *See* ***State v. Setagord***, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997). The sentence was a proper exercise of discretion.

By the Court.—Judgments and orders affirmed.

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