COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1517

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COLIN N. GELFORD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: SUSAN E. BISCHEL, Judge. *Affirmed.*

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

PER CURIAM. Colin Gelford appeals an order denying his motion to withdraw his no contest "***Alford*** pleas"[1] to two counts of sexual contact with a child. He argues that he established a manifest injustice by showing that his trial

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970)

counsel was prejudicially ineffective and because defense counsel abandoned him on his direct appeal. We reject these arguments and affirm the order.

Following a preliminary hearing at which the victim testified to sexual assaults that were photographed by other children, Gelford pleaded no contest to two counts of sexually assaulting a child. The photographs depict an adult having sexual contact with children. The witness identified Gelford as the adult, suggested that other children would also identify him and created a basis for other potential charges. Gelford pleaded no contest in return for the State's agreement not to charge him with sexually assaulting other young children and its agreement to recommend not more than sixty-years' prison time. The court sentenced Gelford to consecutive terms totaling forty years in prison.

Gelford moved to withdraw his no contest pleas based on a claim of ineffective trial counsel. Withdrawal of a plea is permitted only when necessary to correct a manifest injustice. *See* ***State v. Clement***, 153 Wis.2d 287, 292, 450 N.W.2d 789, 790 (Ct. App. 1989). The defendant has the burden of proving grounds for withdrawal by clear and convincing evidence. *See* ***State v. Rock***, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979). To establish ineffective assistance of counsel, Gelford must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This court need not address both components if the defendant has failed to establish either one. ***Id.*** at 697. We choose to review only the prejudice component.[2] To satisfy the prejudice prong of

[2] The record before this court discloses no deficient performance by trial counsel. Gelford contends that the trial court restricted the evidence he could present on the deficient performance prong. Because Gelford has failed to establish prejudice, we need not speculate whether additional evidence would have disclosed deficient performance.

the ***Strickland*** test, a defendant seeking to withdraw a no contest plea must show a reasonable probability that, but for counsel's errors, he would not have pleaded no contest and would have insisted on going to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). The trial court's findings of historical or evidentiary fact will not be set aside unless they are clearly erroneous, and this court will defer to the trial court's judgment on the credibility of the witnesses. *See* ***State v. Harrell***, 182 Wis.2d 408, 415, 513 N.W.2d 676, 679 (Ct. App. 1994).

Gelford argues that his trial counsel ineffectively represented him by failing to attempt to suppress the photographs, failing to attempt to undermine the children's testimony, sending an associate to represent Gelford at the plea hearing and failing to independently investigate the case. At the postconviction hearing, trial counsel testified that Gelford told her he was guilty of the offenses. She testified that Gelford was aware of the alternative defense strategies and fully agreed with the chosen strategy of "damage control," an effort to minimize his sentence exposure and avoid additional charges.

Gelford consulted other attorneys about the possibility of vacating his pleas before sentencing. The trial court found Gelford's testimony that he sought to withdraw the plea before sentencing incredible and characterized as "deceitful and dishonest" his testimony that he had no idea about ***Miranda*** motions, suppressing evidence, or psychological testing of child victims. The court found that Gelford's pleas did not result from trial counsel's performance, but rather resulted from Gelford's instruction to get the best deal possible. Because Gelford presented no credible evidence to establish that his pleas were the result of counsel's unprofessional conduct, he has not established prejudice and has failed to meet his burden of showing a manifest injustice.

Gelford argues that prejudice should be presumed because his counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. *See* ***United States v. Cronic***, 466 U.S. 648, 659-61 (1984). This argument is based on Gelford's exaggerated assertion that his attorney abandoned him and failed to function as counsel at all. The record supports the trial court's finding that trial counsel was presented with overwhelming evidence of guilt, the potential for numerous other serious charges and that her options were limited by Gelford's admission that he was guilty of these offenses. Negotiating a plea agreement that was acceptable to Gelford under these circumstances did not effectively deprive Gelford of counsel altogether. Therefore, prejudice is not presumed.

Gelford argues that his trial attorney "abandoned" him on his direct appeal. He contends that his retained counsel should have been required to file a no merit report under RULE 809.32, STATS., just as a court appointed lawyer would. Wisconsin's no merit procedure is based on the mandates set out in ***Anders v. California***, 386 U.S. 738 (1967). Only court appointed counsel is required to file a no merit report. In addition, Gelford has not established any prejudice from counsel's failure to pursue an appeal because he has established no basis for reversal in this appeal or in his previous appeal (No. 96-3069-CR).

Gelford argues that there is insufficient factual basis to support his plea to count two in which the State alleges that Gelford touched G.V.'s buttocks with his hand. This issue was not properly preserved by objection or postconviction motion. A challenge to the validity of a plea cannot be made for the first time on appeal. *See* ***State v. Nelson***, 108 Wis.2d 698, 701-02, 324 N.W.2d 292, 294 (Ct. App. 1982). Furthermore, there is no merit to the argument. The factual basis may be derived from documents of record. During the plea hearing, defense counsel agreed that the criminal complaint would form the factual

basis for the pleas. Although the complaint charged a single count of first-degree sexual assault of a child, the probable cause portion of the complaint describes several acts that could form the basis for the charge, two of them relating to G.V. Both of these charges relate to the child touching Gelford's penis rather than his touching the child's buttocks. This variance is not fatal to the adequacy of the factual basis for the plea. The two kinds of sexual contact are merely alternative forms of committing the same crime between the same parties. In addition, preliminary hearing transcript and exhibits include a photograph found at Gelford's home depicting an adult touching a child's buttocks and testimony that the photos were taken in Gelford's bedroom and no other adults were present. This evidence constitutes a sufficient factual basis to support the no contest plea to count two.

By the Court.—Order affirmed.

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