**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 5, 1999**

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-0781-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEROME L. THOMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgment and an order of the circuit court for Vilas County: MARK A. MANGERSON, Judge. *Affirmed.*

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

¶1 PER CURIUM. Jerome Thoms appeals his conviction for substantial battery and an order denying his postconviction motions. He seeks either to be resentenced or permitted to withdraw his no contest plea. Thoms seeks to withdraw his plea on the grounds that his counsel did not explain, and

Thoms did not understand, the maximum penalty that could be imposed or that he could be sentenced to more time than the prosecutor recommended. Thoms further claims he was denied effective assistance of counsel at sentencing and should be resentenced because he had inadequate time to review the presentence investigation report (PSI) and because counsel failed to present witnesses at the hearing. The record does not support Thoms's claim that he did not understand the maximum penalty or that the court could impose a longer sentence than recommended by the State. The trial court correctly declined to permit Thoms to withdraw his plea. We also conclude that Thoms has not shown counsel's performance to be defective and, even if it was, Thoms has not shown he was prejudiced. We therefore affirm the judgment.

## FACTS

¶2 Thoms was charged with substantial battery in violation of § 940.19(3), STATS. He struck the victim, Tanner Wayman, numerous times with an eighty- to ninety-pound driveshaft. Wayman sustained a broken arm and leg along with numerous cuts and bruises. The information identified the maximum penalty as including imprisonment not to exceed eleven years.[1] Thoms was on parole at the time of the incident.

¶3 Thoms agreed to plead no contest to substantial battery in return for the State recommending four years imprisonment, consecutive to his parole revocation.[2] Thoms was free to argue for whatever sentence he felt appropriate.

[1] Violation of § 940.19(3), STATS., is a Class D felony. That penalty was enhanced because Thoms was charged as a repeat offender, *see* § 939.62(1)(b) & (2), STATS., and for committing the crime while using a dangerous weapon. *See* § 939.63(1)(a)3, STATS.

[2] Thoms's parole was revoked as a result of the Wayman battery.

Prior to his plea, Thoms met with counsel, discussed and completed a plea questionnaire/waiver of rights form. At the plea hearing, the court questioned whether Thoms had carefully reviewed that form and confirmed that Thoms read through it line by line and did not have any trouble understanding it. The court ensured Thoms understood he was waiving significant rights and that he had no additional questions. The court also verified that Thoms's counsel believed Thoms was voluntarily entering his plea and understood the charges admitted and rights waived. Thoms was then permitted to plead no contest to substantial battery and was convicted of that crime. His counsel requested a PSI and the court ordered one.

¶4 Thoms's counsel received the PSI on the day of Thoms's sentencing. He spent one and one-half hours reviewing the report and preparing for the sentencing hearing. Thoms's counsel also met with Thoms to review the PSI for approximately one-half hour.

¶5 At sentencing, the State's recommendation was consistent with the plea agreement. Thoms's counsel requested that the court impose and stay a prison sentence and place Thoms on probation. He argued that Wayman initiated the fight, was inebriated and was significantly larger than Thoms. Counsel also pointed out that it was Wayman who brought the drive shaft into the fray. He asserted that Thoms did not have problems with the law when sober, that he needed treatment to help him stay sober and that he would not receive treatment if sentenced in accordance with the State's recommendation.

¶6 Thoms also exercised his right of allocution at the sentencing hearing. He explained how the fight had started and admitted hitting Wayman

with the eighty- to ninety-pound drive shaft four times. Although he acknowledged responsibility for what happened, he blamed alcohol.

¶7 The circuit court sentenced Thoms to nine years imprisonment. The court noted the aggravated nature of the assault and, in particular, that Thoms hit Wayman numerous times after he was on the ground. The court also reflected on Thoms's criminal history, his background, the failure of previous rehabilitative efforts and the need to protect the public.

¶8 The court ordered that Thoms be given credit for the time he spent in jail since his arrest. The judgment was later modified to delete that credit because the Department of Corrections had credited that time against Thoms's previous sentence, for which his parole was revoked. The department explained that because the substantial battery conviction was consecutive to the earlier sentence, it was inappropriate to give Thoms double credit.

¶9 Thoms subsequently filed a postconviction motion to withdraw his plea because he did not understand the maximum possible penalty or that the court's sentence might exceed what the prosecutor requested. He further contended that his counsel was ineffective by failing to advise him that the sentence could exceed the State's recommendation. He alternatively sought to be resentenced on the grounds that his counsel was ineffective because he did not spend sufficient time reviewing the PSI with Thoms and because he did not present witnesses at the sentencing hearing or request an adjournment of that hearing in order to do so. Thoms also requested that the credit for time served be reinstated. At the postconviction motion hearing, Thoms's trial counsel testified; Thoms did not. The court denied the motion. This appeal ensued.

¶10 We first examine Thoms's request to withdraw his no contest plea. We then examine his claims that his counsel was ineffective at sentencing. Finally, we examine his contention that the credit for time served should be reinstated on his conviction for substantial battery.

## ANALYSIS

### *Plea withdrawal claim*

¶11 Thoms contends that he should be permitted to withdraw his plea because it was his and his counsel's belief and experience that the court would not impose a sentence exceeding that recommended by the State. He also claims he was unaware of the maximum possible sentence. We reject Thoms's contentions because they are not supported by the record.

¶12 In ***State v. Van Camp***, 213 Wis.2d 131, 569 N.W.2d 577 (1997), the supreme court described the standard of review for withdrawing a plea claimed not to have been voluntarily, knowingly and intelligently entered. Fundamental due process is violated when a no contest plea is not voluntarily, knowingly and intelligently entered, and withdrawal of the plea is a matter of right. ***Id***. at 139-40, 569 N.W.2d at 582. Whether a plea was voluntarily, knowingly and intelligently entered is a question of constitutional fact and is reviewed de novo. ***Id***. at 140, 569 N.W.2d at 582. We will uphold the circuit court's findings of evidentiary and historical facts unless they are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).

¶13 Under the procedure the supreme court established in ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986), and restated in ***Van Camp***, we employ a two-step process to determine whether a defendant

voluntarily, knowingly, and intelligently entered a plea. First, we determine whether the defendant has made a "prima facie showing that his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08, and other mandatory duties imposed by [the supreme] court, and … whether he has properly alleged that he in fact did not know or understand the information ... provided at the plea hearing." ***Van Camp***, 213 Wis.2d at 140-41, 569 N.W.2d at 582-83 (footnote omitted). If the defendant makes this initial showing, "the burden then shifts to the State, and we must determine whether the State has demonstrated by clear and convincing evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered …." ***Id***. at 141, 569 N.W.2d at 583.

¶14 Thoms ignores the circuit court's finding that Thoms did not mistakenly believe that the maximum sentence he could receive was four years. The plea questionnaire that Thoms signed informed him both that the court did not have to follow any plea agreement and that the maximum penalty was eleven years. The first paragraph of the questionnaire identified the penalty, the plea agreement and the statement that the court was not bound by the plea agreement "but could sentence me to the maximum …." Thoms affirmed that he read each line of the form, that he understood everything on it and had no additional questions. The circuit court's finding that Thoms understood the maximum penalty that could be imposed and that the circuit court could sentence Thoms to that maximum regardless of the State's recommendations was not clearly erroneous. Thus, Thoms failed to make the initial required showing.

***Ineffective assistance claim***

¶15 Thoms contends that his attorney was ineffective in preparation for and at sentencing. He asserts that counsel did not have adequate time to review

the PSI with Thoms nor to discuss any claimed inadequacies in the PSI. Thoms also claims that counsel was ineffective because he failed to call witnesses to testify: (1) that Wayman was struck only three times and not fifteen times; (2) about Wayman's high blood alcohol content and that Thoms's alcohol content was not measured; (3) as to Wayman's larger size; (4) that Thoms retreated from the altercation; and (5) about Thoms's history of child support payments.

¶16 The right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable by the Fourteenth Amendment, and WIS. CONST. art. I, § 7, and ***State v. O'Brien***, 223 Wis.2d 303, 323, 588 N.W.2d 8, 17 (1999). To establish ineffective assistance of counsel, the defendant must prove both that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶17 Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). The circuit court's "determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." ***State v. Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986). Whether counsel's conduct, however, violated the defendant's right to effective assistance of counsel is a question of law that this court decides without deference to the circuit court. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

¶18 We initially address whether Thoms's counsel's performance was deficient at sentencing, either because Thoms had inadequate time to review the

PSI or because counsel failed to call witnesses. An attorney's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992) (quoted source omitted). We thus assess whether the performance was reasonable under the circumstances of this case. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992). To prevail, the defendant must show that counsel "made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." ***Johnson***, 133 Wis.2d at 216-17, 395 N.W.2d at 181 (quoted source omitted).

¶19 We reject Thoms's assertions that his counsel's performance was deficient for two reasons. First, because Thoms chose not to testify at the postconviction hearing there is no evidence that he had insufficient time to review the PSI. Thoms had time to point out several factual inaccuracies in the PSI when he met with counsel. Counsel did not recall what those facts were at the post conviction hearing, but recalled that he did not consider them significant. Thoms appears to request that we hold as a matter of law that the approximate one-half hour he had to review the PSI with his counsel is inadequate. We decline to do so. Absent evidence from Thoms himself as to the inadequacy of that amount of time, Thoms is unable to present clear and convincing evidence that counsel's performance was deficient in failing to request additional time to review the PSI.

¶20 Second, most of the information that Thoms claims witnesses should have presented at the sentencing hearing was already contained in the PSI. The circuit court found that counsel's performance was not deficient because the information was already part of the record. The record supports the circuit court's determination. There was no need to call a witness who would testify that he

observed Thoms hit Wayman only three times. The circuit court was aware that there were discrepancies as to the number of times Thoms hit Wayman. Moreover, the witness in question admitted he did not see the entire fight.

¶21 Similarly, the information regarding blood alcohol levels and size of the victim compared to Thoms was part of the record and was utilized by defense counsel in his sentencing argument. Both the PSI and Thoms informed the circuit court that Thoms had retreated from the altercation.

¶22 The only evidence not available to the court was an accurate history of Thoms's child support payments. The evidence of this in the PSI was in error. The PSI did not, however, elaborate on the payment history, which was ultimately tangential to Thoms's substantial battery sentence. The court merely indicated that it could not consider Thoms's child support payments as a mitigating factor. The court's statements at both the time of sentencing and the postconviction hearing affirm that the court did not consider this a factor that affected the length of Thoms's sentence.

¶23 Based on the record before us, we cannot say that Thoms has shown that counsel's claimed omissions were unreasonable or outside the wide range of professional competent assistance. We cannot fault counsel for failing to present evidence at a sentencing hearing duplicative of information already before the court in a PSI.

¶24 Even if we were to assume that counsel's performance was deficient, we cannot say that Thoms was prejudiced thereby. In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." ***Strickland***, 466 U.S. at 694. The prejudice component's touchstone is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***State v. Smith***, 207 Wis.2d 258, 276, 558 N.W.2d 379, 387 (1997).

¶25 Thoms asserts he should have had more time to review the PSI, but he failed to provide any evidence of how this prejudiced him. He also contends that counsel erred in failing to elicit certain evidence. Yet, as discussed above, the record reflects that most of that claimed missing information was before the circuit court at sentencing. He fails to explain how he was prejudiced by the failure to have witnesses testify to information already contained in the PSI. If counsel's performance was deficient, we cannot say it rendered the result of the sentencing hearing unreliable.

¶26 Thoms also contends, for the first time on appeal, that his due process right to be sentenced on accurate information was violated. We decline to consider this argument. Thoms waived the due process issue by failing to raise it before the circuit court. *See* ***State v. Caban***, 210 Wis.2d 597, 604-05, 563 N.W.2d 501, 505 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.").

***Sentence credit claim***

¶27 Thoms finally claims that he should have been given ninety days credit against his substantial battery sentence as originally ordered. The Department of Corrections had, however, notified the court that the department had credited the ninety days against a sentence Thoms was serving in connection with an earlier conviction. An amended judgment was subsequently entered on the substantial battery conviction, which granted no credit.

¶28 We conclude that the amended judgment of conviction appropriately reflects the law of this state. ***State v. Boettcher***, 144 Wis.2d 86, 87, 423 N.W.2d 533, 534 (1988), sets forth the rule that time in custody is not to be double counted and is to be credited against the sentence first imposed. The ***Boettcher*** court stated:

> [C]ustody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences. For ease in calculation and clarity in respect to subsequent exercise of court discretion, the credits should be applied to the sentence that is first imposed.

***Id***. at 100, 423 N.W.2d at 539.

¶29 Thoms would have us apply the credit only to this most recent conviction. He asserts this would avoid double counting. We decline to do so. ***Boettcher***'s application here mandates that the time in custody be credited against Thoms's earlier conviction. In addition, permitting defendants to select the sentence that time in custody is to be credited against could create confusion and uncertainty.

¶30 In conclusion, we determine that Thoms has failed to show that he misunderstood the maximum penalty that could be imposed or that the court could impose a harsher sentence than the State requested. He may not withdraw his plea. Thoms has also failed to show that counsel's performance was deficient or that he was prejudiced. His counsel's assistance was therefore not ineffective. Under controlling Wisconsin law, if two sentences are consecutive, the days served on a parole hold in connection with the first sentence are credited to that sentence. The amended judgment therefore properly reflects that Thoms is

entitled to no credit for time served. Accordingly, the judgment and order are affirmed.

*By the Court.*—Judgment and order affirmed.

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