

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-1195-CR
99-1196-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. KAZANJIAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. Michael S. Kazanjian appeals from a judgment of conviction entered upon his guilty pleas to charges of escape and forgery and from the trial court's order denying his postconviction motion. Kazanjian contends that:

(1) the convictions are void because the trial court lacked subject matter jurisdiction; (2) the convictions should be reversed because he was denied his constitutional rights to a speedy trial and due process; and, in the alternative, (3) he should be allowed to withdraw his guilty pleas as a matter of right because his constitutional rights were violated, to correct a manifest injustice, and because the trial court violated the requirements of WIS. STAT. § 971.08 (1997-98).¹ We reject Kazanjian's contentions and affirm the judgment and order.

BACKGROUND

¶2 Kazanjian was convicted of escape and forgery. The escape conviction arose as a result of his failure to return to custody from a Huber release. The forgery conviction arose as a result of Kazanjian's endorsing several checks made payable to his employer and cashing them for his own use.

¶3 Kazanjian was charged with escape on February 28, 1997. The complaint on the escape charge contained a repeater charge pursuant to WIS. STAT. § 939.62. Kazanjian entered a guilty plea on the escape charge as enhanced on April 17, 1997. Prior to sentencing, Kazanjian filed a pro se motion to withdraw his guilty plea, which included claims of ineffective assistance of counsel. As a result, counsel sought to withdraw, the motion was granted, and a hearing was scheduled on Kazanjian's motion to withdraw his plea. At the hearing, new counsel sought a continuance and subsequently filed another plea withdrawal motion on the grounds that Kazanjian had been improperly charged as a repeater. Counsel also filed a motion to reduce bail. The State ultimately agreed that the plea withdrawal motion should be granted and moved to amend the

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

information to delete the repeater allegation. The trial court granted Kazanjian's motion for plea withdrawal, granted the State's motion to amend the information, and reduced bail from \$5,000 to \$1,000 cash. Kazanjian was unable to make the reduced bail and remained in jail.

¶4 In August 1997, while still in jail, Kazanjian sent the trial court a pro se speedy trial demand, indicating that he had been incarcerated for more than five months without a trial. As a result of this pro se motion, counsel sought to withdraw and in September 1997, the court granted the motion. The case was continued so new counsel could review the file and evaluate defense strategy.

¶5 On November 14, 1997, the forgery complaint was filed. Kazanjian pleaded not guilty. There were no further court appearances until March 3, 1998. At that time, Kazanjian entered an agreed plea and was sentenced on both the escape and forgery charges. When he entered his guilty plea to the escape charge, the court noted that the information still mistakenly contained the repeater allegation. The State conceded the error and the court again ordered the repeater allegation dismissed. Kazanjian pleaded guilty to the forgery charge as a repeater after the parties stipulated to a prior conviction. He was sentenced to three years on the escape conviction and two years on the forgery conviction, to run consecutively.

¶6 Kazanjian filed a post-conviction motion seeking to void both convictions, to vacate the convictions, or, in the alternative, to withdraw his pleas. The trial court denied the postconviction motion.

ANALYSIS

Void Convictions

¶7 Kazanjian first contends that both convictions are void because the court lacked subject matter jurisdiction. He argues that WIS. STAT. § 946.42, the escape statute, does not apply because the statute does not proscribe his failure to return to the Huber facility, but instead punishes “escape,” which is defined as “to leave ... without lawful authority or permission.” WIS. STAT. § 946.42(1)(b).

¶8 We conclude this contention is meritless. A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea. *See Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). We have held that a trial court lacks subject matter jurisdiction in a criminal case only where the complaint does not charge an offense known to law. *See State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Here, Kazanjian does not allege that the criminal complaint failed to charge an offense known to law. Instead, he alleges that the facts do not support a conviction for the offense. Therefore, Kazanjian’s argument is not jurisdictional. Because this claim does not raise a jurisdictional defense, and because we conclude below that the plea was knowingly and voluntarily entered, the claim is waived.

¶9 Kazanjian next contends that the arraignments in the escape and forgery cases were invalid to confer jurisdiction. With regard to the escape charge, Kazanjian bases the invalidity on a defect in the information improperly charging escape as a repeat offense. WISCONSIN STAT. § 971.26 provides that no information shall be invalid by reason of any defect in matters of form which do not prejudice the defendant. *See* WIS. STAT. § 971.26. Here, Kazanjian was

allowed to withdraw his first plea to the escape charge as enhanced and in the second information, the improper repeater charge was dismissed. Thus, there was no repeater conviction and therefore, no prejudice to Kazanjian from his conviction for unenhanced escape. Accordingly, the defect did not invalidate the arraignment on the escape charge or impair the court's jurisdiction.

¶10 Kazanjian also challenges the validity of the arraignments on the grounds that the informations were not handed to him personally, were not read to him, and that he did not personally waive their reading pursuant to WIS. STAT. § 971.05(3). In both cases, counsel acknowledged receiving a copy of the information and waived further reading. Kazanjian made no objections in court and his brief does not allege any prejudice to his rights. We have held that furnishing an information to defense counsel and failing to read it are imperfections in form that are waived by silence. *See State v. Martinez*, 198 Wis. 2d 222, 235, 542 N.W.2d 215 (Ct. App. 1995). We have also held that waiver of reading of the information is a decision which a defendant delegates to his attorney. *See State v. Wilkens*, 159 Wis. 2d 618, 622-23, 465 N.W.2d 206 (Ct. App. 1990). We conclude, therefore, that Kazanjian waived his right to complain about the validity of the arraignments on these grounds.

Reverse Convictions

¶11 Kazanjian next contends that his forgery and escape convictions should be reversed because he was denied his constitutional rights to due process and to a speedy trial. He first maintains that the improper repeater charge, and the trial court's failure to give or read the informations personally or to take a waiver of the reading personally violated his due process rights. Kazanjian also contends he was denied his constitutional right to a speedy trial. Kazanjian's guilty plea,

which we conclude below was made knowingly and voluntarily, waives all defects and defenses of a constitutional dimension. *See Mack*, 93 Wis. 2d at 293. Therefore, this argument is without merit.

Withdrawal of Guilty Pleas

¶12 Finally, Kazanjian contends that he should be allowed to withdraw his guilty pleas. He makes three separate arguments. First, he maintains he should be allowed to withdraw his guilty pleas as a matter of right because his constitutional due process and speedy trial rights were violated. Because we have already rejected Kazanjian's allegations asserting a denial of constitutional rights as waived, we conclude this argument fails.

¶13 Second, Kazanjian asserts that he should be allowed to withdraw his guilty pleas to correct a manifest injustice because he was denied the effective assistance of counsel. To withdraw a guilty plea after sentencing, a defendant must establish that the trial court should permit him or her to withdraw the plea to correct a manifest injustice. *See State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). The defendant must prove a manifest injustice by clear and convincing evidence; the plea withdrawal is addressed to the trial court's sound discretion. *See State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). A manifest injustice may occur when a defendant is denied the effective assistance of counsel. *See Washington*, 176 Wis. 2d at 213-14.

¶14 Determining whether a defendant who has entered a guilty plea has been denied effective assistance of counsel requires application of a two-part test. The defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficient performance inquiry focuses on whether

counsel's assistance was reasonable under prevailing professional norms. *See id.* at 688. Counsel is strongly presumed to have rendered adequate assistance and to have exercised reasonable professional judgment in making significant decisions. *See id.* at 690. As to the prejudice component, a defendant must establish a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See State v. Harvey*, 139 Wis. 2d 353, 378, 407 N.W.2d 235 (1987). Whether counsel's performance was ineffective is a mixed question of fact and law. *See id.* at 376. The trial court's findings of what counsel did or did not do and the basis for the challenged conduct are findings of fact that will be upheld unless they are clearly erroneous. *See id.* Whether counsel's conduct deprived the defendant of the effective assistance of counsel is a question of law that we review without deference to the trial court. *See id.*

¶15 Kazanjian raises numerous bases for his ineffective assistance claim. He claims that trial counsel's performance was deficient for failing to recognize the improper repeater charge in the escape case, failing to move to dismiss the improper charge and failing to move to dismiss the escape charge for lack of subject matter jurisdiction. Any error from counsel's failure to recognize and move to dismiss the improper repeater charge was cured when the repeater charge was dismissed and Kazanjian was allowed to withdraw his plea. Consequently, Kazanjian has failed to demonstrate any prejudice flowing from the first two alleged deficiencies. In addition, a motion to dismiss the escape charge for lack of subject matter jurisdiction would have been denied because Kazanjian's contention that the facts do not support an escape conviction does not raise a jurisdictional defense. *See Aniton*, 183 Wis. 2d at 129. An attorney is not required to pursue a motion that clearly lacks merit. *See State v. Wolverton*, 193

Wis. 2d 234, 268 n.26, 533 N.W.2d 167 (1995). Therefore, Kazanjian has failed to demonstrate that the failure to file a motion to dismiss the escape charge was deficient performance.

¶16 Kazanjian also claims that counsel's failure to demand a speedy trial or to object to due process violations constituted ineffective assistance. Any alleged error in failing to object to due process violations occurring during the arraignment hearing was cured at the plea hearing when Kazanjian was provided reasonable notice of the charges against him. Therefore, Kazanjian has failed to establish prejudice. With respect to his argument that counsel was ineffective for failing to demand a speedy trial, we conclude that the record demonstrates that Kazanjian occasioned the delay himself and, as a result, counsel's failure to move for a speedy trial was reasonable under professional norms.

¶17 Third, Kazanjian claims counsel rendered ineffective assistance by incorrectly advising him that he would serve only fifteen months total in prison, that he would receive twelve months credit, and that he would be released by the summer of 1998. Kazanjian claims he was prejudiced because he would not have accepted the plea agreement if he had known counsel's advice was wrong.

¶18 We conclude that the record supports the trial court's finding that counsel did not unequivocally assure Kazanjian that he would be sentenced to only fifteen months. Counsel testified that although he suggested fifteen months, he also warned Kazanjian that the sentencing determination was discretionary and that he could not guarantee the result. Counsel also testified that he sent Kazanjian a letter advising him that the trial court was not bound by counsel's and the district attorney's recommendation and that no promises could be made as to the end result. On this record, we conclude that Kazanjian has failed to establish

that counsel provided inaccurate information regarding his total exposure on the forgery and escape charges. In sum, we reject all of Kazanjian's ineffective assistance of counsel claims and conclude that Kazanjian has failed to establish that a manifest injustice would result if he were not permitted to withdraw his pleas.

¶19 Finally, Kazanjian asserts that he should be allowed to withdraw his guilty plea because the trial court failed to comply with the requirements of WIS. STAT. § 971.08, and therefore, his plea was not entered knowingly, voluntarily and intelligently. Whether a plea was knowingly, voluntarily, and intelligently entered is a question of constitutional fact that we review de novo. *See State v. Bollig*, 224 Wis. 2d 621, 628, 593 N.W.2d 67 (Ct. App. 1999), *aff'd*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199. We first review the plea hearing transcript to determine whether Kazanjian has made a prima facie showing that the court failed to comply with § 971.08 plea procedure. *See State v. McKee*, 212 Wis. 2d 488, 490-91, 569 N.W.2d 93 (Ct. App. 1997). If Kazanjian makes a prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that Kazanjian entered his plea knowingly, voluntarily and intelligently. *See id.*

¶20 Kazanjian contends that the trial court erred by not determining the extent of his education and general comprehension and by not inquiring into whether any promises had been made to him. We conclude that the plea hearing transcript discloses that the court complied with the plea procedures under WIS. STAT. § 971.08. The court summarized the elements of and potential punishments for each count. At the hearing, the court personally addressed Kazanjian and Kazanjian acknowledged that he had read each of the plea forms, had reviewed them with counsel, and understood every paragraph of each form. The extent of

Kazanjian's education is set forth in the plea questionnaires which were before the court at the plea hearing. The questionnaires indicate that at the time of the pleas, Kazanjian was thirty-six years old, had at least a GED, had completed eleven years of schooling, could read and write and understand the English language, and had read the charges against him. Furthermore, the plea forms show Kazanjian's initials next to the provision stating, "Other than the plea agreement itself, if any, no other promises or threats have been made in order to get me to enter this plea." We reject Kazanjian's assignments of error to the plea procedure and conclude that Kazanjian has failed to make a prima facie showing that the plea procedure was deficient.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

