COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1233-CR
99-1800-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STANLEY H. GRAEWIN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ

¶1 PER CURIAM. Stanley H. Graewin appeals a judgment convicting him of possession of a firearm by a felon, a judgment convicting him of possession of an untagged deer, and an order denying his postconviction motion for relief. He claims he should have been allowed to withdraw his pleas on the

grounds that they were involuntarily and unintelligently made due to counsel's ineffective assistance and a mistake in the complaint and information. For the reasons discussed below, we reject Graewin's contentions and affirm.

BACKGROUND

¶2 Graewin was charged with two felony counts of possession of a firearm by a felon, two misdemeanor counts of hunting without a license, and one misdemeanor count of possession of an untagged deer. The complaint cited the wrong statute for the felonies, listing them as class D rather than class E offenses, and incorrectly stated that the penalty for each felony was five, rather than two years. The information duplicated the mistaken penalty information.

¶3 Graewin appeared at the plea hearing in person, while counsel appeared by telephone. Graewin indicated that he wished to waive his preliminary hearing and plead no contest because he didn't "want any further monkeying around with this," and because he didn't want to place his family and friends in the position of having to testify against him. The trial court corrected the information, and informed Graewin that the actual maximum penalty for possession of a firearm was two years. Graewin asked whether that meant he could go to prison for two years if his probation was revoked, and the trial court affirmed his understanding.

¶4 Graewin indicated that his attorney had told him to plead no contest. The court inquired whether that was what Graewin himself wished to do, and he answered affirmatively. In addition to the standard questions in the plea colloquy, the trial court several times urged Graewin to discuss any questions he had about the process. Graewin indicated that his discussions with third parties led him to believe he had a defense, but that counsel had advised him that his friends'

analysis of the law was incorrect. Graewin specifically stated that he was making his pleas intelligently and voluntarily. The trial court accepted the pleas, dismissed two separate cases against Graewin as well as the other charges in the information, and proceeded to sentence Graewin to eighteen months probation, with hunting restrictions, plus over $2,000 in fines and costs, in accordance with the plea agreement.

STANDARD OF REVIEW

¶5 The trial court ordinarily has discretion whether to allow plea withdrawal. *See* ***State v. Farrell***, 226 Wis. 2d 447, 453-54, 595 N.W.2d 64 (Ct. App. 1999). We will uphold a discretionary determination by the trial court so long as the court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). However, we will independently determine whether the established facts constitute a constitutional violation sufficient to warrant plea withdrawal as a matter of right. *See* ***State v. Sturgeon***, No. 98-2885, slip op. at ¶16 (Wis. Ct. App. Nov. 17, 1999, ordered published Dec. 16, 1999).

ANALYSIS

¶6 Graewin first argues the trial court should have allowed him to withdraw his pleas upon a showing of any fair and just reason, because there would be no prejudice to the state. However, it is very well established that the fair and just standard for plea withdrawal applies only prior to sentencing. *See* ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989). Relief is appropriate after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a

manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). A constitutional violation such as an unknowing, involuntary or unintelligent plea or ineffective assistance of counsel constitutes manifest injustice if the plea would not have occurred absent the violation. *See* ***id.***; ***Sturgeon***, No. 98-2885, slip op. at ¶15. We are satisfied the trial court applied the proper standard of law.

¶7 Graewin next contends his pleas were involuntary and he was deprived of effective assistance because counsel pressured him to accept the proposed plea agreement. He claims his attorney threatened to withdraw representation without refunding the retainer if Graewin did not enter pleas to the charges and told him that the court would not grant a continuance for Graewin to obtain substitute counsel. Counsel admitted that Graewin initially wanted to proceed to trial, but said Graewin reluctantly agreed to plead no contest in exchange for the dismissal of additional charges and a recommendation for probation. This occurred after counsel had investigated and explained the state of the evidence and the law to his client, and had informed him that he would be more likely to be incarcerated if he went to trial on all five charges and lost.

¶8 Counsel could not recall if he had based his discussion of Graewin's total exposure on the felonies being class D or class E. However, Graewin, who was a month shy of 57 at the time of the plea hearing, specifically recalled counsel telling him that he could be in jail until he was 62 years old. That would be

consistent with receiving two years on each of the felonies and 6 months on each of the misdemeanors.[1]

¶9 Counsel said he never discussed the possibility of a continuance or substitute counsel with his client, but may have indicated that the retainer would not be returned due to the number of hours he had already spent on the case. The record shows that Graewin himself asked the court whether a continuance would be possible, and the court said the matter would not be continued unless Graewin presented some good reason to do so. Graewin did not tell the court that he would like to obtain substitute counsel, and in fact, stated that he was satisfied with present counsel's performance.

¶10 We infer from the trial court's decision that the trial court resolved conflicts in the testimony in counsel's favor. We are satisfied that the trial court's implicit finding that Graewin did not tell his attorney that he wanted a continuance to obtain substitute counsel was not clearly erroneous. Given that finding, we agree with the trial court that counsel's performance was not deficient and Graewin's pleas were not involuntary.

¶11 Graewin also asserts his pleas were unintelligent because he did not know until the plea hearing that the maximum penalties for the charged felonies were two years each. However, the record amply demonstrates that Graewin was informed about and comprehended the correct applicable penalties before entering his pleas, and he assured the trial court that he did not need additional time to discuss the pleas with counsel.

[1] If Graewin had received five years on each of the felonies and six months on each of the misdemeanors, he would have been imprisoned until he was 67 or 68 years old, depending on the trial date.

¶12 Finally, Graewin maintains the plea hearing was flawed because WIS. STAT. § 967.08 (1997-98),[2] does not allow telephonic appearances for pleas. However, Graewin offered no objection to the manner of counsel's appearance to the trial court, and his brief does not develop an argument as to why such a procedural failing should entitle to him to withdraw his pleas. We therefore deem the issue waived. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶13 In sum, the established facts do not show any constitutional violation and the trial court did not misuse its discretion in determining that Graewin had failed to establish a manifest injustice by clear and convincing evidence.

By the Court.—Judgments and order affirmed.

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

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.