

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 2, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**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.

**Appeal No. 2016AP724-CR**

**Cir. Ct. No. 2014CM1760**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**WILLIAM J. DRAKE, II,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> William Drake, II, appeals a judgment of conviction for retail theft and disorderly conduct, contrary to WIS. STAT. §§ 943.50(1m)(b) and 947.01, and an order of the circuit court denying his

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

postconviction motion to withdraw his plea on the grounds of ineffective assistance of counsel. Drake contends that his trial counsel was ineffective for failing to determine prior to Drake entering his plea whether Drake was eligible for Huber privileges and in failing to inform Drake that he was not guaranteed to receive Huber privileges for the entire duration of his incarceration. For the reasons discussed below, I affirm.

### **BACKGROUND**

¶2 Drake was charged with retail theft and disorderly conduct. Drake was unable to pay the cash bond set as a condition of release pending trial and he remained housed at the Dane County Jail. Drake pled guilty and was sentenced to a total of eight months in jail with Huber privileges. *See* WIS. STAT. § 303.08.

¶3 Approximately one week after Drake was sentenced, the Dane County Sheriff's office petitioned the circuit court to revoke Drake's Huber privileges. The petition alleged that Drake had arrived at the Dane County Jail on January 19, 2015, and at that time was placed in administrative confinement based on the recommendation of jail mental health staff and Drake's prior history of behavioral issues. The petition further alleged that the sheriff's department had "not been able to monitor [] Drake and attempt to transition him out of Administrative Confinement housing in a safe and appropriate manner," but that the department was "planning to move him to less restricted housing over the next few weeks." The petition alleged that if Drake's behavior remained "stable and appropriate in general population for a minimum of 120 days, [Drake] could be eligible for Huber housing/release at that time."

¶4 The circuit court entered an order revoking Drake's Huber privileges. Thereafter, Drake filed a motion for postconviction relief seeking to

withdraw his plea on the basis of ineffective assistance of counsel. Drake argued that his trial counsel was ineffective for leading Drake to believe that he would serve his sentence with Huber privileges, when in fact he “was practically ineligible for Huber release at the time of [his] plea.” The circuit court denied Drake’s postconviction motion following a *Machner* hearing.<sup>2</sup> Drake appeals.

## DISCUSSION

¶5 Drake contends that he is entitled to withdraw his guilty plea because his trial counsel provided ineffective assistance.

¶6 To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow plea withdrawal would result in a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. A manifest injustice occurs when a defendant’s trial counsel rendered ineffective assistance. *Id.*, ¶49.

¶7 To establish a claim of ineffective assistance of counsel, a defendant must show both that his counsel’s performance was deficient and that the defendant was prejudiced by counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To show deficient performance, a defendant must point to specific acts or omissions by counsel that were “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice in the context of a motion to withdraw a plea based upon ineffective assistance of counsel, a defendant must “allege facts to show ‘that there is a

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<sup>2</sup> A *Machner* hearing is an evidentiary hearing to determine trial counsel’s effectiveness. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoted source omitted). Both prongs need not be considered if a defendant fails to make a sufficient showing as to either one. *Strickland*, 466 U.S. at 697. Whether counsel's performance was deficient and prejudicial to the defendant are questions of law, which this court reviews de novo. *State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305.

¶8 Drake argues that at the time he entered his plea, he had indicated to this attorney that he was concerned about an inability to work or attend school if incarcerated and that he pled guilty because trial counsel led him to believe he would get Huber privileges automatically and during the duration of his sentence. Drake contends that his trial counsel was deficient for failing to explain to him that: (1) whether a defendant is sentenced with Huber privileges is a discretionary decision by the circuit court, (2) certain defendants are frequently denied Huber privileges in Dane County; and (3) that even if the court sentenced him with Huber privileges, the court could later revoke those privileges. He also contends that counsel was deficient for failing to investigate whether his issues and behavior during prior confinements and his prior criminal record made it unlikely that he would be eligible for Huber privileges.

¶9 At the *Machner* hearing, Drake's trial counsel, Antonette Laitsch, testified that prior to Drake entering his guilty plea, Drake asked her if the circuit court would order Huber privileges and that she “advised him that the judge would allow him to have Huber at the time that he was sentenced.” Laitsch testified that she has had “thousands” of clients that have been sentenced to the Dane County Jail and that she did not “think [she had] ever had a judge not order Huber at the time of sentencing.” Laitsch further testified that she had never had a client ask if

Huber privileges can be revoked. In addition, Laitsch testified that her “general practice is to advise clients that the judge is free to impose what the judge wants to.” If you agree to something, “the judge can still deviate from that agreement ... the judge will make a determination as to what sentence he or she feels is justified.” Drake testified that Laitsch advised him, as best he could remember, that “everybody in Dane County gets Huber privileges unless ... there’s a reason to revoke [them] or not grant [them].”

¶10 The testimony from the *Machner* hearing establishes that trial counsel informed Drake that her experience was that defendants in Dane County were uniformly given Huber privileges at sentencing, but that the court is free to sentence a defendant however the court deems appropriate. According to Drake, counsel also informed him that Huber privileges could be revoked. Based upon this testimony, Drake’s argument that counsel did not inform him that Huber privileges are discretionary, that not all defendants receive those privileges, or that Huber privileges could be revoked is without merit.

¶11 As to whether counsel was deficient for failing to investigate the likelihood that Drake’s Huber privileges would be revoked, I conclude that counsel was not. Counsel testified that she had had “thousands” of clients sentenced to the Dane County jail and she could not recall a defendant ever asking her if Huber privileges could be revoked. Laitsch also testified that Drake “told [her] if he would get Huber then he would do his plea.” Drake does not direct this court to any evidence that he informed Laitsch that his plea was contingent upon his Huber privileges not being revoked.

¶12 In retrospect, in light of the importance that Drake placed on his ability to work and attend school while serving his sentence, the prudent course of

action might have been to advise Drake that his Huber privileges were subject to revocation. However, Drake has not provided sufficient information to allow me to evaluate whether he had any practical alternative. He does not discuss the strength of the evidence or whether he had any defense. In light of the lack of information available regarding Drake's situation, I cannot say that counsel's failure to provide more detailed advice about the discretionary nature of Huber privileges was outside the wide range of professionally competent assistance.

¶13 Furthermore, even if I were to conclude that trial counsel was deficient, I would conclude counsel's deficiency was not prejudicial. To prove prejudice, Drake must have shown "that there is a reasonable probability that, but for the counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 311 (quoted source omitted). Drake asserts that he established that he had been prejudiced by his trial counsel's deficiency because his "straightforward testimony [at the *Machner* hearing] was that he would not have [pled] guilty if he had known the correct information about Huber release."

¶14 The primary problem with Drake's argument, however, is that he failed to show that but for counsel's deficiency, he would have insisted on going to trial. Drake testified at the *Machner* hearing that "had [h]e known that Huber privileges were not a possibility,"<sup>3</sup> "[i]t would have made me wait, you know, for a better plea deal than the whole maximum and argue sentenc[ing]. Or I could have waited a week ... I was only a week off from getting my Huber privileges.

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<sup>3</sup> Huber privileges were, in fact, a "possibility." They were even ordered, initially. So, it is not clear that Drake has made any cogent argument here relative to his willingness to go to trial.

All I had to do is come off of [administrative confinement] and they were currently reviewing that ....”

¶15 Drake’s testimony was not that he would have insisted on going to trial, rather it was that he would have waited for a “better plea deal” before pleading. Furthermore, Drake did not provide the circuit court below with any evidence that a “better plea deal” from the State was likely to be forthcoming and he has not given this court any reason to believe that it was. Drake also testified that he “could have waited a week,” at which point he would have been eligible for Huber privileges. Drake’s testimony suggests that he would have waited a week to enter his plea, at which point he believed that he would have been eligible for Huber privileges, not that he would have insisted that his case be tried. Because Drake failed to show that he would have insisted on going to trial, I conclude that Drake has not shown that he was prejudiced. Accordingly, I affirm.

### CONCLUSION

¶16 For the reasons discussed above, I affirm.

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

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

