

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2001

Cornelia G. Clark
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. 01-0377-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-33

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS S. ZUNKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Douglas Zunker appeals a judgment convicting him of conspiracy to commit burglary and an order denying his postconviction motion. He argues that the trial court lost competency to proceed because the preliminary examination was not held within twenty days of the initial appearance, his counsel was ineffective for failing to move for dismissal on that basis, and the

prosecutor violated the plea agreement by vigorously arguing for a ten-year prison sentence. We reject these arguments and affirm the judgment and order.

¶2 Pursuant to a plea agreement, Zunker pled no contest to conspiracy to commit burglary. The State was free to argue for up to ten years of incarceration, concurrent with a Door County sentence. Zunker's counsel argued for five years' incarceration. The court sentenced Zunker to eight years in prison concurrent with the Door County sentence.

¶3 Zunker's no contest plea waived any challenge to the timeliness of the preliminary hearing. See *Crummel v. State*, 46 Wis. 2d 348, 355-56, 174 N.W.2d 517 (1970). Failure to timely conduct a preliminary hearing is not a matter of subject matter jurisdiction, and can be waived by entering a plea without objecting to that defect.¹ Zunker also argues that the delay in the preliminary hearing violated his speedy trial rights. His no contest plea also waived that issue. See *Hatcher v. State*, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978).

¶4 Zunker has not established ineffective assistance of his trial counsel based on counsel's failure to move for dismissal or assert Zunker's speedy trial rights. To establish ineffective assistance of counsel, Zunker must show that his counsel performed deficiently and that the deficient performance prejudiced his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Zunker must show

¹ The State also argues that the preliminary hearing was timely because Zunker had numerous initial appearances due to his inability to find counsel. We need not resolve that issue because of Zunker's waiver.

that he would not have entered the no contest plea but for counsel's deficient performance. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶5 Zunker's trial counsel testified at the postconviction hearing that he believed the delay benefited his client because it allowed time to resolve the Door County matter, a reasonable strategic decision. Furthermore, upon dismissal of the charge for failure to conduct a timely preliminary hearing, the State could have recharged Zunker, resulting in no benefit to him. *See Logan v. State*, 43 Wis. 2d 128, 138, 168 N.W.2d 171 (1969). Counsel reasonably chose to pursue a favorable plea agreement rather than seeking a temporary dismissal.

¶6 Finally, the prosecutor did not violate the plea agreement. Zunker faults the prosecutor for vigorously arguing for the ten-year concurrent sentence. The plea agreement placed no restriction on the prosecutor's argument other than the restriction to ten years concurrent with the Door County sentence. The prosecutor's arguments do not suggest that the State had second thoughts about the plea agreement or that the prosecutor was attempting to undermine the agreement. The prosecutor was free to focus on negative information about Zunker to support the ten-year recommendation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

