COURT OF APPEALS
DECISION
DATED AND RELEASED

June 13, 1995

NOTICE

No. 94-2576-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. MARTINKOSKI, SR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Joseph J. Martinkoski, Sr. appeals from a judgment convicting him of first-degree sexual assault of a child. Upon his no contest plea, Martinkoski was sentenced to eighty-four months in prison and granted 369 days of sentence credit. Martinkoski's appellate counsel filed a no merit report pursuant to ***Anders v. California,*** 386 U.S. 738 (1967) and RULE 809.32, STATS. Martinkoski was provided a copy.

The no merit report addressed three potential issues: whether (1) the trial court erroneously permitted Martinkoski to proceed *pro se*; (2) his no contest plea was entered knowingly, intelligently, and voluntarily; and (3) the trial court erroneously exercised its sentencing discretion. Martinkoski filed

responses raising additional potential issues and we ordered appellate counsel to file a supplemental report addressing the additional issues.

Appellate counsel filed the supplemental report addressing the following additional issues: whether (4) the prosecutor breached the plea agreement; (5) Martinkoski was denied effective assistance of trial counsel; (6) he was competent to enter his plea; (7) but for his deprivation of a right to speedy trial he would not have entered a plea; (8) newly discovered evidence entitles him to withdraw his plea; and (9) he was denied the right to copies of medical and investigative reports.

Martinkoski was provided a copy and filed responses to the supplemental report. He alleged ineffective assistance of appellate counsel. Based upon our independent review of the record, we conclude that the record reveals no potential issue of arguable merit. Consequently, we affirm the judgment.

PROCEDURE

The record reveals a lengthy procedural history. Martinkoski was arrested July 30, 1990. The criminal complaint, dated August 1, alleged that on July 29, the twelve-year-old victim was awakened by Martinkoski placing his hand on her breast. The victim stated that she knew Martinkoski as a friend of her mother and that he lived in the same building as the victim. She alleged that he touched her breasts on several other occasions over the preceding couple of weeks while she was sleeping.

On August 8, a preliminary hearing was held and the trial court found probable cause. The trial was set for October 24. On October 24, he waived a speedy trial demand and requested an adjournment. On December 6, Martinkoski entered a plea of not guilty and not guilty by reason of mental disease or defect. Upon defense request, Dr. Vincent Giannattasio was appointed to examine him. On January 4, 1991, Giannattasio's report was filed. Trial was set for July 15.

Due to court congestion, the trial was rescheduled to December 2. On September 6, Martinkoski was found non-compliant with bail conditions

and not keeping in contact with Wisconsin Correctional Services. A warrant was issued and on September 26, Martinkoski turned himself in. On October 11, a status conference was held. Martinkoski demanded a speedy trial. Trial was set for January 6, 1992.

On January 6, 1992, the State requested an adjournment and a mental examination of Martinkoski relative to his NGI plea. The defense did not object. A new trial date was set for April 20, 1992. On April 17, the matter was again adjourned and the mental examination was rescheduled for May 18. Trial was rescheduled for November 2.

On May 18, Dr. George Palermo, appointed for the State, reported that Martinkoski suffered from an organic personality disorder superimposed on a convulsive disorder (epilepsy) for which he received treatment, but that he was competent to stand trial.

On November 2, the trial date, Martinkoski failed to appear. A bench warrant was issued. Martinkoski was taken into custody. On December 23, a bail hearing was held. The trial court determined that Martinkoski did not appear due to intoxication, a possible seizure and hospitalization. His $800 bail was forfeited; $500 cash bail was set with the conditions of no alcohol and release to in-house detention. Because Martinkoski believed he would be unable to post bail, he made a speedy trial demand. Trial was set for March 8, 1993.

On February 15, 1993, Martinkoski waived his speedy trial demand in order to change attorneys. Over the State's opposition, the trial court granted counsel's request for new counsel due to complete breakdown in communication. On February 19, new counsel was appointed and the new trial date was set for April 5.

On April 5, Martinkoski appeared in court with counsel and requested to proceed *pro se*. The court granted the request subject to Martinkoski proceeding with stand-by counsel. Martinkoski made another speedy trial demand. Because the medical expert was out of town, the trial court rescheduled trial for June 1, and ordered that counsel remain available as stand-by counsel.

On May 28, Judge Connors recused herself after Martinkoski initiated a federal lawsuit against her. The case was administratively transferred to another judge.

On June 8, 1993, Martinkoski appeared *pro se* and his counsel appeared as stand-by counsel. The State recited the plea agreement—that upon his plea, the State would recommend an imposed and stayed prison sentence and probation with appropriate conditions that did not include incarceration. After a thorough plea colloquy, the trial court accepted Martinkoski's plea.

The trial court rejected the State's probation recommendation and sentenced Martinkoski to eighty-four months in prison, with credit for time served. He appealed and his appellate counsel filed a no merit report. *See* § 809.32, STATS. Martinkoski responded. Our independent review of the record uncovers the following issues that we conclude are without arguable merit.

DISCUSSION

1. Did the trial court err when it granted Martinkoski's request to proceed pro se?

On April 5, 1993, Martinkoski appeared in court with his newly appointed defense counsel and requested to proceed *pro se*. The court reminded Martinkoski that rules of evidence and procedure would be applied. It reminded him of the seriousness of the charge and the potential twenty-year penalty. Martinkoski replied that his attorney had advised him to enter a plea and that he had rejected her advice. The court stated that Martinkoski was innocent until proven guilty by a jury trial and that he would receive a speedy trial. Although the trial court advised Martinkoski against representing himself, it stated that it would grant his request subject to the condition that counsel remain as stand-by counsel.

The constitutional right to counsel invokes trial court protection to proceed without counsel. ***Keller v. State,*** 75 Wis.2d 502, 507-08, 249 N.W.2d 773, 776 (1977). Waiver of trial counsel must appear upon the record as knowing, intelligent and voluntary waiver. ***Id.*** at 508, 249 N.W.2d at 776. Here, the record reflects not only Martinkoski's unequivocal waiver of counsel, but also his awareness of the difficulties and disadvantages of self-representation,

the seriousness of the charge, and the potential penalties. The record also reveals that Martinkoski, age fifty-two, had obtained a GED and had earlier experiences with the judicial system. *See* ***Martinkoski v. State,*** 51 Wis.2d 237, 186 N.W.2d 302 (1971).

Dr. Palermo's report, which had been filed with the court, indicated that Martinkoski was competent to stand trial. The trial court reminded Martinkoski that the rules of evidence and procedure would apply and that the law placed limits on trial procedures of which Martinkoski may not be aware. The record demonstrates no issue of arguable merit with respect to Martinkoski's decision to proceed *pro se*.

2. Was Martinkoski's plea valid?

A constitutionally valid plea of guilty or no contest waives nonjurisdictional defects and defenses. ***State v. Bangert,*** 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). Section 971.08(1), STATS., proscribes the procedure the court is to follow when accepting a plea. To be constitutionally acceptable, the record must show that the plea was knowingly, voluntarily, and intelligently entered. ***Bangert,*** 131 Wis.2d at 257, 389 N.W.2d at 20. This includes a showing that the defendant understood the charges against him and knowingly waived his constitutional rights. ***Id.***

The record demonstrates a constitutionally valid plea. Martinkoski appeared with his stand-by counsel. Stand-by counsel assisted Martinkoski in completing a guilty plea questionnaire and time served credit sheet. The trial court stated that the matter had been set for jury trial and asked Martinkoski if he had changed his mind and was going to plead guilty to the charge of sexual assault, to which Martinkoski responded, "yes." The prosecutor recited the plea agreement, which was essentially that upon Martinkoski's plea, the State would recommend probation with appropriate conditions, not to include incarceration.

The trial court asked Martinkoski if he was going to enter a guilty plea to the charge of sexual assault of a twelve-year-old child, described in the information as putting his hand on her breast. Martinkoski responded "yes." It advised Martinkoski that it would listen to the recommendations of the district attorney and presentence investigation, "[b]ut ultimately I will make the final

determination as to what the appropriate sentence is in this case in spite of what anyone recommends. Do you understand that?" Martinkoski responded affirmatively.

The trial court questioned Martinkoski regarding his decision to enter a no contest plea. The court described the offense and the twenty-year maximum term of imprisonment. The court also questioned Martinkoski about his NGI plea. Martinkoski explained that he entered the NGI plea because he was on medication at the time of the incident and could not recall the incident. He stated that he has been working with the jail psychiatrist who has modified his medications. He discussed his plea with his new counsel and decided to withdraw his NGI plea.

Martinkoski stated that he was fifty-two years old and had obtained a GED. He suffered from depression and was an epileptic. He stated that he is on medication and able to understand the court proceedings. His medication was stabilized and he felt competent to proceed. No one threatened him or forced him to enter his plea. Family members were in court with him. He stated that he received sufficient legal advice from his present stand-by counsel and was satisfied with her advice and representation. He stated that he knew his constitutional rights. He had no questions about the proceedings, except to ask the court to explain the difference between a no-contest plea and an ***Alford*** plea. The State recited the facts alleged in the criminal complaint as a factual basis of the plea. Because the plea colloquy meets the requirements of § 971.08, STATS., and, together with the guilty plea questionnaire, demonstrates a knowing, voluntary, and intelligent plea, we conclude that there is no issue of arguable merit with respect to the plea.

3. Did the trial court properly exercise its sentencing discretion?

As with any other discretionary decisions, the sentencing court must articulate a reasonable basis for its decision and demonstrate a logical process based upon the facts of record and appropriate legal standards. ***Anderson v. State,*** 76 Wis.2d 361, 364, 251 N.W.2d 768, 770 (1977). The primary factors are the gravity of the offense, the protection of the public, and the character of the defendant. ***Id.***

At sentencing, Martinkoski and his stand-by counsel reviewed the presentence report and Martinkoski had one correction. He disputed that he had made a false representation to receive public assistance. The State renewed its recommendation that Martinkoski be placed on probation with conditions. Martinkoski's prior record included a burglary, an operating an auto without the owner's consent, an escape, and a sexual assault of a child more than thirty years earlier. He also had several misdemeanor convictions.

In imposing sentence, the trial court noted Martinkoski's prior lengthy record, the seriousness of the offense, and the impact on the victim. The court stated that it normally gives much deference to the district attorney's recommendation, but noted that the presentence report did not recommend probation, based upon Martinkoski's past problems with probation and parole, long history of untreated alcoholism and long criminal record, including a past sexual assault of a child. In consideration of these factors as well as for the protection of the public, the trial court sentenced Martinkoski to eighty-four months in prison, with credit for time served.

The record reflects a reasonable exercise of sentencing discretion. The trial court is not bound by the plea agreement. ***State v. Beckes,*** 100 Wis.2d 1, 6 n.3, 300 N.W.2d 871, 874 n.3 (Ct. App. 1980). Accordingly, no issue of arguable merit exists with respect to sentencing.

4. Did the prosecutor breach the plea agreement?

The failure of a prosecutor to fulfill promises made during a plea bargain violates due process. ***Santobello v. New York,*** 404 U.S. 257, 262 (1971). Here, the record reflects that the State recommended an imposed and stayed prison sentence with conditions that did not include incarceration. There was no dispute or objection with respect to the plea arrangement as recited by the State. The record fails to show any basis for an argument that the State violated its agreement. The trial court, of course, is not bound by the agreement, *see* ***Beckes,*** and so advised Martinkoski at the plea hearing. The record reveals no arguable merit to the claim that the prosecutor breached the plea agreement.

5. Was Martinkoski denied effective assistance of counsel?

No ***Machner***[1] hearing was held. However, prior to the entry of his plea, Martinkoski waived counsel and elected to proceed *pro se*. To demonstrate ineffective assistance of counsel, Martinkoski must show that counsel performed deficiently and that, as a result, Martinkoski was prejudiced. ***Strickland v. Washington,*** 466 U.S. 668 (1984). Because Martinkoski waived counsel and proceeded *pro se*, the record fails to show any prejudice and, therefore, no basis for an appeal on this issue.

The record reveals no basis for a claim of deficient performance, other than the communication breakdown with his first attorney. Because the first attorney was permitted to withdraw and a second attorney was appointed, the record provides no basis for a claim of prejudice with respect to the first counsel.

After Martinkoski complained of the advice he received from his second attorney, Martinkoski elected to proceed *pro se*. At the time of his plea hearing, Martinkoski stated affirmatively that he was satisfied with his stand-by counsel's assistance. Because Martinkoski elected to discharge the second appointed counsel, proceeded *pro se* and entered a plea of no contest, the record provides no basis for an appeal based upon a claim of ineffective assistance of counsel.

6. Was Martinkoski competent to enter a no contest plea?

The question of competency is for the trial court to determine. Sections 971.13 and 971.14, STATS. The record contains no formal hearing on the issue of competency. However, the record also reveals no issue of arguable merit with respect to competency. The record reveals two mental status exams, neither of which give any indication of incompetency to proceed to trial. The first report did not address the competency issue directly. On January 4, 1991, Dr. Giannattasio reported to the court that, as a result of his exam, he concluded that Martinkoski suffered from organic brain syndrome with seizure disorder, substance abuse, alcohol and schizoid personality. Giannattasio opined that the black-outs and seizure disorder make it difficult for Martinkoski to recall

[1] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" at a post-conviction hearing.).

contact. Further, a psychomotor seizure at the time of the offense could cause the patient to have difficulty conforming his conduct to the dictates of law.

On May 18, 1992, Dr. George Palermo, a forensic psychiatrist, reported to the court that his interview with Martinkoski led him to conclude that Martinkoski was aware of courtroom procedures, aware of the charges against him, aware of the roles the various personnel play in the courtroom, and able to rationally communicate with his attorney and assist in his defense.

The trial court entered into lengthy colloquies with Martinkoski on two occasions. First, it discussed at length with Martinkoski his request to discharge his second attorney and proceed *pro se*. Second, it entered into a lengthy plea colloquy. The record of the two colloquies gives no reason to doubt competency. *See* § 971.14(1), STATS. The two mental status exams indicate a seizure disorder, alcohol or substance abuse and personality disorders. However, neither report indicates a lack of competency to proceed to trial. Although Martinkoski's first attorney withdrew as a result of a breakdown of communication, there was no claim or suggestion that the breakdown was due to competency issues. A second attorney was appointed who later, as stand-by counsel, assisted Martinkoski with respect to his plea questionnaire. The record at the plea hearing shows a thorough discourse with the judge during which Martinkoski commented that his thinking was clear. Consequently, the record fails to uncover an issue of arguable merit with respect to competency.

7. Was Martinkoski deprived of his right to speedy trial?

Martinkoski's plea of no contest waives a defense based upon a claim of deprivation of a right to speedy trial. ***Hatcher v. State,*** 83 Wis.2d 559, 563, 266 N.W.2d 320, 322 (1978). Martinkoski claims, however, that the deprivation of his right to speedy trial caused him to enter a plea. The record of the plea hearing, however, discloses that Martinkoski advised the trial court that he was not forced into entering the plea. The trial court found that the plea was entered voluntarily.

Further, the record reveals numerous waivers of his speedy trial requests. On October 24, 1990, Martinkoski waived a speedy trial and requested an adjournment. On January 6, 1992, Martinkoski did not object to

the State's requested adjournment for the purpose of obtaining a mental exam of Martinkoski relative to his NGI plea. On November 2, 1992, the scheduled trial date, Martinkoski did not appear due to hospitalization for intoxication and a possible seizure. On February 15, 1993, Martinkoski waived his right to a speedy trial in order to change attorneys.

On May 28, 1993, the trial judge recused herself after Martinkoski initiated a federal lawsuit against her. On June 8, 1993, Martinkoski entered a no contest plea. The record provides no basis for a claim of deprivation of speedy trial.

8. Does newly discovered evidence allow Martinkoski to withdraw his plea?

Martinkoski submitted a copy of an affidavit with his response to the no merit report. The affidavit is of a friend who states that she would be willing to testify that Martinkoski was with her the entire night of the alleged offense at a location other than that described in the complaint.

The test for granting a new trial on the basis of newly discovered evidence requires that: (1) the evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must have been material; (4) the testimony must not merely have been cumulative; and (5) there must be a reasonable probability that a different result would be reached on a new trial. ***Swonger v. State,*** 54 Wis.2d 468, 471, 195 N.W.2d 598, 600 (1972).

The affidavit that Martinkoski offers is legally insufficient to support an order for a new trial. There is no suggestion that the information came to Martinkoski's knowledge after trial, or that Martinkoski was not negligent in discovering it. The record does not demonstrate an issue of arguable merit with respect to newly discovered evidence.[2]

[2] The motion for a new trial must be presented to the trial court pursuant to § 809.30(1)(h), STATS., or § 974.06, STATS. This was not done in this case. Without further explanation, appellate counsel states: "The reasons for the failure of appellate counsel to ask the trial court for a new trial based upon newly discovered evidence are based upon privileged information."

9. Was Martinkoski denied investigative and medical reports?

Martinkoski alleges that he was denied access to investigative and medical reports. The record reflects no request for any report except the presentence report. Defendant is entitled to a timely disclosure of the presentence report. ***State v. Skaff,*** 152 Wis.2d 48, 56, 447 N.W.2d 84, 88 (Ct. App. 1989). The record demonstrates that Martinkoski reviewed the presentence report before sentencing and made one correction. Martinkoski does not suggest how a later denial of a copy of the report prejudices his rights. *See* § 805.18, STATS. On the record before us, the denial of reports does not present an issue of arguable merit.

10. Is Martinkoski denied ineffective assistance of appellate counsel?

Direct appeal is not the appropriate procedure to challenge the effectiveness of appellate counsel. ***State v. Knight,*** 168 Wis.2d 509, 519, 484 N.W.2d 540, 544 (1992).

Because our independent review of the record fails to uncover any issue of arguable merit, we affirm the conviction and relieve attorney Elizabeth Stephens of further representation of Martinkoski in this matter.

By the Court. – Judgment affirmed.