COURT OF APPEALS
DECISION
DATED AND RELEASED

September 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1947-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL W. FINK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Michael W. Fink appeals from his conviction for two counts of second-degree sexual assault of a child, having pled guilty to the charges. Fink's counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Fink received a copy of the report and has filed a response. Counsel's no merit report raises four possible arguments: (1) the plea procedures were inadequate; (2) the sentence was excessive; (3) trial counsel provided Fink ineffective representation at sentencing; and (4) the trial court improperly denied Fink's motion to dismiss the charges because of an untimely preliminary hearing.

Upon review of the record, we are satisfied that the no merit report properly analyzes these issues, and we therefore will not discuss them further. In his pro se response, Fink raises several arguments: (1) trial counsel ineffectively failed to challenge the sufficiency of the amended complaint; (2) the trial court made insufficient findings for a bindover; (3) the weight of the prosecution's charges coerced his guilty plea and warrant its vacation; and (4) the prosecution improperly attacked Fink's record and character at sentencing, in violation of the spirit of the plea agreement. We reject these claims and conclude that the appeal has no arguable merit. Accordingly, we adopt the no merit report, affirm the conviction and discharge Fink's appellate counsel of his obligation to represent Fink further in this appeal.

Guilty pleas waive all defects leading up to the plea except jurisdictional defects, *see* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986), including claimed pre-plea incidents of ineffective trial counsel, such as Fink's trial attorney's claimed failure to present a relevant, promising defense. *See* ***Smith v. Estelle***, 711 F.2d 677, 682 (5th Cir. 1983), *cert. denied*, ***Smith v. McKaskle***, 466 U.S. 906 (1984). At the time of Fink's plea, the trial court expressly informed him that his guilty plea would waive the right to a trial by jury, the right to confront witnesses, and any defenses his trial counsel could have mounted in a trial. These defenses included Fink's right to attack the validity of the amended complaint, the timeliness of the preliminary hearing, the adequacy of the bindover findings, and his trial counsel's failure to adequately raise what Fink now views as relevant issues.

Fink stated that he understood the waiver of these rights. He gave no indication that he wished to challenge the validity of the amended complaint, the timeliness of the preliminary hearing, the adequacy of the bindover findings, or his counsel's failure to adequately raise relevant issues. Forewarned of the consequences, Fink chose to exchange an uncertain outcome by trial for a certain one by guilty plea. Under such circumstances, where Fink freely, unconditionally and unequivocally exchanged an uncertain outcome by trial for a certain one by a guilty plea, he has no basis to now demand a trial on the ground that his trial counsel failed to pursue a relevant and promising defense. Fink's election of a guilty plea cured any pre-plea defects and became the last word on these issues.

Moreover, Fink's plea reversed the presumption of innocence, ***State v. Koerner***, 32 Wis.2d 60, 67, 145 N.W.2d 157, 161 (1966), and he has raised no issue that merits a reexamination of his guilt. Trial and appellate courts must ignore every defect in pleading, procedure and the proceedings that does not affect the substantial rights of the parties. ***State v. Weber***, 174 Wis.2d 98, 109, 496 N.W.2d 762, 767 (Ct. App. 1993). The same standard applies to actions by defense counsel. Such actions cause no prejudice unless they affect substantial rights. *See* ***Herman v. Butterworth***, 929 F.2d 623, 628 (11th Cir. 1991). Here, Fink raises procedural defects or substantive issues that do not bear upon substantial rights or substantially undermine his plea's fundamental factual basis. Litigants may not use ineffective counsel claims to prolong substanceless proceedings on the basis of such issues.

Likewise, Fink has not shown that the issues he now raises contributed to his decision to plead guilty. Litigants may withdraw pleas on a postjudgment basis if they were not intelligent and voluntary. ***State v. James***, 176 Wis.2d 230, 236-37, 500 N.W.2d 345, 348 (Ct. App. 1993). This rule rests on the premise that whatever misapprehensions plea makers may have had must concern their substantial rights. The misunderstanding must have advanced a manifest injustice. ***State v. Woods***, 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). Otherwise, plea makers could withdraw their pleas on the basis of immaterial misunderstandings. Here, Fink raises procedural defects that have not affected substantial rights or substantive issues that have not undermined the plea's fundamental factual basis. In sum, he has not shown a manifestly unjust misunderstanding.

Last, we see no plea-voiding coercion or improper sentencing argument. First, the weight of the prosecution's charges and the apprehension they caused Fink do not constitute impermissible coercion. In order to withdraw a plea, Fink needed to show coercion beyond the normal fear most accuseds feel when faced with the prospects of a conviction. *See* ***State v. Weidner***, 47 Wis.2d 321, 328, 177 N.W.2d 69, 73 (1970). Moreover, Fink's guilty plea amounted to an admission that the prosecution's charges were true. ***Brady v. United States***, 397 U.S. 742, 748 (1970). Fink has supplied no indication that the prosecution falsified charges to induce a plea, committed some other plea-inducing misconduct, or disserved the public interest in the plea proceedings.

Second, the prosecution had the right at sentencing to argue about Fink's character defects and criminal record. The fact that the prosecution had agreed to request a certain sentence did not bar the prosecution from submitting arguments about character and criminal record to back up the sentence that it did request. Prosecutors can make any argument at sentencing that is a fair comment on the evidence. *See* ***State v. Amundson***, 69 Wis.2d 554, 572, 230 N.W.2d 775, 785 (1975). The prosecution's comments on Fink's character and criminal record did not violate either the prosecution's promise to make no sentence recommendation or the spirit of the parties' plea agreement. In sum, further postconviction proceedings would have no arguable merit.

By the Court.—Judgment affirmed.