

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2009

David R. Schanker
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. 2008AP319-CR

Cir. Ct. No. 2005CF1930

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. PHILLIPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU and JOHN W. MARKSON, Judges.
Affirmed.

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. James Phillips appeals a judgment convicting him of repeated second-degree sexual assault of the same child and an order denying his postconviction motions for release on bond pending appeal, plea withdrawal,

resentencing, and the reappointment of counsel. We affirm for the reasons discussed below.

BACKGROUND

¶2 The State charged Phillips with one count of repeated sexual assault of the same child based upon allegations that he had an ongoing relationship with a runaway fifteen-year-old girl, whom he impregnated. Phillips entered a guilty plea without any agreement from the State regarding a sentence recommendation. The circuit court sentenced Phillips to five years of initial incarceration and five years of extended supervision.

¶3 Postconviction counsel filed a plea withdrawal motion for Phillips, but then moved to withdraw as counsel at Phillips's request due to a disagreement over whether to raise additional issues. The circuit court allowed counsel to withdraw after conducting a colloquy to ascertain that Phillips was knowingly and voluntarily waiving his right to counsel. Phillips subsequently filed *pro se* motions for release on bond pending appeal, plea withdrawal or resentencing, and the appointment of successor counsel. The circuit court denied the motions without a hearing, and Phillips appeals.

¶4 On appeal, Phillips contends the circuit court erred by: (1) refusing his motion for release on bond without a hearing; (2) permitting counsel to withdraw without first advising him of the no-merit report option; (3) failing to require the State to place its sentencing recommendation on the record before accepting Phillips's plea; and (4) failing to advise Phillips that the court was not obligated to follow any negotiated sentencing recommendation. We will set forth more detailed facts relating to these issues in our discussion below.

STANDARD OF REVIEW

¶5 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See State v. Allen*, 2004 WI 106, ¶¶9 and 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion to warrant a hearing *de novo*, based on the four corners of the motion. *Id.*, ¶¶9 and 27.

DISCUSSION

Release on Bond

¶6 Phillips claims that the circuit court was obligated under WIS. STAT. RULE 809.31(2) (2005-06)¹ to “promptly hold a hearing” on his motion for release on bond. The State first responds that the issue is not properly before this court because Phillips did not petition for leave to appeal the circuit court’s bond decision. The State apparently fails to recognize that the rules of appellate procedure were amended in 2001 to allow review of bond determinations by motion under WIS. STAT. RULE 809.14. *See* WIS. STAT. RULE 809.31(5); S. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii, 1.

¶7 Our correspondence file does not show that Phillips ever filed a separate motion under WIS. STAT. RULE 809.14 seeking review of the circuit court’s bond decision, although we are not certain whether he mentioned the issue in the context of one of his other motions. In any event, we conclude that any error in failing to hold a bond hearing was harmless here because the circuit court

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

could properly deny relief on the grounds it stated—namely, that Phillips had an insufficient likelihood of success on appeal to warrant relief. *See State v. Salmon*, 163 Wis. 2d 369, 373, 471 N.W.2d 286 (Ct. App. 1991) (in addition to the statutory factors, the court should also take into consideration the nature of the crime, the length of the sentence, and the likelihood of success on appeal).

Waiver of Counsel

¶8 Phillips claims that his waiver of postconviction counsel was not knowingly and voluntarily made because neither counsel nor the circuit court advised him that he had a right to require counsel to file a no-merit report on his behalf. He relies upon *State v. Thornton*, 2002 WI App 294, ¶21, 259 Wis. 2d 157, 656 N.W.2d 45 (footnote omitted), which provides:

Before a court may conclude that a criminal defendant has knowingly and voluntarily waived his or her right to counsel on direct appeal, it must satisfy itself that the defendant is aware: (1) of the *Flores* rights (to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report); (2) of the dangers and disadvantages of proceeding pro se; and (3) of the possibility that if appointed counsel is permitted to withdraw, successor counsel may not be appointed to represent the defendant in the appeal.

¶9 We agree with the circuit court, however, that the constitutional requirement that a waiver of counsel be made knowingly means that a defendant must be made aware of his *actual* choices. The reference in *Thornton* to the no-merit option does not apply here because counsel had *not* concluded that any further proceedings would be frivolous, and therefore could not have filed a no-merit report. To the contrary, counsel had already filed a postconviction motion on Phillips's behalf. Given Phillips's stated desire to pursue postconviction relief and the SPD's stated policy against appointing successor counsel in such

circumstances, Phillips's actual options were to proceed on the motion counsel had already filed, or to discharge counsel and raise his own issues *pro se*.

¶10 The circuit court conducted an exemplary colloquy ascertaining that Phillips was making a deliberate choice to proceed *pro se* because he wished to raise issues other than the one counsel was going to pursue; that he understood that the SPD would not appoint successor counsel; and that he understood the seriousness of the case and the risks of proceeding on his own. In addition, counsel informed the court that he had discussed Phillips's rights with him and Phillips had filled out a waiver-of-counsel form. In short, the record conclusively demonstrates that Phillips was not entitled to relief based on the allegations in his motion.

Plea Withdrawal

¶11 Phillips's last two claims are interrelated. He claims he should be allowed to withdraw his plea because the State did not place its sentencing recommendation on the record before Phillips made his plea, and because the court did not advise Phillips that it was not bound to follow any negotiated sentence recommendation. Both claims are based upon the same false premise.

¶12 Phillips provides no authority in support of his position that the State is required to place a sentencing recommendation on the record at a plea hearing when the plea bargain itself does not contain an agreement as to what the State's recommendation will be. The transcript of the plea hearing shows that there was "no agreement regarding recommendations by the parties at the time of sentencing." Instead, the parties asked for a presentence investigation report. Therefore, there was no negotiated sentence recommendation for the State to place on the record, and no reason for the circuit court to advise the defendant that it was

not bound by such an agreement. We again conclude that the allegations in Phillips's motion were insufficient to warrant a hearing.

By the Court.—Judgment and order affirmed.

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

