COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 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

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No. 96-0458-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL F. KRATOCHWILL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Deininger, JJ.

VERGERONT, J. Daniel Kratochwill entered a no contest plea to a charge of knowingly possessing with intent to deliver between fifteen and forty grams of cocaine, as a drug offense repeater, in violation of §§ 161.41(1m)(cm)3 and 161.48, STATS. He appeals from the judgment of conviction and the denial of his motion for postconviction relief, claiming that he is entitled to withdraw his plea because the trial court failed to inform him

of the minimum period of incarceration for the offense and because he did not know about certain potential constitutional challenges to the State's case against him. He also claims that his trial counsel was ineffective for not pursuing those constitutional challenges. We reject each contention and affirm.

We first consider Kratochwill's argument that his plea was not knowingly, voluntarily and intelligently entered because the trial court did not inform him of the minimum period of incarceration. A plea of guilty that is not knowingly, voluntarily and intelligently entered creates a manifest injustice which entitles the defendant to withdraw the plea. ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). When a defendant claims that the procedures of § 971.08(1)(a) and (b), STATS., or other mandated procedures are not followed at the plea hearing, the defendant has the burden to make a prima facie showing of that. ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). Once the defendant has done so and has alleged that he or she did know the information that should have been provided, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered despite the inadequacy of the record at the plea hearing. ***Id.***

Kratochwill contends that the procedures of § 971.08, STATS., were not followed because the requirement in para. (1)(a) that the trial court "address the defendant personally and determine that the plea is made with understanding of ... the potential punishment if convicted" includes informing the defendant of the minimum as well as the maximum punishment, or ascertaining that he knows the minimum as well as the maximum sentence. We do not decide whether Kratochwill's interpretation of § 971.08 is correct because, even if it is and the burden therefore shifts to the State, we conclude the State has shown by clear and convincing evidence that Kratochwill knew of the minimum period of incarceration.

The amended information,[1] filed the day of the plea hearing, stated that the penalty for the crime of possession with intent to deliver between

[1] The original complaint charged Kratochwill with possession with intent to deliver cocaine in an amount greater than forty grams, contrary to §§ 161.41(1m)(cm)4 and 161.16(2)(b)1, STATS.

fifteen and forty grams of cocaine was a fine of not more than $500,000 and imprisonment for not less than three years nor more than twenty years. The amended information also stated that because Kratochwill had been previously convicted of a drug offense, the maximum and minimum fines and periods of incarceration were doubled.[2] At the plea hearing, Kratochwill stated, in response to the court's question, that he had received the amended information. When the court asked him whether he wanted to have the amended information read to him, his counsel stated that they waived the reading. The court informed Kratochwill that the maximum penalty he was facing was a fine up to $500,000 and forty years in prison or both and asked Kratochwill if he understood that. Kratochwill said he did. The court did not inform Kratochwill of the minimum penalty. The plea questionnaire contained the maximum penalty but not the minimum.

At the sentencing hearing, Kratochwill's counsel argued for a term of six years' imprisonment and, on at least two occasions, stated that this was the minimum sentence. The record shows that Kratochwill did not make any objection or comment or ask any question of his counsel or the court during the sentencing proceeding. The court sentenced Kratochwill to nine years.

At the hearing on Kratochwill's motion to withdraw his plea, Kratochwill and his attorney were both present. Kratochwill's trial counsel testified that he had a specific recollection of discussing with Kratochwill the maximum and minimum penalties of the offense originally charged and that he believed he did so on other occasions as well. Counsel did not have a specific recollection of discussing the penalties of the amended charge with Kratochwill, but he assumed he did because that is his practice. His notes showed that he discussed with Kratochwill the possibility of trying to get the district attorney to lower the alleged amount of cocaine so that the minimum and maximum penalties would be lower than those for the crime he was initially charged with. He went over the plea questionnaire and waiver of rights form with Kratochwill prior to the entry of the plea and the maximum and minimum penalties were again discussed with Kratochwill. Kratochwill did not testify and his trial counsel's testimony was not disputed.

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[2] The minimum sentence is a "presumptive minimum" in that the court may sentence below the minimum if it makes certain findings. Section 161.438, STATS.

The trial court found that Kratochwill was "completely advised as to the appropriate penalties that might be imposed in conjunction with these offenses" and concluded that the plea was, in fact, entered freely, knowingly and intelligently. Because Kratochwill specifically raised the issue of his knowledge of the minimum penalty in his motion, we construe the court's finding to include both the minimum and the maximum penalty in its reference to "the appropriate penalties." We do not reverse a trial court's finding of fact unless it is clearly erroneous. Section 805.17(2), STATS. The trial court's finding is not clearly erroneous because it is supported by the uncontradicted testimony of trial counsel that he advised Kratochwill of the minimum and maximum penalties of the amended charge to which he entered a plea. The fact that trial counsel argued for a term of six years, referring to that as the minimum penalty in Kratochwill's presence and without objections or questions from him, also supports this finding.

Whether the facts as found by the trial court meet the applicable constitutional standard is a question that we review de novo. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). We conclude, as did the trial court, that the State has met its burden of showing that Kratochwill entered his plea knowingly, voluntarily and intelligently with respect to knowledge of the minimum penalty of the offense.

Kratochwill also claims that his plea was not knowing, voluntary and intelligent because he did not have knowledge of three possible constitutional challenges to the State's case against him. Kratochwill recognizes that his plea waives challenges to any non-jurisdictional violation of constitutional rights occurring before the entry of the plea. *See* ***State v. Riekkoff***, 112 Wis.2d 119, 123, 332 N.W.2d 744, 746 (1983). However, Kratochwill contends that his trial counsel was ineffective for not pursuing these constitutional challenges. In order to prevail on this claim, Kratochwill must show both that trial counsel's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 688, 694 (1984). Kratochwill has the burden of proving prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69, 74 (1996).

The trial court found that Kratochwill was advised throughout the proceedings of his constitutional and statutory rights and that his counsel made certain decisions about whether to bring pretrial motions. The court concluded

that these decisions were not in any way defective and Kratochwill had adequate assistance of counsel.

We review the trial court's finding of fact under the clearly erroneous standard. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether those findings constitute deficient performance and prejudice are issues of law, which we review de novo. ***Id.*** at 128, 449 N.W.2d at 848. We may dispose of an ineffective assistance claim by deciding either that counsel's performance was not deficient or that there was no prejudice. ***Id.***

Kratochwill first claims that trial counsel was deficient for not pursuing constitutional challenges to the admissibility of statements he made to the police. Kratochwill's trial counsel testified that, before entry of the plea, he considered a possible challenge to the admissibility of Kratochwill's statements to the police and discussed the statements with Kratochwill. In his view, there was a basis for a motion to suppress his statements because Kratochwill stated that he was not given ***Miranda*** warnings. However, trial counsel also knew that the police report of the detective questioning Kratochwill stated that the detective read Kratochwill his constitutional rights from his "***Miranda*** card." Given that conflict in testimony, counsel thought the prospects of the motion's success were slim. He did not challenge the admissibility of the statements within twenty days of the arraignment, but he knew that there remained the opportunity, even after the jury was selected, to have the court rule on the statements' admissibility.

Trial counsel's performance is not deficient if it is reasonable under the circumstances. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992). The burden is on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. We have no hesitation in concluding, as did the trial court, that trial counsel's decision not to bring a motion to suppress the statements prior to the entry of the plea was not deficient performance.

We reach the same conclusion with respect to counsel's decisions not to bring a motion to suppress the evidence seized from Kratochwill. Trial counsel considered this, discussed this with Kratochwill, and viewed

videotapes of the alleged offense. Counsel decided not to challenge the arrest because, in his view, there was probable cause to arrest and search Kratochwill. The transfer of the cocaine was videotaped and the arrest took place immediately after Kratochwill left the motel room where the transfer took place.

Kratochwill makes the point that on appeal he is not challenging the decision not to attack the validity of arrest for lack of probable cause. Rather, in his view, the arrest should have been challenged on the grounds of "outrageous government conduct" because he was setup in a sting operation. Unlike the defense of entrapment, which requires that the defendant not be predisposed to commit the crime, the defense of outrageous government conduct, or government abuse, focuses on whether the government instigated the crime. ***State v. Steadman***, 152 Wis.2d 293, 301, 448 N.W.2d 267, 271 (Ct. App. 1989). Kratochwill concedes that trial counsel considered entrapment and "correctly realized that the lack of predisposition on [his] part would be difficult to establish, given his prior drug conviction and the materials found on his person following the arrest." Trial counsel testified that he also considered the defense of outrageous government conduct and the cases recognizing such a defense. However, he did not think that defense would be successful, either, and he advised Kratochwill to enter into a plea agreement rather than pursuing those defenses.

The defense of outrageous government conduct in Wisconsin requires an assertion by the defendant that the State violated a specific constitutional right and that the government's conduct be so enmeshed in a criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system. ***State v. Gibas***, 184 Wis.2d 355, 360, 516 N.W.2d 785, 787 (Ct. App. 1994). Kratochwill does not state what specific constitutional right the State violated and we do not perceive one. Trial counsel explained, in the context of argument at sentencing, that he advised Kratochwill against pursing this defense because he could not think of a specific constitutional right of Kratochwill's that was violated in the sting operation. We conclude that counsel's decision to advise Kratochwill not to pursue this defense was a reasonable one, in view of the absence of one of the two requirements for the defense.

Finally, Kratochwill contends that trial counsel should have challenged the application of the repeater statute to him on the ground that it

violates his right to equal protection. Trial counsel testified that he did not consider a challenge to the statute prior to the plea hearing. There is no other testimony on this point. Since Kratochwill did not testify, there is no evidence that, had he known of the possibility of such a challenge, he would not have entered a plea. Therefore he has not met his burden of showing that he was prejudiced by counsel's failure to consider this challenge.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.