COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0486-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD A. KOZINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and STANLEY A. MILLER, Judges. *Affirmed and cause remanded.*

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

FINE, J. Donald Kozinski appeals from a judgment, entered on his guilty plea, convicting him of one count of armed robbery and one count of

attempted armed robbery.[1] He also appeals from an order denying his motion for postconviction relief, claiming that his trial lawyer did not give him effective assistance of counsel and seeking to withdraw his guilty plea. We affirm, but remand so the judgment of conviction may be corrected in accordance with footnote one.

I.

The record in this case is full of inconsistencies as to when Kozinski committed the crimes to which he pled guilty. It is upon these inconsistencies that Kozinski seizes in an attempt to avoid the consequences of his guilty pleas. Yet, the critical issue, as discussed below, was resolved by the postconviction trial court in its fact-finding role following its assessment of the credibility of the witnesses who testified at that hearing.

Kozinski was charged with one count of armed robbery and one count of attempted armed robbery in connection with the holdup of two stores. The complaint, the information, and the judgment of conviction assert that the crimes were committed on November 20 and 24, 1995. The complaint, however, is internally inconsistent, asserting that the crimes occurred on November 20 and 24, 1995, but then making reference to November 11 as the date of the armed robbery, and to November 20 as the date of the attempted armed robbery. The

[1] The transcript of the plea hearing indicates that Kozinski pled guilty to one count of armed robbery and one count of attempted armed robbery. The judgment of conviction incorrectly states that Kozinski was convicted of two counts of armed robbery, although the judgment of conviction does correctly list the applicable statutes. Upon remand, the trial court should enter a corrected judgment.

police record of Kozinski's confession asserts that both crimes occurred on November 20, several hours apart.[2]

Kozinski sought to withdraw his guilty plea, claiming that he would not have pled guilty if his trial lawyer had properly advised him about a possible defense of coercion. Kozinski claims that he committed the crimes because drug dealers to whom he owed money forced him to do so at gun-point. During the postconviction hearing, Kozinski's trial lawyer testified that Kozinski explained that he believed he was "coerced" into committing the armed robbery, and that they had discussed the issue "in depth." Kozinski's trial lawyer also testified that he did not consider the defense to be viable, noting that, in his recollection at the time he was testifying, "the armed robberies took place … either three or four days apart," and Kozinski had "reassociated himself" after the first robbery with the persons he claims forced him to commit these crimes. Kozinski's trial lawyer testified that these circumstances created a "big[] hole in the coercion defense."

[2] Although the charging portions of the complaint and the information as well as the judgment of conviction all represent that the armed robbery and attempted armed robbery took place on November 20 and 24, 1995, respectively, the probable cause portion of the complaint recites that the armed robbery took place on November 11, 1995, at 12:10 a.m., and that a surveillance video reveals that Kozinski was wearing "a dark sweatshirt, blue jeans short, white socks and black shoes." The probable-cause portion of the criminal complaint also represents that the attempted armed robbery took place on November 20, 1995, at 2:55 a.m., and that a surveillance video reveals that Kozinski was wearing a "white Guess T-shirt." Nevertheless, the probable cause portion of the complaint also represents that Kozinski told the police that both the armed robbery and the attempted armed robbery took place on November 20, 1995. Additionally, there is an inconsistency in Kozinski's post-arrest statement to the police. He first said that after the armed robbery he was "dropped off at home" by the persons whom he alleges coerced him, and then he backtracked and said that "he did not get dropped off as indicated above, but was instead was driven" to the place where he attempted to commit the armed robbery. Significantly, footnote 1 to Kozinski's memorandum in support of his motion for postconviction relief acknowledges the discrepancies between the charging portion and the probable-cause portion of the complaint, and the police report's recitation of Kozinski's post-arrest statements—but represents that the discrepancies have "no impact on any aspect of this appeal [presumably, motion for postconviction relief]." In fact, the postconviction lawyer did not argue the discrepancies to the postconviction court, although Kozinski mentioned them, in passing, as a reason why he believed that his trial lawyer was ineffective.

When asked whether he realized that there was a discrepancy in the dates the crimes took place, Kozinski's trial lawyer answered "no."

Kozinski testified at the postconviction motion hearing that he never discussed the coercion defense with his trial lawyer and was not even aware that such a defense existed until a fellow inmate told him about it. Kozinski also testified that the two crimes were committed on the same evening, several hours apart, and that he was forced to commit them at gun-point. The trial court denied Kozinski's motion to withdraw his plea, concluding that Kozinski's trial lawyer did not give to Kozinski ineffective assistance of counsel.

II.

After sentence has been imposed, "a defendant who seeks to withdraw a guilty … plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). A "manifest injustice" may occur where a defendant has received ineffective assistance of counsel. ***Id***., 176 Wis.2d at 213–214, 500 N.W.2d at 335.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must identify acts or omissions of counsel that are not the result of "reasonable professional judgment." ***Id.***, 466 U.S. at 690. That professional judgment must, however, be "based upon a knowledge of all facts and all the law that may be available." ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Stated another way, a lawyer's

tactical decision will not be second-guessed as deficient performance if that tactical decision is reasonable.

Three things were brought out at the hearing on Kozinski's postconviction motion.

First, the case was plea bargained, and the prosecutor agreed to recommend that Kozinski be sentenced to concurrent prison terms of not more than ten years. The trial court sentenced Kozinski to a fifteen-year prison term on the armed robbery conviction, concurrent to a ten-year prison term on the attempted armed robbery conviction. Kozinski was on parole at the time he committed the armed robbery and attempted armed robbery, and the trial court ordered that the sentences on the convictions for these crimes be consecutive to Kozinski's previously imposed sentence. Kozinski was upset because the trial court did not go along with the prosecutor's recommended sentence; Kozinski's postconviction lawyer explained to the postconviction court that Kozinski "doesn't understand how the judge could do that."

Second, the assistant public defender who represented Kozinski at sentencing testified that he discussed the coercion defense with Kozinski, and that, as noted, he discussed it "in depth." Ultimately, Kozinski, who had a long and serious criminal record, decided that the better part of valor would be to accept the bargained recommendation of concurrent time and forego the possibility of asserting a coercion defense. The defense lawyer testified that he used the facts that Kozinski urges as justifying a coercion defense to argue with the prosecutor for a recommendation of concurrent time. He also testified that, taking what Kozinski told him to be the truth, he did not believe that coercion would be a viable defense, especially because Kozinski's long criminal record would have

been used at trial to impeach his testimony.[3] The trial lawyer testified at the postconviction hearing that one of the reasons he believed that a coercion defense would not be viable was that the "armed robberies took place either three or four days apart."

Third, Kozinski denied having *any* discussion with his trial lawyer about the possibility of a coercion defense, although he claims to have told the lawyer that he was "forced with gun point." He also testified, consistent with his post-arrest statement to the police, but not consistent with the dates set out in the probable-cause portion of the complaint, that both crimes took place on November 20, 1995.

The postconviction court believed the trial lawyer and disbelieved Kozinski. That finding, which we must infer from the postconviction court's decision, is certainly not clearly erroneous. *See* RULE 805.17(2), STATS. (Trial court's findings of fact may not be set aside on appeal unless they are "clearly erroneous."); ***State v. Friday***, 147 Wis.2d 359, 370–371, 434 N.W.2d 85, 89 (1989) (appellate courts must accept reasonable inferences that trial court draws from the evidence). Moreover, Kozinski's trial lawyer told the court at the sentencing hearing that:

> [T]he people he was there with apparently were very violent. It doesn't excuse what he did because he's the one in the store. He had other options. For example, ask the clerk to set off the alarm. He didn't do that because these drug dealers knew who he was and his girlfriend. As you

[3] Kozinski had an adult record dating from 1983: batteries, bail jumping, thefts, receiving stolen property, fleeing, and armed robbery. His juvenile record goes back to 1976. Moreover, as noted, Kozinski was on parole from an armed-robbery conviction when he committed the armed robbery and attempted armed robbery involved in this appeal.

> can see, the second incident took place after these guys took his girlfriend's car.[4]

Kozinski was in court and did not dispute anything his trial lawyer said. Indeed, Kozinski told the sentencing court that "there is no sense to what I did. I can't justify it."

Kozinski argues that reversal is warranted because his trial lawyer allegedly did not know that the two crimes took place on the same day, hours apart. But that they occurred within hours *is an assumption* that is impermissible in light of the trial court's decision, and is supported *only* by Kozinski's statements. There is *nothing* in the record, other than Kozinski's statements, that contradicts either the trial lawyer's recollection or the complaint's recitation that the two events were separated by either four or nine days. The postconviction court accepted the trial lawyer's testimony as truthful; under our standard of review, we are bound by that. *See* RULE 805.17(2), STATS. Thus, we must accept that the trial lawyer *did* discuss the coercion defense with Kozinski, especially given Kozinski's testimony that he told the lawyer that he was "forced with gun point"; *we must, therefore, assume that at the time of the discussion Kozinski related his version that the two crimes took place within hours of each other.* The trial lawyer used that information to get a great plea bargain for his recidivist client—a perpetual, one-man crime spree. The lawyer also exercised his experience-based knowledge to weigh the possibility that a coercion defense would be successful—an analysis that took place after an "in depth" discussion with Kozinski. The tactical decisions made by the trial lawyer here withstand scrutiny under ***Strickland***.

[4] This appears to conflict with Kozinski's post-arrest statement to the police officers, which implies that the two events were fluid.

By the Court.—Judgment and order affirmed and cause remanded.

Publication in the official reports is not recommended.

SCHUDSON, J. *(dissenting)*. Kozinski was charged with one count of armed robbery and one count of attempted armed robbery for holdups that occurred in two stores. The record is replete with inconsistencies about the timing of the two crimes. The complaint, the information and the judgment of conviction state that the crimes occurred on November 20 and 24, 1995.[5] The police record of Kozinski's confession states that both crimes occurred on November 20, several hours apart. The timing of the crimes was never discussed during the various appearances Kozinski made before the trial court, for which this court has transcripts, including the initial appearance, the preliminary hearing, the plea hearing and the sentencing hearing.

Kozinski moved for postconviction relief, arguing that he received ineffective assistance from his trial counsel because counsel, laboring under the misconception that the crimes occurred hours rather than days apart, did not properly investigate and advise him as to the applicability of the defense of coercion. Therefore, Kozinski contends, the trial court should have allowed him to withdraw his guilty plea. Kozinski is correct.

Kozinski maintained that he committed these crimes because drug dealers to whom he owed money forced him at gun point to commit the robberies to pay them back. Kozinski further alleged that he would not have pled guilty if he had known that the defense of coercion existed.

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[5] The complaint is also internally inconsistent, stating that the crimes occurred on November 20 and 24, 1995, but then making reference to November 11 as the date the armed robbery occurred.

During the postconviction motion hearing, Kozinski's trial counsel testified that Kozinski had told him when they first met that he believed he was the victim of assaultive behavior, perhaps coercion. Counsel further testified that he discussed the defense of coercion with Kozinski several times, but that he did not consider this defense to be viable because, as he testified, "the armed robberies took place … either three or four days apart," and Kozinski had "reassociated himself" after the first robbery with the men he claims forced him to commit these crimes. Counsel characterized these circumstances as creating a "big[] hole in the coercion defense." When asked on redirect examination whether he realized that there was a discrepancy in the dates the crimes took place, counsel answered "no."

Kozinski testified at the postconviction motion hearing that he never discussed the defense of coercion with his counsel and did not become aware that such a defense existed until a fellow inmate told him about it. Kozinski testified that he did not meet with his counsel between the initial appearance and the plea hearing (a substitute attorney assisted Kozinski at the preliminary hearing), a fact he claimed could be verified by checking the jail records of his visitors because he was in jail the entire time. Kozinski further testified that the two crimes occurred on the same evening, several hours apart, and that he was forced at gun point by drug dealers to whom he owed money to commit the robberies. Finally, Kozinski testified that, after these crimes were committed, the drug dealers brought him to his house seeking more money. Kozinski testified that they pounded on his windows and his neighbor's windows, causing property damage and causing the neighbors to call the police and, further, that these facts could be corroborated by Milwaukee Police Department records because police officers were called to the scene.

In its oral decision, the trial court did not make any factual findings about the dates on which these crimes occurred, whether trial counsel was aware of the correct dates, and whether trial counsel formed his opinion that the defense of coercion was not applicable based on a misconception as to when the crimes occurred. The trial court simply stated:

> The court in this case had an opportunity to review the moving paper filed by the defendant in this case and had an opportunity to hear the testimony of both trial counsel and his recollections of pretrial negotiations and discussions that he had both of the state and the defendant prior to entering of the plea in the matter.
>
> The court further had an opportunity to hear the defendant's recommendations of what transpired between him and his counsel.
>
> Based on the totality of the testimony the court's heard at this hearing, this court finds – cannot find that the representation of the defendant received [from counsel] at the time he entered his guilty plea and at subsequent sentencing was ineffective and, therefore, the defense motion essentially to withdraw the guilty plea … is denied.

"[A] defendant who seeks to withdraw a guilty … plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). A "manifest injustice" may occur where a defendant has received ineffective assistance of counsel. ***Id.*** at 213-14, 500 N.W.2d at 335.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must identify acts or omissions of

counsel that are not the result of "reasonable professional judgment." ***Id.*** at 690. The supreme court has repeatedly stated "that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Nevertheless, trial counsel's strategic or tactical decisions must be "based upon a knowledge of all facts and all the law that may be available." ***Id.***

Here, the trial court failed to determine whether trial counsel's decisions were "based upon a knowledge of all facts"—facts critical to the assessment of whether a coercion defense would be viable. Although the trial court did not make an express finding as to the credibility of the witnesses, even if the trial court chose to believe Kozinski's counsel's testimony that he discussed the defense of coercion with his client over Kozinski's testimony that they did not discuss it, the trial court failed to address *whether counsel advised Kozinski about the applicability of the coercion defense based on a misconception as to when the crimes occurred.* Trial counsel specifically acknowledged at the postconviction motion hearing that he believed the crimes took place "either three or four days apart." Because the trial court's decision does not address whether the crimes were committed hours or days apart and whether counsel advised Kozinski based on a misconception of facts essential to the assessment of a potential defense, *see* ***Felton***, 110 Wis.2d at 502, 329 N.W.2d at 169 (trial counsel's strategic decisions must be based upon knowledge of all the facts), we should reverse the order denying the motion for postconviction relief. Accordingly, I respectfully dissent.