COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2644-CR
2014AP2645-CR
2014AP2646-CR

Cir. Ct. Nos. 2013CF0339
2013CF0885
2013CF2303

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIUS LEE SANDERS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: LINDSEY CANONIE GRADY, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRASH, J. Julius Lee Sanders appeals from his judgments of conviction on one count of strangulation, contrary to WIS. STAT. § 940.235(1)

(2015-16)[1], one count of felony bail jumping, contrary to WIS. STAT. § 946.49(1)(b), and one count of intimidating a witness, contrary to WIS. STAT. § 940.43(7), stemming from a domestic violence incident with his girlfriend, K.H. He also appeals from the denial of his postconviction motion to withdraw his guilty plea, which was denied without an evidentiary hearing.

¶2 Sanders argues that his trial counsel was ineffective for failing to investigate possible defenses related to the alleged conduct of K.H., and for failing to inform Sanders that the judge who would sentence him may be different than the judge who accepted his plea. He also argues that his plea was not knowingly and voluntarily entered, and he claims that for these reasons, he is entitled to an evidentiary hearing with regard to his request for a plea withdrawal. In the alternative, Sanders seeks resentencing on the grounds that his trial counsel had a conflict of interest at his sentencing.

¶3 Sanders' final claim on appeal is that one of the conditions of his extended supervision, that he is prohibited from having contact with the children he fathered with K.H., is overly broad and not reasonably related to his rehabilitation or the community's interest. We affirm on all issues.

BACKGROUND

¶4 On January 13, 2013, Sanders was arrested after an incident at K.H.'s apartment in Greendale. K.H. stated that Sanders had pushed her up against a wall and spit on her face several times. Sanders then pushed K.H. down

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

on the couch and choked her until she spit up blood and almost lost consciousness. Sanders also called her a "bitch" and a "whore." During this confrontation, K.H.'s phone fell out of her pocket. Sanders took her phone and blocked the door to prevent K.H. from leaving the apartment.

¶5 When the police arrived, they found Sanders outside the apartment, looking agitated and claiming that he had not done anything wrong and that the police were just "harassing" him. The officers, who knew Sanders from prior contacts, handcuffed him and led him to the police car, at which time Sanders threatened the officers and tried to pull away from them.

¶6 Upon entering the apartment and making contact with K.H., the officers observed several burst blood vessels in one of K.H.'s eyes and swelling on her neck, consistent with being strangled. Additionally, there was spit running down the wall of the apartment. Also, K.H.'s phone was recovered from the defendant when he was arrested.

¶7 Furthermore, the police discovered that there had been an injunction issued against Sanders on June 11, 2012, which allowed contact with K.H. only to discuss the children that Sanders and K.H. have together. This injunction was in effect on the date of this incident. Additionally, Sanders had previously been charged with a misdemeanor offense of resisting or obstructing an officer and was out on bond at the time of this incident.

¶8 Two days after the incident, on January 15, 2013, Sanders attempted to contact K.H. while he was still in jail. Sanders had called his mother, Susan Wooley, and asked her to go to the daycare where K.H. takes their children to talk to K.H. when she came to pick up the children. Wooley was to take a different car

so that K.H. would not recognize Wooley's vehicle. Wooley did as Sanders requested, and attempted to speak with K.H. outside of the daycare. Sanders also attempted to speak with K.H. at that time over Wooley's cell phone, but K.H. refused to talk to him.

¶9 Later that day, Wooley went with her husband to K.H.'s apartment to try to convince her to change her story with regard to the incident with Sanders. As soon as Wooley entered K.H.'s apartment, Wooley said to K.H. that Sanders would get "27 years" in prison, and stated "[n]o victim, no case." Wooley also said that K.H. "can tell them this was all a big mistake."[2]

¶10 Subsequently, after being released on bail, Sanders began sending text messages to K.H. Sanders sent a number of texts to K.H. between January 30, 2013, and February 11, 2013, regarding the incident and their relationship. Sanders continued to contact K.H. after he was taken back into custody for failing to appear in court for this matter, calling her from the House of Correction on April 13, 2013. During that call, Sanders attempted to convince K.H. to change her story regarding the incident. K.H. then received a letter on or around April 30, 2013, from Sanders that was sent from the House of Correction, again trying to convince K.H. to change her story and not "send [him] away to prison for 30 plus years." Sanders also stated that their kids "will be the main ones suffering by me being in prison" and that K.H. should not "take away a father who would do anything for his kids."

[2] Susan Wooley was charged with misdemeanor intimidation of a witness and contact after domestic abuse arrest—party to a crime, as a result of these incidents; however, her case was handled separately and is not part of this appeal.

¶11 Sanders ultimately agreed to plead guilty to strangulation, intimidation of a witness, and felony bail jumping. He entered his pleas on June 13, 2013, before the Honorable Mary Triggiano. Pursuant to the plea agreement, the following additional charges were dismissed but read in: false imprisonment, battery to an injunction petitioner, contact after a domestic abuse arrest, an additional count of intimidation of a witness, resisting an officer, misdemeanor bail jumping, and four additional charges of felony bail jumping.

¶12 Due to judicial rotation, Sanders was sentenced by the Honorable Lindsey Grady on November 14, 2013. He was sentenced to a total of seventeen years: nine years of initial confinement and eight years of extended supervision. He subsequently filed a motion for postconviction relief, seeking to withdraw his plea due to ineffective assistance of counsel, and because his plea was not knowingly entered. In the alternative, Sanders sought resentencing, alleging that his attorney had a conflict of interest at sentencing.

¶13 The trial court denied Sanders' postconviction motion, finding that all of Sanders' allegations were based "entirely on speculation and unsupported allegations." This appeal follows.

DISCUSSION

1. Plea Withdrawal

¶14 Sanders primarily seeks to withdraw his plea and argues that he is entitled to an evidentiary hearing on that issue. A defendant who wishes to withdraw his plea post-sentencing must demonstrate, by clear and convincing evidence, that withdrawal is necessary to prevent a manifest injustice. ***State v.***

Taylor, 2013 WI 34, ¶24, 347 Wis. 2d. 30, 829 N.W.2d 482. This higher standard of proof is warranted because:

> ... once the guilty plea is entered the presumption of innocence is no longer applicable, and when the record on its face shows that the defendant was afforded constitutional safeguards, the defendant should bear the heavier burden of showing that his plea should be vacated. Once the defendant waives his constitutional rights and enters a guilty plea, the [S]tate's interest in finality of convictions requires a high standard of proof to disturb that plea.

State v. Krieger, 163 Wis. 2d 241, 249-50, 471 N.W.2d 599 (Ct. App. 1991) (citation and one set of quotation marks omitted). We review the trial court's decision on a postconviction motion for plea withdrawal under the erroneous exercise of discretion standard. ***Id.*** at 250.

¶15 The courts have previously recognized various examples of manifest injustice that, if proven, provide a defendant with proper grounds to withdraw a guilty plea. Several situations from the non-exhaustive list of examples are argued by Sanders, including that he received ineffective assistance of counsel, and that his plea was involuntary. *See* ***Taylor***, 347 Wis. 2d 30, ¶49. We address each in relation to Sanders' claims.

a. Ineffective Assistance of Counsel

¶16 To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." ***Id.*** at 691. To demonstrate prejudice, "[t]he

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See* ***Strickland***, 466 U.S. at 697.

¶17 A defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony at a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to a hearing upon filing a postconviction motion. A trial court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶18 Whether the allegations necessitate a hearing presents another question of law for our independent review. ***Id.*** If the defendant is not entitled to a hearing—either because the defendant does not make sufficient allegations that, if true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively shows that the defendant is not entitled to relief—the trial court then has the discretion to deny a postconviction motion without a hearing. ***Id.*** We review a trial court's discretionary decisions with deference. ***Id.***

¶19 Sanders first argues that his counsel was ineffective because he failed to investigate claims made by Sanders regarding K.H.'s credibility.

Specifically, Sanders claims that in May 2013, approximately one month prior to entering his guilty pleas, he wrote to his attorney requesting that he investigate K.H.'s psychological condition. Sanders also requested that trial counsel investigate prior instances in which he claimed K.H. had made false allegations against him, including a report to the Franklin Police Department for pulling a gun on her, and a report to the Greendale Police Department for violating a no-contact order.

¶20 The trial court appropriately denied Sanders' request for a hearing because he failed to provide sufficient information and develop this argument in his postconviction motion so that the trial court could fully assess his claims. Sanders did not provide any records regarding the incidents where he claims that he was falsely accused by K.H., nor did Sanders establish that the allegations were actually false. Additionally, Sanders provided no information to support his allegations of mental health issues on the part of K.H.

¶21 Furthermore, Sanders failed to demonstrate that any lack of investigation was a deficiency in trial counsel's performance, or that it resulted in prejudice against him. Sanders alleges that "[t]o [his] knowledge" trial counsel did not investigate these claims. He does not explain how any evidence that might have been uncovered during such an investigation would have been admissible and relevant to his defense. *See* ***Allen***, 274 Wis. 2d 568, ¶9. In fact, Sanders never even alleges that he would not have pled guilty if an investigation had been completed. Consequently, Sanders does not establish that "the result of the proceeding would have been different" had the investigation been done. *See* ***Strickland***, 466 U.S. at 694.

¶22 Moreover, Sanders spoke with trial counsel prior to entering his guilty plea with regard to his request for the investigation of K.H.'s conduct. At that time, Sanders claims that counsel advised him that the information Sanders had given counsel was not relevant to the charges against him. Therefore, counsel advised him to accept the plea agreement, which dismissed many of the charges and reduced his overall sentence exposure. Sanders then entered his guilty pleas, thereby waiving his right to challenge K.H.'s credibility. For all of these reasons, Sanders' ineffective assistance claim with regard to counsel's failure to investigate K.H. was properly rejected by the trial court.

¶23 Sanders next argues that his trial counsel was ineffective for failing to file a plea withdrawal motion upon discovering that he would not be sentenced by Judge Triggiano. To succeed on a motion to withdraw a plea before sentencing, the defendant "must proffer a fair and just reason for withdrawing his plea." ***State v. Jenkins***, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. "Not every reason will qualify as a fair and just reason." ***Id.*** Examples of reasons the court has deemed "fair and just" are the "genuine misunderstanding of the plea's consequences; haste and confusion in entering the plea; and coercion on the part of trial counsel." ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999).

¶24 Sanders alleges that his trial counsel indicated prior to Sanders entering his pleas that counsel knew Judge Triggiano personally and suggested that she was likely to sentence Sanders to probation. However, this court has previously upheld a determination that "fear of an unfair sentencing process" is not a fair and just reason under the standard for pre-sentence plea withdrawal. ***Id.*** at 741. In other words, merely wanting a different judge for sentencing because

that judge may be more lenient is purely speculative, and thus would not be considered to be a fair and just reason warranting plea withdrawal. *See* ***id.*** Therefore, Sanders' argument that his trial counsel was acting "professionally unreasonable" by not making such a motion fails. *See* ***Strickland***, 466 U.S. at 691.

¶25 Additionally, Sanders argues that his trial counsel was ineffective because he did not advise Sanders that the threshold for plea withdrawal after sentencing—the demonstration by clear and convincing evidence that withdrawal is necessary to prevent a manifest injustice, *see* ***Taylor***, 347 Wis. 2d 30, ¶24—was higher than the standard for pre-sentence withdrawal—the proffer of a fair and just reason, *see* ***Jenkins***, 303 Wis. 2d 157, ¶43. This argument is not persuasive, given that we have already determined that a motion for plea withdrawal would not have been successful under either standard.

¶26 Sanders' next argument, that his trial counsel had a conflict of interest during his sentencing, is also "treated analytically as a subspecies of ineffective assistance of counsel." ***State v. Love***, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999). The alleged conflict is based on trial counsel's simultaneous representation of Sanders and Terrance Egerson, who was incarcerated in the Milwaukee County Jail with Sanders. Sanders' claim stems from an allegation that Egerson had sent letters to his wife from jail under Sanders' name, without Sanders' knowledge, because Egerson had a no-contact order that prevented him from sending the letters himself. Sanders was disciplined in jail for sending the letters on Egerson's behalf, but jail authorities subsequently determined that there was insufficient proof that Sanders had committed this violation. Sanders claims

that Egerson thought that Sanders had informed the jail authorities about Egerson sending the letters himself, causing him to be angry with Sanders.

¶27 In the meantime, Egerson's wife had apparently become friends with K.H. Sanders alleges that because Egerson was angry with him, Egerson told his wife that she should advise K.H. to "bury" Sanders at sentencing. Sanders contends that this makes Egerson his adversary, thus establishing a conflict.

¶28 To establish that an actual conflict of interest exists, it is not sufficient for a defendant to show that "'a mere possibility or suspicion of a conflict could arise under hypothetical circumstances."' ***Id.*** at 69-70 (citation omitted). "The fact that one attorney represents more than one defendant is not in itself a conflict of interest and the attorney is entitled to represent more than one defendant unless the interest of the defendants is shown to be in conflict." ***Id.***

¶29 The trial court found that there was no actual conflict. First, it noted that Sanders had submitted no documentation to substantiate his allegations against Egerson. Furthermore, the trial court held that even if the allegations against Egerson were true, there was still no actual conflict because the domestic violence charges against Egerson, for which trial counsel was representing him, were unrelated to the letters Egerson was alleged to have sent under Sanders' name.

¶30 Sanders then moved the trial court to reconsider based on newly discovered evidence. This new evidence related to a disciplinary hearing held by the Milwaukee County Sheriff's Office regarding Sanders allegedly sending mail on behalf of another inmate, Montrael Clark. The outcome of the hearing was that Sanders was taken off disciplinary status because the charge was unfounded.

¶31 In his motion for reconsideration, Sanders argued that this shows that other inmates, likely including Egerson, used Sanders' name to send and receive mail. The trial court denied this motion as well, again stating the lack of evidence that Egerson had used Sanders' name to send and receive mail. It further noted that even if it could be proven that Egerson had sent mail using Sanders' name, which is speculative, the most that would come of it is Sanders could be asked to testify against Egerson with regard to other acts evidence, and this does not represent an active conflict of interest for trial counsel. We agree, and in finding that there was no conflict of interest, we find that counsel was not ineffective with regard to this issue.

¶32 As part of Sanders' conflict of interest claim, he seeks resentencing. In support he cites ***State v. Dadas***, 190 Wis. 2d 339, 526 N.W.2d 818 (Ct. App. 1994), where this court held that the defendant was entitled to resentencing because the record showed that at sentencing the defendant's counsel had "actively represented a conflicting interest." ***Id.*** at 347. However, because in this case we affirm the trial court's determination that there was no active conflict by Sanders' trial counsel, there is no basis for resentencing.

b. Involuntary Plea

¶33 Intertwined with Sanders' ineffective assistance arguments is the claim that he did not enter the plea knowingly and voluntarily. As previously noted, a defendant who demonstrates, by clear and convincing evidence, that his or her plea was involuntary establishes sufficient grounds for having the plea withdrawn after sentencing to prevent a manifest injustice. ***Taylor***, 347 Wis. 2d

30, ¶¶24, 49. However, Sanders fails to demonstrate that his plea was in any way involuntary.

¶34 Sanders cites ***State v. Ravesteijn***, 2006 WI App 250, ¶27, 297 Wis. 2d 663, 727 N.W.2d 53, in support of his argument for the premise that a defendant who "'does not understand the nature of the charge and the implications of the plea ... should not be entering the plea, and the court should not be accepting the plea.'" ***Id.*** (citation omitted). In ***Ravesteijn***, the defendant, who had pled guilty to a kidnapping offense, was informed at sentencing that he had waived the right to reduce the charge to a lesser felony, and thus reduce his prison time exposure, by pleading guilty. ***Id.***, ¶24. This misunderstanding was traced back to the defendant's trial counsel, who incorrectly believed that the absence of a permanent physical injury to the victim, which would be the basis for reducing the class of felony, would be litigated at sentencing. ***Id.***, ¶22. Yet, even after acknowledging that the plea was not entered knowingly, this court determined that resentencing would resolve the issue, and upheld the denial of the motion for plea withdrawal. ***Id.***, ¶31.

¶35 In the present case, Sanders' claim that he did not knowingly enter the plea does not rise to the level of misunderstanding demonstrated in ***Ravesteijn***. Sanders' allegation that he was not informed that a different judge might preside at his sentencing is not a misunderstanding of the "'nature of the charge'" or the "'implications of the plea.'" *See* ***id.***, ¶27 (citation omitted). Additionally, Sanders does not claim that he was promised a certain sentence by his trial counsel. In fact, Sanders clearly indicated at the plea hearing that he understood the rights he was giving up by entering the plea, and that he was giving up those rights "freely, voluntarily, intelligently and knowingly."

¶36 Instead, Sanders' claim rests on the suggestion that the judge who took the plea might be more lenient. As stated by the trial court, this is "rank speculation," and thus is not a sufficient argument to support Sanders' claim that his plea was involuntary and should be permitted to be withdrawn.

¶37 In sum, both of the arguments Sanders presents to establish grounds for an evidentiary hearing to withdraw his plea—ineffective assistance of counsel and an involuntary plea—fail. Sanders has simply not demonstrated that counsel's conduct was deficient with regard to any of these issues or that he was prejudiced in any way. *See* ***Strickland***, 466 U.S. at 687. Nor has Sanders demonstrated that his plea was involuntary, compelling its withdrawal. *See* ***Taylor***, 347 Wis. 2d 30, ¶49. We therefore find that the trial court properly denied Sanders' postconviction motion for plea withdrawal.

2. Condition of Extended Supervision

¶38 Sanders also appeals one of the conditions of his extended supervision imposed by the trial court, which prohibits Sanders from having contact with his children. Sanders argues that this order should be vacated on grounds that it is overly broad and is not reasonably related to his rehabilitation or the community's interest, since he has never been charged with or convicted of physically endangering his children.

¶39 "Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate." ***State v. Stewart***, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165. The reasonableness and validity of such conditions is measured by "how well they serve their objectives: rehabilitation and protection of the state

and community interest." ***Id.*** We review the imposition of conditions under the erroneous exercise of discretion standard. ***Id.***

¶40 At the sentencing hearing, K.H. testified that Sanders created a violent environment in which their children thus far have been raised. She believes that as a result the children are learning that violence is "normal and acceptable" behavior, and that this is "a disgrace." Her concern for her children's welfare was the primary reason that K.H. requested that Sanders be "put away for the full extent of the sentence."

¶41 The trial court found the safety and protection of Sanders' children to be a valid concern, and agreed that they would be at risk if Sanders were allowed to be in contact with them during his time under extended supervision. We agree as well, and find this to be a reasonable and appropriate condition of Sanders' extended supervision.

¶42 In conclusion, we affirm the trial court's finding that the allegations set forth in Sanders' postconviction motion for plea withdrawal were insufficient to warrant an evidentiary hearing. We also affirm the trial court's denial of Sanders' motion for resentencing based on a conflict of interest by trial counsel. Finally, we affirm the trial court's imposition of a condition of extended supervision that prohibits Sanders from having contact with his children as a proper exercise of the trial court's discretion.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.