COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP632-CR **Cir. Ct. No. 2001CF1754**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNY L. WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Kenny L. Warren pled guilty to one count of first-degree reckless homicide, while armed, and one count of being a felon in possession of a firearm. In a postconviction motion, Warren moved to withdraw

his plea as not made knowingly or voluntarily.[1] After an evidentiary hearing, the circuit court denied the motion. Warren appeals. We affirm.

BACKGROUND

¶2 The criminal complaint alleged the following facts. On May 26, 2001, Equinees Kimbrough was shot to death after he attempted to stop a street fight among a group of girls. A group of men, including Warren, also was present, and some of the men accused Kimbrough of hitting one of the girls. When Kimbrough backed away and started to run from the group, Warren pulled a gun and fired a shot toward Kimbrough. Kimbrough tried to crawl away and Warren caught up to him and fired a second shot. In interviews with police, Warren initially denied being involved. In a second interview, Warren admitted to being the shooter, although he told police that the gun went off when he fell while chasing Kimbrough.

¶3 Warren initially was charged with first-degree intentional homicide and possession of a firearm by a felon. As part of a plea bargain, the State moved to amend the homicide charge to first-degree reckless homicide, while armed. The State would recommend that the maximum sentence, both as to initial confinement and extended supervision, be imposed. Warren pled guilty to the amended charge. The court sentenced Warren to sixty years of imprisonment for the first-degree

[1] The circuit court initially denied Warren's motion without a hearing. We reversed and remanded for an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). ***State v. Warren***, No. 2002AP2849-CR, unpublished slip op. (WI App Sept. 22, 2003).

reckless homicide charge, comprised of forty years of initial confinement and twenty years of extended supervision, and to five years of imprisonment for the possession of a firearm charge, comprised of two years of initial confinement and three years of extended supervision, to be served consecutively.

¶4 In a postconviction motion to withdraw his guilty plea, Warren claimed that his trial counsel was ineffective when he did not move to suppress the statements Warren gave to police. In an affidavit, Warren averred that detectives continued questioning him after he asked for an attorney and that his request for an attorney was "ignored." Warren also stated that he was under "serious pressure" from the detectives and he "signed a confession, even though it was not true." Warren stated that he told his trial attorney about "the improper conduct by the police" but that counsel told him "it did not matter" and counsel did not file a suppression motion "even though I asked him to do so." Warren also stated that he "repeatedly" told his trial attorney that he was not the shooter, a statement consistent with the first statement that Warren gave to police. In addition to the assertions about his statement, Warren also asserted that he did not understand the elements of the crimes or the potential sentence.

DISCUSSION

¶5 After sentencing, a plea may be withdrawn only if withdrawal is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). The defendant has the burden of proving by clear and convincing evidence that a manifest injustice has occurred. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is satisfied by a showing that the defendant received ineffective assistance of counsel. ***Id.***

¶6 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, as a result, he was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶7 In determining whether there was deficient performance, a reviewing court must make every effort to avoid relying on hindsight. ***Id.*** Rather, we focus on counsel's perspective at the time of trial, and the burden is on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. An attorney's performance is not deficient unless it is shown that, "'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (citation omitted).

¶8 To prove prejudice, the defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶9 At the postconviction hearing, trial counsel testified that he did not file a motion to suppress because he wanted to use Warren's statements which counsel felt supported the lesser charge of reckless homicide rather than

intentional homicide. The postconviction court took judicial notice of the transcript of the final pretrial conference at which counsel advised the court that he understood "there would be a ***Miranda-Goodchild*** hearing … if it were to go to trial."[2] The postconviction court found no deficient performance because defense counsel had given the court "notice" that Warren would contest the admissibility of his statements under ***Miranda-Goodchild***. In his appellate brief, Warren states that he is "not directly pursuing" the "failure to file a suppression" motion on appeal, but suggests that "circumstances warrant consideration" of the question because counsel's "reasons were not justifiable." We will not address issues that are inadequately briefed, and we need not address that matter further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

¶10 At the postconviction hearing, Warren asserted that trial counsel did not adequately investigate his case. Warren testified that he told his attorney that Shaquena Johnson, one of the girls involved in the fight, told him that she would testify that he was not the shooter. Warren contends that his attorney never interviewed Johnson or conducted any meaningful investigation on the question of whether or not Warren was the shooter.

¶11 Trial counsel testified that Warren admitted he was the shooter, although Warren asserted that the gun went off accidentally when he fell. Warren told police the same thing. Counsel testified that the defense strategy throughout the case was to seek a reduction of the charge from first-degree intentional homicide to reckless homicide, and Warren agreed with that strategy. Counsel

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

also testified that he did not contact Johnson because she had named Warren as the shooter in the statement she gave to police. Because Warren admitted that he was the shooter, counsel did not consider Johnson to be a helpful witness.

¶12 At the ***Machner*** hearing, the circuit court made an express finding that trial counsel was more credible than Warren. This court "must be sensitive" to the circuit court's assessment of credibility, and we will uphold that factual determination unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. That assessment is supported by the record and we will not disturb it.

¶13 The court found that trial counsel articulated a "coherent strategy of defense … to get a first degree reckless amendment … at a plea hearing or a lesser included instruction on that." Findings of fact concerning the circumstances of the case and counsel's conduct and strategy will be upheld unless clearly erroneous. ***Id.***, ¶21. Again, the circuit court's factual finding is not clearly erroneous, and it leads inexorably to the conclusion that trial counsel's performance was not deficient. The decision to pursue an amendment of the charge was a reasonable strategic decision. Warren concurred in that strategic decision. We will not second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Where, as here, a strategic decision is based upon rationality founded on the facts and law, counsel is not deficient. *See* ***id.***

¶14 At the postconviction hearing, Warren also argued that he did not understand the elements of the offense at the time of the guilty plea.[3] At the postconviction hearing, Warren testified that his attorney never explained the elements of the crime and that he did not recall the judge reviewing the elements during the plea colloquy. Trial counsel testified that he explained the elements of first-degree reckless homicide by reviewing the relevant jury instructions with Warren.

¶15 As noted above, the circuit court found counsel to be more credible than Warren. The court noted that the phrase on the plea questionnaire, "the elements were explained by counsel" was underscored, lending credence to counsel's testimony that he used the jury instructions to explain the elements to Warren. The court also found it not credible that Warren would have signed the plea questionnaire without reading it. In his brief, Warren "dispute[s]" the court's credibility determination. However, the determination of witness credibility is left to the circuit court. ***State v. Arredondo***, 2004 WI App 7, ¶17, 269 Wis. 2d 369, 674 N.W.2d 647. The court's factual findings are not clearly erroneous, and therefore, Warren's contention fails.[4]

---

[3] Warren does not pursue the contention, first raised in the postconviction motion, that he did not understand the potential sentence.

[4] The plea colloquy also defeats Warren's contention. During the colloquy, the court explained to Warren "that the State must prove each and every element of the offenses … by evidence that is beyond a reasonable doubt." The court explained that the State "would have to prove that on May 26th of 2001, at 3018 North 25th Street in the City of Milwaukee, while using a dangerous weapon, you did recklessly cause the death of Equinees Kimbrough, another human being, under circumstances which showed utter disregard for human life." The court also explained that the State "would have to prove on May 26th of 2001, at 3018 North 25th Street in the City of Milwaukee, having previously been convicted of a felony, you did possess a firearm." Warren told the court that he understood both charges. We agree with the State that by reviewing the charges with Warren, the court sufficiently informed Warren of the elements of the crimes. *See* ***State v. Trochinski***, 2002 WI 56, ¶11 n.6, ¶¶23, 42, 253 Wis. 2d 38, 644 N.W.2d 891.

¶16 In sum, we conclude that Warren's trial counsel was not ineffective and that Warren understood the elements of the offenses to which he pled guilty. Accordingly, Warren's motion to withdraw his guilty plea was properly denied.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).