COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP2637-CR **Cir. Ct. No. 1999CF50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT ELVERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 NETTESHEIM, J. In ***State v. Hampton***, 2004 WI 107, ¶¶20, 38, 274 Wis. 2d 379, 683 N.W.2d 14, the supreme court held that a circuit court must

personally advise a defendant that the court is not obligated to follow the terms of a plea agreement and ascertain whether the defendant understands that warning. As a remedy for a ***Hampton*** violation, the court adopted the plea withdrawal procedure set out in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). ***Hampton***, 274 Wis. 2d 379, ¶¶45-49.

¶2 In the instant case, the State concedes that the trial court failed to advise the appellant, Scott Elvers, that the court was not bound by the parties' plea agreement. However, under the ***Bangert*** plea withdrawal methodology and consistent with our post-***Hampton*** decision in ***State v. Plank***, 2005 WI App 109, ___ Wis. 2d ___, 699 N.W.2d 235, we hold that the State has met its burden to show that, despite the ***Hampton*** violation, Elvers knew at the time of his plea that the trial court was not bound by the plea agreement. We therefore affirm both the postconviction order denying Elvers' motion seeking to withdraw his guilty plea and the judgment of conviction.

FACTS

¶3 The facts of this case are straightforward and undisputed. The State charged Elvers with felony bail jumping pursuant to WIS. STAT. § 946.49(1)(b) (1999-2000). On the morning of the scheduled jury trial, the parties advised the circuit court that they had reached the following plea agreement. Elvers would enter a plea of guilty to the charge, and the State would recommend that Elvers receive a two-year prison sentence consecutive to the prison sentence he was then serving. The plea agreement also provided that both the State and Elvers' attorney waived the right to make any statements in support of the plea agreement, but that Elvers was free to make his own personal mitigating statement, which would be offered through his attorney. The parties also indicated that they were not asking

for a presentence investigation and, instead, wanted to proceed directly to sentencing.

¶4 After the terms of the plea agreement were placed on the record, the trial court personally engaged Elvers in a plea colloquy. However, this colloquy did not advise Elvers that the court was not bound by the terms of the plea agreement. Following the colloquy, the court accepted Elvers' guilty plea, and proceeded directly to the sentencing. The court then adopted the State's recommendation and sentenced Elvers to two years in prison consecutive to the sentence Elvers was then serving.

¶5 Represented by new counsel, Elvers brought a postconviction motion seeking to withdraw his guilty plea on two grounds: (1) the trial court had failed to advise him that the court was not bound by the terms of the plea agreement, and (2) his trial counsel was ineffective by entering into a plea agreement under which counsel waived the right to make a sentencing argument on his behalf. After hearing testimony from both Elvers and his prior counsel, the circuit court denied Elvers' motion. The court held that Elvers' guilty plea was knowingly made and therefore Elvers had failed to establish a manifest injustice requiring a withdrawal of the guilty plea. Elvers followed with the instant appeal.[1]

[1] Aware that ***State v. Hampton***, 2002 WI App 293, 259 Wis. 2d 455, 655 N.W.2d 131, *aff'd*, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, was then pending in the supreme court, we placed this appeal on hold pending the supreme court opinion. After the opinion was released, the State moved for summary reversal and a remand to the trial court for further fact finding. We denied the motion for summary reversal and ordered the parties to address whether ***Hampton*** applied in a case such as this where the trial court, although failing to give the ***Hampton*** warning, nonetheless imposed a sentence within the bounds of the plea agreement. The parties complied, and we then certified to the Wisconsin Supreme Court the question of whether ***Hampton*** represented a "bright line" rule and whether it applied in a situation such as this where the trial court imposed a sentence consistent with the plea agreement. However, the supreme court declined our certification.

DISCUSSION

The Plea

¶6 Elvers argues that his plea was not knowingly made because the trial court did not advise him pursuant to ***Hampton*** that the court was not obligated to abide by the plea agreement.

¶7 We begin with a brief summary of the ***Hampton*** holdings. A trial court must personally advise a defendant that the court is not bound by the terms of a plea agreement, including a prosecutor's recommendation, and the court must ascertain that the defendant understands this information. ***Hampton***, 274 Wis. 2d 379, ¶¶20, 38. The remedy for a ***Hampton*** violation is the plea withdrawal procedure set out in ***Bangert***. ***Hampton***, 274 Wis. 2d 379, ¶¶33, 48-49. The circuit court must conduct an evidentiary hearing on the alleged ***Hampton*** violation when the defendant's motion points to the circuit court's failure to deliver the ***Hampton*** warning in the plea colloquy and the defendant additionally alleges that he or she did not understand that the circuit court was not bound by the plea agreement. *See* ***id***., ¶¶46, 48-49. If the defendant's motion satisfies these requirements, the burden shifts to the State at the evidentiary hearing to show by clear and convincing evidence that the defendant's plea was nonetheless knowingly, voluntarily and intelligently entered, meaning that the defendant in

fact knew the information that should have been provided. *See* ***id***.[2] The supreme court premised these holdings on constitutional grounds. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts *done with sufficient awareness of the relevant circumstances and likely consequences*." ***Id***., ¶22 (emphasis added; citation omitted).

¶8 Next we address ***Plank***, the first post-***Hampton*** decision to apply the ***Hampton/Bangert*** plea withdrawal procedure in the face of a ***Hampton*** violation. There, Plank pled no contest pursuant to a plea agreement which obligated the State to not seek prison time but instead to ask the trial court to place Plank on probation for thirty-six months. ***Plank***, 699 N.W.2d 235, ¶3. At the plea hearing, the State made the promised sentencing recommendation. *See* ***id***., ¶4. However, during the plea colloquy, the trial court failed to advise Plank that it was not bound by the State's recommendation. *See* ***id***. At the sentencing, the court declined to follow the State's recommendation and instead sentenced Plank to prison. *See* ***id***. Plank then sought to withdraw his no contest plea on the grounds that it was not knowingly and voluntarily entered. ***Id***., ¶5. Following an evidentiary hearing, the trial court denied the motion. ***Id***. Plank appealed.

[2] Since the circuit court in ***Hampton*** had failed to conduct an evidentiary hearing, the supreme court analyzed the defendant's motion and concluded that the motion was sufficient to trigger the need for an evidentiary hearing. ***Hampton***, 274 Wis. 2d 379, ¶¶66-72. In reaching that conclusion, the supreme court first noted that it was undisputed that the trial court had failed to expressly advise the defendant that the court was not bound by the terms of the plea agreement. ***Id***., ¶66. Next, the court rejected the State's arguments that the plea questionnaire and the circuit court's statement as to the maximum penalties sufficed to show that the defendant nonetheless knew that the circuit court was not bound by the terms of the plea agreement. ***Id***., ¶¶68-70. The supreme court said that such matters, while proper grist for the evidentiary hearing, were not relevant to the question of the sufficiency of the defendant's motion. *See* ***id***.

¶9 Applying the ***Bangert*** plea withdrawal methodology, we looked beyond the four corners of the plea hearing proceeding in order to determine whether Plank's plea was nonetheless knowing and voluntary despite the ***Hampton*** violation. *See* ***Plank***, 699 N.W.2d 235, ¶7. In doing so, this court noted that Plank had signed a plea questionnaire and waiver of rights form, which recited Plank's understanding that "the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: $10,000 fine, 3.5 years imprisonment[.]" ***Id***., ¶9 (alteration in original). In addition, we noted that the trial court had confirmed Plank's understanding of these maximum penalties at the plea hearing. ***Id***. Finally, we noted trial counsel's testimony at the plea withdrawal hearing that he had advised Plank that the trial court was not bound by the plea agreement and that the trial court rejected Plank's postconviction testimony to the contrary as "just not believable." ***Id***., ¶¶10-11.

¶10 Here, as in ***Plank***, Elvers also signed a plea questionnaire form which contained the identical language as that in ***Plank***, except for the maximum prison exposure. The form stated, "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: $10,000, 5 years prison." At the outset of the plea hearing, Elvers' counsel recited the terms of the plea agreement, including the State's sentencing promise. The trial court then personally asked Elvers, "Is that your understanding of the agreement, Mr. Elvers?" Elvers responded, "Yes, sir." Next, the trial court personally confirmed with Elvers that he had reviewed and read the plea questionnaire and had signed the form. Later in its personal colloquy with Elvers, the trial court asked Elvers, "Do you understand what the maximum penalty for this offense could be?" Elvers answered, "Yes,

sir." The court then obtained Elvers' waiver of his other constitutional rights and accepted Elvers' guilty plea.

¶11 Pursuant to the parties' wishes, the trial court then immediately proceeded to the sentencing phase of the proceedings. A portion of Elvers' statement, as made through his counsel, included the following: "Based upon the things I have told the court, Mr. Elvers wants to request to the court that any prison time it imposes, *whether one, two, three, four, five years*, that it be made concurrent to his present time." (Emphasis added.) Elvers did not register any objection, surprise or concern in response to this statement. Later, when Elvers' counsel objected to the trial court's statement that the court would examine a presentence report prepared in a prior case involving Elvers, the court responded, "The court is free to sentence a person. *You can't bind the court to do anything as far as sentencing* goes." (Emphasis added.) Once again, this evoked no objection or other statement from Elvers indicating surprise or concern.

¶12 Thus, this is a case very similar to ***Plank***. Elvers signed a plea questionnaire which advised him of the potential maximum penalties and also warned him that the trial court was not bound by the plea agreement. This was a factor prominently noted by the trial court at the very outset of its remarks when denying Elvers' plea withdrawal motion. In addition, Elvers acknowledged during the plea colloquy that he was aware of the maximum penalties. True, unlike ***Plank***, here the trial court did not expressly recite those penalties. But we do not deem that a controlling factor given that this information was provided in the plea questionnaire. Moreover, this case has an added factor not present in ***Plank*** which supports the trial court's ruling that Elvers' plea was knowingly made. During the course of the sentencing proceeding, both Elvers' counsel and the trial court made statements about a potential sentence beyond the bounds of the State's

recommendation. This reasonably conveyed to Elvers that the trial court was not bound by the plea agreement. Yet, Elvers voiced no objection, concern or surprise in response. We uphold the trial court's ruling that Elvers' plea was knowingly made.[3]

Ineffective Assistance of Counsel

¶13 Elvers argues that his trial counsel was ineffective for negotiating a plea agreement which barred both counsel and the State from making any arguments in support of the plea agreement, thereby limiting Elvers' input to just his own mitigating statement, offered though the voice of his attorney.

¶14 The law of ineffective assistance of counsel is well known and well settled, and we will not repeat it in detail here. Suffice it to say that the defendant must show that counsel's performance was deficient and that such deficient performance resulted in prejudice to the defendant. ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). As to prejudice, the defendant must demonstrate more than speculation; rather, the defendant must affirmatively establish prejudice. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Finally, where a claim of ineffective assistance of counsel underpins a request for withdrawal of a plea, the defendant must show that he or she "would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

[3] Having upheld the trial court's ruling that Elvers plea was knowingly made, we need not address the State's alternative harmless error argument. The State contends that the ***Hampton*** violation did not result in any harm or prejudice to Elvers since the trial court imposed the very sentence called for by the State pursuant to the plea agreement.

¶15 Like the trial court, we acknowledge the oddity of this provision of the plea agreement. But that is of no consequence since, even if we assume that counsel was ineffective, we hold that Elvers has failed to establish any prejudice. "[I]t is appropriate to assume for the sake of argument that counsel's performance was deficient and determine whether the claim can be disposed of on prejudice grounds." ***State v. Carprue***, 2004 WI 111, ¶49, 274 Wis. 2d 656, 683 N.W.2d 31.

¶16 At the postconviction plea withdrawal hearing, Elvers failed to provide any evidence or other information as to what trial counsel would have provided if he had made a sentencing statement on Elvers' behalf.[4] A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Elvers' testimony at the plea withdrawal hearing was that he would not have entered into the plea agreement if he had known that both his attorney and the State had the duty to explain their reasons for the plea agreement. But the trial court needed more than this conclusory statement before it could grant Elvers relief. The court needed to know what information trial counsel should have provided so the court could make a reasoned determination as to whether the information would have altered the outcome of the sentence. *See* ***id***. On appeal, we are left in a similar informational vacuum. Elvers has failed on the prejudice prong of the test for ineffective assistance of counsel.

[4] Actually, despite the plea agreement, Elvers' counsel did make certain arguments on Elvers' behalf which appear to be more than simply Elvers' personal mitigating statement.

CONCLUSION

¶17 We uphold the trial court's ruling that the entire record demonstrates Elvers' knowledge that the court was not obligated to abide by the parties' plea agreement. We further hold that Elvers has failed to demonstrate any prejudice resulting from his trial counsel's performance. We affirm the order denying Elvers' motion for plea withdrawal, and we affirm the judgment of conviction.

By the Court.—Judgment and order affirmed.

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