COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP2215-CR
2005AP2216-CR

Cir. Ct. Nos. 2002CF256
2002CF554

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN J. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Dustin Johnson appeals judgments of conviction for substantial battery, contrary to WIS. STAT. § 940.19(4), as party to a crime; burglary as party to a crime, felony bail jumping, and aggravated battery, contrary

to § 940.19(5), as party to a crime and with a weapons enhancer.[1] Johnson also appeals an order denying his postconviction motion for plea withdrawal. Johnson asserts his plea was not knowing or voluntary and that trial counsel was ineffective. We reject his arguments and affirm the judgments and order.

Background

¶2 In Eau Claire County case No. 2002CF256, the State charged Johnson with aggravated battery as party to a crime and three counts of obstructing an officer, alleging that Johnson and his co-defendants had assaulted Scott Garnett. In Eau Claire County case No. 2002CF554, the State charged Johnson with attempted first-degree homicide as party to a crime, aggravated burglary as party to a crime, felony bail jumping, and theft as party to a crime, alleging Johnson and a co-defendant had attacked Ken Lesperance and stabbed him multiple times.

¶3 Johnson and the State reached a plea agreement encompassing both cases. Johnson pled guilty to substantial battery as party to a crime, a lower class of felony, in case No. 2002CF256. In case No. 2002CF554, Johnson entered no contest pleas to burglary, felony bail jumping, and aggravated battery as party to a crime and with a weapons enhancer.

¶4 This appeal concerns circumstances surrounding the plea to the aggravated battery charge. Johnson purportedly wanted to enter an ***Alford***[2] plea

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] An ***Alford*** plea is one in which the defendant agrees to accept conviction while simultaneously maintaining his or her innocence. ***North Carolina v. Alford***, 400 U.S. 25 (1970).

because he insisted he had not stabbed Lesperance. The State, however, had said an ***Alford*** plea would negate the entire agreement. At the plea hearing, Johnson's attorney, Michael Cohen, told the court:

> [Johnson] does not admit that he engaged in that conduct, but he understands that under a no-contest plea what he's telling the Court is that there is sufficient information in the case which he has reviewed which he understand that if the case went to trial and a jury believed the State's version of the events and not his, that there is sufficient information to convict him, so that is the charge to which we're entering pleas of no contest.

When the court addressed Johnson and asked for his plea to the aggravated battery charge, he answered, "no contest."

¶5 Sentencing was three months after the plea hearing. As Cohen made his sentencing argument, he stated "if the court may recall, at the time of the entry of the plea, he pled ***Alford*** to the [aggravated battery]." The State protested, telling the court Johnson had not entered an ***Alford*** plea but that if he were so insisting, the court should allow his plea withdrawal and the State would take the case to trial.

¶6 Ultimately, the court rejected Cohen's assertion, observing that the minutes reflected a no contest plea to the aggravated battery charge. The court refused to conclude Johnson had entered an ***Alford*** plea and advised that it would either proceed to sentence Johnson on the no contest pleas, or he could move to open the judgment or withdraw the plea. Cohen stated he would not delay the proceedings and the court ultimately sentenced Johnson to a total of twenty years' initial confinement and ten years' extended supervision.

¶7 A no-merit appeal was filed and we rejected it, instructing appellate counsel to file a supplemental no-merit report or pursue a postconviction motion

for plea withdrawal. Johnson filed a motion to withdraw his plea, arguing he intended to enter an ***Alford*** plea to the aggravated battery charge and Cohen was ineffective for failing to ensure Johnson entered the correct plea. Johnson alleged he would not have entered a no contest plea and that, when the dispute arose at sentencing, Cohen should have conferred with him before "renegotiating" his plea. Johnson further alleged his plea was neither knowing nor voluntary.

¶8 At the motion hearing, Cohen testified that Johnson had always maintained he had not stabbed Lesperance, but also insisted Johnson did not want to go to trial on the attempted homicide charge. Cohen said he told Johnson the State would never agree to an ***Alford*** plea on the battery charge. When asked about his statement to the court explaining the plea, Cohen testified he was "starting to lay the grounds to try to get around the plea agreement." He wanted to get Johnson's position, that he had not stabbed Lesperance, before the court, but knew he could not "use the word '***Alford***' because [the State] told me that if I did, there would be no deal." In fact, the State had explicitly told Cohen that without a plea to the stabbing charge, the entire agreement in both cases would be invalid.

¶9 In other words, Cohen used the term "no contest" but phrased the rest of his argument in the language of an ***Alford*** plea to avoid direct confrontation with the State and to misdirect the court. Cohen acknowledged the possibility he could get in trouble for his actions, but reiterated that while Johnson always maintained he had not actually done the stabbing, he also did not want to go to trial and did not want to lose the other terms of the plea agreement. Cohen also testified he informed Johnson of his strategy to attempt to circumvent the State's prohibition on an ***Alford*** plea.

¶10 Johnson testified that he wanted to enter an ***Alford*** plea because he wanted to maintain his innocence and protect his right against self-incrimination. Johnson said he thought he was entering an ***Alford*** plea and had he known he was not, he would not have pled no contest. He testified he would have protested at sentencing if he had realized his "plea was being changed" from an ***Alford*** plea to a no contest plea. Johnson did acknowledge, however, that Cohen had told him that even if someone else had stabbed Lesperance, he could be incriminated as a party to the crime depending on the degree of his involvement.

¶11 The court rejected Johnson's arguments. It found Cohen had been attempting to reach, then circumvent, a plea for his client and Johnson was fully aware of this strategy. The court noted the record demonstrated Johnson had acknowledged his various plea options, that the no contest box on the plea questionnaire form had been checked, and the form had been reviewed by Johnson with Cohen's assistance. The court observed that Johnson specifically stated "no contest" when asked for his plea and found that he purposefully avoided stating he was entering an ***Alford*** plea because Cohen had warned him the State would not accept that plea. The court accordingly denied Johnson's motion, and he appeals.

Discussion

Voluntariness of Plea

¶12 A defendant seeking to withdraw a guilty plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883 (citation omitted). Whether to allow plea withdrawal is generally committed to the trial court's discretion, meaning this court will reverse only if the trial court has erroneously exercised that discretion. ***Id.***

¶13 However, even after sentencing, a defendant may withdraw a plea as a matter of right if it is established that a violation of constitutional magnitude occurred during entry of the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 864, 532 N.W.2d 111 (1995). A guilty or no contest plea must be knowing, intelligent, and voluntary to pass constitutional muster. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257-61, 389 N.W.2d 12 (1986). Whether a plea was knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. Questions of constitutional fact are reviewed in two steps. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We review the trial court's findings of fact under the clearly erroneous standard, but we review the ultimate application of the law to the facts de novo. *See* ***id.***

¶14 Johnson asserts his no contest plea was neither knowing nor voluntary given Cohen's strategy of deception. However, the trial court explicitly found Johnson was aware of the plan, and implicitly found, based at least in part on Johnson's actions, that he approved of the plan.[3] The court's factual findings are not clearly erroneous in this regard. Because Johnson was complicit in Cohen's plan, his plea was necessarily informed; simply put, he knew what was going on. The plan simply failed. Johnson cannot now, in hindsight, disavow the

[3] For example, when Johnson was addressed specifically by the court during the plea hearing, he stated his plea was "no contest." Thus, at the motion hearing, the court stated Johnson

> understood the fine line Mr. Cohen was attempting to walk because he had the opportunity, when asked how he pled, to have said the word "Alford," …. And I think he didn't say a word because he knew darn well if he mentioned the word, we wouldn't have been proceeding. And he was told that by Mr. Cohen. Very carefully.

strategy he accepted. There is no basis for Johnson to withdraw his plea as unknowing or involuntary.

Assistance of Counsel

¶15 A defendant is also constitutionally entitled to the assistance of counsel. Ineffective assistance of counsel constitutes deprivation of that right and a manifest injustice. *See* ***State v. Reppin***, 35 Wis. 2d 377, 384, 151 N.W.2d 9 (1967). In evaluating whether counsel has been ineffective, the defendant must demonstrate both that counsel's performance was deficient and that the defendant suffered prejudice as a result of that deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶16 To prove deficient performance, the defendant must identify a specific action or omission by counsel that is outside the scope of professionally competent assistance. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325. However, "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***State v. Mosley***, 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996) (citation omitted). To demonstrate prejudice, the defendant must show there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. A reasonable probability is one sufficient to undermine our confidence in the outcome of the proceeding. *See* ***id.*** If the defendant fails to satisfy one of the prongs, we need not address the other. *See* ***id.*** at 697. Whether counsel was ineffective is also a question of constitutional fact, reviewed in two parts. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶17 Johnson asserts Cohen was ineffective for attempting to circumvent the plea agreement. Assuming without deciding that this strategy constituted

deficient performance, Johnson never shows how he was prejudiced by Cohen's actions. Nothing suggests Johnson would have been able to enter an ***Alford*** plea—the State was unwilling to accept one. Thus, he would either have had to accept the no contest plea or face trial on attempted homicide charges. Because Johnson was equally adamant about not going to trial on the attempted homicide charge, no different outcome could have resulted. There is no reason to believe Johnson would have agreed to proceed to the trial.

¶18 The primary reason Johnson wanted to enter an ***Alford*** plea was to maintain that he had not actually stabbed Lesperance. The trial court, however, acknowledged Johnson's position in that regard at sentencing. Moreover, Johnson was charged as a party to the crime for the attack on Lesperance. Under WIS. STAT. § 939.05(1), "[w]hoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it." Because Johnson at least acknowledged choking Lesperance, the underlying facts support the aggravated battery conviction regardless whether Johnson did the actual stabbing. Thus, his protestations of innocence do not suggest a reasonable probability of a different outcome. Confidence in the result is not undermined.

¶19 Johnson also claims Cohen was ineffective for failing to consult him about the plea "renegotiation" that happened at the sentencing hearing when the State corrected Cohen's statements about Johnson's plea and Cohen declined to delay the proceedings. This argument, however, is premised on the idea that Johnson entered an ***Alford*** plea. He did not. The trial court observed, and the record confirmed, that Johnson had actually entered a no contest plea. Accordingly, Cohen was not required to consult with Johnson about a

"renegotiation" from an ***Alford*** to a no contest plea because no such thing happened.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.