COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP554-CR **Cir. Ct. No. 1999CF5988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE D. PRUDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Terrance D. Prude appeals from a corrected judgment of conviction for five armed robberies, and from an order denying his motion for postconviction relief. The issues are whether the trial court erroneously exercised its discretion in denying Prude's motions for presentence

plea withdrawal, and whether he received the ineffective assistance of trial counsel at sentencing.[1] We conclude that the trial court properly exercised its discretion in denying Prude's presentence plea withdrawal motions, and properly denied his ineffective assistance of counsel claim for lack of prejudice. Therefore, we affirm.

¶2 Prude was charged with six armed robberies, endangering safety by using a dangerous weapon, and false imprisonment, each as a party to the crime. Incident to a plea bargain, he pled guilty to five armed robberies, each as a party to the crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (1999-2000); the State dismissed but read-in the remaining charges and agreed to recommend "very substantial incarceration" without specifying a range or number of years.[2]

¶3 Attorney Russell D. Bohach represented Prude when he pled guilty on May 1, 2000.[3] After discharging Attorney Bohach, who was succeeded by Attorney Mark S. Rosen, Prude moved for presentence plea withdrawal on August 7, 2000. After an evidentiary hearing at which Attorney Bohach and Prude testified, the trial court found Attorney Bohach "credible and more reasonable than [Prude]," and denied the motion.

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[1] Prude moved for presentence plea withdrawal. In his postconviction motion, he renewed his presentence plea withdrawal motion. Consequently, we use the plural because we are referring to the initial and renewed (postconviction) motions.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] The Honorable Mel Flanagan presided over most of the initial proceedings, including the guilty plea hearing. After Attorney Mark S. Rosen was appointed as Prude's successor counsel, this case was transferred incident to a routine calendar rotation to the Honorable Martin J. Donald, who presided over the presentence plea withdrawal motion, sentencing, and postconviction proceedings.

¶4 At sentencing, Attorney Rosen represented Prude, recommending alternative dispositions: five consecutive probationary terms, to which the prosecutor immediately objected as an illegal disposition, or an aggregate sentence in the thirteen-to-seventeen-year range. The trial court imposed five consecutive twenty-year sentences, staying the fifth sentence, in favor of a twenty-year probationary term.

¶5 Prude then filed a postconviction motion, renewing his challenge to the trial court's denial of his presentence motion for plea withdrawal, and alleging trial counsel's ineffective assistance at sentencing. Prude alleged that his pleas were unknowingly and involuntarily entered because Attorney Bohach lied, telling him not to worry because the trial court would not impose an aggregate sentence of more than twenty years. Prude's ineffective assistance claim involved Attorney Rosen's recommendation of an illegal sentence, followed by an inconsistent recommendation that was thus ignored by the trial court, resulting in Prude being essentially unrepresented at sentencing. The trial court summarily denied Prude's postconviction motion.

¶6 To withdraw a guilty plea prior to sentencing, the defendant must show a fair and just reason. ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). The factors to consider when determining whether a defendant has shown a "fair and just reason" are: (1) an assertion of innocence; (2) a genuine misunderstanding of the plea's consequences; (3) hasty entry of the plea; (4) confusion on the defendant's part; (5) coercion by trial counsel; (6) expeditiously seeking plea withdrawal; (7) record support for the reasons for seeking plea withdrawal; and (8) the potential of substantial prejudice to the State. ***State v. Shanks***, 152 Wis. 2d 284, 290, 292, 448 N.W.2d 264 (Ct. App. 1989).

> [A trial] court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced.
>
> Although "freely" does not mean "automatically," the exercise of discretion requires the court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal. A fair and just reason contemplates "the mere showing of some adequate reason for defendant's change of heart." However, the reason must be something other than the desire to have a trial.

State v. Bollig, 2000 WI 6, ¶¶28-29, 232 Wis. 2d 561, 605 N.W.2d 199 (citations omitted).

¶7 This court reviews the trial court's determination for an erroneous exercise of discretion. ***Shanks***, 152 Wis. 2d at 288. An exercise of discretion contemplates considering the facts of record in the context of the applicable law, and through logical reasoning, achieving a reasoned and reasonable determination. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) ("It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.").

¶8 Prude's plea withdrawal claim was that Attorney Bohach lied to him; consequently he misunderstood the plea negotiations and its consequences. Successor counsel, Attorney Rosen, admitted that this was a credibility contest between Attorney Bohach and Prude.

¶9 At the evidentiary hearing, Attorney Bohach testified to the specific aspects of the plea negotiations and the State's two sentencing proposals: one involving a sentencing recommendation of "very substantial incarceration," and the other involving a specific number of years. Attorney Bohach testified that he

"d[id]n't believe [he] sat there and told [Prude] to take either [proposal]. [Attorney Bohach] let [Prude] make that decision." Attorney Bohach "th[ought] on several occasions [he] talked about somewhere between ten and twenty years being a realistic number that we could convince the Court of depending on the presentence and the psychological and a potential private presentence coming back." Attorney Bohach told Prude that "in looking at fifteen to twenty, I can make an argument that that is very substantial incarceration, and, therefore, in a sense, the State and [the defense] are somewhat in agreement." Attorney Bohach testified that he would have never guaranteed a particular disposition, nor would he have ever told Prude not to worry. Attorney Bohach also testified that he explained the plea questionnaire, and discussed the elements of the offense with Prude, as corroborated by the highlighted armed robbery jury instruction stapled to the questionnaire. Attorney Bohach estimated that he spent five to six hours in substantive conversations with Prude, much of that time regarding the strengths and weaknesses of his case and the plea negotiations.

¶10 Prude's recollection of the plea negotiations was considerably less clear than that of Attorney Bohach. Prude testified that Attorney Bohach told him "[a]bout three times" that the trial court would follow defense counsel's recommendation of ten to twenty years for all five crimes. Prude claimed Attorney Bohach told him "don't worry about [the sentence], and that is why I didn't worry about it." Prude testified that he pled guilty "[b]ecause [Attorney Bohach] told me I wasn't going to get more than ten, and that is what I wanted." Prude testified that he sought plea withdrawal because Attorney Bohach "lied to [him,]" in that "[Judge] Flanagan wasn't going along with [the defense sentencing recommendation], and [Attorney Bohach had] told [him] that she was."

¶11 The prosecutor told the trial court that the State would be substantially prejudiced if it were to grant Prude's plea withdrawal motion. The prosecutor explained that Prude "was involved in making threatening phone calls to one of the witnesses in the case, Darlene McGowain. They traced phone calls that were received back to [Prude's] pod in the County Jail." The prosecutor continued:

> There is no question that he was involved in the making of those threatening phone calls, as a consequence of which, she has gone into witness protection. She had to move from her residence. Her family's life has been extremely disrupted. She is very fearful of this man and his gang of associates, and with the passage of time she – as well as all of the other victims in this matter – have tried to put this case behind them thinking it was done.
>
> Well, low and behold, because this defendant has decided that he wants to jerk the system around, it isn't done. I would say that does incalculable damage to the well-being of all of our victims. I think there are six of them here involved, more if you count the read-in cases. If we go to trial, if we have to, it will involve all eight cases here. I think all of these victims have felt further victimized by this motion because of the manipulative nature of this defendant and because this really amounts to revictimization of them by opening all of the healing that has started to occur and starting it all over again.

¶12 The trial court found the testimony of Attorney Bohach "credible and more reasonable" than that of Prude, explaining that Prude did not recall nearly as well as did Attorney Bohach, the substance of their conversations regarding Prude's potential guilty pleas. The trial court explained that Prude sought a guarantee as to the outcome of the case, which was not obtainable. The trial court determined that Prude's reason for seeking plea withdrawal was "to renegotiate a [better] deal," and explained why that was not a "fair and just reason." It found that Prude was familiar with the criminal justice system and understood that the trial court was not bound by any sentencing recommendations

and could impose up to the maximum aggregate sentence.[4] It also mentioned that plea withdrawal would "revictimize those victims."

¶13 Prude's principal reason for seeking plea withdrawal was his claimed misunderstanding of the plea's consequences. The trial court, however, found Attorney Bohach's testimony more credible than that of Prude. That finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2). Consequently, we accept Attorney Bohach's version of the plea negotiations with Prude, rather than Prude's version. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). According to Attorney Bohach, he did not guarantee Prude any particular result if he pled guilty. The trial court's assessment that Prude sought plea withdrawal to renegotiate is a reasonable inference from the credible evidence and supports the trial court's determination that the belated desire to renegotiate is not a fair and just reason to allow presentence plea withdrawal. Moreover, the prosecutor explained in specific detail, why granting plea withdrawal would substantially prejudice the State since Prude was allegedly threatening one of the prosecution's witnesses. We consequently affirm the trial court's exercise of discretion in denying Prude's motion for presentence plea withdrawal.

¶14 Prude also claims that he received ineffective assistance at sentencing because trial counsel failed to propose a viable option by first, recommending an unauthorized sentence, and then, recommending an alternative

[4] The trial court confirmed, with citations, why the record belied any claim that Prude misunderstood the consequences of his guilty plea. Prude also sought to allege an intoxication defense at trial. The trial court rejected that claim, explaining with a record citation, Prude's claimed defense and trial counsel's assessment of why that defense would not succeed.

but inconsistent sentence. To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The necessity to prove both deficient performance and prejudice obviates the need to review proof of one if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶15 The trial court denied the claim because trial counsel's performance at sentencing was not prejudicial to Prude. The trial court is given an additional opportunity to explain its sentence when challenged by postconviction motion. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). It explained in its postconviction order, that it would not have considered probation regardless of whether it was statutorily authorized. The trial court cited to the sentencing transcript, where it rejected probation as an option, explaining that it made no difference that defense counsel's alternative sentencing recommendation was inconsistent with his principal recommendation "because the court would never have considered placing [Prude] on probation for these violent offenses."

¶16 Defense counsel's alternative sentencing recommendations were not necessarily inconsistent. Defense counsel presented his alternative sentencing recommendation – a thirteen-to-seventeen-year aggregate sentence – expressly acknowledging the later confirmed possibility that the trial court would reject

probation as an option. The trial court explained that it paid too little attention to defense counsel's principal recommendation to disregard his alternative recommendation as inconsistent. In its postconviction order, the trial court explained why defense counsel's performance at sentencing was not prejudicial. By failing to establish prejudice, Prude cannot prevail on an ineffective assistance claim. *See* ***Strickland***, 466 U.S. at 687.

By the Court.—Judgment and order affirmed.

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