COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP2587-CR
2006AP2588-CR

Cir. Ct. Nos. 2004CF284
2004CF399

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD D. PERKINS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Chad Perkins appeals two judgments of conviction and an order denying his motion to withdraw his pleas. We affirm for the reasons discussed below.

BACKGROUND

¶2 Perkins was charged in one complaint with one count of burglary while armed, one count of substantial battery while armed, one count of battery while armed, and one count of criminal damage to property, each as party to the crime and as a repeat offender. The charges arose out of allegations that Perkins and a friend broke into the home of Perkin's ex-wife and beat her and her new boyfriend with a baseball bat. Perkins was charged in a second complaint with escape for failing to return to the Huber Center while on work release. The cases were consolidated pursuant to a negotiated plea agreement in which the State dropped the habitual criminality penalty enhancer on the burglary count, reduced the substantial battery charge to battery while armed, and dismissed and read-in the criminal damage to property count.

¶3 At the plea hearing, Perkins told the court that he was satisfied with counsel's representation, and agreed that the facts in the complaint were pretty much true with respect to the charges to which he was entering guilty pleas. Perkins told the PSI author that his ex-wife and the other victim were causing trouble for him by claiming he was stalking them, so he went over to confront them with a kid's baseball bat. He admitted that he had hit both victims with the bat. Perkins told an alternate PSI writer hired by the defense that he went over there because he learned that his ex-wife had begun having a sexual relationship with her new boyfriend even while she was still married to Perkins. He said he "had never thought of physical revenge before this time." He said he felt like he was in a trance during the attack and felt completely hopeless. At the sentencing hearing, Perkins said that the victims did not deserve what happened, that he was wrong and ashamed of himself. He wished he was stronger, and that he hadn't hurt anybody.

¶4 After he was sentenced to consecutive sentences totaling sixteen years of initial incarceration and nine years of extended supervision, Perkins filed a postconviction motion claiming he was innocent, and that he involuntarily entered pleas only because counsel had failed to adequately investigate the charges, and would not return his retainer. Perkins further alleged that cell phone records proved he was not at the victims' house that night and claimed to have had a romantic relationship with counsel's assistant. The trial court denied Perkins' plea withdrawal motion following a hearing, and Perkins appeals.

DISCUSSION

¶5 A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as evidence that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). Perkins offers three reasons on appeal why he believes his plea was manifestly unjust: (1) counsel performed ineffectively by failing to investigate the case and refusing to respect the defendant's request to go to trial; (2) Perkins was "economically coerced" into accepting counsel's advice that he enter pleas because counsel would not return his retainer; and (3) the constant "love notes of encouragement" Perkins received from counsel's secretary left him unable to weigh the advantages of pleading guilty against the advantages of going to trial. We will address each contention in turn.

Counsel's Performance

¶6 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶7 Perkins alleged in the trial court that cell phone records showed he made a call carried from a tower in Hixton nearly sixty miles away from the scene of the attack in La Crosse only about fifteen minutes after the attack. However, defense counsel testified that it is not unusual for calls from La Crosse to be carried by the Hixton tower due to atmospheric conditions. Counsel further explained that he felt the cell phone records were really just a red herring because

his client had already told him that he had made the call from near a bridge in La Crosse. The trial court found that it was reasonable for counsel to have concluded that the cell phone records were not going to be much help, and that there was no reason for counsel to further investigate Perkins' actual whereabouts when his client had already told him he had committed the crime.

¶8 Similarly, the court noted that there were only four people at the crime scene, and three of them were going to testify for the State if the matter went to trial. Perkins did not specify any favorable testimony counsel could have obtained by personally interviewing any of those three witnesses instead of relying on police reports, and he did not identify any other witnesses who would have relevant information. We agree with the trial court that counsel did not perform ineffectively by failing to investigate the matter further, because there was no showing that there was anything helpful to be discovered.

¶9 Perkins' next claims that counsel performed ineffectively by urging him to accept a plea agreement despite his assertion of innocence. However, counsel testified that Chad had admitted from the very beginning that he was involved in the incident. He said that Perkins' primary position was that he did not feel he should have to serve a lengthy prison sentence because he was provoked. Perkins also wanted to take the stand and deny he was at the crime scene, but counsel told Perkins that he could not allow him to take the stand and offer such testimony, since he had already told counsel that he had been there. Therefore, counsel reasoned, if the case went to trial, there would be no "other side" of the story to counter the account given by the two victims and the co-defendant, who had agreed to cooperate.

¶10 The trial court explicitly found that Perkins' assertion of innocence was not credible, given his prior admissions of guilt to counsel, two PSI authors, and the court. Credibility determinations by a trial court acting as the factfinder are not reviewable by this court. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. The trial court's findings that Perkins did in fact commit the offense and admitted as much to counsel leads to the conclusion that counsel did not perform ineffectively in urging Perkins to enter pleas.

Economic Coercion

¶11 Perkins claims that he asked counsel to transfer his retainer to a new attorney, and that counsel's refusal to do so "economically coerced" him into accepting counsel's advice that he enter pleas. However, counsel testified that the retainer had actually been paid by Perkins' girlfriend, and counsel would pay it back only to her, not to Perkins. The trial court found that there was no evidence that the girlfriend had ever requested that the retainer be repaid or forwarded to another attorney.

¶12 Furthermore, even without getting the retainer back, the court noted that there was nothing preventing Perkins from seeking a public defender appointment, since he had been represented by the PD before and knew he would qualify. The court concluded it was not credible that Perkins was locked into being represented by Attorney Brinkman. Once again, therefore, Perkins lacks a factual basis for his claim on appeal.

Relationship with Counsel's Secretary

¶13 Perkins alleged that he developed a romantic relationship with counsel's secretary. He said the secretary had informed him that counsel did not

have enough time to work on his case, and that she had to bribe him to do so with baked goods. Counsel agreed that his former secretary, who had worked for him for less than a year, got "emotionally involved" with some of his clients, becoming tearful when hearing their stories. However, counsel denied that he did not have enough time to work on Perkins' case or that his secretary ever bribed him to do more work on the case. The trial court did not find the allegation that the secretary had to bribe counsel into working on Perkins' case to be credible, and saw no connection between the secretary's feelings for Perkins (many of which were expressed after the pleas had been entered) and Perkins' decision to enter pleas.

¶14 The trial court is free to assess the credibility of a proffered explanation for a plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Here, the court noted that Perkins fully understood what the plea offer was and that there was no guarantee at sentencing, but that he was "just unhappy with what he got." Given the trial court's findings that Perkins entered his pleas in the hope of obtaining favorable sentences, and that the real reason for his plea withdrawal motion was dissatisfaction with the actual sentences he received, we agree that his relationship with the secretary was irrelevant and certainly presented no manifest injustice warranting plea withdrawal.

By the Court.—Judgments and order affirmed.

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