COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2860-CR **Cir. Ct. No. 2004CF188**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARL L. DIEHL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Earl Diehl, pro se, appeals an order denying his postconviction motion to withdraw his no contest plea. Diehl argues the circuit court erred by denying his motion to withdraw his plea based upon claims of

ineffective assistance of counsel. We reject Diehl's arguments and affirm the order.

BACKGROUND

¶2 An Information charged Diehl with perjury. The State alleged that during a trial that resulted in Diehl's conviction for theft by contractor, Diehl knowingly made a false material statement when he testified that he placed $3,400 from a cashed check in a lock box at his home. In exchange for his no contest plea to the crime charged, the State agreed to dismiss a felony bail jumping charge in another case. The court ultimately sentenced Diehl to one year of initial confinement followed by two years' extended supervision. Diehl's postconviction motion for plea withdrawal was denied without a hearing, and this appeal follows.

DISCUSSION

¶3 Diehl argues that the circuit court erred by denying his motion to withdraw his no contest plea based upon claims of ineffective assistance of counsel. A plea withdrawal motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Diehl has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶4 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). However, a defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. To obtain an evidentiary hearing, the defendant's motion must allege, with specificity, both that counsel provided

deficient performance and that the deficiency was prejudicial. ***Id.*** at 313-18. If the motion alleges facts that entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** at 310. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.***

¶5 However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10. When reviewing a court's discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. ***Id.*** at 310-11.

¶6 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶7 To prove prejudice, Diehl must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation.

Id. at 690. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id.***

¶8 In his postconviction motion for plea withdrawal, Diehl argued that his counsel was ineffective because he failed to challenge what Diehl characterized as prosecutorial misconduct. This court reviews allegations of prosecutorial misconduct in light of the entire record of the case. *See* ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996). Diehl contends the prosecutor engaged in misconduct by "initiating [the] perjury prosecution without jurisdiction." Specifically, Diehl claims that because the trial court lacked subject-matter jurisdiction in the underlying theft by contractor case, a perjury charge arising from that case is invalid. We are not persuaded. Diehl argues the court lacked subject-matter jurisdiction because the complaint charged an offense "not known to law." WISCONSIN STAT. § 779.02(5) (2005-06),[1] however, defines theft by a contractor and provides that such theft is punishable under WIS. STAT. § 943.20, the statute governing the crime of theft. Diehl's claim is, therefore, unfounded. To the extent Diehl contends a violation of § 779.02(5) is a civil violation and not a crime, Diehl provides no support for his claim that a dispute over this distinction deprives a circuit court of its subject-matter jurisdiction. Because Diehl fails to establish misconduct by the prosecutor, counsel is not deficient for failing to raise this claim. *See* ***State v. Swinson***, 2003 WI App 45,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (counsel not deficient for failing to raise meritless claim).

¶9 Citing ***State v. Canon***, 2001 WI 11, 241 Wis. 2d 164, 622 N.W.2d 270, Diehl also argued that the prosecutor was collaterally estopped from initiating the perjury charge without "new evidence" of perjury. As the circuit court concluded, however, Diehl's reliance on ***Canon*** is misplaced. In ***Canon***, the defendant was acquitted of operating a vehicle while intoxicated and after revocation, following his testimony that he was not the driver. ***Id.***, ¶3. After subsequently receiving a letter from a man alleging that Canon said he was the driver, the State charged Canon with perjury. ***Id.***, ¶4. On appeal from the perjury conviction, our supreme court rejected Canon's claim that issue preclusion barred his prosecution for perjury. ***Id.***, ¶1. Here, Diehl was not acquitted in the underlying theft by contractor trial; therefore, the doctrine of issue preclusion does not apply. Further, Diehl has provided no authority for his claim that "post-trial" evidence is necessary to sustain a perjury charge under the facts of this case. Counsel, therefore, was not deficient for failing to raise this claim.

¶10 In his postconviction motion, Diehl also claimed the prosecutor made misrepresentations to the sentencing court by telling the court that: (1) the Department of Corrections waited to see if Diehl would be convicted of theft by contractor before initiating revocation of Diehl's probation in another case; (2) Diehl lied to law enforcement and his probation agent about still having the money he had allegedly stolen as a contractor; and (3) Diehl enlisted his wife to lie to law enforcement. Diehl additionally claimed the prosecutor improperly informed the sentencing court about Diehl's attempt at the theft trial to present false testimony through his wife.

¶11 With respect to the prosecutor's comment that the DOC waited to revoke Diehl's probation, the circuit court found nothing in the record to indicate the statement was untrue. Moreover, as the court acknowledged, *when* the DOC revoked Diehl's probation was immaterial to Diehl's sentence in the perjury conviction. To the extent Diehl challenges the prosecutor's statement that Diehl lied about still having the money and enlisted his wife to also lie, Diehl admitted during the plea colloquy that he knew the subject money was not in the lock box when he testified that it was. Further, the facts alleged in the criminal complaint with respect to Diehl's wife are consistent with the prosecutor's statements. Although Diehl additionally claims that the exclusion of his wife as a rebuttal witness in the theft case precluded the prosecutor in the present case from informing the sentencing court about Diehl's earlier attempt to present false testimony through his wife, Diehl provides no authority to support his argument. Moreover, this information was relevant to an evaluation of Diehl's overall character, and character is one of the primary factors that a court is to consider at sentencing. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Because Diehl has failed to establish that the prosecutor engaged in misconduct, trial counsel was not ineffective for failing to raise these claims.[2]

¶12 Diehl additionally claimed the prosecutor breached the plea agreement and counsel was ineffective for failing to inform Diehl of the consequences of that breach. At sentencing, the prosecutor referred to a bail jumping charge that had been dismissed outright pursuant to the plea agreement. While commenting on Diehl's character, the prosecutor stated that Diehl had

[2] We note that, contrary to Diehl's claim, his trial counsel did challenge the prosecutor's statement about the delay in revocation of Diehl's probation.

failed to appear for sentencing on the underlying theft case and was consequently charged with bail jumping. The prosecutor emphasized, however, that the bail jumping charge had been dismissed. Diehl contends that reference to the dismissed charge elevated the charge into a "read-in" for sentencing purposes. Diehl, however, provides no authority for his claim that reference to the dismissed charge breached the plea agreement. Further, "[i]n determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct." ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). "Evidence of unproven offenses involving the defendant may be considered by the court for this purpose." ***Id.*** We therefore conclude that reference to the dismissed charge did not breach the plea agreement. Because there was no breach to discuss, counsel was not ineffective.

¶13 Finally, Diehl claimed his trial counsel was ineffective for failing to file pretrial motions challenging the admissibility of evidence, jurisdiction, collateral estoppel, and dismissal. Diehl also claimed trial counsel failed to properly advise him of the law regarding "personal and subject matter jurisdiction, suppression of evidence, double jeopardy, collateral estoppel, consequences of [breach] of plea agreement, [and] Alford pleas." Diehl additionally argued his trial counsel was ineffective for failing to properly investigate witnesses and documents that would have exonerated him. We agree with the circuit court's conclusion that these assertions of trial counsel's deficiency are too conclusory to entitle Diehl to an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 313-18.

By the Court.—Order affirmed.

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