COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP971-CR
2007AP972-CR

Cir. Ct. No. 2005CF1398
2005CF1650

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD M. MARESH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed; attorneys sanctioned.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Edward M. Maresh pled guilty to one count each of felony bail jumping and maintaining a drug-trafficking place. He appeals from the judgment of conviction and the order denying his postconviction motion to

withdraw his guilty pleas based on ineffective assistance of counsel. Maresh also seeks resentencing on grounds the trial court failed to state on the record the basis for the sentence and relied on inaccurate information. Maresh has not shown manifest injustice: his counsel's performance was not prejudicial, his pleas were knowingly and intelligently entered and he has waived direct review of whether the State breached the plea agreement. In addition, the trial court did not erroneously exercise its discretion in sentencing Maresh. We affirm.

BACKGROUND

¶2 The State charged Maresh in case no. 05-CF-1398 with one count of maintaining a drug-trafficking place and one count of possessing drug paraphernalia, contrary to WIS. STAT. §§ 961.42(1) and 961.573(1), and later charged him in case no. 05-CF-1650 with two counts of bail jumping, contrary to WIS. STAT. § 946.49(1)(b) (2005-06).[1] In exchange for Maresh's guilty pleas to maintaining a drug-trafficking place and one count of bail jumping, the State agreed to recommend probation and to dismiss and read in the two other counts.

¶3 Finding Maresh's testimony about his rehabilitation efforts "totally incredible," the court rejected the State's recommendation and sentenced Maresh to an aggregate sentence of three and a half years' initial confinement and two and a half years' extended supervision on the two counts. Maresh filed a postconviction motion to withdraw his guilty pleas, claiming ineffective assistance of counsel. The trial court denied his motion after a ***Machner***[2] hearing.

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

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶4 Maresh contends that he should have been permitted to withdraw his guilty pleas either because his counsel provided ineffective assistance or because his plea was uninformed and the State breached the plea agreement.

¶5 A defendant who moves to withdraw the plea after sentencing carries the heavy burden of establishing by clear and convincing evidence that the trial court should permit plea withdrawal to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations omitted). The "manifest injustice" test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Ineffective assistance of counsel, an uninformed plea and a breach of the plea agreement are examples of factual situations that establish manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 251 and n. 6, 471 N.W.2d 599 (Ct. App. 1991). Plea withdrawal under the manifest injustice standard rests in the trial court's discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

Ineffective Assistance of Counsel

¶6 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove both deficient performance and prejudice from that deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***State v. Marshall***, 2002 WI App 73, ¶5, 251 Wis. 2d 408, 642 N.W.2d 571 (citation omitted). We presume counsel acted reasonably. ***State v. Pitsch***, 124 Wis. 2d

628, 637, 369 N.W.2d 711 (1985). To prove prejudice, a defendant must show that counsel erred so seriously as to deprive him or her of a fair proceeding and a reliable outcome. *See* ***Marshall***, 251 Wis. 2d 408, ¶5. The alleged facts must be sufficient to establish a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312.

¶7 Ineffective assistance claims present mixed questions of fact and law. ***Marshall***, 251 Wis. 2d 408, ¶6. We uphold the trial court's factual findings unless clearly erroneous. ***Id.*** Whether counsel's performance was deficient and, if so, whether it then prejudiced the defendant are questions of law. ***Id.*** The defendant has the burden of persuasion on both prongs of the test. ***Id.***

1. Failure to inform that court not bound by plea agreement

¶8 Maresh first asserts that counsel's assistance was deficient because she did not explain that the court was not bound by the plea agreement. Maresh's claim arises from a letter his counsel wrote him after Maresh's mother told counsel Maresh "doesn't know his choices." Counsel wrote back to Maresh the next day, laying out the State's offer. An excerpt of the letter reads:

> The state's offer is as follows:
>
> 1) In Case No: 05-CF-1398 Plead to Count 1, receive 3 years imposed and stayed, that's 18 months prison/18 months probation, 3 years probation 120 days Racine County Jail as a condition of that probation and other appropriate conditions. Count 2 would be dismissed and read in.
>
> 2) In Case No: 05-CF-1650 Plead to count 1, dismiss and read in count 2, receive an imposed and stayed prison term of 1 year in, 1 year extended supervision and 3 years probation to run concurrent with the other case.

> Please take some time to review your options and decide how you would like to proceed. If you take the pleas on the above mentioned cases you would serve a total time of 3 years probation ….

¶9 Maresh contends that counsel misadvised him of the actual punishment he faced because the letter conveys a certainty that by pleading he "would serve" three years' probation. Maresh concedes that the court advised him that it was not obligated to follow the State's recommendation and could impose the statutory maximums and that he acknowledged to the court that he understood. He asserts, however, that counsel repeatedly told him not to worry, literally saying that to him even as the court advised him that it could impose the full sentence. The record does not support Maresh's argument.

¶10 First, the letter plainly says, "The State's offer is as follows." Second, counsel followed up the letter with a visit to Maresh. She testified that she informed him, as with all of her clients who plead, that the court was not bound by the plea and, in fact, could impose the maximum sentence. She also testified that she discussed that the sentences could be consecutive. She was sure she did not tell him not to worry or that probation was a guarantee because the sentencing judge "[is] a tougher judge." After the visit, she "felt certain he understood what was going on."

¶11 For its part, the court rebuffed Maresh's testimony as a "bogus, incredible story." The court rejected Maresh's contention that counsel was saying "don't worry" to him even as the court gave its advisories because it would have seen her speaking and offered a recess. Furthermore, the court itself carefully reviewed each count and the maximum penalty each entailed, stressing that it was not held to any agreement. Maresh confirmed that he understood and was pleased with his lawyer's performance. Finally, Maresh signed the plea questionnaire

advising that the court is not bound by the State's recommendation and may impose the maximum sentence. Significantly, Maresh entered the plea and received the explanations from the court *after* receiving the letter containing the information he claims misled him. The court noted that any lingering confusion after counsel's letter was more than fully resolved by further discussion with counsel and the plea colloquy itself. The court's findings, including that Maresh's testimony was "totally incredible" are not clearly erroneous.

¶12 Maresh maintains on appeal that he would not have pled guilty had he known he would get prison time instead of probation. At the ***Machner*** hearing, however, he testified only that he would not have pled guilty had trial counsel shared "complete discovery" with him. The failure to address below the claim he now raises deprives us of the trial court's assessment of the claim's credibility. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶29, 259 Wis. 2d 843, 657 N.W.2d 77. Nor can we meaningfully assess a claim of prejudice if he does not allege specific facts explaining why he would have gone to trial. *See* ***State v. Thornton***, 2002 WI App 294, ¶27, 259 Wis. 2d 157, 656 N.W.2d 45; ***Bentley***, 201 Wis. 2d at 312.

2. Failure to inform of all penalties

¶13 In addition to his prison sentence and extended supervision, the court revoked Maresh's driving privileges for three years. Maresh contends trial counsel failed to explain that the array of penalties he faced included revocation of his driving privileges. *See* WIS. STAT. § 961.50(1). Counsel did not recall whether or not she discussed his conviction's impact on his driver's license.

¶14 An understanding of potential punishments or sentences includes knowledge of the plea's direct consequences, but does not require that a defendant be informed of consequences collateral to it. ***State v. Kosina***, 226 Wis. 2d 482,

485, 595 N.W.2d 464 (Ct. App. 1999). In Wisconsin, mandatory revocation of a driver's license is a collateral consequence. *See* ***State v. Madison***, 120 Wis. 2d 150, 152, 159-61, 353 N.W.2d 835 (Ct. App. 1984). The consequence "is a result of the conviction, not the plea." ***Id.*** at 160. Even if counsel should have informed Maresh that his license would be revoked, he establishes no prejudice. His revocation is for three years; his initial confinement is three and a half.

3. Failure to object to State's reference to unissued charge

¶15 Maresh next asserts counsel was ineffective for failing to object when, while making its sentencing recommendation, the State referred to an unissued charge of fraud on an innkeeper. The matter arose from a recent incident where Maresh allegedly took a motel room with a group of people he did not know well, used controlled substances and caused damage, and then left without paying for further use of the room but with the other people still there. Maresh contends the State breached the plea agreement by presenting the unissued charge as having been dismissed and read in when, in fact, it was referred in but never formally charged. He asserts that counsel's failure to object to the alleged breach automatically prejudiced him. We see what transpired differently.

¶16 Maresh was charged in case no. 05-CF-1398 with one count of maintaining a drug-trafficking place and one count of possessing drug paraphernalia. When the court asked for the State's recommendation, the prosecutor stated:

> Your Honor, on the 05-CF-1398 file, the State is recommending on a plea to count one three years in prison imposed and stayed with eighteen months initial incarceration, eighteen months extended supervision and three years of probation. That includes 120 days jail, serve 90, 30 stayed and other appropriate conditions. We moved to dismiss and read in count three previously.

Logic convinces us that the prosecutor mistakenly said "count three" instead of "count two." Case no. 05-CF-1398 never had more than two counts and count two was the only one dismissed and read in. If this were not so, there would be no recommendation or comment upon count two. This language did not breach the agreement because the recommendation was the same to dismiss and read in a second count in that case.

¶17 After the above comment, the prosecutor noted that the offer was "silent as to whether or not prison will be concurrent or consecutive on the two cases." She then commented that she reviewed a fraud on an innkeeper charge the sheriff's department referred in after Maresh missed a court appearance. The prosecutor expressly told the court that she did not believe the State could meet its burden. Maresh's counsel said this was the first she knew of the episode, but that the court should not consider the uncharged matter. The court answered, "Okay."

¶18 We see no grounds for plea withdrawal or resentencing. The reference to "count three" was a verbal misstep and was not directly connected to the comment about the motel incident. Moreover, counsel testified at the ***Machner*** hearing that she thought she had objected and so did not re-raise the issue, as she already had told the court the uncharged incident should not be considered. Regardless of whether counsel's comment was a clear objection, the court confirmed that it "kind of sluffed … off" the reference, and the record shows that it did not rely on, or even refer to, the incident in its sentencing. Rather, it focused on the Presentence Investigation report, Maresh's tendency to shift blame and his outright lie about faithfully attending Alcoholics Anonymous meetings. The spirit of the agreement was not violated.

4. Failure to correct PSI report at sentencing

¶19 In the "Offender's Version" portion of the PSI, Maresh denied all responsibility for the crime, claiming he had been set up by a friend. He contends that since his guilty plea required him to accept full responsibility, his PSI denial should have been a "red flag" to trial counsel that his plea may not have been knowing, intelligent and voluntary and she should have drawn that discrepancy to the court's attention.

¶20 Assuming without deciding that counsel should have alerted the court, we see no prejudice flowing from her failure to do so. First, Maresh assured the trial court that he thoroughly discussed the issues with counsel, was satisfied with the job she had done for him, had no questions, understood the elements of the crimes to which he was pleading and was admitting guilt to all of them. Maresh's assertion of innocence is a factor that bears on whether his claim of misunderstanding, confusion or coercion in entering his plea is credible, *see* ***State v. Jenkins***, 2007 WI 96, ¶89, 303 Wis. 2d 157, 736 N.W.2d 24, a claim that must be backed by credible evidence. ***State v. Rhodes***, 2008 WI App 32, ¶13, ___ Wis. 2d ___, 746 N.W.2d 599. Credibility determinations are the province of the trial court. ***State v. Lackershire***, 2005 WI App 265, ¶12, 288 Wis. 2d 609, 707 N.W.2d 891, *reversed on other grounds*, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23. The record here supports a conclusion that Maresh's presentation of himself as innocent is not credible. In addition, it is within the court's discretion to decide the extent to which it will rely on the information in a PSI. ***State v. Shimek***, 230 Wis. 2d 730, 741 n. 4, 601 N.W.2d 865 (Ct. App. 1999). Maresh does not establish that the court would have sentenced him any differently had counsel pointed out that Maresh asserted his innocence to the PSI writer, especially given his lack of candor to the court.

5. Failure to provide discovery

¶21 Maresh asserts that if counsel had provided the discovery he requested, he would have pursued a different defense theory and would not have pled guilty. Except for hinting at the ***Machner*** hearing about some unspecified possible witnesses, Maresh leaves us to guess at what the discovery entailed or what other theory of defense he might have pursued. We decline to consider this undeveloped argument. *See* ***State v. Williquette***, 180 Wis. 2d 589, 608, 510 N.W.2d 708 (Ct. App. 1993).

Involuntary Plea

¶22 Reiterating his earlier arguments, Maresh next claims that he should be permitted to withdraw his pleas to correct a manifest injustice because his pleas were not knowing and voluntary. We already have concluded that Maresh's plea was knowingly and voluntarily entered. The letter from counsel which Maresh claims misled him about his sentence was but one piece of the information he received. Maresh knew his potential sentence because he had seen the complaint, was present at the preliminary hearing, read and signed the plea questionnaire, and was instructed by the court at the plea colloquy. He told the court he understood the court was not bound by the plea agreement and could impose the maximum sentence. This argument fails.

Breach of Plea Agreement

¶23 Maresh argues that the State breached the plea agreement by putting on the record the uncharged motel incident. This argument also fails. Maresh acknowledges that he did not object to the State's alleged breach of the plea agreement at the sentencing hearing. He also concedes that he waived his right to

directly challenge the alleged breach, thus placing the issue before us in the context of an ineffective assistance of counsel claim. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. We already have found that if counsel's comment fell short of a full objection, no prejudice resulted.

Erroneous Exercise of Sentencing Discretion

¶24 Maresh's final argument is that the trial court erroneously exercised its sentencing discretion either by failing to state on the record the basis for the sentence or by considering inaccurate information. Sentencing rests within the trial court's sound discretion and we examine only whether the court has properly exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a strong public policy against interfering with that discretion. ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. We will affirm if the court's decision is based on the facts of record and in reliance on the appropriate law. ***Id.*** The court must consider three primary sentencing factors: the gravity of the offense, the character of the offender and the protection of the public. ***Spears***, 227 Wis. 2d at 507. The sentence may be based on one or more of the three primary factors after all relevant factors have been considered. *See* ***id.*** at 507-08. The trial court has another 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).

1. Failing to state basis for sentence

¶25 We start with the presumption that the court acted reasonably. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The court addressed each of the primary factors. It observed that Maresh: faced sentencing for maintaining a drug-trafficking place and bail jumping in two separate files; had a

prior history of drug possession and carrying a concealed weapon; took no responsibility for his actions; and "despicabl[y]" lied to the court about attending AA and Cocaine Anonymous meetings regularly, completing AA's twelve-step program, having a sponsor and helping others "get clean."

¶26 The court acknowledged that it had been prepared to consider probation, but Maresh's unabashed lying convinced it that he needed to be confined. The court concluded that the correctional and rehabilitative treatment Maresh needed could be provided most effectively in prison and that confinement was necessary to protect the public from his further criminal activity. The court's explanation was adequate. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-42, 270 Wis. 2d 535, 678 N.W.2d 197.

2. Relying upon inaccurate information

¶27 The second part of Maresh's sentencing challenge is that the court relied upon inaccurate and incomplete information. Once again he points to the alleged "count three," which we have concluded was a verbal slip. The trial court did not refer to the motel incident in its sentencing remarks. Maresh offers no evidence that the court actually considered this or any other inaccurate or incomplete information. This argument fails.

CONCLUSION

¶28 We note that Maresh did not reply to any of the State's arguments by way of a reply brief. While none is required, we take this as a concession that the State is correct. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may treat a failure to refute a proposition in a reply brief as a concession). On the basis of this implicit concession, we conclude Maresh has not

proved his claim of ineffective assistance of counsel so as to entitle him to resentencing or plea withdrawal. Even if some aspect of counsel's performance was deficient, Maresh has not shown that it caused him prejudice. Maresh has not shown a serious flaw in the fundamental integrity of the plea. The trial court properly exercised its discretion in sentencing Maresh and in denying his motion for plea withdrawal based on the existence of a manifest injustice.

Attorney Sanction

¶29 As a final matter, we address certain deficiencies and errors in Maresh's appellate brief. For starters, the statement of facts contains no references to the record and only a few citations to his own appendix. Such citations do not conform to the rules of appellate procedure because they do not inform the court where the facts he asserts may be found in the record. *See* ***Forman v. McPherson***, 2004 WI App 145, ¶6 n. 4, 275 Wis. 2d 604, 685 N.W.2d 603. An appellate court is improperly burdened where briefs fail to cite to the record. *See* ***id.*** In addition, a portion of the confidential PSI is reproduced, unredacted, in the appendix. Making this information available without specific court authorization is prohibited. *See* WIS. STAT. § 972.15(4). Finally, the appendix does not conform to the mandates of WIS. STAT. § 809.19(2)(a) and counsels' own certification. *See* ***State v. Bons***, 2007 WI App 124, ¶¶22-25, 301 Wis. 2d 227, 731 N.W.2d 367. The appendix does not include the judge's complete rulings and is devoid of record cites. Accordingly, we sanction Attorneys Margaret S. O'Connor and Erika L. Moore and direct that they pay a total of $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment and order affirmed; attorneys sanctioned.

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