COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP2836-CR
2008AP922-CR

Cir. Ct. No. 2005CF743

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANUELE JASPER HARPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and WILLIAM SOSNAY, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Danuele Jasper Harper appeals from a judgment of conviction for three robberies, and from a postconviction order denying his plea withdrawal motion.[1] The issue is whether trial counsel was ineffective for failing to move to suppress Harper's statements and for advising him to plead guilty. We conclude that trial counsel did not render ineffective assistance, and that it was Harper's personal decision to plead guilty without moving to suppress his statements. Therefore, we affirm.

¶2 Harper was charged with three counts of armed robbery with the use of force, an attempted armed robbery with the use of force, and robbery with the threat of force. These charges were based on Harper's incriminating statements, which formed the entirety of the prosecution's case against him. Rather than moving to suppress his statements, Harper elected to plead guilty to two armed robberies with the use of force, in violation of WIS. STAT. § 943.32(2) (amended Feb. 1, 2003), and robbery with the threat of force, in violation of 943.32(1)(b) (amended Feb. 1, 2003), in exchange for the State's dismissal and reading-in of the other two charges, and its recommendation of a global concurrent sixteen-year sentence, comprised of eight years of initial confinement. The trial court imposed two sixteen-year sentences for the armed robberies, comprised of eight-year respective periods of initial confinement and extended supervision, and a ten-year sentence for the robbery, comprised of five-year respective periods of initial confinement and extended supervision. The trial court imposed all of these

[1] Appeal No. 2007AP2836-CR is from the judgment of conviction entered by the Honorable David A. Hansher. Appeal No. 2008AP922-CR is from the postconviction order entered by the Honorable William Sosnay.

sentences to run concurrent to each other and consecutive to any other sentence. Harper appealed.

¶3 After filing his notice of appeal from the judgment, Harper moved for postconviction plea withdrawal. After a ***Machner*** hearing, at which Harper and his trial counsel testified, the trial court denied the motion.[2] Harper moved to consolidate these appeals and pursues only the issue of whether trial counsel was ineffective for failing to move to suppress his statements and for advising him to plead guilty.

¶4 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***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. *See* ***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). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

[2] A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶5 Harper contends that his trial counsel was ineffective because she failed to read him his statements word-for-word, and misadvised him to plead guilty without first filing a suppression motion. His claim rests on several facts that are not legally consequential; namely, that trial counsel failed to read his statements to him word-for-word, notwithstanding her discussion with him about the substance of his statements, and that he refused to sign his statements in several places, notwithstanding the absence of evidence that he had involuntarily made those statements to police or was coerced to sign multiple waivers of his ***Miranda*** rights.[3]

¶6 Trial counsel testified that she provided copies of Harper's statements to him and, although she "did not sit and read page for page, line for line, any of these documents separately or collectively with Mr. Harper," they discussed Harper's statements and the significance of various parts of his statements, to evaluate the merits of a suppression motion. Trial counsel addressed various aspects of Harper's statements with him, answered his questions, and explained the significance of various comments and circumstances surrounding the statements to enable Harper to determine whether a suppression motion was warranted. Trial counsel continued that

> there were several statements taken and one is—it ends with Mr. Harper writing an apology. There are several statements taken over time, which indicate any number of things, what was given [to] him, bathroom breaks, dinner, and they actually—one has times of these breaks, cigarettes, Mountain Dew, pizza, from where it came, and one actually has in his own handwriting what—an apology is what it is. It's an apology in Mr. Harper's hand.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> What I told Mr. Harper is I would proceed as he would prefer. There were—I told him if he did not want me to negotiate, I would not. But if he did, I would. I did negotiate with his consent and I explained to him he had a right for me to proceed with the trial suppression motions and any other issues or we could waive these issues. But it was very clear to Mr. Harper that he would make the final decision on whether he wanted to take, if you will, advantage of some negotiations in this case, which included, I believe at least one attempt[ed] armed robbery and one robbery count being dismissed, or proceed on the line of the suppression of the statements, which would be just that issue.
>
> Ultimately regarding the case Mr. Harper and I, with his being explained that every point as we went along, if he went along, if he decided to do the negotiations and enter a plea he would be waiving the issues of [a suppression] motion.

Trial counsel testified that

> These are copies of the statements that I provided Mr. Harper with and I discussed with him. I will say to this court I did not sit and read page for page, line for line, any of these documents separately or collectively with Mr. Harper.
>
> What I would do with Mr. Harper, for instance, if he says, well, I didn't get rest, then I refer to where he would have signed and said that. If he said he wasn't – he didn't understand his rights, and that was just for the discussion of what the, if you will, parameter of the Miranda Goodchild motion would be.
>
> But I think it's important that the Court know I did not read it word-for-word. We discussed it, he was given a copy of it, and this would have been in that package he got in February of 2005, which was clearly roughly eight months, let's say seven, prior to there being a plea.

Trial counsel testified that it was ultimately Harper's choice not to challenge his statements by filing a suppression motion, and to instead "take advantage of the negotiations, which included several dismissals, several factors. He decided that. And it was done with me twice, that review of that, what he would waive."

¶7 Harper's testimony was essentially that he is a layman, and signed and initialed what his trial counsel told him to, but testified that "I felt that I was in a no-win situation. The system is overwhelming … [trial counsel] presented herself as she was going to help me. She was there to help me. So I figured why not trust her?"

¶8 The trial court watched trial counsel and Harper testify, and then found that "[trial counsel] … is a staff attorney with the state public defender's office, who appears in this court and other courts within this jurisdiction on numerous occasions on a daily basis, and … her primary specialty is representing defendants in criminal felony cases." The trial court specifically found that Harper and his trial counsel had addressed Harper's statements and the viability of a suppression motion on more than one occasion. It

> f[ou]nd that [there was] the specific discussion on whether or not the defendant's statements and the admissibility of those statements should be challenged by way of motion. [The trial court] do[es] find based upon the credible evidence of [trial counsel] that it was determined by the defendant not to pursue the motion to suppress the defendant's statements and instead to plead guilty pursuant to the plea agreement that was offered and subsequently [entered].
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> The court does find that that obviously was a very – very … a very good deal for the defendant. And [the trial court] think[s] based upon the evidence in the record, including the statements by the defendant notwithstanding his position that he understood that.
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> [The trial court] find[s] that the defendant is an intelligent young man, it's evident to the Court…. [T]he defendant is very articulate, he is very bright, he is very astute, and he has evidenced that to the Court not only in his written submissions but in the manner in which he has conducted himself in the hearing today and on other occasions.

> The court further finds that this was not the first time that the defendant had gone through the system….
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> ….
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> The Court does find that it was the defendant's decision not to pursue the motion to suppress his statements, and it was based on the fact that he was being offered a very lucrative negotiation whereby his potential exposure if he went to trial and if convicted was substantial, significant in fact. In addition to those two counts that were dismissed, the State's recommendation … for these three offenses was limited to 16 years. The Court does find that he made that decision knowingly and voluntarily.
>
> The Court further relies on the addendum to the plea questionnaire, which is required to be filed….
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> ….
>
> The addendum more particularly points out quite specifically that one by pleading guilty [he] is giving up his right to challenge certain things, and one of those things includes obviously any statement taken from him and its admissibility. [The trial court] do[es] find from the record and the evidence here and the credible testimony of [trial counsel] that she did go over this with him. The defendant by his own admission acknowledges that she did at least on October 26. But [the trial court] find[s] based upon the credible testimony that this was reviewed with him on October 27 as well.
>
> [Harper] also responded to questions asked by Judge Hansher. These all, in this Court's opinion and findings, substantiate the believability of [trial counsel]'s recount of what happened. In effect, and again, [the trial court] emphasize[s] that the defendant is an intelligent young man and the defendant understood what he was doing and made a decision and understood the impact of him not pursuing his motion to suppress.… and that certainly [trial counsel] was, therefore, not ineffective in her representation of the defendant and the defendant has not shown that he was prejudiced by that based upon the evidence in the record.

¶9 Harper contends that trial counsel's performance was deficient because she admitted that she had not read his statements to police. Trial counsel

did not admit that she had not read his statements; she testified that she did not read them "word-for-word." Trial counsel reviewed Harper's statements with him to answer his questions and to address the points she believed were important in evaluating the merits of a suppression motion.

¶10 The trial court found trial counsel more credible than Harper. Trial counsel testified about her standard practice with clients and her independent recollection of her specific discussions with Harper. Trial counsel's testimony reflected her familiarity with Harper's statements, and her knowledgeable assessment of whether to forgo pursuing suppression in favor of pursuing negotiations. Harper's testimony was less factually specific, and more conclusory in nature. Harper did not deny that he had these discussions with his trial counsel; he claimed that he did not understand the ramifications of their discussions, notwithstanding the trial court's firsthand assessment of Harper's intelligence, knowledge of and familiarity with court proceedings.

¶11 The trial court found that Harper personally decided not to file a suppression motion. According to the trial court, Harper's decision was based on an advantageous plea bargain.

¶12 Harper has not proven that he did not understand why he did not pursue a suppression motion or that by pursuing suppression the advantageous plea bargain would have remained available to him. We independently conclude that trial counsel did not render deficient performance in her representation of Harper with respect to the advisability of filing a suppression motion or pleading guilty.

¶13 Absent proof of counsel's deficient performance, we need not address whether there was resulting prejudice.[4] *See* ***Moats***, 156 Wis. 2d at 101. We therefore affirm the trial court's ruling that trial counsel did not render ineffective assistance of counsel, and affirm the postconviction order denying Harper's plea withdrawal motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[4] Although we do not analyze the prejudice aspect of ineffectiveness, Harper seemingly believes that the existence of prejudice is a foregone conclusion because his inculpatory statements were the entirety of the prosecution's case against him. However, the issue is whether there was a valid basis to pursue suppression, not whether the State could successfully prosecute him without his statements.