

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1711-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-75

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. KOUTNIK, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert Koutnik appeals a judgment convicting him of arson, contrary to WIS. STAT. § 943.02(1)(a).¹ Koutnik was sentenced to twelve

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

years in prison and twelve years extended supervision. He also appeals an order denying postconviction relief. He argues that he was denied effective assistance of trial counsel. Because the record fails to support his contention, we affirm the judgment and order.

¶2 In April 2000, Koutnik was charged with arson as a repeat offender. He initially entered a plea of not guilty, reserving the right to amend the plea to not guilty by reason of mental disease or defect. On August 7, Koutnik entered a plea of not guilty and not guilty by reason of mental disease or defect (NGI). Later, he changed his plea to no contest. After judgment was entered, he brought postconviction proceedings alleging that counsel was ineffective by failing to explore an insanity defense and to obtain a psychological evaluation. He also alleged that defense counsel failed to adequately discuss his plea with him or inform him as to the consequences of the plea.

¶3 At the postconviction hearing, Koutnik's trial counsel, John Gower, testified that Koutnik was entirely lucid when they met and that nothing Koutnik did suggested any reason to pursue an NGI plea. Nonetheless, Gower testified that he explored the possibility of an NGI defense with Koutnik. He testified that he met with Koutnik three times at the jail. Gower recalled that Koutnik eventually decided that he "simply wanted to get the matter over with" and changed his mind about pursuing the NGI defense. Gower stated that he reviewed with Koutnik the consequences of changing his plea and the potential penalties. Gower also recalled that Koutnik had reconciled with his wife and that she was going to "wait for him." Gower believed that factor weighed on Koutnik's decision to change his plea to no contest.

¶4 In addition, Gower stated that he reviewed with Koutnik a plea questionnaire and waiver of rights form. The questionnaire provided that Koutnik would enter a no contest plea and that the State would recommend fifteen years actual time in prison and ten years of extended supervision, and that the defense would be free to argue for a lesser sentence.² In addition, Gower mailed a copy of the presentence report to Koutnik at the prison in Waupun, with a letter directing Koutnik to read the report and advise if he wanted Gower to call any witnesses at sentencing.

¶5 Koutnik testified he felt he was rushed into his plea decision. He admitted, however, that before entering his plea, Gower went over the plea questionnaire form with him and discussed the potential penalties. Gower also discussed with Koutnik the rights he would be giving up. Koutnik stated that Gower told him that he did not pursue an NGI defense because there were no mental health experts who would perform the evaluation. Koutnik acknowledged that as of the time of the postconviction hearing, he had yet to be examined by any mental health expert to determine if he or she would have an opinion whether Koutnik was suffering from a mental disease or defect at the time the crime occurred.

¶6 Koutnik admitted that he engaged in a plea colloquy with the judge who questioned him about whether he understood the plea agreement and the rights that he was giving up. Koutnik agreed that he told the judge that he understood everything and wanted to enter a plea. Koutnik conceded that the

² The record indicates that the State also moved to dismiss the repeater allegation as part of the plea agreement.

judge gave him an opportunity to address anything that he wanted at sentencing. He did not tell the judge, however, that he wanted to withdraw his no contest plea.³

¶7 Koutnik also testified that he sent a letter to Gower advising that he wanted to withdraw his no contest plea. Gower testified, however, that he did not receive the letter and that Koutnik did not advise him that he wanted to withdraw his plea. Although Gower testified that he had advised Koutnik that he was unable to retain the three mental health experts he had contacted, he denied that he told Koutnik no mental health experts were available or that Koutnik should give up his NGI defense.

¶8 Following the hearing, the trial court made thorough findings of facts. The court observed that Koutnik's age and prior criminal experience suggest "that he had a basic awareness of the criminal justice procedure and system before becoming involved in this prosecution." It found that Koutnik abandoned his desire to pursue an NGI defense in light of the State's offer to recommend less than the maximum forty years of initial confinement and twenty years of extended supervision. The court noted that due to Koutnik's record, a maximum sentence would have been likely. The court concluded that the State's recommendation of only fifteen years was a substantial consideration.

¶9 The trial court also found that Koutnik's testimony that he wrote a letter to Gower asking to withdraw his no contest plea was not credible. The court noted that there was no record of any such letter and that Koutnik never mentioned

³ The record reveals that Koutnik took the opportunity, however, to make a detailed critique of the presentence report.

his desire to change his plea at sentencing. The court also rejected Koutnik's insinuation that Gower told him that securing an expert witness was impossible. The trial court found that Gower would have secured an expert in time to present an NGI defense at trial. The court further found, however, that Gower's attempt to secure an expert "was short-circuited by the defendant's decision to enter his no contest plea" The court found that Gower met with Koutnik and adequately prepared for the plea hearing and sentencing. The court determined that even if an expert could be retained at this late stage to testify to an NGI defense, "I don't think that that solves the issue because I think Mr. Gower was preliminarily competent in his representation of the defendant." Koutnik's appeal followed.

¶10 We conclude that Koutnik has failed to demonstrate that he was denied effective assistance of counsel. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). In order to demonstrate a claim for ineffective assistance of counsel, there must be a showing of counsel's deficient performance and prejudice to the defendant. *Id.* at 633.

¶11 It is counsel's duty to investigate and "to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Id.* at 638 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function*, § 4-4.1 (2d ed. 1982)). However, judicial scrutiny of counsel's acts is highly deferential and "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 637 (quoting *Strickland*, 466 U.S. at 691). To withdraw a guilty or no contest plea due to ineffective assistance of counsel, a defendant must show

a reasonable probability that but for counsel's errors, he would have not pled guilty but would have insisted on going to trial. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶12 An ineffective assistance of counsel claim is a mixed question of fact and law. *Pitsch*, 124 Wis. 2d at 633-34. We do not reverse the trial court's factual findings unless they are clearly erroneous. *Id.* at 634. Whether counsel's conduct was deficient and prejudicial present questions of law that we review independently of the trial court. *Id.*

¶13 Koutnik argues that trial counsel was ineffective by failing to secure a mental health expert to evaluate Koutnik's mental status at the time of the offense, which caused Koutnik to abandon his NGI defense. We are unpersuaded. The trial court rejected Koutnik's testimony that Gower failed to secure a mental health expert. The court found that Gower did not obtain the services of a mental health expert because Koutnik decided to accept the State's plea bargain. The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. WIS. STAT. § 805.17(2).

¶14 Koutnik bases his ineffective assistance of counsel claim on the factual premise that Gower's inability to obtain an expert prevented Koutnik from pursuing his NGI defense. He cites his own testimony to support his claim. He claims that Gower's testimony should be accorded little weight because the transcript indicates that Gower stammered. He also argues: "There is a difference of opinion as to whether or not Mr. Gower's inability to obtain an expert caused Mr. Koutnik to surrender his NGI defense" and notes the conflicting testimony in this regard.

¶15 This argument ignores our standard of review. “Sorting out the conflicts and determining what actually occurred is uniquely the province of the trial court, not the function of the appellate court.” *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). Also, weight and credibility assessments are for the trial court, not this court, to determine. WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court could have but did not reach. *In re Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *Id.* at 151-52. Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Because the trial court’s factual findings are supported by its credibility determinations, they are virtually unassailable. In view of the trial court’s credibility assessment, Koutnik’s claim that he abandoned his NGI defense due to Gower’s failure to obtain mental health experts cannot stand.

¶16 Next, Koutnik argues that the trial court erroneously denied his request for a continuance of the postconviction hearing to attempt to obtain funding to secure a mental health expert to evaluate his mental health status at the time of the crime. He concedes, however, that the trial court found that Koutnik “competently and voluntarily withdrew his ‘Not Guilty’ and NGI pleas at the time he entered his ‘No Contest’ plea,” making the NGI examination unnecessary. In light of Koutnik’s concession and the trial court’s finding that due to his decision

to accept the plea bargain the examination would be irrelevant, we conclude that the trial court committed no reversible error.

By the Court.—Judgment and order affirmed.

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

