COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1649 **Cir. Ct. No. 98-CF-1121**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARL H. AMENSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Karl Amenson appeals an order denying his motion to withdraw his no contest plea or, alternatively, to modify his sentence. Amenson argues that the circuit court erred by denying his motion to withdraw his no contest plea based upon claims of ineffective assistance of counsel. Amenson

also contends he is entitled to sentence modification because the sentence imposed exceeds the recommendation made pursuant to the plea agreement and is otherwise unduly harsh and excessive. We reject these arguments and affirm the order.

BACKGROUND

¶2 In December 1998, Amenson was charged with homicide by intoxicated use of a motor vehicle and with a prohibited alcohol concentration, operating while intoxicated, second offense, and operating with a prohibited alcohol concentration, second offense. The charges arose from allegations that Amenson drove his vehicle into the back of a car driven by Roy G. Allen, while Allen was stopped in traffic due to an unrelated accident. Allen subsequently died as a result of the injuries he sustained.

¶3 In exchange for his no contest pleas to homicide by intoxicated use of a motor vehicle and operating while intoxicated, second offense, the State agreed to dismiss the remaining charges and recommend three years in prison. The court ultimately imposed fifteen-years' imprisonment on the OWI-homicide conviction and a concurrent sentence of thirty days in jail on the OWI-second conviction. The court denied Amenson's postconviction motion for sentence modification. Amenson then filed a motion for release of his presentence investigation report and "ex parte petition for access to medical records." The circuit court concluded that Amenson was entitled to a ***Machner***[1] hearing "to determine whether the defendant was prejudiced by his attorney's alleged failure

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

to request medical records." Following a ***Machner*** hearing, Amenson's motions were denied.

¶4 Amenson then filed a motion for release of transcripts and again requested a copy of Allen's death certificate and hospital records. The circuit court ordered preparation of the requested transcript but denied Amenson's request for medical records concluding, "I am absolutely satisfied based on the Criminal Complaint, [PSI] and testimony … that the contents of the victim's medical records are not consequential to the defendant's conviction in this matter." The court added, "Because I concluded … that the performance of defendant's counsel was neither defective nor prejudicial, it appears that this motion is also not timely." Amenson subsequently filed a motion "for withdrawal of plea and vacation of sentence" alleging ineffective assistance of trial and postconviction counsel. The circuit court denied that motion and this appeal follows.

ANALYSIS

A. Plea Withdrawal

¶5 Amenson argues that the circuit court erred by denying his motion to withdraw his no contest plea based upon claims of ineffective assistance of counsel. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A 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). Amenson 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).

¶6 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Amenson must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***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. ***Id.*** at 697.

¶7 To prove prejudice, Amenson must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] 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. 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.***

1. Trial Counsel

¶8 Amenson alleges numerous deficiencies with respect to both trial and postconviction counsel. With respect to trial counsel, Amenson claims:

> [Trial counsel] failed to investigate the accident scene, failed to do any investigation of any kind into the facts of the case, but relied on the Sheriff Office's reports, advised him to waive the preliminary hearing, failed to file any motions of any kind, failed to check with the doctor who [attended] the victim, [failed] to check into why the Sheriff's office was so late in responding to the crime scene, failed to challenge the court on the refusal to follow the plea agreement, after accepting the plea, failed to file for any reduction of charges, advised the defendant to accept the guilty plea offer, as he "would be free in about two years," and filed the notice of appeal late.

¶9 Many of Amenson's allegations may be categorized under a general claim that trial counsel was ineffective for failing to investigate. Amenson claims that further investigation would have revealed that Allen died after his family decided to remove him from the life support system. Arguing that the family's decision was an intervening cause of Allen's death, Amenson contends he should not have been charged with "homicide" by intoxicated use of a motor vehicle, but rather, "injury" by intoxicated use of a motor vehicle. Amenson is mistaken.

¶10 A defendant may be found guilty of homicide by intoxicated use of a motor vehicle if: (1) the defendant operated a vehicle; (2) the defendant's operation of the vehicle caused the death of another; and (3) the defendant was under the influence of an intoxicant at the time he or she operated the vehicle. WIS. STAT. § 940.09(1)(a); *see also* WIS JI—CRIMINAL 1185. Here, Amenson claims that because Allen's family removed him from life support, the second element could not have been satisfied by the facts of this case. "Cause" pursuant to the statute, however, means that the defendant's operation of a vehicle was a "substantial factor" in producing the death. WIS JI—CRIMINAL 1185.

¶11 Our supreme court has held that "[a] substantial factor need not be the sole cause of death." ***State v. Oimen***, 184 Wis. 2d 423, 436, 516 N.W.2d 399 (1994). In ***Cranmore v. State***, 85 Wis. 2d 722, 271 N.W.2d 402 (Ct. App. 1978), a defendant was convicted of murdering a police officer. The ***Cranmore*** court held that "the chain of causation between the defendant's acts and the consequent death" would not be broken even if the negligence of the officer's attending physicians contributed to the officer's death. ***Id.*** at 775. The court noted that the State was "only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death." ***Id.*** In the present case, the record indicates that Allen suffered serious head trauma and died as a result of the

injuries he sustained in the accident. Because the acts of Allen's treating physicians, including the decision to remove Allen from life support, do not break the chain of causation between Amenson's acts and Allen's death, trial counsel was not deficient for failing to pursue this claimed issue.[2]

¶12 Next, Amenson contends trial counsel was ineffective for waiving the preliminary hearing. We conclude that regardless of whether counsel's performance was deficient, Amenson fails to establish that he was prejudiced by the lack of a preliminary hearing. To show such prejudice, he must allege facts establishing that there would not have been probable cause to support the information. He has not done so. To the extent Amenson contends counsel was ineffective for waiving a reading of the Information, Amenson fails to establish how his decision to plead no contest would have been affected had counsel not waived a reading of the Information.

2. Postconviction Counsel

¶13 Amenson claims postconviction counsel was ineffective by failing to "file a direct appeal or postconviction [motion] challenging [the] homicide charge." As noted above, Amenson's claim that he should have been charged with injury, rather than homicide, by intoxicated use of a motor vehicle is without merit. As the circuit court noted, postconviction counsel filed an appropriate postconviction motion for sentence modification. Additionally, because trial

[2] With respect to Amenson's various other claims regarding counsel's failure to investigate, Amenson does not identify what he anticipates counsel would have discovered through a more thorough investigation nor why it would have caused him not to plead guilty. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Moreover, the circuit court found that trial counsel "more than adequately investigated the facts surrounding the case, got all the police reports … read the medical examiner's report" and advised Amenson regarding the strength of the State's case against him.

counsel was not ineffective, postconviction counsel was not ineffective for failing to raise Amenson's claims regarding the ineffective assistance of trial counsel. Counsel is not required to raise on appeal under WIS. STAT. RULE 809.30 every nonfrivolous issue the defendant requests. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). Counsel must exercise professional judgment in the manner in which he or she represents the defendant. *See* ***id.*** Amenson fails to show how postconviction counsel was deficient or how Amenson was prejudiced by any claimed deficiency.

B. Sentence Modification

¶14 Amenson contends he is entitled to sentence modification because the sentence imposed exceeds the sentence recommendation made pursuant to the plea agreement. We disagree. It is well established that the sentencing court is not in any way bound by or controlled by a plea agreement between the defendant and the State. *See* ***Young v. State***, 49 Wis. 2d 361, 367, 182 N.W.2d 262 (1971). Amenson nevertheless claims the circuit court failed to advise him that it was not bound by the plea agreement. The record belies Amenson's assertion. At the plea hearing, the circuit court clarified Amenson's understanding that the court did not have to follow the recommendations made pursuant to the plea agreement. The court stated:

> I will certainly listen to everything that's presented, any witnesses that are called, anything you have to say, consider the pre-sentence reports, all the arguments, the position of the family, and I will take all of those things into consideration; but ultimately, … I can impose the maximum penalties, which would be 40 years plus 6 months.

To the extent Amenson is unhappy with the sentence ultimately imposed by the court, "disappointment in the eventual punishment imposed is no ground for

withdrawal of a guilty plea." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶15 Amenson also cites sentences imposed in unrelated OWI cases as evidence that the sentence imposed here was unduly harsh and excessive. Our supreme court has held that "[t]here is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences." ***State v. Lechner***, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). Here, the circuit court considered the gravity of the offense, Amenson's character, the need to protect the public and the mitigating factors Amenson raised, *see* ***State v. Smith***, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997), and ultimately imposed fifteen years' imprisonment out of a maximum possible forty-year sentence. Under these circumstances, it cannot reasonably be argued that Amenson's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Because the trial court properly exercised its sentencing discretion, Amenson is not entitled to modification of his sentence based upon the court's decision to exceed the sentence recommendation made pursuant to the plea agreement.

By the Court.—Order affirmed.

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