COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1944-CR **Cir. Ct. No. 00 CF 4596**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GAMEL S. HEGWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. Di MOTTO, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Gamel Hegwood appeals from a judgment convicting him of soliciting first-degree intentional homicide, and from an order denying his postconviction motion to withdraw his plea. We affirm for the reasons discussed below.

BACKGROUND

¶2 The underlying facts of this case are somewhat involved. According to various sources cited in the complaint, Calvin Ollie beat David Stokes to death in the presence of Ollie's uncle, Ricky, and Jimmie Williams. Ollie told several people that the police would have no case against him without Williams' testimony. Ollie, along with his friends Anthony Lee and Tifinee Love, went searching for Williams several times with the intent of killing him, but were unable to find him. Lee and Love told police that Ollie subsequently told them they did not have to worry any more because Gamel Hegwood "took care of business" for him, which Lee and Love both understood to mean that Hegwood had killed Williams for Ollie.

¶3 Hegwood claims he told counsel that he was questioned for twelve hours by the police on his first day in custody, and was not given access to a lawyer as he had requested. His contentions are contradicted in several respects by the police reports, which include signed and initialed ***Miranda*** waivers. It is undisputed that after another two days in custody, Hegwood told the police that Ollie had approached him and asked him to "tap someone" for him, which Hegwood understood to mean kill someone. Hegwood said that he had told Ollie that he did not do that, but he had given Ollie the phone number of his stepbrother, Jason Ashley. Hegwood said he then called Ashley and told him that Ollie would be calling. About a month later, when Hegwood asked Ashley if Ollie had called, Ashley told him, "Yeah, I talked to him and yeah, we did that," which Hegwood interpreted to mean that Ashley and Ollie had killed the person Ollie had wanted killed.

¶4 Hegwood was charged with solicitation of first-degree homicide, and Attorney Russell Bohach was appointed to represented him. After several months, Bohach moved to withdraw at Hegwood's request, citing a deterioration of the attorney/client relationship. Hegwood claimed that Bohach was not adequately investigating his case or conferring with him. Hegwood further asserted that he was innocent, that he had made up the story about directing Ollie to Ashley only because the police had pressured him to implicate Ollie, and that he could provide evidence that Ashley had actually been out of state at the time of Williams' murder. The trial court denied the motion as a dilatory tactic. The following week, Hegwood entered an ***Alford*** plea, which the trial court accepted. Hegwood moved to withdraw his plea prior to sentencing on the ground that it was involuntary, but the trial court denied the motion. Hegwood renewed the motion to withdraw his plea after he was sentenced on the ground of ineffective assistance of counsel. The trial court again denied relief. Hegwood now appeals, claiming that he should have been allowed to withdraw his plea because it was coerced by counsel, counsel was ineffective in several respects, and counsel should have been allowed to withdraw when Hegwood asked to discharge him.

DISCUSSION

Withdrawal of Counsel

¶5 The trial court has discretion to decide whether or not to allow an appointed attorney to withdraw, taking into consideration whether the motion is made for the purpose of delay. ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1999). Here, the trial court found that Hegwood himself was largely responsible for the breakdown of the attorney/client relationship because he refused to talk to counsel, and concluded that Hegwood was attempting to

manipulate the system and delay trial. The trial court's findings were supported by counsel's statements that his client had stopped speaking to him. Although there was other evidence from which the trial court could have made alternate findings, we will not second guess credibility determinations that the trial court was in the best position to make. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). In sum, the trial court's decision to deny permission for counsel to withdraw shortly before trial represented a proper application of the relevant law to the facts as the trial court found them.

Presentence Motion for Plea Withdrawal

¶6 A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his charge of heart, beyond the simple desire to have a trial, so long as the State has not been prejudiced by reliance on the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264, 266-67 (Ct. App. 1989). Fair and just reasons for plea withdrawal may include a genuine misunderstanding of the consequences of the plea, haste and confusion in entering the plea, and coercion by trial counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). In considering whether a fair and just reason exists, the trial court may take into account an assertion of innocence and the promptness of the motion, ***id.***, and may also assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶7 Hegwood claimed prior to sentencing that counsel had coerced him into entering his plea by telling him and his mother that Hegwood would be charged with first-degree intentional homicide and convicted by an all-white jury

if he did not enter a plea to the solicitation charge. Hegwood further proclaimed his innocence and expressed his belief that he could not get a fair trial with Bohach representing him. Bohach confirmed that he had informed Hegwood that the State was planning to revise the charge to first-degree intentional homicide if the case went to trial, and that he had advised Hegwood and his family that a plea would be in Hegwood's best interest. He maintained, however, that Hegwood had made a voluntary decision to minimize his sentence exposure by entering an ***Alford*** plea, notwithstanding his protestations of innocence.

¶8 The trial court's view was that Hegwood simply did not appreciate counsel having been candid with him about the possible results of the case. It credited counsel's account of his discussions with Hegwood and his family. The trial court also noted that it had asked Hegwood several times during the initial plea colloquy whether the plea was the result of threats or promises by anyone, including his lawyer, and Hegwood had responded negatively. The trial court found that Hegwood had fully understood the nature and consequences of the plea, the plea had not been entered in haste or confusion, and counsel had not exerted coercion. Based on its findings, the trial court reasonably exercised its discretion by denying the presentence plea withdrawal motion.

Postsentence Motion for Plea Withdrawal

¶9 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991).

¶10 Our discussion of the trial court's presentencing conclusion that Hegwood's plea was voluntarily given applies equally to the post-sentencing plea withdrawal motion. We turn then to Hegwood's allegations that counsel's assistance was ineffective.

¶11 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, ___ Wis. 2d ___, 660 N.W.2d 12.

¶12 Hegwood alleges that Bohach failed to adequately investigate the facts of his case and to advise him of possible defenses and should have filed a suppression motion. We conclude his allegations are insufficient to establish deficient performance.

¶13 The deficient investigation and deficient advice allegations are interrelated. Hegwood claims that if Bohach had looked into Hegwood's assertion that a certain woman could provide an out-of-state alibi for Ashley, and had explored the credibility problems of the State's other witnesses, counsel could then have advised Hegwood that the State had a weak case for proving Hegwood was party to the crime to first-degree intentional homicide, thus reducing the State's plea leverage. The fact remains, however, that the State had two witnesses who could testify that Ollie told them Hegwood had taken care of the Jimmie Williams problem for him, and the State was prepared to press ahead with first-degree intentional homicide charges. It was not unreasonable for counsel to advise Hegwood to take a plea given the evidence available to the State, and Hegwood has not identified any information that he did not already know when he entered his plea and that further investigation would have disclosed. In addition, we are persuaded that a reasonable attorney could conclude that a suppression motion would be unlikely to succeed given the police reports that contradicted Hegwood's assertions. We therefore see no ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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