COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2045-CR **Cir. Ct. No. 99-CF-530**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAMENG VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

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

¶1 PER CURIAM. Wameng Vang appeals a judgment convicting him of one count each of burglary and armed burglary contrary to WIS. STAT.

§§ 943.10(1)(a) and 943.10(2)(b).[1] Vang also appeals the order denying his motion for postconviction relief. Vang argues (1) his inculpatory statement to police should have been suppressed as 'poisonous fruit' of an unlawful stop and arrest; (2) the State breached the plea agreement; (3) there was no factual basis for the armed burglary charge; and (4) counsel was thus ineffective for encouraging Vang to plead guilty to the armed burglary charge. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In October 1999, the State charged Vang with two counts of armed burglary. In exchange for his guilty pleas to an amended count of burglary and one count of armed burglary, the State agreed to cap its sentence recommendation at a total of ten years' imprisonment for both counts. Vang was convicted upon his guilty pleas and sentenced to consecutive terms of ten years' imprisonment on the burglary conviction and fifteen years' imprisonment on the armed burglary conviction. The court denied Vang's postconviction motion for plea withdrawal and this appeal follows.

ANALYSIS

I. Effective Assistance of Trial Counsel

¶3 Vang argues that because the police lacked both reasonable suspicion to stop him and probable cause to arrest him, his inculpatory statement to police officers should have been suppressed. Vang also argues that the State

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

breached the plea agreement. Because trial counsel did not raise these issues before the circuit court, the issue on appeal is whether trial counsel was ineffective for failing to seek suppression of his pretrial statement or challenge the alleged breach.

¶4 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. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). 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." ***Id.*** The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.*** at 697. This analysis requires a mixed standard of review. We review the circuit court's findings of fact regarding counsel's conduct under a clearly erroneous standard. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

A. Reasonable Suspicion to Stop and Probable Cause to Arrest

¶5 Vang argues the police lacked both reasonable suspicion to stop him and probable cause to arrest him. We are not persuaded. Officers may stop and detain individuals if they have reasonable suspicion that the individual committed a crime. *See* ***Terry v. Ohio***, 392 U.S. 1, 30; ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). Whether the facts of a given case constitute probable cause to arrest is a question of law that we decide independently. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not. *See* ***id.***

¶6 Here, Marshfield police impounded an abandoned car registered to Shoua Vang. An inventory search of the car revealed firearms and other items reported stolen from the victims of the charged burglaries. The police eventually traced Shoua to the Park Motel. When police knocked on Shoua's motel room door, there was initially no answer, although the officer heard individuals talking from within. An individual identified as Lee Chang subsequently answered the door. Chang claimed he was the only person in the motel room and he had been talking to his dog. After a search of the room, the officers noticed that a sliding window was open and the track at the bottom of the window was bent in an outward direction, as if someone had left the motel room through the window. After the officers left the Park Motel, a citizen witness told police that she saw three men running through a park located adjacent to the motel. Police stopped

Vang and two other men shortly thereafter. After the police identified Vang and upon learning that he was the subject of a probation hold, the police took Vang into custody. Given this chain of events, we conclude the police had both reasonable suspicion to stop Vang and probable cause to arrest him on the probation hold. Counsel was therefore not ineffective for failing to make a meritless motion to suppress evidence. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

B. Breach of Plea Agreement

¶7 Vang argues that the State breached the plea agreement. Plea bargaining has been recognized as an "essential component of the administration of justice." ***Santobello v. New York***, 404 U.S. 257, 260 (1971); ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 21, 203 N.W.2d 638 (1973). As an important phase in the process of criminal justice, plea bargaining must be attended by procedural safeguards to ensure that a defendant is not treated unfairly. ***Santobello***, 404 U.S. at 262. Thus, when a defendant pleads guilty to a crime pursuant to a plea agreement and the prosecutor fails to perform his part of the bargain, the defendant is entitled to relief. ***Id.***

¶8 A plea agreement is analogous to a contract and we therefore draw upon contract law principles for its interpretation. ***State v. Jorgensen***, 137 Wis. 2d 163, 167, 404 N.W.2d 66 (Ct. App. 1987). The law in Wisconsin is that unambiguous contractual language must be enforced as it is written. ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979) (citation omitted), *aff'd*, 100 Wis. 2d 120, 301 N.W.2d 201 (1981). Contractual language is ambiguous only when it is "reasonably or fairly susceptible of more than one construction." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d

653 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide independently. ***Id.***

¶9 Here, Vang contends that the State breached the plea agreement by: (1) telling the circuit court that "the recommendation was made as if [it's a] truth in sentencing sentence,"[2] (2) recommending a lengthy term of probation; and (3) failing to explicitly recommend a ten-year prison sentence. "Whether a breach of contract exists involves a question of fact," and "[f]indings of fact will not be overturned unless clearly erroneous." ***Jorgensen***, 137 Wis. 2d at 169 (citations omitted). The party asserting a breach of a plea agreement must "show, by clear and convincing evidence, not only that a breach occurred, but also that it was material and substantial." ***Id.*** at 168.

¶10 Vang claims the State's comment regarding truth-in-sentencing somehow "violated both the letter and spirit" of the plea agreement. We disagree. The State correctly noted that Vang's sentence for these offenses should be made pursuant to the old sentencing laws. To the extent Vang claims the State violated the plea agreement by failing to explicitly recommend a ten-year prison sentence, the State did not agree to recommend ten years in prison. Rather, the State agreed it would recommend no more than ten years in prison. Likewise, the State made no agreement with respect to its probation recommendation and was thus free to argue both the length and conditions of probation. We conclude that the State did

[2] "Truth-in-sentencing" refers to the sentencing revisions enacted in 1998 and applicable to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, §419, creating WIS. STAT. § 973.01.

not breach the plea agreement; therefore, counsel was not ineffective for failing to challenge the alleged breach.

II. Factual Basis for Armed Burglary

¶11 Vang contends the circuit court failed to establish a factual basis for the armed burglary charge. In order to determine whether a defendant committed a charged crime, the circuit court must establish a factual basis that the defendant committed the charged crime. WIS. STAT. § 971.08(1)(b). When a trial court finds sufficient factual basis to support a guilty plea, we will not upset that finding "unless it is contrary to the great weight and clear preponderance of the evidence." ***State v. Higgs***, 230 Wis. 2d 1, 11, 601 N.W.2d 653 (Ct. App. 1999).

¶12 A conviction for armed burglary pursuant to WIS. STAT. § 943.10(1)(a) and (2)(b) requires proof that the defendant armed himself with a dangerous weapon while in the enclosure. *See* WIS JI—CRIMINAL 1425B. All that is required is proof that the defendant armed himself with a dangerous weapon in the course of the burglary. *See* ***State v. Norris***, 214 Wis. 2d 25, 27, 571 N.W.2d 857 (Ct. App. 1997). As a factual basis for Vang's pleas, the court considered the facts set forth by both the criminal complaint and Vang's own statement. The documents contain allegations that Vang took knives during one of the burglaries, throwing one knife repeatedly against a wall in the home and driving the second

knife into the wall. This is sufficient to establish a factual basis for Vang's guilty plea to the armed burglary charge.[3]

¶13 Finally, based on his allegation of an inadequate factual basis to support his guilty plea for armed burglary, Vang contends counsel was ineffective for counseling him to plead guilty to that charge. Because the court properly established a factual basis for the armed burglary charge, Vang has failed to establish ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

[3] To the extent Vang argues the plea colloquy did not establish his actual understanding of the "armed" element of the charged crime, we conclude there is no basis for challenging Vang's guilty plea. Vang executed a plea questionnaire and waiver of rights form in which he acknowledged the elements of the offense. At the plea colloquy, the court ascertained that Vang understood the form he signed and the elements of the offense. Additionally, the court confirmed Vang's understanding that if his case went to trial, the State would have to prove that Vang armed himself with a knife while still in the burglarized home.