COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3372-CR **Cir. Ct. No. 01-CF-65**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

YENG VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: GERALD W. LAABS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Yeng Vang appeals a judgment convicting him of armed burglary, contrary to WIS. STAT. § 943.10(2)(a).[1] Vang also appeals from

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

the order denying his postconviction motion for plea withdrawal. Vang argues the circuit court erred by denying his postconviction motion without a hearing because (1) he was denied the effective assistance of counsel; and (2) his limited English language skills rendered his plea unknowing. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In June of 2000, several guns and other items were stolen from the home of Kathy and Mark Gehl. After the burglary, Bruce Von Haden, a police investigator, entered the serial numbers of several of the stolen guns into the National Crime Information Center, which is a computerized index of criminal justice information. On July 21, 2000, Von Haden received a "hit" confirmation on one of the stolen guns from the Ramsey County Sheriff's Department in Minnesota. A Ramsey County deputy informed Von Haden that several local gang members had been arrested for possessing a sawed-off shotgun that the deputy believed was one of the Gehls' guns.

¶3 Ultimately, a confidential informant familiar with the gang's criminal activity implicated Vang and another person in the Gehl burglary. In June 2001, Kevin Navara, an investigator from the Minnesota Gang Strike Force, interviewed Vang regarding several sexual assaults in which the gang was allegedly involved. The interview was conducted in the presence of both Vang's public defender and an assistant county attorney. During that interview, Vang admitted being present at and participating in the Gehl burglary, specifically noting that although he could not remember everything that was taken, he knew at least two long guns and a jar of quarters were removed from the Gehl house. In July 2001, the State charged Vang with one count of armed burglary. Vang's

subsequent motion to suppress statements was denied after the trial court heard testimony from the defendant, Navara and the county attorney. Vang was convicted upon his no contest plea and sentenced to twenty years' initial confinement followed by fifteen years' extended supervision, concurrent with a sentence imposed in Minnesota. Vang's post-sentence motion to withdraw his plea was denied without a hearing and this appeal follows.

ANALYSIS

¶4 If a motion to withdraw a guilty plea after judgment and sentence alleges facts that entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.*** However, if the motion's factual allegations are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the trial court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10.

¶5 A motion 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). Vang 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).

A. Ineffective Assistance of Counsel

¶6 Ineffective assistance of counsel can constitute a manifest injustice. ***Bentley***, 201 Wis. 2d at 311. In order to prove ineffective assistance, Vang 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, Vang 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.***

¶8 Here, Vang argues his counsel was ineffective by failing to challenge admission of his June 2001 statement to Minnesota officials on grounds that the statement would have been suppressed under Minnesota law. Citing ***State v. Kennedy***, 134 Wis. 2d 308, 396 N.W.2d 765 (Ct. App. 1986), Vang argues that "standards for suppressing statements from the jurisdiction where the statement was taken [are] to be applied by Wisconsin law." In ***Kennedy***, however, this court concluded that while the manner and method of obtaining evidence is governed by the law of the jurisdiction in which the evidence is secured, "the rules of evidence governing admissibility are those of the forum state." ***Id.*** at 320.

¶9 In ***State v. Scales***, 518 N.W.2d 587 (Minn. 1994), the court stated: "in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation … shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." ***Id.*** at 592. The court held that if law enforcement failed to comply,

"any statements the suspect makes in response to the interrogation may be suppressed at trial." ***Id.*** The court further determined that violations would be decided on a case-by-case basis and suppression would be required if the violation were deemed "substantial" pursuant to specified provisions of the Model Code of Pre-Arraignment Procedure. ***Id.***

¶10 Here, Vang cannot establish that he would have prevailed on his motion to suppress had trial counsel, in fact, raised a ***Scales*** objection. As noted above, the rules of evidence governing admissibility are those of the forum state. ***Kennedy***, 134 Wis. 2d at 320. In any event, even were we to apply Minnesota law, Vang's statement regarding the Gehl burglary was not custodial. In ***State v. Tibiatowski***, 590 N.W.2d 305, 306 (Minn. 1999), the Minnesota Supreme Court held that under circumstances "where there is no evidence of restraint on the suspect's freedom other than that to which the suspect was already subject by reason of his custody for an unrelated offense, the suspect is not in custody for purposes of ***Miranda***."[2] In the present case, Vang was not in custody with respect to the Gehl burglary, but rather, was detained in connection with the unrelated gang rapes.

¶11 Even were we to construe the interview as custodial in nature, however, the circumstances of the interview do not implicate the concerns expressed by the ***Scales*** court with respect to unrecorded interrogations. Specifically, the ***Scales*** court concluded that the recording of custodial interrogations is a necessary safeguard, "essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his

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

right to a fair trial." ***Scales***, 518 N.W.2d at 592. Here, Vang's counsel participated in arranging the interview and was present during the statement, Vang voluntarily incriminated himself pursuant to a plea agreement and Vang waived his right to trial by agreeing to plead no contest. Because Vang would not have prevailed on his suppression motion under ***Scales***, counsel was not deficient for failing to raise a ***Scales*** objection.

B. Knowing, Voluntary and Intelligent Plea

¶12 Vang argues that in the absence of an interpreter, his limited English language skills rendered his plea unknowing. The record, however, sufficiently refutes this allegation. Also, because he presents only conclusory allegations, Vang was not entitled to a hearing on his postconviction motion.

¶13 When reviewing a circuit court's postconviction determination that a defendant did not need an interpreter, we do not set aside a circuit court's finding unless it is clearly erroneous, and we must give due regard to the circuit court's opportunity to judge the credibility of witnesses. ***State v. Yang***, 201 Wis. 2d 725, 735, 549 N.W.2d 769 (Ct. App. 1996).

¶14 Our supreme court has stated that fairness requires that those who speak and understand only languages other than English, and who become defendants in Wisconsin's criminal courts, should have the assistance of interpreters when needed. ***State v. Piddington***, 2001 WI 24, ¶43 n.23, 241 Wis. 2d 754, 623 N.W.2d 528. WISCONSIN STAT. § 885.37(1)(b) (1999-2000) provides in relevant part:

> If a court has notice that a person … has a language difficulty because of the inability to speak or understand English … the court shall make a factual determination of whether the language difficulty … is sufficient to prevent

> the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English.

A circuit court has notice of language difficulty within the meaning of WIS. STAT. § 885.37(1)(b) when it becomes aware that a defendant's difficulty with English "may impair his or her ability to communicate with counsel, to understand testimony in English, or to make himself or herself understood in English." ***Yang***, 201 Wis. 2d at 734. Some instances of misunderstanding or lack of communication, however, do not necessarily require a finding that the defendant was prevented by a language disability from communicating with his or her attorney. *See* ***id.*** at 740.

¶15 Here, the circuit court noted that Vang prepared the plea questionnaire with his attorney, acknowledging "I do understand the English language." Vang told the court he understood the plea form and confirmed he could read English and communicate with his attorney. The court further observed that with respect to the plea hearing, there was no showing of any misunderstanding on the defendant's part. The court additionally reviewed the suppression hearing to ascertain that Vang could adequately participate in his own defense without the aid of an interpreter. Finally, the court noted that Vang attended high school in the United States and was seeking a GED. Despite his allegations to the contrary, the trial court's finding that Vang was not entitled to an interpreter was not clearly erroneous.[3]

[3] To the extent Vang claims his trial counsel was ineffective for failing to seek an interpreter, we have concluded Vang did not establish the need for an interpreter. Counsel, therefore, was not deficient.

¶16 The record conclusively demonstrates that Vang is not entitled to relief, and thus the circuit court properly exercised its discretion by denying his plea withdrawal motion without an evidentiary hearing.

By the Court.—Judgment and order affirmed.

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