COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2353-CR **Cir. Ct. No. 2009CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH L. SHRUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph Shrum pled no contest to one count of causing mental harm to a child and to two counts of exposing a child to harmful material. The circuit court imposed a sentence totaling ten and one-half years of

initial confinement and nine years of extended supervision. The circuit court denied Shrum's postconviction motion to withdraw his plea and Shrum appeals. We affirm.

¶2 A criminal complaint charged Shrum with one count of repeated sexual assault of a child. *See* WIS. STAT. § 948.025(1)(b).[1] On the morning of the scheduled trial, the parties reached a plea agreement. Shrum's attorney told the circuit court:

> [T]he State will be moving to amend the count of repeated sexual assault of a child to causing mental harm to a child, and … also amend the Information to add two additional counts of exposing the child to harmful material. Therefore, Mr. Shrum will be pleading no contest to the one count of causing mental harm to a child and the two counts of exposing a child to harmful materials.
>
> The State will be requesting a presentence investigation. Both sides will be free to argue at sentencing, but the State agrees to ask for no more than 9 years' initial confinement. We are free to argue on other points.

The State agreed that defense counsel had "accurate[ly]" set forth the plea agreement.

¶3 In his postconviction motion to withdraw his plea, Shrum contended the State breached the plea agreement when it subsequently filed criminal charges, arising from these incidents, against his wife. He also alleged his attorney was ineffective because she did not "specifically state on the record that the non-filing

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

of charges against [his wife] was a material provision of the plea agreement."[2] Shrum, his attorney, and the assistant district attorney who had represented the State at the plea hearing, testified at the postconviction hearing. The postconviction court found that the plea agreement did not include any promise by the State not to charge Shrum's wife and, accordingly, denied Shrum's motion.

¶4 At the postconviction hearing, Shrum's trial attorney testified the possibility of criminal charges against Shrum's wife was "important to" and a "material issue" for Shrum. Counsel talked to the assistant district attorney about Shrum's concern, and the assistant district attorney told her that the State "did not plan on charging" Shrum's wife. Shrum's attorney relayed the State's response to Shrum. Shrum's attorney testified that the State's position "certainly was a factor in [Shrum's] decision to plead." Shrum's attorney testified, however, that the possibility of charges against the wife "was not part of the plea agreement" and, if it had been, she would have included that term in her on-the-record description of the negotiations. Shrum's attorney testified she never told Shrum that the plea agreement included a promise not to charge his wife.

¶5 The assistant district attorney testified that when Shrum's attorney asked about the possibility of charges against Shrum's wife, he checked to see if

[2] On appeal, Shrum does not make a discrete, developed argument that his trial attorney was ineffective. Therefore, we need not separately address that issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (an undeveloped argument will not be considered); *see also* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992) (an issue raised in the circuit court, but not on appeal, is deemed abandoned). Moreover, given the circuit court's factual findings concerning the terms of the plea agreement, the performance of Shrum's attorney was not deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To succeed on a claim of ineffective assistance of counsel, a defendant must show that his or her attorney's performance was deficient and that the deficient performance prejudiced his or her defense.).

any law enforcement agency had requested the issuance of charges. The assistant district attorney did not find any request, and he relayed that information to Shrum's attorney. The assistant district attorney testified that he did not promise Shrum's attorney the State would never file charges against Shrum's wife.

¶6 Shrum testified his attorney told him "there was no intention of charging [his] wife" and he "agreed to take the plea agreement upon [his attorney's] words that they had no intention of charging [his] wife." Shrum "took" that as a "long-term promise" by the State that his wife would not be charged. He admitted, however, his attorney "didn't say it was a promise." Shrum admitted the plea agreement included other important concessions reducing the severity of the crime and potential sentence, but the non-charging of his wife was a "vital" part of the agreement. Shrum admitted he had answered "no" when the court asked, during the plea colloquy, whether "anybody had made any threats or promises to force … or coerce" him into pleading no contest. Shrum also admitted the plea agreement described on the record did not mention anything about not charging his wife. Shrum stated, however, "promises were made" by his attorney when she "told me that the State had no intention on charging" his wife.

¶7 A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). The threshold question—what are the terms of the plea agreement—presents a question of historical fact that this court reviews under the clearly erroneous standard of review. *See* ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733.

> [W]hen the [circuit court] acts as the finder of fact, and where there is conflicting testimony, the [circuit court] is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983); *see also* WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

¶8 The postconviction court found Shrum's attorney and the assistant district attorney had "a one-time discussion" about Shrum's "concern … about his wife facing charges." After ascertaining there were "no active requests from law enforcement," the assistant district attorney told Shrum's attorney the State "had no intentions of bringing charges" against her. The postconviction court found "there was, in fact, no promise made by the State not to charge" Shrum's wife and "[t]here was no agreement between the State and the defendant to preclude or restrict or limit the right of the State ... to charge [Shrum's wife] in conduct or behaviors related to the defendant's actions." The postconviction court found Shrum's attorney told Shrum "there was no promise of no charges … but did tell him that there were no plans by the State to charge" his wife. The postconviction court found that "Shrum understood that" and "knew that there was no agreement." The postconviction court rejected Shrum's testimony as "not credible" because he was "impeached" by his statements during the plea colloquy and by inconsistencies within his postconviction testimony. The postconviction court found Shrum's attorney was credible and counsel's description of the plea agreement was "accurate." Based on those factual findings, the postconviction court concluded "there was no breach of the plea agreement by the State … by

charging [Shrum's wife] because there, in fact, was no agreement not to charge her." Accordingly, counsel was not ineffective and Shrum "ha[d] not shown any good cause or substantial reasoning or basis to withdraw his plea, that he made the plea agreement freely, knowingly, voluntarily, intelligently, and there's been no manifest injustice."

¶9 On appeal, Shrum continues to blame his trial attorney for not putting "an incredibly important piece of the negotiation pie on the record" and argues that he should be allowed to withdraw his plea because the State later charged his wife. Shrum overlooks the threshold factual finding made by the postconviction court—the plea agreement did not include any promise by the State not to charge Shrum's wife. He does not argue that the factual finding is clearly erroneous. That finding dooms Shrum's appeal. The State cannot be said to have breached the plea agreement over a nonexistent term. *See* ***State v. Bowers***, 2005 WI App 72, ¶16, 280 Wis. 2d 534, 696 N.W.2d 255 (noting "the State should be held only to those promises it actually made to the defendant"). Shrum has not shown the manifest injustice needed to support the postsentencing withdrawal of his plea. *See* ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (a guilty plea may be withdrawn after sentencing only when necessary to correct a manifest injustice).

By the Court.—Judgment and order affirmed.

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