COURT OF APPEALS
DECISION
DATED AND RELEASED

August 10, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-2910

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RITCHIE H. DUMER,

Defendant-Appellant.

APPEAL from order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Ritchie H. Dumer appeals from an order denying a § 974.06, STATS., postconviction motion to withdraw his no contest pleas. Dumer argues that he was denied the effective assistance of counsel because his trial attorney did not adequately investigate prior to the plea hearing and withheld exculpatory evidence from Dumer. Dumer also argues that the court failed to explain the nature of the charges, making his pleas unintelligent and

involuntary, and that there was an inadequate factual basis to support his pleas. After a postconviction hearing at which both Dumer and his trial attorney testified, the court denied Dumer's motion. We affirm.

Facts

A seven-count criminal complaint was filed on February 7, 1985. The complaint charged Dumer with three crimes against Jessica P.: second-degree sexual assault, false imprisonment, and misdemeanor battery. The complaint also charged Dumer with four crimes against Lauren O.: attempted second-degree sexual assault, false imprisonment, misdemeanor battery, and threatening injury. Each count included a repeater allegation under § 939.62, STATS.

The complaint alleged that, on February 5, 1985, at approximately 12:45 a.m., Dumer accosted Jessica P. in the lobby of her Langdon Street apartment building. Dumer followed Jessica into the lobby, and asked her if she wanted "some company." Jessica told Dumer to "get away from me," and struck Dumer in the chest. Dumer then grabbed Jessica and dragged her outside the building. Once outside, Dumer grasped Jessica's buttocks and slapped her several times. Jessica began screaming and managed to escape. She reentered the building and Dumer fled the area.

Jon Dickinson, another resident of the building, heard Jessica's screams and witnessed part of the incident from a third-floor window. Dickinson saw the assailant enter an older, large dark blue car. Dickinson ran out of the building to where the car had been parked. While outside, Dickinson saw the vehicle drive past the parking spot.

At approximately 1:00 a.m., Dumer accosted Lauren O. near Elizabeth Waters dormitory on the University of Wisconsin campus. Dumer grabbed Lauren as she exited her car, and forcibly dragged her into a secluded area. After Lauren started to scream, Dumer hit her in the face and threatened to kill her. Lauren's screams alerted others in the area, and they chased Dumer onto frozen Lake Mendota. Dumer was caught and turned over to police. Police also secured Dumer's car, a 1977 blue Pontiac. After Dumer's arrest,

Dickinson identified him as the man he saw running from the Langdon Street apartment.

Dumer waived his right to a preliminary hearing on February 14, 1985. At that time, Dumer's attorney stated "for the record ... I have had discussions with the district attorney concerning a potential plea arrangement. I expect that at the arraignment a plea will be entered. I don't think that it's necessary to go into the terms and conditions of that arrangement at this time."

On February 21, 1985, the State filed a six-count Information. The Information did not contain the "threaten injury" offense relating to Lauren O. The Information also amended the second-degree sexual assault charge as to Jessica P. to attempted second-degree sexual assault.

A plea hearing was held on June 7, 1985. At the outset, Dumer's attorney advised the court that the State had dismissed the felony charge of threatening injury and amended the initial charge of second-degree sexual assault to attempted second-degree sexual assault "as part of a plea agreement." The court then accepted Dumer's no contest pleas. Further facts as to the plea colloquy will be stated below as necessary.

Ineffective Assistance of Trial Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his attorney's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To satisfy the prejudice prong of the ***Strickland*** test, a defendant who pled guilty "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart,*** 474 U.S. 52, 59 (1985). The success of an allegation that counsel did not fully investigate or discover exculpatory evidence "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." ***Id.***

This court accepts the factual findings made by the trial court at the postconviction hearing unless the findings are clearly erroneous. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). This court also defers to the fact finder's credibility determinations. ***Ivalis v. Curtis,*** 173 Wis.2d 751, 762, 496 N.W.2d 690, 695 (Ct. App. 1993). However, this court reviews independently the legal question of whether counsel's performance was prejudicial. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

Dumer argues that his trial attorney was ineffective in two respects. First, Dumer argues that his attorney did not adequately investigate the case prior to the plea hearing. Dumer points to a police report indicating that Jessica P. could not positively identify him as the assailant. Dumer suggests that his attorney did not have this report prior to the plea, or if he did, he did not tell Dumer of its contents. Dumer contends that he would not have entered his plea if he had been aware of this exculpatory evidence.

Initially, we note that the fact finder determined that Dumer's trial attorney was more credible than Dumer. Thus, when faced with a conflict in the testimony, we must accept the version offered by Dumer's attorney.

We conclude that Dumer has not shown the necessary prejudice. Trial counsel testified that he felt that Jessica's inability to positively identify Dumer was not compelling in light of Dickinson's identification of Dumer as her assailant. Dumer's car matched the description of the car seen leaving the Langdon Street incident. Counsel testified that he discussed the strength of the State's case with Dumer, and suggested to Dumer that the fact that he was caught virtually "red-handed" minimized the prospects of a successful defense on both incidents. Even if we assume that counsel was not aware of Jessica's non-identification or that he did not tell Dumer of the evidence, it is not likely that disclosure of the evidence "would have led counsel to change his recommendation" that Dumer accept the proposed plea agreement. We agree with trial counsel's assessment of Dumer's defense prospects—Jessica's non-identification likely would not have affected the outcome of a trial in light of the other evidence implicating Dumer in the assaults.

Dumer also asserts that his attorney did not inform him of any plea agreement, and that he would never have accepted a plea agreement. The

record defeats Dumer's assertion. Dumer faced a maximum of sixty-six years under the seven charges contained in the criminal complaint. When Dumer waived a preliminary hearing, defense counsel indicated that plea negotiations were ongoing. Dumer was present at that hearing, and affirmatively waived his right to a preliminary hearing after counsel's statement.

The subsequent Information contained six charges, and decreased Dumer's exposure to forty-four years. At the plea colloquy, defense counsel informed the court that the State had filed the Information, which dropped one count and amended another count to an "attempt," in exchange for Dumer's previous waiver of the preliminary examination. Dumer was present at the plea colloquy, and entered his no contest plea shortly after counsel's description of the plea agreement. Dumer assured the court that he understood the plea proceedings and that he had no questions.

The trial court found Dumer's assertion that he was "confused" to be unfounded. That finding is amply supported by the record and is not clearly erroneous. Dumer has not shown that his trial attorney failed to inform him of the terms of the plea agreement.

Voluntary and Intelligent Pleas

Dumer seeks to withdraw his pleas as not knowingly, voluntarily and intelligently entered. He argues that he had inadequate notice of the nature and elements of the charges, and that the trial court did not establish a factual basis for the pleas. Dumer's arguments are not persuasive.[1]

Prior to accepting a no contest or guilty plea, the trial court shall "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential

[1] Dumer entered his no contest pleas on June 7, 1985, three days before the Wisconsin Supreme Court decided ***State v. Cecchini,*** 124 Wis.2d 200, 368 N.W.2d 830 (1985), *overruled in part on other grounds*, ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Therefore, Dumer's claims are governed by pre-***Cecchini*** law. *See* ***State v. Harvey,*** 139 Wis.2d 353, 380-81, 407 N.W.2d 235, 247 (1987).

punishment if convicted." Section 971.08(1)(a), STATS.; *see also* ***Ernst v. State,*** 43 Wis.2d 661, 674, 170 N.W.2d 713, 719 (1969), *modified in part on other grounds*, ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The court should "ascertain, at the plea hearing itself, whether the defendant had an adequate understanding of the crimes charged." ***State v. Harvey,*** 139 Wis.2d 353, 381, 407 N.W.2d 235, 247 (1987). The court, however, is "not precluded from examining the entire record to aid in that determination." ***Id.***

Our examination of the record leads us to the same conclusion as the trial court; that is, Dumer understood the nature of the crimes charged when he entered his no contest pleas. Dumer received a copy of the criminal complaint at his initial appearance.[2] The complaint set forth the elements of the crimes facing Dumer and the factual underpinnings for the charges.[3] In his postconviction testimony, Dumer's trial counsel testified that he had discussed the complaint's factual allegations, and their legal import, with Dumer. While Dumer denies any such discussions occurred, the trial court accepted counsel's testimony as credible. We conclude that the record as a whole shows that Dumer understood the nature of the charges against him when he entered his no contest pleas. Therefore, Dumer has not shown the necessary due process violation that would support the withdrawal of his pleas.

Dumer also argues that the trial court failed to establish a factual basis for the pleas. Again, the record refutes Dumer's contention. When accepting a plea, a court must make sufficient inquiries to satisfy it that the defendant did in fact commit the crime to which he is pleading. Section 971.08(1)(b), STATS.; *see also* ***State v. Harrington,*** 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994). During the plea colloquy, the court asked Dumer: "[A]re you willing to acknowledge your involvement in the attempted sexual assault, false imprisonment, and battery of both [victims] on February 5 of this year?" Dumer answered, "Yes." Dumer's response, and the allegations of the criminal complaint, constitute an adequate factual basis for Dumer's pleas.

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[2] At the postconviction motion, Dumer testified that he never saw the criminal complaint before the plea hearing. That assertion is contradicted by the court record of the initial appearance. We also note that the trial court specifically rejected Dumer's testimony as not credible.

[3] Dumer pled to two counts each of attempted second-degree sexual assault, false imprisonment and misdemeanor battery, one as to each victim.

Ineffective Assistance of Appellate Counsel

Dumer has represented himself in this § 974.06, STATS., postconviction motion and appeal. As a final argument in his brief to this court, Dumer complains that the attorney appointed in 1986 to represent him did not file either a direct appeal under RULE 809.30, STATS., or a no merit appeal under RULE 809.32, STATS. Dumer asserts that appointed counsel did nothing on his behalf, and the state public defender ultimately closed its file for "inactivity." Dumer asks this court to construe his brief as a petition for habeas corpus under ***State v. Knight,*** 168 Wis.2d 509, 484 N.W.2d 540 (1992), and "determine whether [postconviction counsel] was ineffective in refusing to assist the Defendant in his motion to withdraw his pleas or file a No Merit Brief."

In ***Knight,*** the supreme court held that a defendant claiming ineffective assistance of appellate counsel should petition the court that heard the appeal for a writ of habeas corpus. ***Id.*** at 520, 484 N.W.2d at 544. The court chose habeas corpus as the appropriate avenue, in part, because an appellate court can "link the remedy closely to the scope of the constitutional violation." ***Id.***

For purposes of this discussion, we assume that Dumer's appointed counsel acted improperly by not filing either a no merit report or a postconviction motion to withdraw the no contest pleas. We decline, however, to order any further proceedings under ***Knight*** because Dumer cannot show prejudice from counsel's actions. *See* ***Strickland,*** 466 U.S. at 687 (to succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the performance was prejudicial). Dumer's desire to withdraw his no contest pleas has been fully addressed by this court. While Dumer has proceeded *pro se,* he has done so competently and presented cogent arguments for our consideration. We have addressed the merits of those arguments. *Cf.* ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994). Therefore, Dumer has already received the "remedy" appropriate to the loss of a direct appeal. Further proceedings under ***Knight*** are not warranted.

By the Court.—Order affirmed.

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