COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP742-CR **Cir. Ct. No. 2008CF159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN D. O'NEILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Darrin O'Neill appeals a judgment of conviction and an order denying his postconviction motion. O'Neill was convicted of one count of aggravated battery with intent to commit great bodily harm, contrary to

WIS. STAT. § 940.19(5) (2009-10),[1] after he entered a no contest plea. We affirm the judgment and order of the circuit court.

BACKGROUND

¶2 O'Neill was charged with one count of aggravated battery with intent to commit great bodily harm and one count of robbery with use of force. Initially, he pled not guilty to both charges. A week before his scheduled trial, the prosecutor made an offer to O'Neill in a letter. The letter stated that if O'Neill pled guilty to the first count, the prosecutor would agree to have the second count dismissed and read in, and would recommend two years of initial confinement, followed by the maximum period of extended supervision. The letter further stated that the victim's family was placing much more value on a conviction than on any particular sentence.

¶3 O'Neill entered a plea of no contest, consistent with the terms of the offer in the prosecutor's letter. He was sentenced to ten years of initial confinement and five years of extended supervision. O'Neill filed a postconviction motion to withdraw his plea on the basis that it was entered unknowingly and that his attorney rendered ineffective assistance of counsel. The circuit court denied the motion after a hearing, and O'Neill now appeals.

DISCUSSION

¶4 On appeal, O'Neill makes two arguments. First, he argues that his plea was not knowing and voluntary. Second, he asserts that his trial counsel

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

rendered ineffective assistance by failing to seek a continuance for the purpose of informing O'Neill that he could withdraw his plea after the victim's family asked the court to impose the maximum sentence. He requests that this court vacate his plea and grant him a new trial. The decision whether to allow withdrawal of a plea, whether before or after sentencing, is a discretionary decision of the circuit court, which we will not reverse unless clearly erroneous. ***State v. Daley***, 2006 WI App 81, ¶14, 292 Wis. 2d 517, 716 N.W.2d 146.

¶5 When a defendant moves to withdraw a plea after sentencing, he carries the heavy burden of establishing, by clear and convincing evidence, that the circuit court should allow withdrawal of the plea to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). One way for a defendant to meet this burden is to show that the plea was not knowingly, voluntarily, and intelligently entered. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891 (citation omitted).

¶6 O'Neill asserts that the major factors that induced him to enter into the plea agreement were representations from the prosecutor and from his trial counsel that the victim's family acquiesced in the joint sentence recommendation. He argues that he was given information that turned out to be incorrect, and that incorrect or incomplete information from counsel, the prosecutor, or the court has been held to negate the knowing, voluntary nature of a defendant's plea, citing ***State v. Riekkoff***, 112 Wis. 2d 119, 128-30, 332 N.W.2d 744 (1983).

¶7 This case is distinguishable from ***Riekkoff***, however. In that case, the defendant pled guilty believing that he was entitled to an appellate review of a reserved evidentiary issue. ***Riekkoff***, 112 Wis. 2d at 128. Both the prosecutor and the trial judge acquiesced in that view and permitted the defendant to believe that,

despite his plea, appellate review could be had of the evidentiary order. ***Id.*** The court concluded that Riekkoff was under a misapprehension with respect to the effect of his plea. ***Id.***

¶8 In this case, the circuit court found that neither defense counsel, nor the prosecutor, nor the court provided O'Neill with incorrect or incomplete information, and the record supports this finding. The plea offer letter from the prosecutor did not make any promise that the court would follow the joint sentencing recommendation. The circuit court asked O'Neill during the plea colloquy whether he understood that the court was not bound by any plea negotiation, and O'Neill responded in the affirmative. Before the victim's family members made their statements at the combined plea and sentencing hearing, O'Neill was present when his counsel told the court that it was his understanding that the victim's family was not satisfied with the sentencing recommendation. In addition, O'Neill's trial counsel testified at the postconviction motion hearing that he communicated to O'Neill that there was no guarantee what the family members would say in court, but that the prosecutor felt that the family was generally on board with the plea offer.

¶9 The circuit court credited trial counsel's testimony and implicitly found that O'Neill's testimony was not credible. The court pointed out that O'Neill stated at the postconviction motion hearing that he would have liked to have gone to trial so that he could prove his innocence. However, the court also pointed out that O'Neill previously admitted to the allegations in the criminal complaint during the plea and sentencing hearing. We do not disturb the circuit court's credibility determinations on appeal. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). Accordingly, we conclude that O'Neill's plea was entered knowingly and voluntarily.

¶10 We now turn to O'Neill's second argument: ineffective assistance of trial counsel. O'Neill argues that his trial counsel was deficient in failing to seek a continuance for the purpose of advising him that he could withdraw his plea because the victim's family members asked the court for the maximum sentence at the plea and sentencing hearing, which O'Neill asserts was a "fair and just reason" for withdrawal. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995) ("A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the defendant's plea."). Even if we assume that O'Neill's counsel was deficient, O'Neill fails to demonstrate that he was prejudiced by counsel's performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶11 O'Neill argues that if he had been advised of his opportunity to withdraw his plea before sentencing, he would have made that motion and it is likely that it would have been granted. We disagree that such a motion would have been granted. While courts liberally grant plea withdrawal requests prior to sentencing, withdrawal is not automatic. ***State v. Leitner***, 2001 WI App 172, ¶24, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. Even putting aside the question of whether a continuance would have been granted, had O'Neill asked to withdraw his plea after hearing the sentencing recommendations of the victim's family, it is likely that his request would have rung hollow and appeared to be motivated by regret that he had decided to enter the plea. Disappointment and unfulfilled hope regarding a sentencing outcome has been held not to be a fair and just reason supporting withdrawal of a plea. ***State v. Jenkins***, 2007 WI 96, ¶¶71, 92, 303 Wis. 2d 157, 736 N.W.2d 24. Because we conclude it is unlikely that O'Neill would have been

allowed to withdraw his plea if he had moved to do so before sentencing, we conclude he suffered no prejudice as a result of his counsel's failure to advise him of his right to make the motion after hearing the family's recommendations.

¶12 For the reasons stated above, we conclude that the circuit court did not erroneously exercise its discretion in denying O'Neill's postconviction motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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