COURT OF APPEALS
DECISION
DATED AND RELEASED

October 5, 1995

NOTICE

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.

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

Nos. 94-3246-CR
94-3247-CR
94-3248-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM D. OLSON,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Jackson County: ROBERT W. WING, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

DYKMAN, J. William D. Olson appeals from a judgment convicting him of theft of a firearm, contrary to §§ 943.20(1)(a) and (3)(d)5, STATS., possession of a firearm by a felon, contrary to § 941.29(2), STATS., possession of a vehicle without the owner's consent, contrary to § 943.23(2), STATS., and two counts of escape, contrary to § 946.42(3)(a), STATS. He also

appeals from an order denying his postconviction motion for relief.[1] The trial court sentenced him to a two-year term for the theft, two concurrent one-year terms for the possession of a firearm as a felon and possession of a vehicle without the owner's consent, and one consecutive one-year term and one consecutive five-year term for the escapes.

Olson raises the following issues on appeal: (1) whether his guilty pleas were entered knowingly, intelligently and voluntarily; (2) whether the State breached the plea agreement; and (3) whether he was denied the effective assistance of counsel. We conclude that: (1) Olson's pleas were entered knowingly, intelligently and voluntarily; (2) the State did not breach the plea agreement; and (3) Olson was not denied the effective assistance of counsel. Consequently, we affirm.

BACKGROUND

About the end of July 1993, William D. Olson escaped from his parents' home, his place of detention under the intensive sanctions program. Over the next week, he committed a series of crimes resulting in his being charged with four felonies and seven misdemeanors. On October 19, 1993, the date of his initial appearance, Olson escaped from the courthouse. He was later charged in two separate cases with two counts of escape—one resulting from his escape from his parents' home and the other from his escape from the courthouse.

Olson entered guilty pleas to three of the felonies and the two escapes. In return, the prosecutor agreed to dismiss the other charges and the repeater allegations on three of the charges to which he pleaded guilty. After sentencing, Olson moved for postconviction relief asking that he be permitted to withdraw his guilty pleas. He also claimed that the prosecutor breached the plea agreement and that trial counsel's representation was ineffective. The trial court dismissed Olson's motion. Olson appeals.

[1] This appeal was consolidated by order dated January 27, 1995.

GUILTY PLEA

Olson argues that the trial court erred when it accepted his guilty plea. According to Olson, his plea was not entered knowingly, voluntarily or intelligently because he was not aware of the potential penalties that he faced for the escapes. He also argues that the court did not establish a sufficient factual basis to support his guilty pleas. We disagree.

When accepting a plea, there must be an affirmative showing that the plea was entered knowingly, voluntarily and intelligently. ***State v. Bangert***, 131 Wis.2d 246, 257, 389 N.W.2d 12, 19 (1986). A plea is not voluntary unless the defendant fully understands the charges against him or her and the penalties that may be imposed. ***Id.*** These requirements have been codified in § 971.08(1), STATS., which provides in pertinent part:

> Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

The trial court must also determine whether a factual basis for the plea exists. ***Christian v. State***, 54 Wis.2d 447, 457, 195 N.W.2d 470, 475-76 (1972). We do not upset the court's determination that there is a sufficient factual basis for the plea unless it is clearly erroneous. ***Id.***, 195 N.W.2d at 476.

Whether the trial court complied with § 971.08(1), STATS., involves the interpretation of a statute and its application to the facts. ***State v. Baeza***, 174 Wis.2d 118, 123, 496 N.W.2d 233, 235 (Ct. App. 1993). These are questions of law which we review *de novo*. ***Id.*** The defendant must first make a *prima facie*

showing that the trial court accepted the plea without conforming with § 971.08(1). ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26. The burden then shifts to the State to show by any relevant, clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Id.*** at 274-75, 389 N.W.2d at 26.

Whether a guilty plea should be withdrawn rests within the sound discretion of the trial court. ***White v. State***, 85 Wis.2d 485, 491, 271 N.W.2d 97, 100 (1978). A plea entered after sentencing may be withdrawn only "to correct a manifest injustice, but this showing must be established by clear and convincing evidence." ***Christian***, 54 Wis.2d at 458, 195 N.W.2d at 476 (quoting ***Griffin v. State***, 43 Wis.2d 385, 389, 168 N.W.2d 571, 573 (1969)).

Olson argues that he did not know that he could receive consecutive sentences for the escape charges[2] and therefore his plea was not made voluntarily. At the postconviction motion hearing, Olson testified that trial counsel did not tell him that the escape charges carried consecutive sentences, and he assumed that the trial court would impose "one lump sentence." But the record reflects that Olson entered his guilty plea knowingly, voluntarily and intelligently. At the plea hearing, the court instructed Olson that the two escape charges potentially subjected him to two five-year prison terms and to two $10,000 fines. At the postconviction motion hearing, counsel directly contradicted Olson, claiming that the two met at least thirteen times and discussed the issue at several of those meetings. Counsel testified that while he and Olson did not discuss the consecutive nature of the escape sentences at any length, they "frequently" discussed Olson's maximum sentencing exposure. Counsel recalled that he and Olson discussed the issue at least twice. Counsel stated that he told Olson that he thought Olson would receive a total sentence of three to five years but that it could be higher.

Olson challenges trial counsel's veracity as to the number of times counsel met him and whether the two discussed the consecutive nature of the escape sentences. Olson points to the fact that counsel thought Olson would be

[2] Section 946.42(4), STATS., provides, "A court shall impose a sentence under this section consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she escaped."

exposed to a maximum three to five-year sentence. But, in concluding that counsel informed Olson that the escape sentences would be consecutive, the trial court found counsel's testimony to be more believable than that of Olson's. The credibility of witnesses and the weight given to their testimony is left within the sound discretion of the trial court and the trial court's findings will only be reversed if clearly erroneous. Section 805.17(2), STATS. The trial court's findings are not clearly erroneous.

Moreover, trial counsel's prediction as to what he believed would be Olson's likely total sentence was not an improbable estimation, but an educated guess. Had the court imposed a two-year term rather than a five-year term for one of the escapes, Olson's total sentence, regardless of its consecutive nature, would have been nearer to counsel's prediction. Counsel's failure to be a better prognosticator does not mean that we should have misgivings about his assertion that he informed Olson about the consecutive nature of the escape sentences.

Olson also argues that the trial court failed to establish a sufficient factual basis to support his guilty pleas. According to Olson, the court only relied upon Olson's affirmation that the facts set forth in criminal complaints were true to establish the factual basis for the plea. Olson claims that there is no indication that the court actually read the complaints and he argues that the court was mistaken as to the facts supporting the pleas. We disagree.

The trial court read from the criminal complaints at the initial appearance and the plea hearing. It listed each charge and described the facts supporting those charges. Olson acknowledged that the facts as alleged in those complaints were true. Based upon our review of the complaints, we are satisfied that they contain sufficient facts to support Olson's pleas.

But Olson contends that one complaint is factually deficient. According to Olson, the complaint alleges that he committed the theft of a firearm on August 1, 1993, but that other information in the complaint states that Olson committed the offense on August 4. From this, he concludes that the trial court could not have determined when he committed the crime.

Olson misunderstands the complaint. The introduction to the criminal complaint provides that Olson committed all of the charged offenses "*on or about* August 1, 1993." (Emphasis added.) As to the theft of a firearm charge, the complaint states that "*on or about* August 4, 1993," Olson committed this offense. (Emphasis added.) These dates were not specific. A four-day difference is trivial. Accordingly, we conclude there is a sufficient factual basis in the record to support the theft plea.

Olson next argues that the trial court did not have sufficient facts to support one of his escape pleas because it is not clear that his placement in his parents' home under the intensive sanctions program is custody within the meaning of § 946.42(3)(a), STATS. Olson, however, has failed to cite any authority for this proposition. Moreover, we note that under § 302.425(6), STATS., a person who intentionally fails to remain within the limits of his or her home detention or to return to his or her place of detention, commits an escape under § 946.42(3)(a). Consequently, we conclude that the allegation in the complaint that Olson escaped from his parents' home, his place of detention under the intensive sanctions program, satisfies his plea to the escape charge.

We conclude that the record reflects that Olson entered his guilty pleas knowingly, understandingly and voluntarily and that the complaints contain sufficient facts from which the trial court could determine that Olson committed the crimes for which he entered a guilty plea. Thus, there is no basis for concluding that any manifest injustice has occurred in this case. The court did not erroneously exercise its discretion when it rejected Olson's request to withdraw his guilty plea.

PLEA AGREEMENT

Olson argues that the prosecutor breached the plea agreement in several respects. First, Olson claims that while the prosecutor moved to dismiss several charges, the trial court did not rule on their dismissal until the postconviction motion hearing. Olson argues that the prosecutor's obligations included ensuring that the court dismiss all of the counts at the plea hearing. Second, Olson argues that the prosecutor breached the plea agreement when she failed to correct references to the dismissed charges in a presentence investigation report (PSI). Third, Olson argues that the prosecutor breached the

plea agreement when she requested restitution on a charge that she had agreed to dismiss. Fourth, Olson argues that the prosecutor breached the plea agreement when she argued that he should receive a maximum sentence based upon a mistaken assertion that both of the two firearms charges involved a theft.

The right to object to an alleged breach of a plea agreement is waived when a defendant fails to object and proceeds to sentencing after he or she knows the basis for the claim of error. ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). Olson and his counsel were present at the plea hearing and sentencing and had the opportunity to make the same arguments he now makes for the first time on appeal. Our review of the record reveals that, with the exception of the argument that the State breached the plea agreement when it failed to secure dismissals from the trial court at the plea hearing, the rest of these issues were never raised before the trial court. Because Olson failed to raise these objections before the trial court before sentencing,[3] we conclude that he has waived his right to review these issues in this court. Additionally, with regard to the dismissed counts, contrary to Olson's assertions, the trial court did dismiss them and did not consider them for sentencing purposes. The court made this clear at the postconviction motion. Accordingly, we reject Olson's argument.

EFFECTIVE ASSISTANCE OF COUNSEL

Lastly, Olson argues that he was denied the effective assistance of trial counsel. We construe Olson's claims as the following: (1) counsel should have corrected references to the dismissed counts in the PSI; (2) counsel should have corrected the trial court's statements at sentencing as to the facts supporting the escape charges; (3) counsel erred in failing to demand that a preliminary hearing be held and an information filed on the escape charges; (4) counsel should have asserted that the prosecutor violated the plea agreement; and (5) counsel's overall representation was inferior.

[3] In his postconviction motion for relief, Olson argued that the prosecutor breached the plea agreement because she recommended a three to five-year sentence. On appeal, Olson has abandoned this alleged breach and raises several others.

To determine whether Olson received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, counsel's performance must be deficient *and* the deficient performance must have prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). These are mixed questions of fact and law. ***Id.*** at 698. We will not reverse a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. If the facts, however, have been established, whether counsel's representation was deficient and, if it was, whether it was prejudicial are questions of law which we review *de novo.* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

We may decide the prejudice prong first. ***Strickland***, 466 U.S. at 697. Whether Olson's trial counsel's deficient performance was prejudicial "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Our review, then, focuses on whether the error causes us to believe that the outcome is unreliable.

First, with respect to counsel's failure to correct the references to the dismissed charges in the PSI, as the State correctly points out, the trial court indicated that it knew that these counts were dismissed and did not consider them when imposing a sentence. Consequently, Olson was not prejudiced by their inclusion in the PSI.

Second, Olson argues that trial counsel should have corrected the trial court's statement indicating that it believed that when Olson escaped from the courthouse on the day of the initial appearance, he was before the court on many felony charges including the escape charge. While it is true that Olson had not yet been charged with the first escape when the initial appearance was held, the court was obviously aware that Olson had already committed the first escape and that his felony charges stemmed from that escape. Olson was eventually charged with two escapes. The fact that he had not yet been charged with the first escape is irrelevant when he committed it before appearing in court on that day.

Third, with respect to Olson's arguments as to the lack of a preliminary hearing or the State's failure to file an information, § 971.31(2), STATS., provides that defects in the institution of the proceedings, insufficiency of the complaint, information or indictment shall be raised before trial by motion or are deemed waived. Olson never raised these issues before the trial court at any of the hearings or by motion. He has waived these arguments on appeal.

Fourth, Olson argues that counsel's failure to object to the prosecutor's violation of the plea agreement prejudiced him and that he should be relieved of any finding of waiver. But our finding of waiver rests upon trial counsel and appellate counsel's failure to preserve these issues before the trial court either before the plea was entered or during the postconviction motion hearing. We will not address them for the first time on appeal. The only breach raised in the trial court relates to the references to the dismissed counts in the PSI. As we stated above, the court did not consider them for sentencing purposes and therefore, their inclusion in the PSI did not prejudice Olson.

Fifth, Olson asserts that counsel's representation was generally inadequate. However, we fail again to see how counsel's representation prejudiced him. Olson was charged with thirteen crimes and faced about ninety years in prison. Counsel negotiated with the prosecutor who agreed to dismiss eight charges and several repeater allegations, leaving Olson with about a twenty-year exposure. The trial court eventually sentenced Olson to eight years. Absent an affirmative showing of prejudice, we must reject Olson's ineffective assistance of counsel claim.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.