COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

NOTICE

No. 95-1985

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL L. GARRITY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Dykman, Sundby and Vergeront, JJ.

PER CURIAM. Daniel L. Garrity appeals from a judgment of conviction for conspiring to deliver cocaine in violation of §§ 161.16(2)(b), 161.41(1)(c)4, 161.41(1x), and 939.31, STATS., 1991-92, and from an order denying his postconviction motion for withdrawal of his guilty plea. He contends that he did not have an adequate understanding of the plea negotiations and that he received ineffective assistance of counsel. We reject each contention and affirm.

Garrity was charged with conspiracy to deliver cocaine, in violation of §§ 161.16(2)(b), 161.41 (1)(c)4, 161.41(1x) and 939.31, STATS., 1991-92.[1] He entered a guilty plea to the charges. The State recommended fifteen years, the maximum sentence available, and the trial court sentenced Garrity to fifteen years. Garrity later moved to withdraw his guilty plea on the ground that he believed he had entered into a plea agreement whereby the State would recommend a ten-year sentence.[2] Both Garrity and trial counsel testified at the hearing on Garrity's motion. Their testimony was sharply conflicting.

At the hearing on Garrity's motion, trial counsel testified that she conveyed the State's final plea offer to Garrity via telephone the day before his plea hearing, and that they discussed the offer again, in person, just before the plea hearing. The offer provided that Garrity would testify against his co-defendants, in exchange for a sentencing recommendation of seven years if he agreed not to dispute the sentence, or ten years if he wanted to argue for less time. Garrity did not think that the State's sentencing recommendation was favorable enough to induce him to testify against his co-defendants. Trial counsel advised him that she estimated that his actual sentence would probably be "about ten years," but she also advised him not to enter a guilty plea without some type of plea agreement from the State, and that he could be sentenced to the maximum penalty. Trial counsel did not ask the district attorney what his recommendation would be in the event that Garrity did not accept the plea agreement. Immediately before the plea hearing, trial counsel reviewed the guilty plea questionnaire with Garrity. She specifically recalled indicating that there was no plea agreement. At the plea hearing, she told the court that she had reviewed the guilty plea questionnaire with Garrity, and that he understood it and had no questions.

Garrity testified that he would not have pleaded guilty had he known the district attorney would recommend the fifteen year sentence. His understanding of the State's offer was that the district attorney would recommend seven years if he pleaded guilty and testified against his co-defendants, and ten years if he pleaded guilty but refused to testify. When he

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[1] The complaint alleged a repeater provision, which was not applicable. The information correctly eliminated this allegation.

[2] Garrity also moved to modify his sentence. The trial court denied that motion. Garrity has not appealed from that order.

entered the guilty plea, he thought he had an agreement with the State whereby it would recommend ten years. Garrity acknowledged that he initialed the statement on the guilty plea questionnaire indicating he did not have a plea agreement, and told the court at the plea hearing that he did not have a plea agreement. However, he testified at the postconviction hearing that he did so at the advice of counsel.

The trial court found that Garrity executed his plea with a full understanding that he did not have a plea agreement, and denied Garrity's motion to withdraw his plea.

Garrity argues that he thought he had entered into a plea agreement under which he would receive a sentence recommendation of ten years from the State, in exchange for his plea of guilty; and that his trial counsel was ineffective because she did not ask the district attorney what his recommendation would be absent a plea agreement.[3]

When a defendant wishes to withdraw a plea after sentencing, he or she must show a manifest injustice by clear and convincing evidence. ***State v. Nawrocke***, 193 Wis.2d 373, 379, 534 N.W.2d 624, 626 (Ct. App. 1995). A defendant may withdraw his plea if he shows by clear and convincing evidence that there was a genuine misunderstanding about a plea agreement. ***Id.*** at 379, 534 N.W.2d at 626. *See also* ***State v. Schill***, 93 Wis.2d 361, 286 N.W.2d 836 (1980). Whether to permit withdrawal is committed to the trial court's discretion. ***Nawrocke***, 193 Wis.2d at 381, 534 N.W.2d at 627. "We will affirm the trial court's exercise of discretion if the record shows that the court correctly applied the legal standards to the facts and reached a reasoned conclusion." ***Id***. We do not overturn findings of fact made by the trial court unless they are clearly erroneous. ***State v. Owens***, 148 Wis.2d 922, 929-30, 436 N.W.2d 869, 872 (1989).

We address first Garrity's claim that he did not have an adequate understanding of the plea negotiations and thought he was entering a guilty

[3] It appears that Garrity is arguing that this omission constituted deficient performance because he did not know what the ramifications of pleading guilty absent an agreement would be. This is inconsistent with his claim that he thought he had reached a plea agreement.

plea pursuant to a plea agreement. Because the testimony of Garrity and of trial counsel was flatly inconsistent, the trial court had to make a credibility determination. It chose to believe the testimony of counsel, rather than Garrity, and determined that Garrity understood and rejected the State's offer. It is the role of the trial court, not this court, to resolve questions of credibility. ***Owens***, 148 Wis.2d at 930, 436 N.W.2d at 872-73. The trial court's findings are not clearly erroneous and are supported by the record.

Garrity also argues that his counsel was ineffective because she failed to ask the district attorney what his sentencing recommendation would be absent a plea agreement. Garrity maintains that he would have gone to trial rather than risk a fifteen-year sentence. "When the competency of trial counsel is questioned, it is incumbent upon one who seeks to show that incompetency to give notice to trial counsel that [her] handling of a criminal matter is being questioned on post-trial or post-conviction proceedings." ***State v. Machner***, 92 Wis.2d 797, 803, 285 N.W.2d 905, 908 (Ct. App. 1979). Garrity did not raise ineffective assistance of counsel in his postconviction motion. However, he contends that the hearing on his motion to modify his sentence and withdrawal of his guilty plea is adequate to satisfy the requirement of ***Machner***. We do not agree.

At the beginning of the postconviction hearing, Garrity's counsel stated that the hearing was not an ineffective assistance of counsel proceeding, but rather a hearing to consider Garrity's withdrawal of his plea. Accordingly, the trial court did not make findings as to deficient performance or prejudice--the basis for a claim of ineffective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There may also be additional testimony pertinent to the ineffective assistance claim that was not presented. Garrity argues that he did not know that he had a claim for ineffective assistance until his trial counsel testified at the postconviction hearing that she did not ask the district attorney what his sentencing recommendation would be in the absence of any plea agreement. Garrity does not explain why, at that time, he did not ask the court to proceed with a ***Machner*** hearing either then or at a later date. The absence of a ***Machner*** hearing precludes our review of the ineffective assistance of counsel claim.

By the Court.—Judgment and order affirmed.

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