COURT OF APPEALS
DECISION
DATED AND RELEASED

October 29, 1996

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. 95-2856-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Bryan Lee Hudson,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Bryan Lee Hudson appeals from a judgment of conviction entered upon his ***Alford*** plea[1] to one count of felony murder, contrary to §§ 943.32(1)(a)(2) and 940.03, STATS. He also appeals from an order denying his postconviction motions. Hudson claims that: (1) he should be allowed to withdraw his plea because it violates public policy; (2) the trial court

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

erroneously exercised its discretion in accepting the plea; (3) he received ineffective assistance of trial counsel; (4) the trial court erroneously exercised its sentencing discretion; and (5) we should exercise our discretionary reversal power pursuant to § 752.35, STATS., to reverse his conviction.

Because the plea was not violative of public policy; because the trial court did not erroneously exercise its discretion in accepting the plea; because he received effective assistance of trial counsel; because the trial court did not erroneously exercise its sentencing discretion; and because we decline to exercise our discretionary reversal authority, we affirm.

I. BACKGROUND

Hudson was charged with felony murder in the shooting death of Michael Wolter. The basis for the charge relied on three pieces of evidence: (1) he was identified in a line-up; (2) a phone call from his home was placed to the victim's home prior to the shooting; and (3) he confessed to the police.

Hudson filed a motion to suppress the confession, claiming that the police beat him with a phone book to coerce him into confessing. The trial court found that the confession was not coerced and, therefore, denied the motion to suppress.[2]

After the suppression hearing, the State filed an amended information changing the charge to first-degree intentional homicide. A plea agreement was reached that would allow Hudson to enter an ***Alford*** plea to the original charge of felony murder. As a part of the agreement, Hudson agreed to retract his earlier claims that the confession was coerced.

The plea was entered. The trial court accepted the plea[3] and Hudson was sentenced to forty years in prison. Hudson filed postconviction

[2] The Honorable John A. Franke presided over the suppression hearing.

[3] The Honorable Jeffrey A. Wagner presided over the plea hearing.

motions seeking to withdraw his plea and alleging ineffective assistance of trial counsel. The trial court denied these motions. Hudson now appeals.

II. DISCUSSION

A. Public Policy.

Hudson claims that public policy should bar the use of ***Alford*** pleas under circumstances where the defendant claims his confession was coerced, at least absent a searching inquiry by the court. We reject Hudson's public policy argument for two reasons: (1) ***Alford*** pleas are legally allowed, *see* ***State v. Garcia***, 192 Wis.2d 845, 532 N.W.2d 111 (1995), and Hudson fails to present any authority to support his general assertion that they violate public policy; and (2) this case does not present a situation involving a coerced confession.

The trial court specifically found both that Hudson's claim that he was coerced into confessing was not credible and that Hudson confessed voluntarily and of his own free will. There is nothing in the record to convince us that the trial court's findings in this regard are clearly erroneous. *See* § 805.17(2), STATS. We review this case, therefore, on the premise that Hudson's confession was not coerced.

Hudson also suggests that the trial court should engage in a "very searching inquiry" before accepting an ***Alford*** plea where there is a claim of coerced confession. Hudson, again, however, fails to cite any authority which requires the trial court to do as he suggests.[4] *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992). Inasmuch as the trial court did

[4] Hudson also suggests that his plea was coerced in part by the trial court's conduct. The record belies such a claim. The decision whether to plead and what type of plea to enter was Hudson's. The prosecutor and the trial court were prepared to try the case. Hudson chose to forgo a trial on the charge of first-degree intentional homicide and plead to the lesser charge of felony murder. He chose to do so because of the strength of the evidence against him and not because of any coercive conduct by the trial court.

make a finding that the confession was voluntary and the product of his free will, nothing else is required.

B. Trial Court's Acceptance of Plea.

Hudson next claims that the trial court erred in accepting his plea.[5] Hudson claims the trial court erred because it did not engage in sufficient inquiry under the facts of this case before accepting the plea and because it failed to find "strong proof of guilt."

A trial court's decision to accept a plea is a discretionary determination that we will not disturb unless there has been an erroneous exercise of discretion. ***Garcia***, 192 Wis.2d at 856, 532 N.W.2d at 115-16. A trial court may, in its discretion, accept a plea where there is strong proof of guilt. ***Id.*** The record in the instant case satisfies this standard.

The trial court relied on the criminal complaint and the representations of counsel in concluding that a sufficient factual basis existed to accept Hudson's plea. Counsel noted three items of evidence showing a sufficient factual basis: an eyewitness identification; the phone call; and the confession. The confession alone clearly provides a "strong proof of Hudson's guilt." Although the trial court did not use these specific words, it did make a finding based on this evidence that a sufficient factual basis existed to accept the plea. Because the evidence that the trial court relied on demonstrates a "strong proof of guilt," the trial court's failure to use the magic words was not fatal. *See* ***State v. Spears***, 147 Wis.2d 429, 435, 433 N.W.2d 595, 602 (Ct. App. 1988); ***State v. Johnson***, 105 Wis.2d 657, 664, 314 N.W.2d 897, 900-901 (Ct. App. 1981).

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[5] As collateral issues, Hudson argues that the trial court's failure to further explore his claim of coercion in light of his "wavering" retraction was error. Given the trial court's finding that the confession was voluntary, we see no merit to Hudson's claim.

Hudson also asserts that he should have been informed that entering an ***Alford*** plea would prevent him from challenging the suppression ruling on appeal. We do not agree. The trial court is required to inform a defendant only of the direct consequences of the plea. ***State v. James***, 176 Wis.2d 230, 238, 500 N.W.2d 345, 348 (Ct. App. 1993).

C. Ineffective Assistance.

Hudson next claims that he received ineffective assistance of trial counsel. Specifically, he argues that his counsel was ineffective for: (1) not calling an alibi witness to testify at the suppression hearing; and (2) not calling himself (trial counsel) to testify at the suppression hearing. The trial court rejected Hudson's ineffective assistance claim without holding an evidentiary hearing. We reject his claim as well.

Hudson has a Sixth Amendment right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to prove that he has not received effective assistance, Hudson must show two things: (1) that his lawyer's performance was deficient; and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.*** at 687. A lawyer's performance is not deficient unless he committed errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. ***Id.*** In order to show that counsel's performance was prejudicial, Hudson must prove that the errors committed by counsel were so serious that they deprived Hudson of a fair proceeding, whose result is reliable. *See* ***id.*** In other words, in order to prove prejudice, Hudson must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

In assessing Hudson's claim that his counsel was ineffective, we need not address both the deficient-performance and prejudice components if Hudson cannot make a sufficient showing on one. *See* ***id.*** at 697. The issues of performance and prejudice present mixed questions of fact and law. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Findings of historical fact will not be upset unless they are clearly erroneous. ***Id.*** Further, the questions of whether counsel's performance was deficient, and, if so, whether it was prejudicial are legal issues we review *de novo*. ***Id.***

Hudson argues that his counsel should have called an alibi witness who would have testified at the suppression hearing that he saw Hudson between 8 and 9 p.m. the night of the murder. Even if this failure constituted deficient performance, it was not prejudicial. The police were not

dispatched to the shooting until 8 p.m., which means that the shooting had already occurred before that time. Accordingly, a witness who testifies that he saw Hudson between eight and nine is really not an alibi witness at all because this time period was not the time at which the crime was committed. Accordingly, this witness's testimony would not have changed the result of the proceeding.

Hudson also argues that his counsel should have testified at the suppression hearing regarding the efforts made to locate Hudson after he was arrested. Counsel stated that about three days before Hudson was charged, counsel had attempted to locate Hudson for several days and that when he did locate Hudson, Hudson said that his repeated requests for an attorney had been ignored. This testimony would apparently show that the police refused to provide Hudson with an attorney so they could coerce him into confessing.

The record, however, does not support Hudson's claim that this failure prejudiced him. According to the record, Hudson was charged on April 19, 1994, which means that counsel started looking for Hudson on April 16 (three days prior to the charging date), which was two days after Hudson had already confessed. Based on these dates, counsel's testimony would have been irrelevant and, therefore, was not prejudicial.

D. Sentencing.

Hudson next claims that the trial court erroneously exercised its sentencing discretion. His argument, although somewhat muddled, appears to suggest that the trial court rushed through the sentencing without providing an adequate explanation for imposing the maximum sentence, and that the trial court treated Hudson harshly because he insisted on maintaining that he was innocent.

Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). There is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court

acted reasonably. ***State v. Thompson***, 146 Wis.2d 554, 565, 431 N.W.2d 716, 720 (Ct. App. 1988).

The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***Harris***, 119 Wis.2d at 623-24, 350 N.W.2d at 639. The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763-64 (Ct. App. 1989).

We have reviewed the sentencing transcript. The trial court properly considered the three primary factors and, although the sentencing was somewhat abbreviated, we cannot say that the length of the sentencing constitutes an erroneous exercise of discretion.

Moreover, the record belies Hudson's assertion that he was punished for maintaining his innocence. Although the prosecutor raised this issue, there is no indication in the transcript that the trial court relied on the prosecutor's comments when it imposed sentence. Further lack of remorse can properly be considered as a factor in a sentencing decision. ***State v. Wickstrom***, 118 Wis.2d 339, 355-56, 348 N.W.2d 183, 191-92 (Ct. App. 1984).

E. Discretionary Reversal.

Finally, Hudson claims this case should be reversed under § 752.35, STATS. He argues that the record demonstrates that the proceedings below were patently unjust and that the prosecutor was overreaching by requiring Hudson to retract his coercion claim.

We reject this argument. Based on our resolution of the individual issues raised, Hudson has failed to demonstrate that the proceedings below were unjust. Moreover, the prosecutor's actions regarding Hudson's retraction are irrelevant for our purposes because the trial court specifically found that Hudson's confession was not coerced.

By the Court.—Judgment and order affirmed.

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