COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2292-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH FOWLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: LAURENCE C. GRAM and VICTOR MANIAN, Judges.[1] *Affirmed.*

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

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[1] The Honorable Laurence C. Gram presided over the plea hearing, entered the judgment of conviction and denied the first postconviction hearing. The Honorable Elsa C. Lamelas presided over the second postconviction motion hearing, and the Honorable Victor Manian signed the order denying the motion for postconviction relief.

¶1 PER CURIAM. Kenneth Fowler appeals, following his ***Alford*** pleas,[2] from a judgment convicting him of burglary and kidnapping. He also appeals from the circuit court order denying his motion for postconviction relief. He argues that the trial court erred in denying his motion to withdraw his pleas, that trial counsel was ineffective, and that his sentence should be reduced. We affirm.

I. BACKGROUND

¶2 In October 1997, Fowler sexually assaulted his sixteen-year-old relative in her home. According to the victim, Fowler held a knife to her neck and forced her to submit to sexual intercourse. After plea negotiations, Fowler entered ***Alford*** pleas to burglary and kidnapping. On the day of sentencing, Fowler filed a *pro se* motion to withdraw his pleas due to his mental disability. After a competency hearing, the trial court determined Fowler was competent and sentenced him to forty years on each crime, to run consecutively.

¶3 Fowler filed a postconviction motion seeking to set aside his ***Alford*** pleas, claiming that they were involuntary, and seeking sentence modification. His motion was denied. Fowler then filed an addendum to his motion with affidavits stating that another prisoner had written some of his previous *pro se* motions, thus supporting his claim that he was illiterate. The trial court held an evidentiary hearing at which trial counsel and Fowler testified. At the conclusion of the hearing, the court denied Fowler's requests.

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

II. ANALYSIS

¶4 Fowler first argues that the trial court erred in failing to permit him to withdraw his pleas. We disagree.

¶5 A post-sentencing motion for plea withdrawal is addressed to the discretion of the trial court, and we will not upset the trial court's decision absent an erroneous exercise of discretion. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). After sentencing, a defendant may withdraw a guilty plea in order to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A plea is manifestly unjust if it is not knowingly, intelligently or voluntary entered. ***Hatcher v. State***, 83 Wis. 2d 559, 564, 266 N.W.2d 320 (1978). A defendant has the heavy burden of showing, by clear and convincing evidence, that the withdrawal is necessary. ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). First, the defendant must make a prima facie showing that his or her constitutional rights were denied. ***State v. Van Camp***, 213 Wis. 2d 131, 141, 569 N.W.2d 577 (1997). Second, the defendant must allege lack of knowledge of the constitutional or statutory rights. ***Id.*** If the defendant satisfies these criteria, the burden shifts to the State to show by clear and convincing evidence that the plea complied with the statutory and constitutional guidelines. ***Id.***

¶6 Fowler offers extensive arguments in support of his plea withdrawal request. Ultimately, however, they reduce to an assertion that the court failed to inform him that, by pleading, he was giving up his right to jury unanimity. His pleas, however, were tendered, in part, through a guilty plea questionnaire that included the statement of that right. The questionnaire, together with Fowler's admission that he had reviewed it with his attorney, and together with the

attorney's postconviction testimony that, as a matter of course, he always read the questionnaire rights to his clients, were sufficient to establish his understanding of that right. *See* ***State v. Brandt***, 226 Wis. 2d 610, 621-22, 594 N.W.2d 759 (1999) (if plea colloquy coupled with guilty plea questionnaire adequately demonstrates compliance with WIS. STAT. § 971.08, defendant cannot make a prima facie showing that the trial court violated § 971.08).

¶7 Fowler also argues for plea withdrawal based on alleged prosecutorial vindictiveness. Fowler first was charged with burglary and first-degree sexual assault. After much negotiation, he decided not to plead guilty. Then, on the day set for trial, the State filed an amended information adding charges of second-degree sexual assault and kidnapping, thus doubling Fowler's potential penalty. Fowler then decided to enter ***Alford*** pleas to burglary and kidnapping, and the other charges were not pursued.

¶8 On appeal, Fowler argues that the prosecutor had no basis for increasing the charges. He alleges that the prosecutor did not want to go to trial and, therefore, wrongly increased the charges to coerce him into pleading guilty to the lesser charges. Neither the law nor the record supports his argument. First, Fowler has waived this argument because, by entering an ***Alford*** plea, he waived all nonjurisdicational defects, including alleged violations of his constitutional rights occurring during his plea. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Second, on the merits, Fowler's argument fails.

¶9 A prosecutor is vested with great discretion in determining whether to prosecute. ***Thompson v. State***, 61 Wis. 2d 325, 328-29, 212 N.W.2d 109 (1973). It is an abuse of that discretion, however, "to charge when the evidence is clearly insufficient to support a conviction," or "to bring charges on counts of

doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ***Id.*** at 330. In this case, however, the record does not substantiate Fowler's allegation that the State increased the charges in order to coerce him into pleading guilty.

¶10 Fowler argues that "there is no plausible motivation for addition of charges on the eve of trial except to punish the defendant for insisting upon his protected right to trial." The State correctly responds, however, that in the pretrial context, the addition of charges does not establish the presumption of prosecutorial vindictiveness that otherwise might exist. Absent that presumption, Fowler has the burden to prove that the addition of charges was actually motivated by the prosecutor's desire to retaliate against him "for doing something that the law plainly allowed him to do." Further, under ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846, to establish actual vindictiveness, "there must be objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights." ***Id.***, 2000 WI 12 at ¶47 (citation omitted). Fowler can do neither.

¶11 In the instant case, the trial court found that there was no evidence of prosecutorial vindictiveness. The court commented that "the State set forth specific reasons for adding additional charges if the defendant was not inclined to resolve the case short of trial, the main reason being to spare the sixteen-year-old victim from testifying." Thus the trial court implicitly concluded that the prosecutor had sufficient evidence to support the charges and, further, that the prosecutor's conduct was not vindictively motivated. Consequently, Fowler's claim fails.

¶12 Fowler next argues that counsel was ineffective for: 1) failing to bring his illiteracy to the trial court's attention; and 2) failing to clarify that what appeared as two sexual assault convictions, from 1984 and 1989, in the presentence report, was actually a single conviction. We need not determine whether counsel's performance was deficient, however, because Fowler cannot establish that prejudice resulted from either alleged failure.

¶13 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶14 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687.

¶15 Fowler claims that counsel was ineffective for failing to apprise the court of his illiteracy. Although he claims that trial counsel's failure to inform the court that he was illiterate prejudiced him because it led the court to find that Fowler was "totally without credibility," the record refutes his premise.

¶16 At the conclusion of the first hearing on Fowler's motion to withdraw his pleas, the court commented that Fowler was completely lacking in credibility. While Fowler suggests that the court's comment was based, in part, on a misunderstanding of whether he was literate, it is clear that numerous other factors led to the court's conclusion. The court heard Fowler testify that he did not remember discussing any plea agreement with his attorney, and that he did not remember discussing the State dropping the sexual assault charges. He also testified that he thought the penalty for kidnapping and burglary was "going home." When asked whether he had been to prison, he claimed, despite his extensive criminal record, that he was not familiar with the term "prison" and had only been to "camp."

¶17 After hearing this testimony and commenting that Fowler was totally without credibility, the court added:

> [Fowler's] made a number of statements as to his understanding at the time of the taking of the plea. This Court relies both on the contents of the file and also the hearing that took place at the time of the taking of the plea at which time [he] acknowledged having gone over the plea questionnaire with his attorney. He acknowledged understanding it. He acknowledged signing it on both sides of the sheet of paper ….

Consequently, the court found that Fowler's claims were incredible.

¶18 The trial court's findings are not clearly erroneous. The record establishes that Fowler was competent and understood the plea proceeding.

Dr. Kenneth Smail testified at the competency hearing and stated that literacy, per se, did not reflect a person's competency. The judges who presided over the plea hearing, the competency hearing and the postconviction motions also determined that Fowler had street smarts, and was shrewd and manipulative. In light of these findings, Fowler cannot claim that disclosing his illiteracy would have resulted in his not entering his ***Alford*** pleas and insisting on going to trial. Accordingly, we cannot conclude that counsel's alleged error of failing to inform the court that Fowler was illiterate affected Fowler's decision to enter his pleas.

¶19 Fowler also claims that counsel was ineffective for not correcting an alleged error in the presentence report's summary of his criminal record. Once again, however, Fowler was not prejudiced by counsel's alleged failure.

¶20 In order to establish prejudice, a defendant must show that "counsel's constitutionally ineffective performance affected the outcome of the plea process." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Here, Fowler can make no such showing. An error in a presentence report cannot affect a defendant's decision to enter a plea because the error would not even be known until after the defendant entered the plea. Because Fowler specifically links his claim of ineffective assistance of counsel to the voluntariness of his pleas, he cannot claim that counsel's alleged error, made during a post-plea examination of the presentence report, affected the previously entered pleas. Simply put, Fowler cannot claim that he placed any reliance on the presentence information in reaching his decision to enter his pleas. Consequently, his ineffective assistance of counsel claim fails.

¶21 Finally, Fowler claims that the trial court relied on inaccurate information at sentencing. Again, he states that the trial court relied on: (1) an

assumption that he was literate, and (2) information about a second-degree sexual assault, which he claims did not occur.

¶22 For a defendant to succeed on a claim that inaccurate information at sentencing resulted in a violation of his or her due process rights, the defendant must show both that the information was inaccurate and that the court actually relied on that information in sentencing him or her. *See* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). Here, Fowler has not established either.

¶23 First, the trial court did not refer to Fowler's literacy status in determining his sentence. Second, whether the 1984 and 1989 sexual assault entries were considered as one conviction or two was insignificant in light of the fact that, excluding those entries, Fowler had fourteen adult convictions and seven juvenile contacts. The court considered his overall record without any specific reference to the sexual assaults. Thus, neither this factor, nor any misunderstanding about his literacy, affected the sentence such that modification would be warranted.

By the Court.—Judgment and orders affirmed.

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