COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2004-CR **Cir. Ct. No. 00-CM-63**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN P. SULLIVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: JOHN A. DAMON, Judge. *Reversed and cause remanded with directions*.

¶1 VERGERONT, P.J.[1] Brian Sullivan appeals the judgment of conviction for resisting an officer as a repeater, which was entered based on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Sullivan's plea, and the order denying his postconviction motion to withdraw his plea or be resentenced. The motion was denied under WIS. STAT. RULE 809.30(2)(i) because the court had not decided it within sixty days. Sullivan contends he is entitled to an evidentiary hearing on his motion and he asks that we remand to the trial court for that purpose. We conclude Sullivan is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to object to the prosecutor's reference to two other cases on the ground that it was a breach of the plea agreement, but he is not entitled to an evidentiary hearing on his claim that trial counsel coerced him into entering a guilty plea. We therefore reverse and remand for an evidentiary hearing on the former issue.

BACKGROUND

¶2 The incident giving rise to the charges occurred when Sullivan was incarcerated at Jackson Correctional Institution. The complaint alleged that an officer was performing a strip search on Sullivan because of information that he had marijuana on his person, when Sullivan bolted into the bathroom and tried to flush the marijuana down the toilet. When the officer tried to stop Sullivan, Sullivan struck the officer in the chest with his elbow.

¶3 Sullivan, represented by counsel, negotiated a plea agreement with the State. At the plea and sentencing hearing, the prosecutor stated that Sullivan had agreed to plead guilty to the charge of obstructing an officer as a repeater and the State had agreed that it would "not recommend any specific sentence, but [would] leave it within the discretion of the Court." Sullivan had completed a plea questionnaire, which he and his attorney had each signed. The section entitled "Voluntary Plea" stated:

> I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows:

and in the blank following was written: "None—ADA will not recommend a specific sentence." In response to the court's questions, Sullivan stated that he had gone though the questionnaire with his attorney, he understood everything on the form, and he was satisfied with how his attorney had helped him in the matter. The court then explained the elements of the crime, the rights he was giving up, the repeater enhancer and the maximum penalty (three years imprisonment or a $10,000 fine or both), and Sullivan responded to each question that he understood what the court had explained and still wished to enter his plea. After the court accepted the plea, the prosecutor stated:

> The state doesn't have a specific recommendation on any specific time, Your Honor. I would advise the Court that two similar cases from the institution both of which involved—one involved a broken bone caused by the resisting indirectly and another was along with a battery, those individuals received 15 and 18 months consecutive time.

¶4 The court then asked Sullivan's attorney for his comments. Counsel asked the court to consider probation or thirty days or less in jail. He argued that Sullivan had already been punished in the institution by being placed in maximum confinement for a year and losing five to six months on his mandatory release date; his behavior in the institution had been good before and since this incident; he had no prior criminal history except the robbery offense for which he had been incarcerated, which occurred when he was seventeen; and he had had a difficult childhood. Counsel pointed out that Sullivan's conduct did not result in an injury to the officer, in contrast to the incident referred to by the prosecutor:

> I think that this was completely different than the one where someone resisted to the level that someone actually breaks a leg, and that's the one that involves the intentional battery and actual striking of the officer.

Sullivan then spoke. He stated that he had resisted the officer instead of cooperating with the search and he apologized.

¶5 The court acknowledged Sullivan's difficult childhood, receipt of a GED while in prison, and the offense for which he was imprisoned. The court then stated:

> This was a crime against a person and it's – I consider it almost an aggravated situation because you were in a situation where you're in prison, and you aren't supposed to do that. If you can't control people in the prison system, where can you control them, and it's a very dangerous situation, and it sounds like the resisting here served it's purpose because the contraband, you were able to flush it down the toilet. [Defense counsel] kind of ignored the fact that there was some penalty that you would have had for the marijuana.
>
> [DEFENSE COUNSEL]: He said it was money. They are not allowed to have cash.
>
> THE COURT: No one knows what it was, and they never will because it was disposed of during the resisting. He committed one crime to protect himself from another one. That's not – we can't have people in prison doing resisting or else there's no control at all, and so to protect the public, I will have to order additional prison time. Fortunately, no one was hurt or that might have gone to the gravity of the offense.

The court sentenced Sullivan to twelve months in the prison system consecutive to the time he was serving.

¶6 Sullivan filed a postconviction motion asking that he be allowed to withdraw his plea, or in the alternative, be resentenced by a different judge. The motion, signed by his postconviction attorney, alleged that the prosecutor's

comments on the other two offenses were a breach of the plea agreement because it was Sullivan's understanding that the prosecutor was to remain silent regarding sentencing; when the prosecutor made this comment, Sullivan alerted his attorney, but his attorney ignored him and failed to object, therefore providing ineffective assistance of counsel. In addition, Sullivan alleged that his plea was not entered voluntarily and his attorney coerced him into pleading in these ways: (1) stating that if Sullivan accepted the plea agreement, counsel would return to Sullivan's mother the additional $1,500 retainer she paid for a jury trial, but counsel never returned that money; (2) canceling the jury trial even though Sullivan informed counsel he was not sure of his decision; (3) telling Sullivan that the judge would be upset when Sullivan told counsel, on the day scheduled for a plea and sentencing, that he (Sullivan) was considering requesting a jury trial on that day; and (4) "continually coerc[ing] [Sullivan] into entering into a plea agreement" despite Sullivan's request for a jury trial.[2]

¶7 The trial court did not rule on the merits of the motion but, after more than sixty days had passed, the court denied it under WIS. STAT. RULE 809.30(2)(i). This statute provides that a court shall determine a defendant's postconviction motion within sixty days of filing or the motion is considered denied, and the clerk of court shall immediately enter an order denying the motion.

[2] The motion also alleged that trial counsel failed to properly investigate and analyze the facts and law and discuss with Sullivan a potential defense, but Sullivan does not pursue that issue on appeal.

DISCUSSION

¶8 When a trial court denies a motion under WIS. STAT. RULE 809.30(2)(i), we review the record to determine whether the defendant is entitled to any relief. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 516, 415 N.W.2d 759 (Ct. App. 1989). In this case we must analyze whether Sullivan's motion alleges facts that, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). This presents a question of law, which we review de novo. ***Id.*** at 310. If the motion meets this standard, we must remand for an evidentiary hearing. ***Id.*** In analyzing the motion, we bear in mind that the defendant may not rely on conclusory allegations but must support them with objective factual assertions that allow the reviewing court to meaningfully assess his or her claim. ***Id.*** at 313-14.

¶9 Sullivan first contends that he is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to object when the prosecutor breached the plea agreement, under which, he contends, the State agreed it would not recommend any specific sentence. The breach occurred, Sullivan contends, when the prosecutor referred to two other resisting cases and the sentences in each. According to Sullivan, the prosecutor was effectively recommending a sentence of between fifteen and eighteen months. In order to prove ineffective assistance of counsel, Sullivan must prove both that counsel was deficient and that counsel's deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 The State responds that to preserve the right to review a prosecutor's alleged breach of a plea agreement at sentencing, the defendant must have made a contemporaneous objection, citing ***State v. Merryfield***, 229 Wis. 2d 52, 64-66, 598

N.W.2d 251 (Ct. App. 1999), and other cases. That is true but it does not respond to the argument that Sullivan's counsel was ineffective for failing to object. ***State v. Howard***, 2001 WI App 137, ¶21, 246 Wis. 2d 475, 630 N.W.2d 244.

¶11 The State also argues that Sullivan's counsel was aware the prosecutor was going to inform the court of the other two resisting cases so that the defendant did not get a sentence similar to theirs or a harsher sentence. However, this is simply an assertion in a brief; because there was no evidentiary hearing on Sullivan's motion, there is no evidence of this in the record before us.

¶12 Analyzing Sullivan's motion under the standard set forth in ***Bentley***, we conclude the motion is sufficient to entitle Sullivan to an evidentiary hearing on whether his trial counsel was ineffective for failing to object to an alleged breach of the plea agreement. On this point, the motion contains specific allegations that it was Sullivan's understanding that the prosecutor would remain silent regarding a sentence, and when the prosecutor mentioned the statements on the other two cases, Sullivan alerted his attorney, but his attorney ignored his concern. The prosecutor's report of the plea agreement to the court—that the State "would not recommend a specific sentence"—is consistent with Sullivan's understanding that the State agreed to be silent with regard to sentencing. If Sullivan's understanding accurately reflects the agreement, the prosecutor's comments on the other two cases could reasonably—although not necessarily—be viewed as a breach of the plea agreement. We recognize that the breach of a plea agreement must be material and substantial rather than merely technical. ***Howard***, 2001 WI App 137 at ¶15. However, without any evidentiary hearing we are unable to conclude as a matter of law that the breach Sullivan asserts here is not material and substantial. If the prosecution did materially and substantially breach the plea agreement, defense counsel's failure to object would be deficient

performance if there were no strategic reason for not objecting. ***Id.*** at ¶28. Whether there was a strategic reason cannot be decided without a ***Machner*** hearing. ***Howard***, 2001 WI App 137 at ¶29. If Sullivan succeeds in establishing deficient performance in failing to object to a substantial and material breach of the plea agreement, then prejudice is presumed. ***Id.*** at ¶26.

¶13 We reach a different conclusion, however, with respect to Sullivan's contention that his plea was not voluntary because his counsel coerced him into pleading guilty. Taking all the allegations in his motion as true, we conclude he is not entitled to withdraw his plea, and, hence, he is not entitled to an evidentiary hearing to prove those allegations. The fourth allegation—that "despite defendant's requests throughout his case for a jury trial, trial counsel continually coerced defendant into entering into a plea agreement"—is conclusory and we therefore disregard it. The allegation concerning the $1,500 retainer that defense counsel allegedly said he would return if Sullivan entered into a plea agreement does not, in itself, give rise to a reasonable inference that Sullivan would have gone to trial had his counsel not said he would return the money; and there are no other details that would make that a reasonable inference. The alleged failure of trial counsel to keep his word with regard to the retainer may mean Sullivan's mother is entitled to a refund, but it does not bear on Sullivan's right to withdraw his plea. The allegation that trial counsel canceled the jury trial even though Sullivan informed his counsel he was not sure of his decision is inadequate, because there are no facts asserted to explain why Sullivan could not have again requested a trial after that cancellation if that is what he wanted. Finally, trial counsel's comment that the court would be upset if Sullivan changed his mind is not by itself coercive. There is nothing to indicate that counsel's prediction of the court's reaction is inaccurate and nothing to explain why Sullivan could not, in

spite of counsel's statement, request a jury trial at that time if that were what he wanted.

¶14 In summary, we reverse the trial court's order denying Sullivan's postconviction motion and remand for an evidentiary hearing limited to the issue of whether trial counsel was ineffective for failing to object to the prosecutor's reference to two other resisting cases on the ground that it was a breach of the plea agreement.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.