COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0276-CR
03-0277-CR

Cir. Ct. Nos. 00-CF-235
00-CF-363

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT M. STERR,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Scott M. Sterr appeals from judgments convicting him of battery committed during a burglary, second-degree sexual assault, and bail jumping and from an order denying his postconviction motion to withdraw his plea. Sterr contends that the use of a computer voice stress analyzer (CVSA)

rendered his statements and confession to police involuntary. He also argues that counsel was ineffective for failing to investigate the involuntariness of the confession and to request and examine DNA results prior to sentencing. His final claim is that his plea was involuntary because he did not understand the elements of the offense or possible defenses due to limited mental functioning. We reject his claims and affirm the judgments and order.

¶2 Sterr self-describes himself as a courteous, simple, hard-working, lonely, insecure and quietly suffering single man who lived and worked on his family's rural farm his whole life. He was charged with entering the home of a female victim as she slept in the early morning hours of June 24, 2000, battering her to a state of unconsciousness, and then having sexual intercourse with her. The burglary and assault occurred after Sterr had been drinking at a tavern where he had observed the victim. Sterr was romantically fixated on the victim, had some prior contacts with her at local taverns, and been inside her home without her knowledge on a couple of occasions after stealing a key to the residence.

¶3 In the afternoon on June 24, 2000, a deputy sheriff visited Sterr at his father's farm and inquired about his whereabouts the night before. Sterr indicated he had been at the tavern and had seen the victim but had gone straight home after leaving the tavern. Sterr gave the officer permission to search his vehicle and residence. The officer also asked if Sterr would come to the sheriff's department and submit to a computer voice stress analyzer (CVSA). The officer explained that the test would indicate whether Sterr was telling the truth. Sterr agreed and drove himself to the sheriff's department. While there, Sterr provided a written statement about who he spoke with at the tavern the night before and the

route he took to his car upon leaving the tavern. The CVSA test was given.[1] Sterr later testified that the officer told him that the CVSA revealed Sterr was lying. The officer testified that he did not discuss the results of the exam with Sterr on that day. In further conversation after the CVSA, the officer learned that Sterr was still wearing the same underwear from the previous night. The officer requested Sterr to turn over his underwear and after doing so, Sterr left the sheriff's department.

¶4 Two days later, the officer contacted Sterr by telephone and asked Sterr to come to the police station to discuss blood found on the underwear. Sterr presented himself at the station and agreed to provide a blood sample. The officer recalled that while leaving the hospital after Sterr's blood draw, he remarked to Sterr that the truth about the assault was going to come out in the end.

¶5 On June 27, Sterr telephoned the officer to ask if the blood test results were back. When Sterr was informed that the results were not ready, Sterr made inculpatory statements. He said he had been at the victim's house on the night of assault attempting to make amends. He admitted that he had hit the victim a couple of times and lifted up her shirt at some point when she was not awake. He indicated that he had taken the bed sheet the victim reported missing and burned it at the farm just one hour before the officer arrived on June 24. The officer asked Sterr to meet him at the police station again. Sterr agreed and drove

[1] Two tests were run each consisting of simple "yes or no" questions. Sterr was provided with the questions beforehand and answered them orally beforehand. Each test used "control" and "irrelevant" questions. On the second test, the two "relevant" questions asked Sterr if he had been in the victim's house in the last twenty-four hours and if he had ever had sexual contact with the victim. He answered "no" to both.

himself to the police station. Sterr was then taken to the sheriff's department in the officer's unmarked squad car.

¶6 At the sheriff's department, Sterr was advised for the first time of his ***Miranda***[2] rights. He agreed to waive his rights and give a statement. Sterr confessed to entering the victim's home, battering her and having sexual contact. He denied having had sexual intercourse with the victim, a position he maintained at sentencing. After a written statement was completed, Sterr indicated that he had come forth with the truth after speaking with two elderly fishermen the night before. Sterr had told the fishermen that he had struck a woman and had been questioned by the police. The fishermen told Sterr to go to the police and do the right thing by telling the truth.

¶7 Sterr first argues that the officer's use of the CVSA rendered his statements involuntary and subject to being suppressed. However, no motion to suppress Sterr's statements was filed. Only by a claim of ineffective assistance of counsel may Sterr obtain review of the issue. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992). In turn, Sterr seeks to withdraw his no contest plea. To withdraw a guilty plea after sentencing, a defendant carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). Ineffective assistance of counsel is a recognized factual scenario that could constitute "manifest injustice." ***Id.*** at 213-14.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶8 There are two components to a claim of ineffective counsel: deficient performance and prejudice. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** Here, we move directly to the suppression issue because only if a motion to suppress the statements would have been successful is counsel's failure to file the motion deficient. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶9 Sterr asserts that use of a CVSA is "out-and-out quackery, scientifically invalid and fraudulent." He equates the officer's use of the CVSA to trickery, deception, and coercion in compelling his confession. We need not address Sterr's concern that a CVSA is not a valid deception-testing technique.[3] We conclude that Sterr's confession was not compelled by the officer's use of the CVSA.

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.
>
> The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation.

[3] We leave for another day the determination of what use, if any, an investigating officer may make of a CVSA during interrogation of a suspect.

> Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.
>
> We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers.
>
> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

State v. Hoppe, 2003 WI 43, ¶¶36-39, 261 Wis. 2d 294, 661 N.W.2d 407 (citations omitted).

¶10 There must be a causal link between the alleged improper or oppressive interrogation technique utilized by law enforcement and the defendant's statements. Like the postpolygraph interview, we consider whether the post-CVSA interview was so closely associated with the electronic testing as to time and content so that it must be considered as one event. *See* ***State v. Greer***, 2003 WI App 112, ¶10, 265 Wis. 2d 463, 666 N.W.2d 518, *review denied*, 2003 WI 140, 266 Wis. 2d 61, 671 N.W.2d 848 (Wis. Sept. 12, 2003) (No. 01-2591-CR). Sterr argues that the CVSA was the precipitating factor in an "evermore intensive continuum" of interrogation pressure. To determine if the continuum exists, we consider the totality of the circumstances and the relevant factors of the time between the end of the CVSA and the interview during which

Sterr made his admissions and whether the officer made frequent reference to the CVSA results. *See* ***id.***, ¶11.

¶11 Sterr's confession came three days after the administration of the CVSA. The trial court found credible the officer's testimony that he had not told Sterr the result of the CVSA. Even if the result was mentioned on the day of Sterr's first interview, it was not mentioned again until after the written confession was obtained. Sterr was cooperating with the investigating officer and provided physical evidence he knew would bear on the possible truth of his initial story. Sterr himself initiated contact with the officer to inquire if the blood sample he provided had corroborated his story. It was in the phone conversation that Sterr initiated that the original inculpatory statements were made. Additionally, Sterr indicated that his discussion with the elderly fishermen the night before he confessed influenced his decision to tell the truth.

¶12 There is no connection between the administration of CVSA and Sterr's confession in time or content. Sterr admitted to the officer prior to the CVSA that he had been at the tavern the night of the assault. Thus, the CVSA did not, as Sterr suggests, compel a "beachhead" or "breakthrough" admission which lead to the confession spilling out. Only later did the possibility that the physical evidence would reveal his explanation of why there was blood on his underwear to be false begin to weigh on him as reflected by his phone call to the officer. His discussion with the fishermen also reveals how he was independently concerned about being less than truthful with the officer. The events leading to his confession are totally discrete. We cannot conclude that the CVSA was part of an increasing continuum of pressure to get Sterr to confess. A motion to suppress the

statement would not have been successful and trial counsel was not ineffective for not moving to suppress Sterr's statements.[4]

¶13 Sterr next complains that his trial counsel was ineffective because counsel did not adequately investigate possible defenses. Specifically, Sterr suggests that counsel should have requested and reviewed DNA testing on semen recovered from the victim and blood stains on Sterr's underwear. We quickly dispense of this claim on the lack of prejudice. Although the testing was not done until after Sterr's conviction and sentencing, it confirmed that Sterr was the source of the semen and the victim the source of blood found in Sterr's underwear. The test results would not have given rise to any defense.[5]

¶14 The claim that Sterr was prejudiced at sentencing because he would not have asserted the absence of vaginal intercourse if he knew the DNA test result also rings hollow. Trial counsel told Sterr that the DNA test established that his semen was present on the vaginal swabs. Although counsel did not have written

[4] Sterr obliquely suggests that he lacked personal characteristics to do anything but acquiesce to even a minimal show of police authority in the request for interviews and physical evidence. He refers to being questioned in a locked police environment but never quite makes the argument that independent of the use of the CVSA, a ***Miranda*** violation occurred in preconfessional contacts with police. We need not consider arguments not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). Even so, nothing in the record suggests that Sterr had mental incapacities that would have rendered his statements involuntary or that any preconfession ***Miranda*** violations were so linked to the confession Sterr initiated to require suppression of the confession.

[5] Sterr makes reference to counsel's failure to consider an intoxication defense. Nothing establishes that an intoxication defense was viable. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Trial counsel indicated that a psychological exam found that Sterr was alert at the time of the crime and not compromised in any way by a psychotic state, alcohol, or drugs.

confirmation of that fact at sentencing, it was not inaccurate information. Sterr was not deprived of the effective assistance of counsel.

¶15 Sterr's final claim is that his no contest plea was not intelligently or voluntarily made. Sterr lists a plethora of reasons why his plea was not "informed consent." Many fallback to the alleged shortcomings of trial counsel's performance with respect to suppression, examination of DNA test results, and investigation of possible defenses. We have determined that trial counsel was not deficient and therefore those claims cannot serve as a basis for plea withdrawal.

¶16 Sterr suggests that he lacked the mental capacity to understand the elements of the offense and the consequences of his plea. He goes so far as to state that trial counsel's representation that Sterr suffered no mental illness or deficit was simply untrue. Sterr states he was functionally illiterate. He contends the trial court should have been so informed so as to make a more complete inquiry into Sterr's understanding of the plea proceeding.

¶17 To withdraw his plea successfully, Sterr must first establish a prima facie case that the trial court violated WIS. STAT. § 971.08 (2001-02) and allege that he did not know or understand the information that the court should have provided at the plea hearing. ***State v. Trochinski***, 2002 WI 56, ¶17, 253 Wis. 2d 38, 644 N.W.2d 891. He has not met this burden. The plea colloquy conformed to the requirements of § 971.08. The trial court questioned Sterr about the constitutional rights he was waiving and his knowledge and understanding of the elements of the offense. The relevant jury instructions were attached to Sterr's plea questionnaire and Sterr indicated that he had gone over those instructions with counsel the day before the plea. Counsel noted for the record that he had spent a significant amount of time going over the elements and the plea

questionnaire. The trial court also went over the potential punishment. At no time did Sterr indicate anything suggesting he lacked sufficient intellect to understand the proceeding or the plea questionnaire. Nothing else in the record supports that possibility. There is no manifest injustice requiring plea withdrawal.

By the Court.—Judgments and order affirmed.

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