COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2468-CR **Cir. Ct. No. 2004CF699**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. BLAKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Thomas J. Blake appeals a judgment convicting him, upon a plea of no contest, of first-degree intentional homicide and an order

denying his motion for postconviction relief. He argues that the trial court misused its discretion in denying his presentence motion to withdraw his plea and that both his pre-plea and post-plea counsel rendered ineffective assistance, the former because they did not inform him of the lesser-included defense of reckless homicide before entering into his plea, and the latter because he failed to present mitigation evidence and to object to an unduly prejudicial victim impact statement. None of his arguments are persuasive. We affirm the judgment and the order.

¶2 The State charged Blake with first-degree intentional homicide, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.50(3)(g), and hiding a corpse, as party to a crime, contrary to WIS. STAT. §§ 940.11(2), 939.50(3)(g) and 939.05 (2005-06).[1] According to the complaint, Blake's statement, and affidavits in support of search warrants, Blake related that he invited Christina Ross to his apartment, sexual contact ensued and Ross agreed to do "something kinky." Blake handcuffed her, turned her face down, lay on top of her and wound an extension cord four times around her neck. As Ross struggled for about ten minutes, Blake tightened the cord and covered her mouth when she tried to scream. Blake held the cord around her neck for another half hour to make sure she was dead. Blake then told a friend who was in another room that he "just killed Christina." They put Ross's sheet- and duct tape-wrapped body in the trunk of Ross's car and abandoned the car in a parking lot. Subsequent investigation revealed that Blake said his girlfriend knew he had talked in the past about killing Ross and that he wrote in his journal about an unrelenting "thirst for killing." Blake also had told his roommate he would like to kill someone and said numerous times he could do

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

it with "things around the house." Blake eventually pled no contest to first-degree intentional homicide, unsuccessfully sought presentencing to withdraw his plea, and moved, also unsuccessfully, for postconviction relief on grounds of ineffective assistance of counsel. Blake appeals.

1. Plea entry and withdrawal

¶3 Public defenders John Kuech and Steve Smits initially represented Blake. The parties agreed that Blake would plead no contest to first-degree intentional homicide, the hiding-a-corpse charge would be dismissed and read in and the State would recommend no parole eligibility for his natural life, capped at sixty years. Kuech and Smits said that Blake told them for the first time after entering his plea that Ross' death was the result of "sex gone bad." They withdrew at Blake's request and Leonard Kachinsky was appointed. Blake told Kachinsky that Kuech and Smits did not believe that Ross died during an attempt to enhance her sexual "high." Still presentence, Blake moved to withdraw his plea on grounds that he entered it without having been advised of the possible lesser-included offense of reckless homicide. The court concluded that Blake did not present a fair and just reason for withdrawing his plea and denied the motion.

¶4 A defendant seeking to withdraw a plea before sentencing must present a credible fair and just reason and rebut evidence that the State will be substantially prejudiced by the plea withdrawal. ***State v. Rhodes***, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599. A "fair and just reason" is some adequate explanation for the defendant's change of heart besides the desire to have a trial, which the defendant must prove by a preponderance of the evidence. ***State v. Nelson***, 2005 WI App 113, ¶11, 282 Wis. 2d 502, 701 N.W.2d 32. Granting or denying the motion lies within the trial court's discretion. ***Rhodes***, 307 Wis. 2d

350, ¶7. We will affirm if the court's decision was demonstrably based on the facts of record and in reliance on the applicable law. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶5 Kuech acknowledged that Blake told him he and Ross had been sexually active in the past and that she liked "rough sex," and Blake's statement indicated Ross had acceded to "something kinky." Kuech also testified that in first reading the complaint "this idea of autoerotic[2] sex jumps out at you" but they asked Blake numerous times "whether he had sex or whether sex was going on at that time and up through the time of the plea [Blake] denied that." He testified that in the at least fifteen or twenty conferences they had with Blake, Blake never said Ross's killing was accidental. Kuech said he did not ask Blake directly if the handcuffs and extension cord were part of sex play because he did not want to "plant that [idea] if it didn't happen." He and Smits reviewed the jury instruction with Blake, going over every element the State would have to prove, including intent. Both said Blake appeared to understand.

¶6 Blake also acknowledged that he gave police a four-page statement in which he admitted keeping the cord around Ross's neck for a half hour to "make sure she was dead," signed each page and specifically initialed the sentence, "We weren't having sex at this point." Some of his testimony was to the contrary, however. He claims he told Kuech and Smits about the sexual aspect a month or two before the plea hearing, but that they did not believe him and it "would provide no defense in any manner." The court stated that Blake could not

[2] The term "autoerotic" appears throughout the proceedings. We agree with the State that it is inaccurately used, as nothing suggests Ross engaged in self-strangulation.

raise a new defense post-plea, implicitly finding Blake's testimony less credible. Credibility assessments of this sort are crucial to a determination of whether the evidence offered in favor of a plea withdrawal constitutes a fair and just reason. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶7 Moreover, Blake entered a knowing, intelligent and voluntary plea pursuant to a thorough colloquy, making his burden even higher on appeal. *See* ***Jenkins***, 303 Wis. 2d 157, ¶44. Blake assured the court he understood the nature of the charge, the meaning of intent and the effects of his plea, never protesting that Ross's death was an accident. The court said it had "a hard time" concluding that Blake genuinely misunderstood the circumstances even if, as Blake argues, he is unsophisticated and unschooled in the law. A misunderstanding may support a plea withdrawal, but the misunderstanding truly must exist. *See* ***State v. Canedy***, 161 Wis. 2d 565, 585, 469 N.W.2d 163 (1991).

¶8 Counsel must search out feasible defenses, but the credible evidence is that Blake did not provide Kuech and Smits with the basic facts suggesting that Ross's death was accidental. Reason dictates that a person of average intelligence, like Blake, would have seized upon one of his many chances to do so. Kuech and Smits had no obligation to propose a theory that ran counter to the facts Blake gave and other information they had. Blake has not shown by a preponderance of the evidence a fair and just reason to withdraw his plea.

2. Post-conviction proceedings

¶9 At sentencing, eight of Ross's friends or family members made statements requesting a sentence of life without parole. Ross's mother asked to be allowed to also show a PowerPoint photo montage of Ross's life accompanied by a recorded musical tribute written and sung by one of Ross's friends. The court

voiced its reservations but assented when Kachinsky, who had not previewed it, expressed no objection. After hearing the victim impact statements and considering the recommendations of the presentence investigation (PSI) report, the State and the defense, the court sentenced Blake to life in prison without the possibility of extended supervision.

¶10 Represented by newly appointed appellate counsel, Blake moved for postconviction relief. Blake petitioned for a new trial and/or resentencing on grounds that pre-plea counsel were ineffective for failing to explain the distinction between reckless and intentional homicide, and that post-plea counsel was ineffective at sentencing for failing to argue mitigating factors or to preview or object to the PowerPoint presentation.

a. Ineffective assistance of pre-plea counsel

¶11 A defendant who seeks to withdraw a no-contest plea after sentencing carries the heavy burden of establishing by clear and convincing evidence that the trial court should permit withdrawal of the plea to correct a "manifest injustice." ***State v. Krieger***, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to plea challenges based on ineffective assistance of counsel. *See* ***Bentley***, 201 Wis. 2d at 311. The motion is addressed to the trial court's sound discretion and we will reverse only if the court failed to properly exercise its discretion. ***Krieger***, 163 Wis. 2d at 250.

¶12 Under ***Strickland***, a defendant must show that counsel's performance was both deficient and prejudicial. ***Strickland***, 466 U.S. at 687;

Bentley, 201 Wis. 2d at 311. The standard is well-known and we need not restate it here. *See, e.g.,* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. We will not reverse the circuit court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient or prejudicial are questions of law that we review independent of the trial court. ***Id.*** If an appellant fails to establish one prong of the analysis, we need not address the other. ***State v. Hammill***, 2006 WI App 128, ¶13, 293 Wis. 2d 654, 718 N.W.2d 747.

¶13 Blake contends the use of handcuffs and an extension cord around Ross's neck, her state of partial undress and his claim that they had sex earlier are consistent with a consensual sexual encounter. Also, Blake's mother, Mary Jo, submitted a supporting affidavit in which she claimed Ross once told her she enjoyed sex involving handcuffs, whips and "S&M" and asked whether Mary Jo liked using handcuffs during sexual activity. Kachinsky testified that he would have felt duty-bound to question Blake further to see whether the lesser-included-offense defense existed.

¶14 Kuech testified at the ***Machner***[3] hearing that nothing Blake told him and Smits supported advising of the possibility of a lesser-included offense because, although they repeatedly asked Blake if "sex was going on at that time[,] … up through the time of the plea he denied [it]." Kuech did not bring it up on his own so as not to "plant any facts in anybody's head as to what happened to make their defense better." Kuech also testified that in their "numerous" telephone conversations Mary Jo never said anything about Ross discussing her

[3] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

sexual interests, and that he thus deemed pleading no contest and arguing for parole eligibility to be the most prudent strategy. Given the countervailing evidence and Blake's plea, we conclude "consistent with" a consensual sexual encounter is insufficient. Kachinsky's opinion to the contrary notwithstanding, ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994).

¶15 The trial court found Kuech's and Smits' testimony to be "overwhelming" and corroborated by Blake's statement to the police, discovery materials and statements to others indicating a general desire to kill. It also found that Kuech's and Smits' credibility far outweighed Blake's, and that Kuech did not have factual reasons to consider the possibility of reckless homicide or an obligation to "plant" the notion of that defense. These determinations are not clearly erroneous. We are not swayed by late-stage testimony or suggestions that Ross's death was consequent to "sex gone bad." It is conceivable that Mary Jo wanted to help her son, that Blake would rather his mother believe that he indulged in "kinky" sex than that he intentionally killed Ross, that Kachinsky accepted at face value the information the Blakes gave him—and that Kuech and Smits would have pursued a lesser-included offense if the facts supported it. We conclude that pre-plea counsel's performance was not deficient. We therefore need not examine whether that performance was prejudicial. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

b. Ineffective assistance of post-plea counsel

¶16 Blake also contends that Kachinsky, his post-plea/sentencing counsel, provided ineffective assistance. He claims Kachinsky failed to present available mitigation evidence at sentencing, instead focusing on a proportionality argument,[4] and failed to prescreen or object to as unduly inflammatory the musically enhanced PowerPoint photo montage.

¶17 A defendant's right to effective representation extends to sentencing. *See* ***Darden v. Wainright***, 477 U.S. 168, 184 (1986). Kachinsky testified that he believed the proportionality argument would be the strongest argument with this particular sentencing judge to avoid life without parole, and that addressing mitigating factors would only detract from the argument's main thrust. We will not second-guess counsel's strategic choices in the face of considered alternatives. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. Moreover, the PSI disclosed Blake's learning disabilities, emotional disturbance and treatment history and the court said it factored those concerns into its sentencing decision. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219-20, 541 N.W.2d 815 (Ct. App. 1995). We see no deficient performance on this issue.

¶18 Blake's final challenge involves the PowerPoint photo montage of Ross's life and the accompanying musical tribute that her family presented as a victim-impact statement. *See* WIS. STAT. § 972.14(3)(a). Blake asserts Kachinsky should have objected to the presentation because it "had a powerful effect on all

[4] Kachinsky argued that strangulation is less vicious than some other ways of committing murder and Wisconsin's most severe penalty, life without parole, should be reserved for those guilty of the most vicious methods.

who viewed it." Kachinsky testified that he did not preview it or object during the slideshow because he saw no legal basis to do so. Without deciding if this constitutes deficient performance, we conclude that Blake has not shown a reasonable probability that it was prejucidial—i.e., that but for Kachinsky's failure to object, the court would have imposed a lesser sentence than it did.

¶19 The same judge heard Kachinsky's argument at sentencing and then the rationale for it at the ***Machner*** hearing. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. The court expressly stated that it did not allow the presentation to affect "in any way or manner" the sentence it imposed. The prosecutor, the PSI author and all who spoke on Ross's behalf recommended that Blake be sentenced to prison without a realistic chance of parole. That is what he got. We see no prejudice.

By the Court.—Judgment and order affirmed.

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