COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP427-CR **Cir. Ct. No. 2006CF1476**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN DONTRELL LOBLEY,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Allen Dontrell Lobley appeals from a judgment of conviction for first-degree reckless homicide and from an order denying his motion for postconviction relief. He seeks to withdraw his guilty plea. Lobley

claims that either the trial judge impermissibly participated in plea bargaining during the proceedings, or his trial attorney was ineffective by misrepresenting that the trial judge participated in plea bargaining.[1] We affirm.

BACKGROUND

¶2 The State charged Lobley with one count of first-degree reckless homicide while armed with a dangerous weapon and one count of recklessly endangering safety. Lobley demanded a jury trial. After jury selection, the parties resolved the case with a plea bargain. Lobley pled guilty to one count of first-degree reckless homicide and the State agreed to recommend "substantial confinement in the state prison." During the plea colloquy, Lobley stated that no one made any threats or promises to induce his plea and he confirmed his understanding that he could receive the statutory maximum sentence of forty years of initial confinement and twenty years of extended supervision. The trial judge imposed a thirty-five year term of imprisonment, bifurcated as twenty-seven years of initial confinement and eight years of extended supervision.

¶3 Lobley pursued postconviction relief. According to Lobley, he entered his plea only after learning from his attorney that the trial judge agreed to impose not more than twenty years of initial confinement.

¶4 The circuit court conducted an evidentiary hearing at which the prosecuting attorney, the defense attorney, and the trial judge all testified. The

[1] Lobley's claims for relief involve allegations about the actions of the Honorable Jeffrey A. Wagner, who presided over the proceedings through sentencing and testified as a witness at the postconviction hearing. In this opinion, we refer to Judge Wagner as the trial judge. The Honorable M. Joseph Donald presided over the postconviction proceedings. We refer to Judge Donald as the circuit court.

prosecutor explained that he made two alternative offers to Lobley. In exchange for Lobley's plea to first-degree reckless homicide, the State would recommend either "substantial confinement," or, if Lobley preferred, the State would recommend a twenty-year term of initial confinement. The prosecutor further testified that after a jury was chosen, "we were in chambers discussing something pertaining perhaps to the jury or some pretrial motions, and at that point there was a discussion about the resolution of the case between [the lawyers] .... [T]he judge was there but he was not participating in those conversations." According to the prosecutor:

> [the defense attorney] said something like well, my client's afraid he's going to get more than 20 years, and then [the defense attorney] looked to the judge and said, you know, do you think he's going to get more than 20 years, and then at that point the judge looked at us and said look, you gentlemen know me, you know my sentencing practices.

¶5 The trial judge also testified. He explained that "we always have pre-trials to determine what issues ... are going to come up .... Those are done up through the trial." The judge recalled that "there probably was some in-chambers conference because apparently there was a jury and then the defendant was going to change his plea." Although the judge did not recall the events with specificity, he remembered the defense attorney asking whether the judge would impose a sentence greater than twenty years. The judge testified that he thought the question was inappropriate, and he responded by stating words to the effect that "I have been sitting on the bench for a significant period of time. Everybody should know my sentencing practices, something [of] that nature." The judge denied making any statement that could be construed as a promise to impose any particular sentence.

¶6 The defense attorney recalled the events differently. He testified that, after jury selection, Lobley stated "that he did not want to continue with the jury trial." According to the defense attorney, the two lawyers and the trial judge then had a meeting in the judge's chambers that focused on the facts of the case and Lobley's concerns about the length of the sentence that might be imposed. The defense attorney testified that after the lawyers explained to the judge their wish to resolve the case with a plea and emphasized the prosecutor's offer to recommend twenty years of initial confinement, the judge responded: "sounds reasonable to me."

¶7 The defense attorney further testified that he told Lobley and his family: "based on the conference in chambers ... I thought the judge would do what he indicated was to him reasonable. My understanding [of] what that meant was no more than 20 [years of initial confinement]." The attorney explained, however, that he did not "guarantee" that the judge would impose a particular sentence.

¶8 The circuit court found that the trial judge and the prosecutor, rather than the defense attorney, accurately recalled the conference in chambers. The circuit court rejected the defense attorney's testimony that the trial judge "indicated" a sentence cap. Rather, the circuit court found that only the State and the defense attorney plea-bargained in chambers. The trial judge was merely "privy to those negotiations ... in the context of ... certain factual issues being brought to the [trial judge's] attention off the record." After determining that the trial judge did not participate in plea bargaining, the circuit court summarily concluded that Lobley did not receive ineffective assistance from his trial attorney.

¶9 Lobley filed an appeal. We deferred a decision and remanded for a hearing to determine unresolved facts underlying Lobley's challenge to his attorney's performance. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶10 Lobley was the only witness at the proceedings after remand. He testified that he accepted a plea bargain because, based on what his trial attorney told him, he "thought there was no way [he] could get more than 20 years." Lobley acknowledged, however, that his attorney described only what the attorney "believed" the judge would impose. Lobley admitted reading on the guilty plea questionnaire that the trial judge could impose a maximum sentence of sixty years, including forty years of initial confinement and twenty years of extended supervision, and Lobley admitted understanding the judge's warning during the plea colloquy that the judge was not bound by any negotiations.

¶11 The circuit court found that Lobley entered a guilty plea understanding that he could receive a sentence up to the statutory maximum. Accordingly, the circuit court concluded that Lobley suffered no prejudice from any deficiencies in his trial attorney's performance. The matter is now before us for review.

DISCUSSION

¶12 "A defendant who seeks to withdraw a plea after sentencing has the burden of showing by 'clear and convincing evidence' that a 'manifest injustice' would result if the withdrawal were not permitted." ***State v. Hunter***, 2005 WI App 5, ¶5, 278 Wis. 2d 419, 425, 692 N.W.2d 256, 259 (citation omitted). Lobley presents two bases for plea withdrawal: (1) the circuit court participated in plea

bargaining; and (2) his trial attorney performed ineffectively. We address each in turn.

Judicial Participation in Plea Bargaining

¶13 "'A sentencing court may not participate in a plea agreement.'" ***State v. Williams***, 2003 WI App 116, ¶15, 265 Wis. 2d 229, 242, 666 N.W.2d 58, 65 (citation and one set of brackets omitted). "A plea entered following a judge's participation in plea negotiations is 'conclusively presumed' to be entered involuntarily." ***Hunter***, 2005 WI App 5, ¶7, 278 Wis. 2d at 426, 692 N.W.2d at 259 (citation omitted). A plea that is not voluntarily entered violates due process and is a manifest injustice. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994).

¶14 Whether a defendant voluntarily entered a plea presents a question of constitutional fact. ***Hunter***, 2005 WI App 5, ¶6, 278 Wis. 2d at 426, 692 N.W.2d at 259. We accept a circuit court's findings of historical and evidentiary fact unless they are clearly erroneous, but we determine *de novo* whether those facts demonstrate a constitutional violation. ***Ibid.***

¶15 Lobley asserts that published Wisconsin decisions have not established the parameters of what constitutes "participation" in plea bargaining.[2] We conclude, however, that even if the parameters of judicial participation in plea

[2] Lobley suggests that this court should assess what took place during the conference that preceded his plea by using "Occam's Razor," a principle that permits "electing the simpler of ... competing interpretations." *See* ***Stockbridge Sch. Dist. v. Department of Pub. Instruction Sch. Dist. Boundary Appeal Bd.***, 192 Wis. 2d 622, 630 n.7, 531 N.W.2d 624, 627–628 n.7 (Ct. App. 1995), *aff'd*, 202 Wis. 2d 214, 550 N.W.2d 96 (1996). We have no use for the principle of Occam's Razor here. We are not required to categorize the events in the judge's chambers. Rather, we are required to determine whether the judge participated in plea bargaining.

bargaining are presently imprecise, we do not need to define them in this appeal. Pursuant to established authority, the facts found by the circuit court reflect that the trial judge's conduct in this case was not improper.

¶16 We first note that the circuit court did not believe the defense attorney's version of the conference in chambers. The circuit court believed the trial judge and the prosecutor, whose testimony indicated that the trial judge was present while the lawyers conferred with each other about ways to resolve the case. Both the trial judge and the prosecutor recalled that the judge deflected the defense attorney's effort to include the judge in the attorneys' discussion and that the judge did no more than observe that the two lawyers knew the judge's sentencing practices. We must accept a circuit court's credibility determination. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 435, 651 N.W.2d 345, 352 (when circuit court acts as fact finder, it is the ultimate arbiter of witness credibility).

¶17 A judge may not "suggest or advocate for a particular plea agreement." *See* ***Hunter***, 2005 WI App 5, ¶11, 278 Wis. 2d at 428–429, 692 N.W.2d at 260. A judge may, however, hold a conference in chambers at which resolution of the case is discussed. *See* ***State v. Wolfe***, 46 Wis. 2d 478, 487, 175 N.W.2d 216, 220–221 (1970). A judge may also make remarks that relate to resolution of the case if those remarks do not constitute direct participation in the negotiations. *See* ***Hunter***, 2005 WI App 5, ¶12, 278 Wis. 2d at 429, 692 N.W.2d at 260–261. For example, in ***Hunter***, this court held that a judge did not participate in plea bargaining by urging the defendant to consider carefully the chance of prevailing at trial given the strength of the State's evidence. ***Id.***, 2005 WI App 5, ¶¶12–13, 278 Wis. 2d at 429, 692 N.W.2d at 260–261. Lobley concedes that the trial judge's comment here, that the lawyers knew the judge's

sentencing practices, was "less pointed" than the remarks approved in ***Hunter***. Indeed, this comment was innocuous.

¶18 The parties were in chambers because Lobley expressed a wish to plead guilty after the parties selected a jury. We recently observed that trial judges have case management responsibilities and must be free to discuss the status of litigation "without fear that their comments or inquiries will later be deemed to have constituted 'judicial participation in plea negotiations.'" ***Id.***, 2005 WI App 5, ¶9, 278 Wis. 2d at 427, 692 N.W.2d at 260. The facts found by the circuit court here do not support a conclusion that the trial judge stepped outside the roles of neutral arbiter and case manager. Accordingly, the circuit court properly denied Lobley's motion for plea withdrawal based on the allegation that the trial judge participated in plea bargaining.

Ineffective Assistance of Counsel

¶19 We turn to Lobley's claim that he is entitled to withdraw his guilty plea because his attorney performed ineffectively by erroneously describing the trial judge's remarks made in chambers.[3] We review claims of ineffective assistance of counsel under the two-prong standard of ***Strickland v. Washington***, 466 U.S. 668 (1984). To prevail on such a claim, the defendant must prove that the attorney's performance was deficient and that the deficiency was prejudicial.

[3] In his appellate brief-in-chief, Lobley asserted that he could mount separate challenges to his plea on the ground that his trial attorney coerced the plea and on the ground that his trial attorney was ineffective. The State responded that the only applicable analysis is "within the rubric of ineffective assistance of counsel." Lobley neither addressed this argument in his reply brief nor used his reply brief to pursue his coercion theory any further. We deem the State's point conceded. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84, 88 (Ct. App. 1998). Accordingly, we address Lobley's complaint about his attorney's conduct solely as a claim that the attorney performed ineffectively.

State v. Allen, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433, 442. "'[B]oth the performance and prejudice components … are mixed questions of law and fact.'" ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985) (citation omitted). The circuit court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether the attorney's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id***. at 128, 449 N.W.2d at 848.

¶20 To prove deficiency, a defendant must show that the trial attorney "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***Allen***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 442–443 (citations omitted). To prove prejudice, the defendant must show "'that there is a reasonable probability that, but for the counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996) (citation omitted). The defendant must satisfy both prongs of the test to be afforded relief. ***Allen***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443. We may address either the deficient performance or the prejudice prong first, and if the defendant fails to satisfy one prong, we need not address the other. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996).

¶21 In its appellate brief, the State offers a partial concession: the defense attorney performed deficiently by communicating to Lobley a mistaken belief that the trial judge agreed to a sentencing cap. We are not bound by a party's concession on a matter of law. ***Bergmann v. McCaughtry***, 211 Wis. 2d 1, 7, 564 N.W.2d 712, 714 (1997). In light of the State's concession, however, we

elect to begin our analysis of Lobley's claim that his trial attorney was ineffective by considering whether Lobley suffered prejudice from the attorney's allegedly deficient performance. We conclude that he did not.

¶22 The circuit court found that "even though [Lobley] is testifying today that he had this reliance on [his attorney's] subjective belief, it is clear that he was told and informed that the Court was not bound by any recommendation." Further, the circuit court found that Lobley knew when he entered his plea that he was "still exposed ... to the maximum full range [of statutory penalties] and the Court was free in its discretion to impose … what it felt was an appropriate sentence."

¶23 The circuit court's conclusion has ample support in the Record. Lobley admitted that he read and signed the guilty plea questionnaire, which reflects that the sentencing judge is not bound by any plea bargain and can impose a maximum penalty. During the plea colloquy, the trial judge explained that the judge was not bound by any negotiations or plea bargains and could impose up to forty years of confinement and up to twenty years of extended supervision. Lobley stated that he understood.

¶24 At sentencing, Lobley personally beseeched the trial judge not to impose the entire forty-year period of initial confinement available or to "take [Lobley's] whole life." Additionally, the trial attorney's sentencing argument focused on Lobley's "courage" in entering his guilty plea because "the Judge is not bound by the plea agreement" and the parties "don't know what the sentence is

going to be."[4] Lobley admitted at the postconviction hearing that he heard his attorney's sentencing remarks, but Lobley did not protest or contradict the remarks during the sentencing proceedings.

¶25 The circuit court's finding that Lobley knew when he pled guilty that the trial judge could impose any sentence up to the maximum is not clearly erroneous. Accordingly, we must accept it. *See* ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. We conclude that Lobley was not prejudiced by any statements that his trial attorney may have made in describing the discussion in chambers after *voir dire*. The information Lobley received at the plea hearing, coupled with the other aspects of the Record confirming Lobley's knowledge of his sentencing exposure, override any alleged misstatements by the defense attorney. *See* ***Bentley***, 201 Wis. 2d at 319, 548 N.W.2d at 57. Lobley plainly knew that the trial judge was not bound by any plea bargain. Lobley entered a guilty plea nonetheless.

¶26 Our determination that Lobley suffered no prejudice from his attorney's alleged misrepresentations ends our inquiry. Because Lobley failed to satisfy the prejudice prong of the test for ineffective assistance of counsel, we do not consider whether Lobley's trial attorney performed deficiently. *See* ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76.

[4] We observe without comment that the trial attorney's sentencing remarks coexist uncomfortably with the attorney's postconviction testimony.

By the Court.—Judgment and orders affirmed.

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