COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1043-CR **Cir. Ct. No. 2012CF201**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN M. CLARMONT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Shaun Clarmont appeals an order denying his motion to withdraw his no contest plea after sentencing. Clarmont argues he met his burden

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to show a reasonable probability that he would have gone to trial on multiple charges in two related cases, rather than plead no contest, but for his trial counsel's deficient performance. We disagree, and affirm.

BACKGROUND

¶2 Clarmont and his then-wife, D.C., were living separately when D.C. reported to the Oconto County Sheriff's Department that Clarmont had kicked her in the leg several days earlier and that there were marijuana plants belonging to him in her basement. Clarmont was charged with one felony count of manufacturing THC and four misdemeanors: possession of drug paraphernalia; disorderly conduct—domestic abuse; battery—domestic abuse; and bail jumping.[2] He was released on bond on October 17, 2012, with conditions that included his having no contact with D.C.

¶3 Two days after he was released, D.C. informed the Oconto County Sheriff's Department that Clarmont had emailed her the previous day, contrary to his bond provisions. She forwarded the email to the investigating deputy's account, and Clarmont was subsequently charged in a separate case with felony bail jumping.

[2] It is unclear from the briefing and the record whether one of the four misdemeanors in case No. 2012CF188, the misdemeanor bail jumping charge, was dismissed and read in at Clarmont's sentencing, or if, as indicated by Clarmont, it was dismissed outright by virtue of its underlying offense being reduced to a forfeiture. As such, there are discrepancies in the briefing and case record as to the number of misdemeanors still at issue in case No. 2012CF188 when Clarmont pled, some of which discrepancies are reflected in this opinion. Our conclusions are not materially affected by whether Clarmont faced three versus four misdemeanor charges in that case.

¶4 The State later offered to dismiss and read in all the charges—including the felony THC charge—in the original case, No. 2012CF188, for sentencing purposes if Clarmont would plead no contest in the second case, No. 2012CF201, to a reduced charge of misdemeanor bail jumping. The State would also recommend that the circuit court withhold sentencing, one year of probation under the "VIP" program,[3] and assessments for both domestic abuse and alcohol and other drug abuse. Clarmont accepted the offer and, following a plea colloquy, he pleaded no contest to misdemeanor bail jumping in case No. 2012CF201 on July 22, 2013.[4]

¶5 On November 18, 2013, Clarmont filed a postconviction motion to withdraw his plea. He alleged he was prejudiced by constitutionally deficient representation because his attorney failed to diligently investigate the origin of the email that resulted in the felony bail jumping charge in case No. 2012CF201. Clarmont also filed a motion for postconviction discovery to obtain a full electronic copy of the email sent to D.C., including the original routing header. Clarmont alleged in both motions that the original routing header would show the email was sent from a computer located at D.C.'s residence, and that, if Clarmont had that information prior to his scheduled trials, he would not have accepted the plea offer and pleaded no contest. Of note, the parties do not dispute that Clarmont drafted the email at issue. Rather, it is Clarmont's contention that D.C.

[3] The Volunteers in Probation Program is a county-specific alternative to state probation for qualified offenders. *See* WIS. STAT. § 973.11.

[4] The circuit court imposed and stayed a ninety-day jail sentence and placed Clarmont on probation for one year. The court also imposed a weekend in jail as a condition of probation, which time Clarmont served in August 2013.

accessed the email as saved in the "Drafts" folder of Clarmont's email account from her home computer, and then sent it to herself while using his account.

¶6 At the hearing on these motions, Clarmont testified that the computer located at the residence he formerly shared with his ex-wife was set up to automatically fill in his user name and password, and that D.C. also knew his password to his personal AT&T email account. Clarmont testified he asked his trial counsel in November of 2012 to investigate the source of the Internet Protocol [IP] address on the email routing header to determine whether it could be associated with a physical address. Further, he stated

> I had questioned [trial counsel] in the morning of the pre-trial. He met me out in the hall. This was the first that I had seen of any plea deal[5] and he, you know, just explained to me what they were offering, you know, in layman's terms.
>
> And then I said to him, well, I don't want a plea deal. I said I want to take this to trial. That's why we're here. And he said to me at that time that he just – he didn't feel comfortable taking it to trial at that time because of financing first of all.
>
> And then the second thing I had asked him if he had the information for the IP address and stuff pursued, and he reiterated back to me that he had not. And I asked him – then I said how can we go into trial if you don't have my evidence there to show what I'm stating is the truth? … I don't remember exactly what his response back was, but he said this was a sweet deal. He said you should take it. It's nothing. And at that point, I was scared and I didn't know what to do.

Nonetheless, Clarmont acknowledged he told the circuit court at his plea hearing that he had not been threatened or coerced into taking the plea. Furthermore,

[5] The parties dispute this assertion, with the State asserting that Clarmont's trial counsel mailed a copy of the offer to Clarmont five days prior to the pretrial hearing. Clarmont contends, and we agree, that this dispute is immaterial to the disposition of this appeal.

during Clarmont's plea colloquy, he specifically agreed that he was satisfied with the representation his attorney provided.

¶7 Clarmont also presented evidence from two witnesses regarding the routing header evidence. Nick Barton from CenturyLink, D.C.'s Internet provider, testified he received a subpoena from Clarmont's postconviction counsel and generated a report detailing CenturyLink's provision of Internet service to D.C.'s residence, located at her specific street address in Lena, Wisconsin. Barton testified the report indicated a device at the Lena address was logged on to the CenturyLink server and operated under IP address 174.124.141.61 from October 10 to October 19, 2012.

¶8 John Duffy, an owner of a computer diagnostic repair business, also testified. Duffy explained that every email has routing information contained in a header that shows the origin of the email and its destination. Clarmont showed Duffy the email sent to D.C.'s email address on October 18, which included the header information. Duffy testified the IP address that sent the email was 174.124.141.61, which, on October 18, 2012, corresponded only with the computer at D.C.'s street address, thus meaning someone using that computer sent the email at issue. The court asked, and Duffy clarified, that an email could not be sent using a computer's IP address if the sender was at a different location. Duffy also testified that if someone forwards an email, the original header information is not lost.

¶9 Clarmont's trial counsel also testified at the motion hearing. He acknowledged that, prior to his plea, Clarmont had denied sending the email to D.C., and he was aware Clarmont believed D.C. had accessed his email account and sent the email to herself. He did not recall whether Clarmont had given him a

copy of the email with the routing information, but agreed that if his file contained a copy, he had no reason to dispute he had received it. He testified he sent a letter to the district attorney in March of 2013 explaining Clarmont's allegations that D.C. had sent herself the email. Trial counsel agreed Clarmont was considering going to trial, prior to the plea deal offer. He stated that if the case had gone to trial, Clarmont "could tell what his theory was or what he knew about the situation" and counsel would be able to cross-examine D.C. When asked whether the IP information would have been "a significant if not a complete defense" to the bail jumping charge, trial counsel conceded that had he obtained the IP information, "it could have been as to that … particular issue …[,]" but pointed out that Clarmont was facing other charges.

¶10 In addition, Clarmont's trial counsel testified on cross-examination:

> Q. Was there any indication that if he had the information regarding where this—what address, this IP address, this email was sent from being in Lena, that he probably would not have entered a guilty plea? Did he ever say if we had this information, I'm not going to enter a guilty plea or a no contest plea?
>
> A. No. I believe he—I don't believe he said that.
>
> Q. Would you say that the most appealing fact or the most appealing part to Mr. Clarmont was the fact that the felony charges would be dismissed against him?
>
> A. Yes. And that the State wasn't recommending regular Department of Corrections probation and was recommending no jail and the VIP probation, which wouldn't be as intensive as regular probation supervision would be.
>
> And then, of course, we talked about the pros and cons of going to trial and the risks involved. If you go to jury trial, you could be convicted of a felony. Maybe you won't be, but there are a lot of consequences here that you need to consider.

¶11 The circuit court ruled on the motions on April 24, 2014. It observed "the information produced at the motion hearings about the header certainly would have ... been powerful evidence in Mr. Clarmont's favor," but noted it "doesn't rule Mr. Clarmont out as the person who sent it. This had been his home for many years,[6] and he wouldn't be the first person during a divorce that returned to his home." The court expressly found trial counsel "very credible," but it did not announce a credibility finding as to Clarmont's testimony. The court called trial counsel's failure to get the header information "arguably deficient performance on that charge, but that's one of six charges." The court expounded on this point, saying,

> I think if the bail-jumping case, if [case No. 2012CF201] and its single count of felony bail jumping … was the only charge before the Court, then I think what [Clarmont's postconviction counsel] says makes a lot of sense, because having your attorney tell you, if that's the only case and that's scheduled for trial and you are looking down the barrel of a trial tomorrow and your attorney tells you no, I didn't get that evidence that I wanted, I think that's a big deal, and I think that could constitute ineffective assistance of counsel.

¶12 Nevertheless, the circuit court observed that trial counsel was representing Clarmont on "six charges, two felonies, two files, and his client ends up with one entire file being read in and dismissed, five charges being read in and dismissed, and then the only remaining charge reduced from a felony to a misdemeanor with a recommendation of VIP probation and no jail." The court

[6] The record reflects that immediately following the court's statement, Clarmont made clear the Lena address was not his home "for many years" as the court assumed, but that he had only lived there for four months prior to the separation.

also referred to the plea colloquy, "Reading from page 11 of the transcript, I asked him:

> Are you satisfied with your attorney and the representation provided by your attorney?
>
> Yes.
>
> Has he done a good job for you up to this point?
>
> Yes.
>
> ….
>
> Is there anything about the plea procedure you do not understand or any questions you'd like to ask your attorney, the Court, or anybody?
>
> No.

The court concluded Clarmont's trial counsel did not perform deficiently and, even if counsel had, Clarmont was not prejudiced. Accordingly, it denied Clarmont's motion to withdraw his plea. Clarmont now appeals.

DISCUSSION

¶13 A defendant who wishes to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow the plea withdrawal would result in a manifest injustice. ***State v. Hudson***, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147, *review denied*, 2014 WI 14, 843 N.W.2d 707. If a defendant's plea was the result of constitutionally ineffective assistance of counsel, the manifest-injustice test is satisfied, ***id.***, and "withdrawal of the plea is a matter of right[,]" ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997) (citing ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986); ***State v. Bartelt***, 112 Wis. 2d 467, 480, 334 N.W.2d 91 (1983)).

¶14 Whether a lawyer was constitutionally ineffective is reviewed de novo. ***Hudson***, 351 Wis. 2d 73, ¶11. To establish such ineffective assistance, a defendant must show there was both deficient representation and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both elements of the ***Strickland*** test if the defendant does not make a sufficient showing on one prong. *See* ***id.*** at 697. We conclude Clarmont has not demonstrated he was prejudiced by any presumed deficiency.

¶15 Proving prejudice in the context of this appeal requires Clarmont to demonstrate that, "under the totality of the circumstances there is a reasonable probability the defendant would not have pled no contest and would have gone to trial" but for counsel's deficient performance. *See* ***State v. Dillard***, 2014 WI 123, ¶99, 358 Wis. 2d 543, 859 N.W.2d 44. Stated slightly differently by the United States Supreme Court, in plea cases

> where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill v. Lockhart, 474 U.S. 52, 59 (1985).

¶16 A defendant attempting to prove prejudice cannot rely on a conclusory assertion of prejudice. ***Dillard***, 358 Wis. 2d 543, ¶100. However, "it is by no means obvious how a court is to determine the probability that a defendant would have gone to trial. It is clear enough that a defendant must make more than a bare allegation that he 'would have pleaded differently and gone to

trial' …." ***Id.***, ¶99 (quoting ***United States v. Horne***, 987 F.2d 833, 835-36 (D.C. Cir. 1993)).

¶17 In a recent decision in which our supreme court found a defendant met his burden to withdraw his plea, the court observed, with respect to prejudice, that the defendant

> presented a persuasive factual account of the special circumstances that support[ed] his contention that he would have gone to trial absent the misinformation he received about the [penalty he faced]. The defendant detailed why his plea of no contest was a direct consequence of the misinformation he received about the penalty he faced. The defendant's testimony is supported by trial counsel's testimony and the record. The record allows the court to meaningfully address the defendant's claim of prejudice.

Dillard, 358 Wis. 2d 543, ¶100. The court continued,

> The defendant explained that he perceived the State's case as having a weak spot (which the State acknowledged at sentencing and in this court) and that he would have gone to trial absent his overwhelming desire to avoid a mandatory sentence of life in prison. The disparity in penalty between the sentence for armed robbery with the persistent repeater enhancer (mandatory life in prison) and the sentence for armed robbery without such an enhancer (a circuit court discretionary determination of prison for a term of years) was significant to the defendant. He did not want to forever foreclose the opportunity to be released from prison. Under these circumstances the State's dropping the (legally impermissible) persistent repeater enhancer was a substantial inducement to the defendant to accept the plea agreement.

Id., ¶101. Importantly, "[t]rial counsel's testimony and written communications with the defendant were consistent with the defendant's account of the defendant's state of mind and the events leading up to the plea agreement." ***Id.***, ¶102.

¶18 The record here does not sufficiently establish Clarmont's claim of prejudice. Unlike in ***Dillard***, trial counsel's testimony and written

communications were not consistent with Clarmont's account of his "state of mind and the events leading up to the plea agreement." ***Id.*** In short, the record reflects Clarmont's professed desire to go to trial during the postconviction proceedings and even prior to the State offering the plea agreement. However, there is a dearth of support for such a proclivity between when the plea offer was tendered and when Clarmont accepted it, affirmatively choosing to plead no contest. It is Clarmont's state of mind during *this* time period that matters for purposes of our review.

¶19 In that regard, Clarmont relies principally on his own testimony at the postconviction hearing to establish he would have insisted on going to trial, but for counsel's failure to obtain the IP evidence and even in light of the State's substantial plea offer. However, the circuit court apparently did not believe Clarmont, though it never made an expressed finding as to his credibility. "If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence." ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998); *see also* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. As we know, the court concluded Clarmont had not demonstrated prejudice.

¶20 In contrast, the circuit court expressly found Clarmont's trial counsel "very credible" for purposes of Clarmont's motion to withdraw his plea. Trial counsel was asked at the postconviction hearing whether there was

> any indication that if [Clarmont] had the information regarding … this IP address, [that] this email was sent from … Lena, that he probably would not have entered a guilty plea? Did he ever say if we had this information, I'm not going to enter a guilty plea or a no contest plea?

He responded, "No. I believe he—I don't believe he said that." Clarmont argues this testimony is equivocal. Further, Clarmont contends "the lack of such a statement [by Clarmont] does not change [his] clearly expressed desire to try the cases." Yet, the burden here is on Clarmont, *see* ***Strickland***, 466 U.S. at 687, and the lack of evidence of such a statement—or of an email, or letter, or other confirmation by trial counsel—hampers our ability to evaluate Clarmont's state of mind at the time he chose to accept the plea offer and forgo a trial.

¶21 Clarmont argues that his intent to proceed to trial but for counsel's failure, and even despite the significant plea offer, is self-evident. For example, on appeal, Clarmont insists that with the IP information, he

> stood a good chance of convincing a jury that none of the remaining charges in [case No. 2012CF188] were true. [D.C.] already had a motive to lie due to the on-going divorce and custody battle. The IP evidence, moreover, would have provided proof positive that [D.C.] created false evidence, lied to the police, and was willing to commit perjury. The worst that would have happened at trial would have been three relatively minor misdemeanor convictions rather than one.[7]

¶22 While Clarmont expresses confidence in the efficacy of the IP address information drastically changing the results of both trials, we are not so convinced. The IP information did not provide Clarmont with a complete defense to the felony bail jumping charge; it certainly did not provide him a complete defense for the one felony and multiple misdemeanor charges in case

[7] Clarmont's argument in this regard ignores the felony marijuana charge. To be sure, at the sentencing hearing following Clarmont's no contest plea, the district attorney disclosed that there would have been difficulties in the State's proof regarding this charge. However, Clarmont does not cite to anything in the record demonstrating that either he or his trial counsel knew of these particular issues with the State's felony marijuana charge *before* Clarmont accepted the plea agreement.

No. 2012CF188. The IP evidence, while undoubtedly persuasive, is not the dispositive fact Clarmont claims. As the circuit court noted, it is not beyond reasonable belief that Clarmont could have returned to the Lena address to send the email. Relevant to this point, it is undisputed that Clarmont, not D.C., drafted the email at issue. Especially given this fact, a jury could reasonably reject Clarmont's claim that D.C. purposely accessed his email account from her home, stumbled upon an email he wrote that was sitting in his "Drafts" folder, and then sent it to herself, all out of malice. Thus, even with the additional IP information, there would still be a credibility contest between D.C. and Clarmont as well as reasonable competing inferences from all the evidence for the jury to consider. As such, and applying ***Hill***, we cannot "predict [that the missing IP address] evidence likely would have changed the outcome of a trial," such that its existence "would have led counsel to change his recommendation as to the plea." *See* ***Hill***, 474 U.S. at 59.

¶23 At the postconviction hearing, Clarmont's trial counsel was neither asked nor did he otherwise testify that discovery of the additional IP information would have led him to change his recommendation as to the plea. *See* ***id.*** ("[T]he determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea."). When asked to consider how the IP information would impact Clarmont's own decision-making, trial counsel agreed the IP evidence would have "enter[ed] the mix of whether or not to take that [plea] deal if [Clarmont] knew whether or not he had a very, very strong defense to this [bail jumping] charge," but counsel pointed out there were other, significant charges pending against Clarmont. Trial counsel further testified that the benefits of the plea agreement, including the

dismissal of the felony charges, as well as the recommendations of probation under the VIP program and no jail time, given "the pros and cons of going to trial and the risks involved," were still appealing to Clarmont.

¶24 Meanwhile, Clarmont failed to persuasively explain via postconviction testimony or now on appeal why he would have chosen to risk going to trial and being convicted on charges of felony bail jumping, felony THC manufacturing, and several misdemeanors after he was presented with, as counsel described it, a "sweet deal" of a no contest plea to a single misdemeanor along with generous sentencing recommendations by the State.[8] *See* ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996) (finding instructive the Seventh Circuit Court of Appeals' holding that "[a] specific explanation of *why* the defendant alleges he would have gone to trial is required") (citation omitted). Clarmont latches on to the now-known weakness in the State's case regarding the felony THC manufacturing charge, but Clarmont does not cite to anything in the record to show his awareness of that fact prior to his acceptance of the plea offer.[9] Meanwhile, Clarmont's postconviction testimony, as well as his briefs on appeal, conspicuously undertake no consideration of the substantial benefits of the State's plea offer. Given the record, we cannot conclude it is reasonably probable that Clarmont would have forgone the offered plea agreement, even with the benefit of

[8] Clarmont's appellate argument regarding ineffective assistance of counsel considers the issue of prejudice in the context of both cases then pending against him (case Nos. 2012CF188 and 2012CF201), which is consistent with the circuit court's approach as well as ours.

[9] Clarmont's appellate briefs fail to cite anything in the record establishing his having knowledge of the particular issues with the State's felony drug case at the time he pled, which was before the State's confession of these problems at sentencing. *See also, supra*, ¶21 n.7. Indeed, while Clarmont's reply brief states that he "knew about the evidentiary problems with the marijuana case when he entered his plea, and this is clearly not a case of sentencing remorse," the brief provides *no* citation to the record in support of this proposition.

the missing IP evidence, given the particulars of the plea deal as weighed against his charges and potential penalties.

¶25 In a final attempt to buttress his argument, Clarmont's reply brief invokes the logic that if he is willing to subject himself to the potential risk of convictions in trying both cases now, and "nothing else has changed," surely that demonstrates his state of mind before accepting the plea. There are numerous problems with this argument, most of which reflect its inherent speculation. For one, it is an appellate argument, not evidence of Clarmont's state of mind at the time he accepted the plea. Meanwhile, the veracity of his assertion that "[t]he evidence against him is the same" is uncertain, especially given the passage of time. Perhaps most tellingly, Clarmont fails to cite any case authority in the thirty-plus years since the ***Strickland*** decision supporting the merit of this syllogism's use in similar cases.

¶26 In sum, while examining the reasonable probability that Clarmont would have gone to trial, we are left with what appears to be little more than "a bare allegation that he would have pleaded differently and gone to trial." ***Dillard***, 358 Wis. 2d 543, ¶99. Specifically, we remain unsure why, even aided by the additional IP information, Clarmont would choose to go to trial and face the possibility of multiple convictions, including for two felony offenses, if the jury found him less credible than D.C. or reached inferences unfavorable to him, rather than accept a plea offer of a single misdemeanor conviction, along with the State's recommendations of a withheld sentence, no jail time and probation under the VIP program. Without a persuasive explanation to that end, we conclude Clarmont has failed to show he was prejudiced by trial counsel's allegedly deficient representation.

By the Court.—Order affirmed.

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