COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 17, 1996

No. 95-0928-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL H. FRASCH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: SUSAN E. BISCHEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel Frasch appeals a judgment convicting him of attempted escape, party to a crime, entered upon his plea of no contest, and an order denying his motion for postconviction relief. He argues that ineffective assistance of counsel coerced his no contest plea and that the trial court erroneously denied his motion to withdraw his plea. Because the record fails to support his contentions, we affirm.

Frasch and a co-defendant, Chad Hagen, were charged with attempting escape from the Brown County jail. Frasch was represented by counsel, and Hagen chose to represent himself. Frasch's defense counsel never filed a motion to sever Frasch's prosecution from Hagen. Frasch claims that he told his trial counsel that Hagen was "nutty" and that he did not want to be jointly tried with him because he thought Hagen would "make him look bad."

On the day of trial, a jury was selected and given initial instructions. After opening statements and noon recess, both Frasch and Hagen advised the court that they intended to change their pleas. Both defendants filled out plea questionnaires. The court first heard Hagen's request to plead no contest. Following Hagen's plea colloquy, in open court in Frasch's presence, the court accepted Hagen's plea of no contest and found him guilty of attempted escape.

After Hagen was adjudged guilty, the trial court proceeded with Frasch's plea hearing. The trial court explained the elements of the offense, the potential penalties and the rights he would be waiving. Frasch indicated that no threats or promises, other than the State's sentencing recommendation of nine months' incarceration, had been made and that he had no questions about the proceedings. The trial court accepted Frasch's no contest plea, finding

> Every time Mr. Frasch has been before me I have not had any concerns that he does not understand what's happening. He is very certain in his answers today. He has had ample opportunity to discuss this with [defense counsel]. ... And I am satisfied that he is doing this freely, voluntarily and intelligently.

The trial court ordered a presentence report. The report recommended nine months' incarceration. Prior to sentencing, Frasch moved to withdraw his no contest plea. Frasch contended that his counsel was ineffective for failing to move to sever his trial from Hagen's and that as a result he felt coerced to enter a no contest plea. The trial court denied his motion and sentenced him to thirteen months' incarceration.

Frasch filed a postconviction motion alleging that his plea was coerced because his counsel was ineffective for failing to file a severance

motion. At the evidentiary hearing on the motion, Frasch testified that he was threatened to plead no contest by his trial counsel. He said his counsel told him, "if you go to trial you're gonna get two and a half because you're gonna go to trial with Chad. If one of you goes to trial you're both going, or something like that. ... [Y]ou better take the nine months." He testified that he was offered nine months if he pled but was sentenced to thirteen. He testified that his defense counsel did not want to file a severance motion but did not give him any reason for his decision.

Frasch's trial counsel testified that he met with Frasch two or three times at Green Bay Correctional Institute and also at the courthouse. Defense counsel testified that he did not recall Frasch making a request for severance and that he "wanted at all times to be with Mr. Hagen." Defense counsel testified that it did not appear that Hagen's behavior was a concern to Frasch. He testified that he recommended the State's plea negotiation but did not pressure Frasch to accept it. He testified while that Hagen's pro se appearance at trial may have been a factor in his recommendation, it was not the only factor. He further testified that he discussed severance with Frasch on the day of arraignment and that Frasch did not want to be severed from Hagen.

The trial court concluded that it was Frasch's "burden to show by clear and convincing evidence ... that his plea was not voluntarily and knowingly entered" and that "withdrawal of his plea is necessary to prevent a manifest injustice ...." The trial court found that defense counsel presented credible testimony that Frasch did not request a severance motion before trial. The court found that the record failed to establish grounds for severance in any event.

The court pointed out that it could have granted severance even after the trial had started had a basis for severance been presented, "[b]ut I looked at the trial that day and Mr. Hagen was nothing but well-behaved" and did not ask the jury inappropriate questions. The court found that Frasch was given a substantial amount of time to discuss his plea decision with his attorney and that his plea was voluntarily entered.

Frasch argues that his plea was coerced by trial counsel's failure to seek severance from his pro se co-defendant, Hagen. Because the record

supports the trial court's findings that the Frasch's plea was knowing, voluntary and intelligently entered, we reject his contention.

"The Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, voluntary, and intelligent." ***State v. Bangert,*** 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). Section 971.08, STATS., is designed to assist the trial court in making the constitutionally required determination that a defendant's plea is voluntary. ***Id***. at 261, 389 N.W.2d at 20.[1] The burden is on the defendant to prove a fair and just reason by a preponderance of the evidence. ***State v. Garcia,*** 192 Wis.2d 845, 862, 532 N.W.2d 111, 117 (1995).

Prior to sentencing, a defendant should be allowed to withdraw a guilty or no contest plea "for any fair and just reason" unless the prosecution would be substantially prejudiced. ***State v. Canedy,*** 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). Withdrawal of a no contest plea is not an absolute right; the defendant must have a reason other than a desire to have a trial in order to withdraw a plea. ***Id.*** at 583, 469 N.W.2d at 170-71.

After sentencing, a defendant wishing to withdraw his guilty plea must show by clear and convincing evidence that the plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent manifest injustice, as may be indicated in situations where (1) defendant was denied effective assistance of counsel; (2) the plea was not entered or ratified by defendant or a person authorized to so act in his behalf; (3) the plea was involuntary or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; and (4) defendant did not receive the concessions contemplated by the plea agreement and the prosector failed to

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[1] Section 971.08, STATS., provides in part:

Pleas of guilty and no contest; withdrawal thereof. (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

seek them as promised therein. ***Birts v. State***, 68 Wis.2d 389, 393, 228 N.W.2d 351, 353-54 (1975).

It is within the trial court's discretion whether to grant a motion to withdraw a plea. ***State v. Shanks,*** 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). On appellate review, the issue whether a plea was voluntarily and intelligently entered presents issues of constitutional fact that we review de novo. ***Bangert,*** 131 Wis.2d at 283. 389 N.W.2d at 30. Underlying historical facts will not be overturned unless they are clearly erroneous. ***Id.*** at 283-84, 389 N.W.2d at 30.

Under both the pre- and post-sentencing analysis, Frasch's contentions must be rejected. First, the record discloses that before Frasch entered his plea, Hagen pled no contest and the court adjudged Hagen guilty. Thus, for all practical purposes, Frasch had obtained the severance he claims to have requested. As a result, Frasch cannot demonstrate that he was prejudiced by his defense attorney's failure to seek severance. Without a showing of prejudice, a defendant has no ineffective assistance of counsel claim. ***Strickland v. Washington,*** 466 U.S. 668, 697 (1984) (a court need not address both components of this inquiry if the defendant does not make a sufficient showing on one); ***State v. Pitsch,*** 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985) (to show ineffective assistance of counsel, defendant must demonstrate deficient performance and prejudice).

Second, the record reflects that the trial court carefully questioned Frasch about his decision to plead no contest. Frasch had consulted with his attorney over the noon hour recess and had filled out a plea questionnaire. The court discussed with Frasch the nature of the charges and the potential penalties. Frasch told the court no one threatened or forced him to plead no contest. The State's plea offer was disclosed, and the State complied with it by recommending no more than nine months' incarceration. We are satisfied that the record reflects a knowing, voluntary and intelligent plea.

Next, we reject Frasch's argument that he is entitled to reversal because at the postconviction hearing, the trial court erroneously shifted the burden by requiring Frasch to call defense counsel. The first prong of ***Strickland*** requires defendant to demonstrate that counsel's performance was deficient. ***Strickland,*** 466 U.S. at 687. This demonstration must be

accomplished against the "strong presumption that counsel acted within professional norms." ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). A prerequisite to a claim of ineffective assistance of counsel is the preservation of trial counsel's testimony. ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Absent counsel's testimony, a claim of deficient performance would not be sustained. ***Id.*** at 804, 285 N.W.2d at 908-09. Frasch's claim of coercion is based upon his claim of ineffective assistance of counsel. The trial court properly required defense counsel's testimony.

Next, Frasch argues that he made a prima facie showing of coercion when he testified that he was scared at the beginning of his trial and that his defense counsel has "not done anything to not go to trial with Chad, or even say anything other than he does not want to." As previously discussed, Frasch's fears were rendered moot by Hagen's subsequent no contest plea. Frasch argues that his version of events is more credible than that of defense counsel. The trial court explicitly found otherwise. Because credibility assessment is a trial court, not appellate court, function, Frasch presents no basis for reversal. *See* ***In re Estate of Wolff v. Town Board***, 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990).

Finally, Frasch argues that although his trial counsel "in many ways performed effectively for defendant" by obtaining discovery, visiting him twice, preparing appropriate motions and arguing them effectively, he was ineffective by not responding to Frasch's major concern for severance and by pressuring Frasch into accepting the plea negotiations. The record proves otherwise. The trial court, the ultimate arbiter of witness credibility, determined that trial counsel's testimony was more credible. Trial counsel testified that Frasch did not ask for severance when they discussed the issue and at all times wanted to be tried with Hagen. Further, defense counsel testified that although he recommended the plea offer, he did not pressure Frasch into accepting it. A desire to avoid a possibly greater penalty does not in itself render a plea involuntary. ***State v. Herro***, 53 Wis.2d 211, 215, 191 N.W.2d 889, 891 (1971). Frasch's claims are without merit.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.