COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1031

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT C. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

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

ANDERSON, J. Scott C. Anderson appeals from a postconviction order denying his motion to withdraw his no contest plea to one count of theft of cable services. Anderson seeks to withdraw his no contest plea on the grounds that he received ineffective assistance of counsel which constitutes a "manifest injustice." We conclude that Anderson has failed to make a prima

facie showing that trial counsel's representation was deficient or prejudicial. Accordingly, we affirm.

On November 11, 1993, Anderson was charged with two counts of theft of cable services in violation of § 943.46(2)(g) and (4)(c), STATS., as a repeater. The charges stemmed from Anderson's sale of a cable box which was designed to receive premium channels for no charge to an undercover officer and from a partially assembled box that Anderson turned over to authorities. The State and Anderson reached a plea agreement that Anderson would enter a plea to count one and the State would dismiss count two. The State also agreed to recommend a "lengthy, imposed and stayed prison [sentence] with probation to run concurrent to any sentence [Anderson] is currently serving."

At sentencing, the State followed through on the recommendation, but also recommended one year in the county jail as a condition of probation.[1] The court imposed and stayed a six-year prison sentence and ordered six years' probation to run concurrent to his intensive sanctions sentence with one year county jail time, eight months stayed, as a condition of probation. Anderson was credited with thirty-three days for jail time served. Anderson's postconviction motion to withdraw his plea was denied. Anderson appeals.

The trial court's decision to deny a postconviction motion for the withdrawal of a no contest plea is discretionary, and we will reverse only if there has been an erroneous exercise of discretion. *See* ***State v. Spears***, 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). To succeed on a motion to withdraw

[1] The State specifically recommended six years in the Wisconsin state prison system, imposed and stayed, eight years probation to run concurrent with Anderson's intensive sanctions sentence and one year in the county jail as a condition of probation.

a no contest plea, the defendant must show "manifest injustice" by clear and convincing evidence. *See* ***id.*** Ineffective assistance of counsel is a recognized factual scenario that could constitute "manifest injustice." *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993).

In order to prove ineffective assistance of counsel, a defendant who has entered a plea must establish that his or her attorney's performance was both deficient and prejudicial. *See* ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985). The deficiency prong asks whether counsel's performance fell below the objective standard of reasonableness. *See* ***id.*** at 57. The prejudicial prong focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea. *See* ***id.*** at 59. To demonstrate prejudice, the defendant must allege facts to show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***id.***

These issues present mixed questions of law and fact. We will not reverse the trial court's underlying factual findings unless they are clearly erroneous. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The ultimate determination of whether the conduct of an attorney constitutes ineffective assistance of counsel is a question of law that we review de novo. *See* ***id.*** at 128, 449 N.W.2d at 848.

Anderson contends that trial counsel's "failure to address with [him] the possibility that the State might argue for the court to confine him was unreasonable." He maintains that "[he] chose, as a matter of defense policy and strategy, to make confinement a top priority when deciding what to plead. Therefore, it was incumbent upon trial counsel to fully provide him with all

relevant information about confinement and to fully counsel him about confinement issues." Because Anderson was not provided full and complete information about the consequences of his plea and plea agreement, he insists that trial counsel's performance was deficient. We disagree.

The trial court made the following findings: (1) the parties did not discuss the conditions of probation; (2) Anderson "understood what was happening, and he understood what he was doing, and that he understood the consequences of his plea"; and (3) Anderson is familiar with the criminal justice system. Although the court never made an express credibility finding on Anderson's claim of misunderstanding the terms of the plea agreement, it clearly rejected the claim as unfounded. In fact, the court's reliance on trial counsel's testimony suggests an implicit finding that the court found counsel to be more credible. The trial court determines the credibility of witnesses. *See* ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993) (where there are inconsistencies within a witness' testimony or between witnesses' testimonies, the trier of fact determines the credibility of witnesses). These findings are supported by the record and are not clearly erroneous.

It is apparent from trial counsel's testimony that from his perspective, "[T]he key to [the plea agreement] was this concurrent probation, which would keep [Anderson] out of *prison*; and he wasn't going to let anything interfere with that, period." (Emphasis added.) Counsel also explained that he did not attempt to get a commitment from the State on its position on conditions of probation because "[he] had worked very hard to get the agreement [he] had, and the State told [him] that morning it was their final offer, period; and so [he] took that to [his] client." Counsel also testified that Anderson was aware that jail was

possible as a condition of probation. Finally, he testified that because the State did not offer conditions of probation as part of the plea agreement, he did not ask.

Anderson now insists that "[j]ail and prison, both forms of confinement, are sufficiently similar so that intense concern about one reasonably warrants at least some small measure of concern about the other." However, at the ***Machner***[2] hearing, Anderson never testified that (1) confinement was a top priority, (2) that he discussed the confinement issue with counsel or (3) that he instructed counsel that he would not accept a plea agreement that included any type of confinement. Nor did Anderson elicit from trial counsel any evidence about what trial counsel knew of Anderson's intentions, other than the importance of concurrent probation to keep Anderson out of prison.

The defendant has the burden of making a prime facie showing that trial counsel's conduct was unreasonable and thereby deficient. *See* ***Hill***, 474 U.S. at 58. We conclude that Anderson has failed to make this showing.

As to the prejudice prong, Anderson contends that he would not have accepted the negotiated settlement if he had known that the State was free to ask for time in the county jail as part of the agreement. In his brief, he points to his reluctance to accept the plea agreement as evidence that he misunderstood it and would not have accepted it if he had been aware of the possibility of time in jail.

Our supreme court requires a defendant to allege facts which allow a court to meaningfully assess claims of prejudice on a postconviction motion to

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

withdraw a guilty plea alleging ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis.2d 303, 318, 548 N.W.2d 50, 57 (1996). An allegation unsupported by objective factual assertions that the defendant pleaded guilty because of misinformation given by trial counsel "is merely a self-serving conclusion." *See* ***id.*** at 313, 316, 548 N.W.2d at 54, 56. A conclusory allegation is insufficient to demonstrate prejudice. *See* ***id.*** at 313 n.7, 316, 548 N.W.2d at 54, 56.

We conclude that Anderson's statement that he pleaded guilty because he misunderstood the plea agreement is merely conclusory. Anderson must provide evidence which allows the court to assess his claim of prejudice, i.e., an explanation of why he would not have pleaded guilty. *See* ***id.*** at 314, 318, 548 N.W.2d at 55, 57. It is simply incredible that Anderson would have changed his plea if he had been aware that the conditions of probation might include jail time. Anderson faced a maximum of sixteen years in *prison* under the two charges contained in the criminal complaint. In addition, Anderson was caught selling a cable receiver device to an undercover agent, he turned over a partially completed cable box and he admitted to the officer that he bought the cable boxes at rummage sales and then converted them to receive premium channels. And as the State points out, the plea agreement which trial counsel finalized the morning of the hearing achieved Anderson's primary goal of avoiding a prison sentence through the recommendation of concurrent probation. Because Anderson has failed to make a prima facie showing of prejudice, we affirm the order.[3]

[3] Because of our determination on Anderson's ineffective assistance of counsel claim, we need not address Anderson's remaining contentions. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.