COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-1326-CR; 97-1327-CR; 97-1328-CR; 97-1329-CR & 97-1330-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL G. KACHELSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN and KITTY K. BRENNAN, Judges. *Affirmed.*

WEDEMEYER, P.J.[1] Michael G. Kachelski appeals from judgments entered after he pled guilty to five counts of battery, contrary to § 940.19, STATS. He also appeals from an order denying his postconviction

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

motion. Kachelski claims the trial court erred in denying his motion seeking to withdraw his guilty plea. He argues that his plea was not entered voluntarily because: (1) his trial counsel had a conflict of interest related to the flat-fee contract between counsel and the State Public Defender's office, and (2) his trial counsel did not provide him with effective assistance. Because Kachelski failed to show that a manifest injustice existed, the trial court did not err in denying his motion to withdraw his plea, and this court affirms.

I. BACKGROUND

Kachelski was charged with five counts of battery and one count of bail jumping. The battery charges stemmed from incidents that occurred on March 14, 1995, May 7, 1995, August 6, 1995, September 9, 1995, and October 1, 1995. The victim of each battery was Kachelski's girlfriend, Annette Teska. On the last three dates, Teska was pregnant.

Trial counsel was appointed on November 13, 1995. Trial counsel met with Kachelski on November 27, 1995, before the pre-trial. At that time, trial counsel discussed with Kachelski the police reports, the complaints, whether the facts as alleged were true, possible defenses, the plea agreement offered by the State and the effect of entering guilty pleas. Kachelski decided to plead guilty. During the plea, the trial court informed Kachelski that it intended to sentence him in accordance with the State's recommendation, which included jail time. Kachelski told the trial court that he understood that and that he did in fact commit the crimes charged.

The trial court accepted the plea, dismissed the bail jumping charge and sentenced Kachelski to twelve months in prison, with concurrent probation.

Following the sentencing, Kachelski moved to withdraw his plea, alleging that trial counsel had a conflict of interest and provided ineffective assistance.

A ***Machner***[2] hearing was conducted. The trial court found that Kachelski's version of events was more credible than Kachelski's and denied the motion. Kachelski now appeals.

II. DISCUSSION

A defendant who seeks to withdraw a guilty plea after sentencing must show that a "manifest injustice would result if the withdrawal were not permitted." ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). Kachelski argues that a manifest injustice will result because he did not actually commit these crimes, but was "railroaded" into pleading guilty by his trial counsel.

At the ***Machner*** hearing, both Kachelski and his trial counsel testified. Trial counsel testified that he did not treat Kachelski's case any different than any other case despite the fact that it represented a "flat-fee" assignment from the public defender's office. He testified that Kachelski wanted to plead guilty to get the case over with, that Kachelski admitted committing the crimes as described in the police report and that it was Kachelski's decision to plead guilty. Trial counsel also testified that he discussed the State's plea agreement with Kachelski, that he told Kachelski the trial court usually imposes the sentence recommended by the State, and this would mean Kachelski's sentence upon the guilty plea would include some jail time.

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

Kachelski offered a very different version of events when he testified at the ***Machner*** hearing. He said that the only reason he agreed to plead guilty was because trial counsel told him he would get out of jail. He testified that he told trial counsel that he did not commit the crimes, and that he lied to the trial court when he admitted committing these crimes. He stated that despite the trial court's statement that it would impose jail time, Kachelski still believed that he would get out of jail if he pled guilty.

The trial court found that Kachelski's testimony was "completely self serving and … a sham attempt to get out of the plea and the sentences," and incredible. There is evidence in the record to support this finding. In addition to trial counsel's testimony, there is strong evidence to show that Kachelski was guilty of committing the crimes charged. There were witnesses who observed the events, medical records to support the claims and Kachelski's own representations at the plea hearing.

Given the conflicting testimony, and the additional support in the record, the trial court's findings are not clearly erroneous. Section 805.17(2), STATS. Moreover, the trial court's decision turns on its credibility assessment. It is the trial court's responsibility to assess the reliability, weight and credibility to be given to the witnesses' testimony. *See* ***State v. Anderson***, 149 Wis.2d 663, 680, 439 N.W.2d 840, 847 (Ct. App. 1989), *rev'd on other grounds*, 155 Wis.2d 77, 454 N.W.2d 763 (1990). This court is obligated to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *See* ***id.*** This court cannot substitute its judgment.

Kachelski based his motion on two factors: (1) that trial counsel's flat-fee contract with the public defender's office created a conflict of interest,

because it motivated trial counsel to dispose of his case as quickly as possible so trial counsel would not be underpaid; and (2) that trial counsel did not provide effective representation. This court is not persuaded.

First, as to the alleged conflict of interest, the trial court found that Kachelski failed to satisfy his burden of proof on this issue. *See* ***State v. Franklin***, 111 Wis.2d 681, 686, 331 N.W.2d 633, 636 (Ct. App. 1983). This court agrees. Although the flat-fee contract may raise a suspicion of potential conflict, there is no evidence that a conflict arose regarding the facts in this case. Trial counsel testified that his representation in this case was not based on how he was being paid and that he would have handled the case the same even if he was representing a private client. There is no evidence that trial counsel would have handled this case differently if it had involved a private client who had paid a large retainer or that this representation was based on greed, financial pressure or economic calculations.

Second, Kachelski claims he received ineffective assistance because trial counsel failed to perform any investigation, (such as interviewing witnesses), failed to make a discovery demand, and failed to represent him as to bail issues. This court concludes that Kachelski has not shown he received ineffective assistance of trial counsel.

Whether counsel has provided ineffective assistance is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984). The ultimate determination involves reviewing "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. The overall purpose of this inquiry is to make sure that a defendant receives a fair trial. A fair trial is defined as "one in which

evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." ***Id.*** at 685.

Strickland set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. Review of trial counsel's performance gives great deference to the attorney and this court will make efforts to avoid determinations of ineffectiveness based on hindsight. The case is reviewed from trial counsel's perspective at the time of the representation, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.

Even if deficient performance is found, the judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair [proceeding], a [proceeding] whose result is reliable." ***Id.*** The standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. ***Id.*** at 698. Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. ***Id.***

Although it may seem at first glance that an attorney who fails to perform any investigation, request any discovery and so forth, has hardly provided

effective representation, a closer look at the facts present here compel a different conclusion. Trial counsel stated that his client admitted committing the crimes, that the client wanted to plead guilty, that his client waived discovery, and that in his opinion the State's plea agreement was beneficial. The agreement involved dismissing one count and a recommendation of twelve months jail time. Trial counsel indicated that the facts of this case, if tried, probably would have rendered a much lengthier sentence. Kachelski battered his girlfriend on five separate occasions. On three of those occasions she was pregnant with his child, and on one of these three, the battery involved punching her in the stomach. In addition, the State had a strong case, including witnesses–other than the victim–to the crimes, a 911 tape, and medical injury evidence.

Based on the foregoing, the trial court found that any investigation would not have made a difference. This court concurs. Even in the absence of testimony for the victim, the State's case was strong. Hence, even if trial counsel would have interviewed the victim and learned that she did not want Kachelski to go to jail, that she played some role in instigating the events leading to the battery and that she would not testify, this information does not render the result of the plea hearing unreliable. Kachelski admitted that he was guilty and he wanted to plead to get the case over with. In light of the foregoing, it was not unreasonable for trial counsel to handle the case in the manner he did.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.