

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-0537-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROYCE MINNICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Royce Minnich appeals a judgment convicting him of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS., following a plea agreement. Minnich also appeals the trial court's denial of postconviction relief. On appeal, Minnich argues that his trial counsel provided ineffective assistance of counsel by failing to inform him of the

“defense” of felony murder and failing to include him in a conference in chambers pertaining to his plea agreement. He further asserts the trial court violated his due process rights by excluding him from the in-chambers conference. We reject Minnich’s assertions and affirm the judgment.

Minnich was charged with party to the crime of first-degree intentional homicide and robbery by use or threat of use of a dangerous weapon in violation of § 943.32(2), STATS., in the murder of Michael H. Wojciuch. As part of a plea agreement, Minnich agreed to plead guilty to first-degree intentional homicide in exchange for the State dismissing the armed robbery charge and recommending a cap of twenty years for parole eligibility.

Prior to Minnich entering his plea, his attorney, the prosecutor and the judge met in chambers to discuss the plea. Minnich was not present. At the conference, the judge stressed his concern whether Minnich’s version of the facts fulfilled the elements for first-degree intentional homicide and whether Minnich’s “story” would adversely affect him in sentencing.¹ By the conference’s end, the court concluded that it was legally acceptable for Minnich to plead to first-degree murder based on the facts he was willing to admit. The court, however, still emphasized its concern that “[Minnich] is going to have to understand that he is running a very, very plain and profound risk that the Court will, without much adieu, reject his version and conclude that he is without remorse because he is

¹ It is undisputed that Minnich and his girlfriend, Mary Sheffield, went to Wojciuch’s house with a metal crowbar with the intent to rob him. Sheffield and the State allege that Minnich beat Wojciuch to death with the crowbar. Minnich, however, argues that he jumped Wojciuch and scuffled with him on the ground, holding Wojciuch by the shoulders until he became limp and Minnich realized that Sheffield was repeatedly striking Wojciuch with the crowbar.

unwilling to admit his culpability.” During conference recesses, Minnich consulted with his attorney for a total of approximately ten minutes.

At the plea hearing, the trial court thoroughly questioned Minnich, stressing that by entering his plea he was admitting he was guilty of intentional homicide, that he was eligible for life imprisonment, that he had a right at sentencing to give his statement of the facts, and that the State adamantly disagreed with his version. The court further emphasized to Minnich that “there is a wide disparity or difference between the facts the state alleges and the ones that you are admitting, and I will listen to all of this and make a decision after I have heard it all. But it could be unfavorable to you as well as favorable.” Minnich stated that he understood and entered a guilty plea to first-degree intentional homicide.

Minnich was sentenced to life in prison. The court did not follow the State’s recommendation of a twenty-year cap for parole eligibility and set a parole eligibility date of 2035. Consequently, Minnich filed a postconviction motion to withdraw his guilty plea and vacate his conviction under § 809.30, STATS. Minnich alleged that he received ineffective assistance of counsel and that the trial court violated his due process right to be present at the conference in chambers

In support of his ineffective assistance of counsel claim, Minnich contends that counsel failed to advise him of the “defense” of felony murder² and

² Despite Minnich’s characterization, felony murder is a *crime*, not a defense to first-degree homicide. See § 940.03, STATS.

failed to apprise him of the full extent of the in-chambers conference held prior to his plea hearing. We reject this argument.

Every defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish ineffective assistance of counsel, a defendant must prove that his lawyer's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Fritz*, 212 Wis.2d 284, 293, 569 N.W.2d 48, 51 (Ct. App. 1997). Whether counsel's performance was deficient and prejudicial are questions of law this court reviews de novo. *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

We do not need to determine whether counsel's performance was deficient "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice" *Id.* (quoting *Strickland*, 466 U.S. at 697). To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Johnson*, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is defined as a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). When a defendant seeks to withdraw his plea he "must allege facts to show ... 'that, but for the counsel's errors, he 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) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

As a preface, we note that it is difficult to assess Minnich's claims because his brief fails to adequately specify what his trial counsel actually *did* tell

him about the conference in chambers. Moreover, we cannot locate any reference in the record which informs on the issue.³ In our review of the postconviction transcript, Minnich's postconviction attorney's primary concern is Minnich's trial counsel's inability to relate verbatim what the trial court said; there is no insight as to what his counsel advised him in the recesses. Without knowing what information in fact Minnich gained in his conferences with counsel, we cannot compare that information to the transcript of the conference in chambers to determine any deficiency on behalf of Minnich's attorney. Minnich is in fact asking us to compare nothing to everything.

Nevertheless, Minnich has failed to provide any evidence or proof that but for his counsel's alleged errors, he would have insisted on going to trial as opposed to giving a more plausible version of events at allocution. Minnich merely makes bald assertions that had he known of the lesser-included offense of felony murder, and known of the substance and tenor of the conversation in chambers, he would not have entered a guilty plea and would have insisted on going to trial. He does not explain why this is so. Minnich does not provide any objective evidence or provide an argument to show that the trial court would have permitted a jury instruction on felony murder. Similarly, Minnich does not demonstrate that had he been present at the in-chambers conference, he would not have agreed to a resolution whereby a Class B felony would be dismissed and the prosecutor would make an acceptable parole eligibility recommendation. In fact, the portions of the record on which Minnich relies in no way appear significant when placed in the context of the entire in-chambers discussion, which primarily

³ At the postconviction motion hearing, Minnich's trial counsel at one point testified that "I discussed the proposed plea bargain with Royce extensively," but later is seen to equivocate to some degree.

concerned the factual basis for the offense.⁴ In support of a plea withdraw, a defendant cannot simply allege that he would have pled differently; the defendant must support this allegation by *objective* factual assertions. *Bentley*, 201 Wis.2d at 313, 548 N.W.2d at 54. Minnich has failed to provide any objective facts in the record to allow us to meaningfully assess his claim. *See id.* Therefore, Minnich has failed to show that he was prejudiced by his counsel's alleged ineffective assistance.

Second, Minnich argues that the trial court violated his due process rights by excluding him from the conference in chambers prior to his plea agreement. We reject Minnich's argument. Under art. I, § 7, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution, an accused has a right to be present at trial. *May v. State*, 97 Wis.2d 175, 186, 293 N.W.2d 478, 483 (1980). We acknowledge that a defendant's due process rights may be violated when a conference is held in chambers without the presence of the accused. *See Ramer v. State*, 40 Wis.2d 79, 85, 161 N.W.2d 209, 211 (1968). The court in *Ramer* emphasized that:

conferences of the court and attorneys outside the presence of the accused should be rarely held during the trial and the trial judge should be solicitous in allowing the defendant to be present at a conference in chambers when he requests it. There is always a risk of the conference exceeding a nonconstitutional scope or causing misunderstanding.

Id. at 85-86, 161 N.W.2d at 211.

⁴ Minnich's trial counsel summarized the in-chambers conference as follows:

This Court oft times handles the Socratic method to determine what is going on; and I think that's what he was doing at that time, testing why Mr. Buslee and I felt that there was a basis for a plea.

The court, however, has specifically held that a defendant's due process rights are not violated when excluded from a conference in chambers between his counsel and the prosecutor in regard to his plea agreement. In *Kruse v. State*, 47 Wis.2d 460, 468, 177 N.W.2d 322, 326 (1970), the court, in discussing the defendant's exclusion from a conference in chambers where a plea agreement was discussed, emphasized that:

In this case the defendant had the benefit of counsel during the entry of his plea and at the sentencing. See *State v. Strickland* (1965), 27 Wis.2d 623, 135 N.W.2d 295. While the practice followed in this case is not commended, such conferences cannot be considered part of any trial in the sense of one's constitutional right to be present when acquiescence to the plea agreement must be made in court and recorded, as was done in this case.

Id.

Here, as in *Kruse*, Minnich had the benefit of counsel at his plea hearing. The trial court went through each element to ensure Minnich understood he was pleading guilty to first-degree intentional homicide. It then stressed to Minnich that it had met with the State and his counsel in chambers and discussed his version of the facts.⁵ The court informed Minnich that if these facts were true

⁵ The trial court stated:

Mr. Minnich, before I make any findings about your understanding of the elements of the crime charged, the record will reflect that your lawyer and the state's lawyer met with me at length in chambers, and I was informed that you are admitting that you went to rob Mr. Wojciuch, that another person was in a car and you were crouched behind it, that when Mr. Wojciuch appeared you rose up holding a metal bar in your hand, that you lost control of the bar, that you tackled or grabbed or laid hold of Mr. Wojciuch and tried to wrestle him into submission; that you held him, and that you became aware that his body went limp, that you then saw another person striking Mr. Wojciuch with the iron bar, and that you saw these blows or some blows hit him in the head or upper – yes, I believe it was the head, after he had

(continued)

and he did admittedly commit armed robbery, he was equally responsible for the crime of first-degree intentional homicide. Next, the court emphasized the consequences of his plea. It advised Minnich of the risks he would run at sentencing by stating a story with which the State adamantly disagreed. The court stressed to Minnich that:

You should understand that if the Court does not give you any credence, does not believe you, does not put any credibility in what you are saying, I could infer or I could conclude, I could decide that you have no remorse or insufficient remorse for this offense, and I could consider it in terms of what is the appropriate parole eligibility date if any. ...

....

What I am trying to emphasize here is that there is a wide disparity or difference between the facts the state alleges and the ones that you are admitting, and I will listen to all of this and make a decision after I have heard it all. But it could be favorable to you as well as favorable.

Thus, Minnich had the benefit of being fully informed by the trial court as to the material aspects of the in-chambers conference regarding the plea.

In conclusion, this court concludes that Minnich's arguments are without merit. Accordingly, the judgment is affirmed.

By the Court.—Judgment and order affirmed.

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gone limp, and that you had done nothing to stop that. Is that true?

