COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-1147

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KIRBY J. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

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

PER CURIAM. Kirby Krueger, pro se, appeals an order denying his motion to withdraw his no contest plea to one count of burglary, contrary to § 943.10(1)(a), STATS. He contends that he suffered a manifest injustice and should be permitted to withdraw his plea for the following reasons: (1) the State violated double jeopardy protections by charging him with one count of burglary

and one count of theft of a financial transaction card; (2) the State breached a plea agreement; (3) he received ineffective assistance of counsel; (4) alleged procedural errors used to revoke his probation in a Milwaukee County conviction; (5) delay in bringing him into court to answer the criminal complaint; (6) alleged misinformation in the presentence report; and (7) he was under the influence when he gave his statement to police. We reject Krueger's contentions and therefore affirm.

Krueger was charged in Outagamie County with one count of burglary, one count of theft of a financial transaction card, and one count of operating a vehicle without the owner's consent. Krueger entered a no contest plea to the burglary charge, and the two other charges were dismissed and read in for sentencing. The prosecutor indicated that the State would request a presentence report with open sentencing. Krueger was later sentenced to four years' imprisonment consecutive to time he was serving on another conviction.

Krueger filed a motion to withdraw his plea, which the trial court orally denied. Krueger appealed before the trial court entered a written order. We dismissed that appeal for lack of jurisdiction and advised Krueger to file a new notice of appeal after a written order was entered. The written order was entered April 15, 1998. Krueger appealed that order, and we transferred the record from his earlier appeal.

To withdraw a guilty or no contest plea after sentencing, a defendant must establish that the trial court should permit him or her to withdraw the plea to correct a "manifest injustice." ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). The defendant must prove a manifest injustice by clear and convincing evidence; the plea withdrawal is addressed to the sound

discretion of the court and will be reversed only for an erroneous exercise of discretion. ***State v. Booth***, 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987). A material and substantial breach of a plea agreement constitutes a manifest injustice. ***State v. Bangert***, 131 Wis.2d 246, 289, 389 N.W.2d 12, 32 (1986). Ineffective assistance of counsel may also result in a manifest injustice. ***Washington***, 176 Wis.2d at 213-14, 500 N.W.2d at 335.

We first address Krueger's argument involving double jeopardy. Krueger appears to argue that he suffered a manifest injustice because the State violated his double jeopardy rights by prosecuting him for one count of burglary, in violation of § 943.10(1)(a), STATS., and one count of theft of a financial transaction card, § 943.41(3), STATS.

First, the conviction does not violate double jeopardy protections because Krueger pled no contest only to the burglary charge while the theft charge was dismissed. In any event, the charges are distinct under the ***Blockburger*** "same elements" test. *See* ***Blockburger v. United States***, 284 U.S. 299 (1932). That test asks whether each offense requires proof of an additional fact which the others do not. ***Id***. at 304. The elements of burglary in violation of § 943.10(1)(a), STATS., are that: (1) the defendant entered a building or dwelling; (2) the defendant entered the building or dwelling without the consent of the person in lawful possession; (3) the defendant knew that the entry was without consent; and (4) the defendant entered the building with intent to steal. WIS J I—CRIMINAL 1421. The elements of theft of a financial transaction card, in violation of § 943.41(3)(a), STATS., are that: (1) the defendant acquired a financial transaction card from the person, possession, custody or control of another; (2) the defendant acquired such card without the consent of the cardholder; and (3) the defendant acquired such card with intent to use it or sell it or to transfer it to a person other

than the issuer. WIS J I—CRIMINAL 1496. The elements of the crimes are clearly distinct, and neither crime is a lesser included offense of the other.

Next, we turn to Krueger's argument that the State breached a plea agreement. He contends that the district attorney "made a deal" that if he pled guilty or no contest he would receive a two-year sentence concurrent with time he was serving on another conviction. The record belies his claim. At the plea and arraignment, the prosecution indicated that it would be asking for a presentence with open sentencing. Both Krueger and his attorney responded that this was their understanding. At sentencing, the State recommended a significant term of imprisonment to run consecutive to the sentence Krueger was then serving. Neither defense counsel nor Krueger then contended that the recommendation breached the plea agreement. Further, Krueger signed a plea questionnaire and waiver of rights form verifying that he was advised that the judge was not required to go along with the plea agreement and could sentence him to the maximum penalty of ten years. "An accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial." ***Cross v. State***, 45 Wis.2d 593, 605, 173 N.W.2d 589, 596 (1970). In short, the record is completely devoid of any indications the State breached a plea agreement.

We next turn to Krueger's argument that his trial counsel was ineffective. Krueger contends that his counsel's performance was deficient because, after reading the police reports, counsel told him that he felt he would be found guilty and that he could get Krueger a deal. He argues that this was ineffective because, given that statement, "There is no way that he could support myself to the best of his ability." We disagree with Krueger's contentions.

A criminal defendant who claims his conviction should be reversed because he received ineffective assistance of counsel must demonstrate both that his attorney's performance was deficient and that any deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986) (*quoting* ***Strickland***, 466 U.S. at 688). To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

Krueger has failed to demonstrate that his attorney's performance was deficient. Given the weight of the evidence, counsel's assessment that Krueger would be found guilty was reasonable. Krueger admitted to police that he entered a home and stole the credit card. Evidence also demonstrated that Krueger had the credit card in his possession when stopped by police. Furthermore, trial counsel did indeed procure a deal for Krueger; two of the charges Krueger faced were dismissed. Counsel's performance was not deficient.

Krueger also contends that he was denied due process because he never went back to the sentencing court in Milwaukee County to have his probation revoked. This has no bearing on whether he should be allowed to withdraw his plea on this conviction. We have no jurisdiction over his Milwaukee County case, and we therefore do not further address the argument.

We turn to Krueger's assertion that he was denied due process when arrested on September 7, 1996, but not brought into court to answer the criminal complaint until January 14, 1997. He fails to provide any argument demonstrating a nexus between this delay and why he should be permitted to withdraw his plea. In addition, the record demonstrates he was incarcerated in the Wisconsin Prison System on other charges during part of this time. The delay in the initial appearance does not, by itself, constitute a manifest injustice warranting plea withdrawal.

We next consider Krueger's argument concerning alleged misinformation in the presentence report. He appears to assert that the sentencing court was unaware that he was placed on probation in the Milwaukee County case, rather than sent to prison. He states that because he has not reviewed the report, he is unsure whether it contained erroneous information in this regard.

We are satisfied by the record that the court was not misled by any possible error in the presentence report. At sentencing, the State advised the court that Krueger was on probation for a burglary in Milwaukee County. His attorney also explained that Krueger's probation was revoked after he was charged in Waukesha County. Further, when sentencing him, the court itself referred to Krueger's activity while "on probation." Finally, while misinformation may be a basis for resentencing, Krueger fails to demonstrate why any possible misinformation in the report should serve as a basis for withdrawal of his plea.

Finally, Krueger argues that he gave his statement to the police while under the influence of crack cocaine. We first note that the mere existence of intoxication is insufficient to render a statement involuntary. ***State v. Clappes***, 136 Wis.2d 222, 240, 401 N.W.2d 759, 767 (1987). More importantly, however,

Krueger fails to provide a nexus between his assertion and why he should be allowed to withdraw his plea.

By the Court.—Order affirmed.

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