COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 00-2396-CR & 00-2397-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHERMAN B. RONES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR. and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Sherman B. Rones appeals from judgments entered after he pled guilty to three counts of first-degree sexual assault, while using a dangerous weapon, and seven counts of armed robbery, several while concealing identity, contrary to WIS. STAT. §§ 940.225(1)(b), 943.32(1)(b), 943.32(2) and

939.641 (1997-98).[1] Rones also appeals from an order denying his postconviction motions. He claims that he should be allowed to withdraw his guilty pleas because: (1) he received ineffective assistance of trial counsel; (2) the prosecutor breached the terms of the plea agreement; and (3) his pleas were not entered knowingly, intelligently or voluntarily. Because Rones failed to prove that he received ineffective assistance of trial counsel, because the record does not reflect a breach of the plea agreement, and because the guilty pleas were knowingly, intelligently and voluntarily entered, we affirm.

I. BACKGROUND

¶2 In May, June and July 1998, Rones committed multiple armed robberies and sexual assaults. On July 6, 1998, after a brief police chase, Rones was arrested and interrogated. He signed a confession, and was charged in three separate cases. In one case, he was charged with first-degree sexual assault, while armed with a dangerous weapon, and armed robbery. The second case involved two counts of first-degree sexual assault, while armed while concealing identity, and two counts of armed robbery while concealing identity. These two cases were assigned to the Honorable Jeffrey A. Wagner. The third case charged Rones with four counts of armed robbery while concealing identity, and was assigned to the Honorable Laurence C. Gram, Jr.

¶3 Trial counsel filed a motion seeking to suppress physical evidence and statements, alleging that Rones had been denied counsel during the interrogation. The prosecutor handling the Wagner cases offered Rones a plea

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

agreement wherein Rones would agree to plead guilty, and the prosecutor would make no specific sentencing recommendation, except that the sexual assault sentences would run consecutively and consecutive to the third case. The prosecutor advised that if Rones elected to proceed to trial, an amended information would be filed adding more charges, which would increase Rones's potential prison exposure. In the four armed robbery cases, the prosecutor offered a plea agreement wherein the attempted armed robbery counts would be dismissed in exchange for Rones's guilty plea, and provided that the prosecutor would recommend prison time consecutive to the cases before Judge Wagner, but not take a position as to whether the four armed robbery sentences would be consecutive to each other.

¶4 Rones entered guilty pleas before both Judge Wagner and Judge Gram. Judge Wagner sentenced Rones to forty years on the first-degree sexual assault, and forty years on the armed robbery, consecutive. Judge Wagner then sentenced Rones to forty-five years each on both counts of first-degree sexual assault, while using a dangerous weapon while concealing identity, and forty-five years each on both counts of armed robbery while concealing identity. Each of these four sentences was imposed consecutive to the other and consecutive to the first case. Judge Gram sentenced Rones to thirty-five years on each of the armed robbery counts, consecutive to each other, and to the cases before Judge Wagner.

¶5 Subsequently, Rones filed postconviction motions seeking to withdraw his guilty pleas in all three cases. Judge Wagner decided the postconviction motions in one order, and summarily denied Rones's claims. Rones appealed from the judgments and order. We consolidated his cases for the purposes of this appeal.

II. DISCUSSION

A. Ineffective Assistance Claims.

¶6 Rones first argues that he should be allowed to withdraw his guilty pleas because his trial counsel provided ineffective assistance. We reject this argument.

¶7 Decisions on plea withdrawal requests are discretionary and will not be overturned unless the trial court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion which is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Rones has the burden of proving by clear and convincing evidence that a manifest injustice exists. ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶8 Ineffective assistance of trial counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Rones must prove both that his counsel's conduct was deficient and that such conduct would prejudice him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Rones must demonstrate 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." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The trial court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law which we review independently. ***Id.***

¶9 Here, Rones specifically contends that his counsel was ineffective because: (1) he failed to conduct a reasonable investigation which resulted in abandoning the motions to suppress; (2) he provided unreasonable advice regarding plea negotiations; (3) he failed to advise Rones as to the elements of the offense and maximum penalties; and (4) he failed to object when the prosecutor breached the terms of the plea agreement. We reject each contention in turn.[2]

1. Motions to Suppress.

¶10 Rones asserts that trial counsel should not have abandoned the motions to suppress, and that such conduct constituted deficient performance. The record conclusively refutes this contention. Trial counsel filed motions to suppress. Before a hearing on the motions could take place, the State proposed a plea agreement. The plea agreement involved dismissing certain counts and making limited sentencing recommendations if Rones would plead guilty. In addition, the State indicated that if Rones chose to try the case, the State would file an amended information, adding more counts and increasing Rones's potential maximum prison time.

¶11 The record contains a letter from trial counsel to Rones stating that, based on the foregoing, trial counsel would recommend accepting the plea agreement, but that the decision of whether to plead or go to trial was Rones's

[2] Rones also claims that the trial court erred when it failed to conduct a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing is not required when a postconviction motion: (1) fails to allege sufficient facts to raise a question of fact; or (2) presents only conclusory allegations; or (3) when the record conclusively demonstrates that the defendant is not entitled to relief. Based on our review of the record and analysis provided in the body of this opinion, the record conclusively proves that Rones was not entitled to relief. Therefore, a ***Machner*** hearing was not required.

decision. Nowhere in Rones's brief does he dispute this. Instead, Rones argues that if the suppression motion would have been pursued and would have been successful, he would have elected to try the cases.

¶12 According to trial counsel's letter to Rones, it was counsel's belief that the chance of winning the suppression motion was slim. The trial court agreed with this assessment in its written decision denying the postconviction motion. Rones, however, asserts that the search warrant which was used to search his apartment was not supported by probable cause. The record refutes this assertion. Rones's girlfriend, Karen Nickel, who lived with Rones at the residence, attested that Rones came home and displayed $75,000 in cash to her. Rones advised that he had received the money from a bank robbery. Nickel then positively identified Rones as the person in the surveillance photo from the bank that was robbed. Nickel also told the police that Rones was looking for a box in which to store the money. All of this information creates a substantial basis to believe that the contraband money could probably be found at Rones's residence. ***State v. Higginbotham***, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991). Therefore, the warrant was supported by probable cause and there was no chance of the suppression motion succeeding on that basis.

¶13 Rones next asserted that the suppression motion would have been granted on the basis that he repeatedly asked for an attorney to be present during his interrogation, and he was not afforded such opportunity. The only thing in the record that supports this claim is Rones's self-serving conclusory statements. We have reviewed the custodial statements in the record. There is no indication that Rones ever asked for an attorney. He signed his name in several places indicating that he waived his right to an attorney. The statements also reflect that he was permitted to phone his girlfriend. Rones was not prevented from using the

telephone and, if he truly had asked for an attorney, he could have used the phone to do so. Thus, there is nothing in the record, but for Rones's self-serving conclusory statement, to support his claim. We agree with the trial court that the suppression motion based on Rones's statement alone would not have been granted.

2. Advice Regarding Plea Negotiations.

¶14 Rones next claims that his trial counsel provided unreasonable advice regarding the plea negotiations. The record reflects that such advice was based on a strategic decision and, therefore, cannot constitute deficient performance. The letter contained in the record reflects a reasonable opinion. Other attorneys in the same position may have recommended proceeding to trial, but the record here reflects that Rones's trial counsel's recommendation was not unreasonable. Taking the plea would limit Rones's potential incarceration exposure because the State was threatening to "up the ante" if Rones turned down the plea. Further, the State agreed to remain silent as to the specific length of the sentence. Under such circumstances, the record conclusively demonstrates that the advice regarding the plea negotiations does not constitute ineffective assistance.

3. Elements of the Offense.

¶15 Rones also asserts that trial counsel was ineffective because he failed to explain the elements of each of the offenses. The record refutes this claim as well. First, Rones signed the Guilty Plea Questionnaire[s], which indicated that he was advised of the elements of the offenses and that he understood each element. Second, during the plea colloquies in these cases, the trial court asked Rones if his counsel had explained the elements of the offenses, and if Rones understood them.

Rones responded affirmatively. Accordingly, he cannot now claim that counsel was ineffective on this ground when he personally admitted that trial counsel had fulfilled this responsibility.

4. Objecting to Plea Agreement.

¶16 Rones claims that trial counsel was ineffective for failing to object when the prosecutor informed the court of the State's sentencing recommendation. Rones argues that the prosecutor's statements were ambiguous and subject to different interpretations. We disagree.

¶17 During the plea colloquy, the prosecutor related the terms of the plea agreement:

> The State agreed that it would make no specific recommendation to the Court, leaving up to the Court the precise length of the sentence, but the State is recommending that the Court impose sentences that run consecutive as to each of the three victims.
>
> And furthermore, I believe that the other matters that the defendant has are still awaiting sentencing. But to fully describe the agreement, I would mention that the State also indicated it would make a recommendation that any time imposed run consecutive to any of the various armed robberies, and so the cases that Irene Parthum from our office is handling as well as the Waukesha County cases, although the practical effects, since I believe this is the first Court sentencing, the other courts will have to deal with how the time is imposed with respect to those cases.

¶18 The trial court addressed this issue in the postconviction motion decision. The trial court indicated that it was clear to the court that the State was seeking consecutive sentences only as to each sexual assault and consecutive to the other pending case. The trial court understood from the prosecutor's statement that, under the plea agreement, the State was leaving it up to the court to determine

whether consecutive or concurrent sentences were warranted as to each individual count. Accordingly, failure to object was not ineffective assistance because the State honored its part of the plea agreement.

B. Plea Agreement.

¶19 Rones argues that the prosecutor breached the terms of the plea agreement by altering the recommendation at the time of sentencing. We are not convinced.

¶20 Whether the State violated the terms of a plea agreement is a question of law that we review independently. ***State v. Poole***, 131 Wis. 2d 359, 361, 394 N.W.2d 909 (Ct. App. 1986). In order to receive relief, the party asserting the breach must prove by clear and convincing evidence that a substantial and material breach occurred. ***State v. Jorgensen***, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987).

¶21 As noted above, we agree with the trial court's assessment. According to the terms of the plea agreement, the State was to leave the length of the sentence up to the court. The State did so. The State was going to recommend that each sexual assault count be consecutive to the other, and that the sentence in the cases before Judge Wagner would run consecutive to the sentence in the case before Judge Gram. The record reflects that that is what the State recommended. Accordingly, there was no breach.

C. Knowing, Intelligent and Voluntary Plea.

¶22 Rones argues that both Judge Wagner and Judge Gram failed to properly advise him of the elements of the offenses to which he was pleading

guilty. As a result, he claims that his plea was not knowingly, intelligently and voluntarily entered. We disagree.

¶23 WISCONSIN STAT. § 971.08(1) requires that the trial court "[a]ddress 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." A defendant has the burden of making a prima facie case that his or her plea was accepted without compliance with § 971.08. If such a showing is made, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly, intelligently and voluntarily entered. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815 (Ct. App. 1995). The State may rely on the entire record in attempting to satisfy its burden. ***State v. Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986).

¶24 In ***Bangert***, the Wisconsin Supreme Court emphasized the importance of making sure the defendant understands the nature of the charge, and provides trial courts with three options to ensure that WIS. STAT. § 971.08 is satisfied: (1) the trial court may summarize the elements of each crime from reading the appropriate jury instruction; (2) the trial court may ask defendant's counsel whether he or she explained the nature of the charge to the defendant, and ask counsel to repeat on the record the explanation, including each element; or (3) the trial court may expressly refer to the record demonstrating the defendant's knowledge of the nature of the charge established before the plea hearing. ***Id.*** at 268.

¶25 The plea colloquies in these cases arguably fall into the third option, i.e., the Guilty Plea Questionnaire[s] establish that Rones understood the nature of the charges. In ***State v. Moederndorfer***, 141 Wis. 2d 823, 826-28, 416 N.W.2d

627 (Ct. App. 1987), this court held that a trial court could use the questionnaire to determine if a defendant's plea was knowingly, intelligently and voluntarily entered. However, in ***State v. Hanson***, 168 Wis. 2d 749, 485 N.W.2d 74 (Ct. App. 1992), we cautioned that reliance on the questionnaire alone may be insufficient. ***Id.*** at 756. To comply with WIS. STAT. § 971.08, a trial court must determine not only that a defendant read and understood the questionnaire, but also that the defendant understood that he or she was waiving constitutional rights. ***Id.***

¶26 Nevertheless, this case is distinguishable from ***Hanson***, despite the brevity of the plea colloquies in the record. The ***Hanson*** case involved whether Hanson understood he was waiving constitutional rights in entering a plea. ***Id.*** The instant case involves whether or not Rones understood the statutory elements of the crimes with which he was charged. Thus, we conclude that the pleas entered here satisfy the dictates of WIS. STAT. § 971.08.

¶27 On the morning of each of the plea hearings, Rones signed a Guilty Plea Questionnaire form. In each form, Rones acknowledged that he read the criminal complaint and the information, that he understood what he was charged with, what the penalties were, and why he was charged. He also stated that he understood the elements of the offense. Trial counsel also signed the forms, indicating that he had personally discussed the contents with Rones and that Rones told counsel he understood each item in the questionnaire forms. At the plea hearings, the trial court asked Rones whether his attorney had explained to him the elements of the offenses, and whether he understood the nature of the charges.

Rones responded affirmatively. Based on the foregoing, we conclude that the plea colloquies were minimally sufficient.[3]

¶28 We do, however, caution the trial courts that the brief colloquies used here barely satisfy the required standards, and strongly urge the trial courts to elect the first or second option clearly set forth in the ***Bangert*** case.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] As a part of this argument, Rones also claims his pleas were infirm because the Guilty Plea Questionnaire set forth inaccurate maximum penalty information. Specifically, he contends that the questionnaire showed five-year enhancers on counts where he was not charged with penalty enhancers. This argument is without merit. The complaint accurately set forth forty years as the maximum penalty and, during the plea hearing, the court apprised Rones of the correct penalty.