COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3116-CR **Cir. Ct. No. 01-CF-955**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AJUANA V. D. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Ajuana Smith appeals a judgment convicting her of first-degree reckless homicide for the death of her two-year-old daughter. She also appeals an order denying her motion for postconviction relief. Smith argues that she received ineffective assistance of trial counsel and that she should be allowed to withdraw her no contest plea. We reject the arguments and affirm.

¶2 Smith's daughter, Dejaney, died from internal bleeding caused by trauma to her head, chest, and abdomen that resulted in severe internal bleeding. Smith confessed that she had repeatedly pushed and hit Dejaney in anger the day before Dejaney died. Smith entered a no contest plea to first-degree reckless homicide as part of a plea agreement. Under the agreement, the parties agreed to make a joint recommendation of a thirty-year sentence, with each side free to argue about the length of initial confinement, except that the State was bound to recommend no more than fifteen years of initial confinement. After entering her plea, Smith wrote a letter to the circuit court expressing her love for her daughter and protesting her innocence. The circuit court forwarded the letter to the State and to defense counsel. Smith was then sentenced to a thirty-year sentence, with twelve years of initial confinement and eighteen years of extended supervision. Smith moved for postconviction relief, arguing that she received ineffective assistance of trial counsel and that she should be allowed to withdraw her plea. After a hearing, the circuit court denied the motion.

¶3 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the performance prejudiced his or her defense. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). In order to show prejudice, "the defendant seeking to withdraw his or her plea must allege facts to show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Bentley***, 201 Wis. 2d at 312 (citation omitted). We will affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we

review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶4 Smith contends that her trial counsel was ineffective for not informing her before sentencing that she could move to withdraw her plea. She argues that her counsel should have known that she wanted to withdraw her plea after he read the letter she sent to the circuit court protesting her innocence. She contends she would have moved to withdraw the plea had she known that she could do so.

¶5 After hearing testimony and argument at the postconviction motion hearing, the circuit court found incredible Smith's assertion that she would have moved to withdraw her plea had she known of the option to do so. While Smith's letter expressed deep feelings for Dejaney, the circuit court pointed out that it did not contain a request to withdraw her plea or an inquiry about a trial date, which would corroborate Smith's assertion that she didn't realize she had given up her right to trial by entering the plea. The circuit court also noted that Smith did not advise the court at sentencing that she wanted to withdraw the plea or have a trial, although she had ample opportunity to do so. Finally, the circuit court gave considerable credence to Smith's attorney's testimony that he met with Smith within one week after she had entered her plea—and about ten times between the plea and sentencing—and that Smith never indicated she wanted to withdraw her plea or indicated that she thought she was going to have a trial.

¶6 The circuit court's factual finding that Smith would not have moved to withdraw her plea had she known of her right to do so turned largely on the court's credibility assessments. Issues of credibility are, of course, committed to the circuit court's discretion. *See* ***State v. Owens,*** 148 Wis. 2d 922, 930, 436

N.W.2d 869 (1989) ("The fact finder does not only resolve questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony."). The circuit court considered testimony of Smith and her attorney, as well as the statements Smith did (or did not) make to the court in her correspondence and at the sentencing hearing, and found that Smith was not credible. We will not overturn this factual finding because it is not clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 374-76, 407 N.W.2d 235 (1987). Because the court found incredible Smith's assertion that she would have withdrawn her plea had she known of the right to do so, Smith has not shown that she was prejudiced by counsel's failure to inform her that she had a right to move to withdraw the plea. Therefore, we reject her claim that she received ineffective assistance of trial counsel. *See* ***Strickland,*** 466 U.S. at 697 (we need not address both deficient performance and prejudice if the defendant makes an inadequate showing on one).

¶7 Smith also argues that the circuit court erred in denying her motion to withdraw her plea. "To withdraw a guilty [or no-contest] plea after sentencing, the defendant 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 (Ct. App. 1987). "The burden of proof of manifest injustice is on the defendant, by clear and convincing evidence." ***Id.*** at 237. "The withdrawal of a guilty [or no-

contest] plea is not a 'right,' but is addressed to the sound discretion of the trial court and will be reversed only for [a misuse] of that discretion." ***Id.***[1]

¶8 Smith contends that a manifest injustice has occurred because her plea was not knowingly entered. She contends she was tired, frightened, and confused, and she points out that this was her first experience in the criminal justice system. The plea colloquy and plea questionnaire/waiver of rights form undercut Smith's claims. Smith was clearly informed of the consequences of her plea, and the plea was taken in accord with the requirements set forth in ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Smith's after-the-fact assertion that she did not understand is not sufficient to show that a manifest injustice occurred, in light of the record showing otherwise.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

[1] Smith argues that the circuit court should have considered her request for plea withdrawal under the more lenient standard applicable before sentencing, which allows withdrawal "where the defendant presents a fair and just reason for doing so, unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). We will not employ the pre-sentencing standard because we have already concluded that the circuit court's factual finding, that Smith would not have withdrawn her plea before sentencing had she known of the right to do so, was not clearly erroneous.