COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0365 **Cir. Ct. No. 96CF961019B**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAYMON D. TATE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Daymon D. Tate appeals from an order denying his motion for postconviction relief based upon his contention that his postconviction counsel was ineffective for failing to allege ineffectiveness of his trial counsel. Tate contends that, but for the ineffective assistance of his trial counsel, he would not have pled guilty, and thus, the trial court erred in denying

his motion to vacate his guilty plea. Because Tate fails to show a manifest injustice entitling him to plea withdrawal, we affirm.

I. BACKGROUND.

¶2 In February 1996, four armed and masked men robbed an automotive garage. The garage owner was killed in the process. Tate was identified as one of the masked men, and the police went to his home. After entering the home, the police commenced a search that uncovered large sums of cash, a coat, and a black mask. Tate was arrested. Initially, Tate made several statements to the police denying his involvement, but three days later, he confessed to being involved in the robbery. He was charged with felony murder, with a penalty enhancer for concealing his identity during the armed robbery, as a party to the crime, in violation of WIS. STAT. §§ 940.03, 939.641, 943.32, 939.05 (1995-96).[1]

¶3 In April 1996, Tate pled guilty to a reduced charge of armed robbery, while concealing his identity, as a party to the crime, pursuant to a plea negotiation. The State amended the information to the reduced charge in exchange for Tate's guilty plea and testimony against the other defendants. The trial court accepted Tate's guilty plea, but Tate maintains that shortly thereafter he sent several letters to the trial court "pleading his cause" and several to his attorney expressing a desire to withdraw his guilty plea.

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

¶4 In May 1996, two of the co-defendants went to trial. The mask and the coat recovered from Tate's home were introduced as evidence. Tate testified as to his involvement in the crime. He also admitted that, prior to confessing, he attempted to convince the police that he was not involved in the crime.

¶5 Although Tate contends that he "continued to plead his cause" by sending additional letters to the trial court during late May and early June of 1996, on June 12, 1996, when the trial court entered a judgment of conviction on Tate's April guilty plea,[2] Tate raised no objections. In July, he was sentenced to thirty years of imprisonment.

¶6 In May 1997, Tate filed a postconviction motion seeking to withdraw his guilty plea. He argued that his plea was not knowingly, voluntarily, and intelligently entered; that the State breached the plea agreement; and that he received ineffective assistance of counsel. After an evidentiary hearing, the trial court denied the motion. Tate appealed. In February 1999, this court affirmed the judgment and order of the trial court. ***State v. Tate***, No. 97-3401-CR, unpublished slip op. (Wis. Ct. App. Feb. 9, 1999).

¶7 In April 2000, Tate filed a *pro se* postconviction motion, pursuant to WIS. STAT. § 974.06 (1999-2000) and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), alleging ineffective assistance of postconviction counsel. Tate argued that his postconviction counsel was ineffective for failing to raise an argument regarding the alleged ineffectiveness of his trial counsel. He insisted that his trial counsel was ineffective for: (1) failing

[2] It appears that the trial court withheld entering the judgment of conviction, per the request of the State, until the final disposition of the co-defendants' cases.

to investigate his claimed alibi; and (2) failing to file a motion to suppress statements made and evidence gathered as a result of an allegedly illegal search and arrest. Tate also sought an evidentiary hearing. In May 2000, the trial court denied his motion without a hearing. Tate appealed, and in July 2001, this court remanded the case to the trial court for an evidentiary hearing concerning the legality of the search. ***State v. Tate***, No. 00-1404, unpublished slip op. (WI App July 13, 2001).

¶8 In June 2002, the trial court held an evidentiary hearing. In its order of January 30, 2003, the trial court concluded that the entry into and search of Tate's home were unlawful, and that the mask and coat would have been suppressed had a motion been filed. However, the trial court further concluded that the seizure of the evidence did not prejudice Tate. The trial court was "unpersuaded that the suppression of this evidence would have made any realistic difference to the outcome of [his] case." The trial court declined to make a finding whether Tate's confession would have been suppressed had a ***Miranda-Goodchild*** hearing been held because Tate's argument was not fully developed. It thus denied Tate's motion to vacate his guilty plea.[3] He now appeals.

II. ANALYSIS.

¶9 Tate insists that the trial court erred in denying his motion to vacate his guilty plea. He contends that, but for the ineffective assistance of his trial counsel, he would not have pled guilty. Tate maintains that "effective

[3] It appears that the trial court considered a motion on behalf of Tate's brother (a co-defendant) together with Tate's motion (for which the evidentiary hearing was being held). Accordingly, the two motions (that of Tate and his brother) were denied in the same order of the trial court on January 30, 2003. Tate's brother, however, is not a party to this appeal.

representation requires adequate investigation and pre-trial preparation," and although counsel's "selection of trial tactics" should not be second-guessed, "[t]here is nothing to second-guess here because there was nothing done other than a plea and sentencing[.]" He contends that his trial counsel did not investigate or have a defense strategy. He insists that it is reasonable to assume that trial counsel would have formulated a different strategy, other than an early plea, had he pursued a suppression motion. Furthermore, Tate argues that the "unique representation" by his trial counsel "makes it admittedly difficult … to support his claim with objective factual assertions that he would have demanded trial with effective counsel[.]"[4]

¶10 Tate urges this court to consider the "entirety of the record" and the "cumulative" ineffectiveness of his trial counsel. He argues that the trial court failed to consider "whether the cumulative effect of [his] 'do nothing' lawyer may be substantial enough to meet the *Strickland* prejudice prong."[5] He insists that he

[4] At this juncture, Tate makes reference to the pleas in the letters he sent to the trial court and his attorney in support of his claim that he would have demanded a trial. He argues: "[The letters] demonstrate that he placed emphasis on the entirety of his case because he knew nothing about the evidence and what was being done on his behalf. Those letters portray a defendant concerned about being deprived of a meaningful defense." He does not, however, indicate what impact those letters allegedly have on the suppression issue.

[5] Tate even appears to suggest that an evidentiary hearing should be held to examine the facts that would be relevant to determining "what [he] would have done had he been effectively represented." We address this issue later in the discussion.

Tate also seems to suggest that the trial court should have investigated the "obvious conflict" between Tate and his trial counsel and "made inquiry of Tate pre-sentencing about his request to withdraw his plea," presumably referring to the letters he sent. Insofar as he may be attempting to raise additional issues in this manner, we decline to address them as they are inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues inadequately briefed).

has "not merely made a self-serving statement that he would have proceeded to trial," but that "a reasonable probability exists that he would have gone to trial."

¶11 The State and Tate agree that the mask, the coat, and the money were "fruits" of the search of Tate's home. What they do not agree on, however, is whether Tate's confession was also a "fruit" of the search. Tate appears to contend that since his *pro se* WIS. STAT. § 974.06 motion "included the claim that evidence, including *statements*, resulting from his unlawful arrest and the unlawful search" should have been suppressed, and because this court's decision on remand "recognized that Tate sought suppression of his statements," he should be able to pursue that avenue here. Yet Tate also concedes that "[w]hat has been lost in the analysis to date has been the potential suppression of [his] inculpatory statement to police." This argument—regarding the alleged significance of the connection between the illegal search and Tate's confession—has not been adequately developed below, and the trial court did not address its merits. In fact, the trial court noted: "[Tate] never explains what difference, if any, the discovery of the mask and the coat in his home made to his decision to confess, to testify against his own brother and to plead guilty." As such, we decline to consider it as a basis for Tate's claim of prejudice. The issue, then, is only whether Tate was prejudiced by his trial counsel's failure to seek suppression of the mask and coat.

¶12 "The withdrawal of a guilty plea is not a 'right,' but is addressed to the sound discretion of the trial court and will be reversed only for an [erroneous exercise] of that discretion." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987) (citation omitted). After sentencing, the defendant is required to show a "manifest injustice" in order to be entitled to plea withdrawal. ***Id.*** at 235; ***State v. Nawrocke***, 193 Wis. 2d 373, 378, 534 N.W.2d 624 (Ct. App. 1995). That showing must be by clear and convincing evidence, and the burden of proof

is on the defendant. *See* ***State v. Rock***, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). "The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." ***Nawrocke***, 193 Wis. 2d at 379.

¶13 The supreme court "has recognized that the 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996); *see* ***Rock***, 92 Wis. 2d at 558-59. In ***Hill v. Lockhart***, 474 U.S. 52 (1985), the United States Supreme Court concluded that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." ***Id.*** at 58. Under ***Strickland v. Washington***, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***id.*** at 687; *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687. Thus, 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 (quoting ***Hill***, 474 U.S. at 59).

¶14 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, "[t]he

questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Id.*** Finally, if the defendant fails to meet either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697.

¶15 Assuming *arguendo* that Tate's trial counsel's performance was deficient, we are not persuaded that Tate was prejudiced as a result. Tate has failed to establish that there is a reasonable probability that, but for the failure to suppress the coat and mask, he would not have pled guilty. Tate confessed to his involvement in the crime, as did other co-defendants, and he has not, until now, developed an argument alleging any nexus between his confession and the discovery of the mask and coat. Indeed, the trial court also determined that "when … Tate decided to plead guilty he was motivated mainly by his hope for leniency in exchange for cooperation against his brother." He has not persuaded us otherwise.

¶16 Tate requests that we "remand this matter to the trial court for an evidentiary hearing on the potential suppression of his inculpatory statement[,]" if we "believe[] the resolution of [his] § 974.06 … motion is affected by a lack of a record concerning the propriety of the claim that his inculpatory statement could have been suppressed as fruit of any unlawful arrest and search[.]" We decline to do so. An evidentiary hearing regarding the illegal search has already been held, and the trial court found that Tate failed to properly develop this argument.

¶17 Tate also requests an evidentiary hearing on the prejudice prong of his ineffective assistance claim. He insists that the most recent evidentiary hearing was limited in scope, and that he "candidly did not think to ask the trial court to

allow him to present evidence on the prejudice issue." While we appreciate his candor, we cannot conclude that the trial court erred in failing to conduct an evidentiary hearing on the matter when it was never requested. Furthermore, the trial court ordered briefing on the prejudice aspect of the ineffective assistance claim—the issue was not ignored.

¶18 While Tate's trial counsel's allegedly deficient performance is regrettable, Tate has failed to establish that he was prejudiced as a result. Accordingly, he has failed to show, by clear and convincing evidence, a manifest injustice requiring the withdrawal of his guilty plea. The trial court properly denied his motion. Thus, we affirm.

By the Court.—Order affirmed.

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