COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0776-CR **Cir. Ct. No. 02CF000055**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES NEWMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Charles Newman entered pleas of no contest to three misdemeanors[2] as a part of a plea agreement with the State.[3] Newman contends that because he intended to enter pleas of guilty rather than no contest that his pleas of no contest should be vacated and a new plea hearing granted. We affirm the trial court order denying Newman's postconviction motion and the judgment of conviction.

¶2 The relevant facts are undisputed. A plea hearing occurred on April 18, 2002. The plea agreement called for Newman to enter a plea of guilty to each of three misdemeanor counts. A guilty plea questionnaire was prepared and provided to the trial court indicating that Newman would enter guilty pleas. However, after the trial court received the questionnaire, Newman's defense counsel stated that "[t]he agreement calls for Mr. Newman to plead *no contest* to Count 2, 3 and 4."[4] (Emphasis added.) During the plea colloquy, Newman affirmed that his plea to each of the misdemeanor counts was specifically "no contest."

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Newman entered pleas to two counts of disorderly conduct contrary to WIS. STAT. § 947.01 and one count of resisting or obstructing an officer contrary to WIS. STAT. § 946.41(1), each count subject to the repeater enhancement under WIS. STAT. § 939.62.

[3] The State agreed to dismiss and read in two additional counts, a felony count of battery to a police officer contrary to WIS. STAT. § 940.20(2), repeater, and one disorderly conduct charge, repeater.

[4] Defense counsel stated in full:

> I'm tendering to the Court a guilty plea questionnaire. The agreement calls for Mr. Newman to plead no contest to Count 2, 3 and 4. Counts 1 and 5 are to be dismissed and read-in. At sentencing both sides are free to argue.

¶3 On June 6, 2002, the trial court sentenced Newman to five years' imprisonment. Defense counsel then requested that Newman be allowed to enter pleas of guilty rather than no contest as called for in the plea agreement. The court denied the request. Newman then filed a postconviction motion requesting that his conviction be vacated and granting him a new plea hearing. The trial court denied the motion.

¶4 Newman raises two issues alleging ineffective assistance of his defense counsel. First, that his counsel was ineffective in entering pleas of no contest when he intended, and the plea agreement called for, pleas of guilty. Second, that his counsel's ineffective representation resulted in his being deprived of the right to enter a plea of his choice as to each misdemeanor.

¶5 To establish an ineffective assistance of counsel claim, Newman must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***See Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id***. at 697. To meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id***.

¶6 Newman contends that he was prejudiced because the result of the plea proceeding would have been different if he had entered a plea of guilty rather than no contest. Newman cites to ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985), which holds that prejudice is shown if a defendant would not have entered a plea but for counsel's deficient performance. Newman concedes, however, that Hill entered a plea of guilty because his counsel's performance was deficient, and that Hill wanted to withdraw that plea, enter a plea of not guilty and go to trial. ***Hill*** is not analogous to the present case and we disagree with Newman that its rationale is relevant here. As the State points out in its reply brief, the ***Hill*** holding still required a prejudice analysis concerning whether "the error had no effect on the judgment." ***Id***.

¶7 Pleas of guilty and no contest to criminal charges are subject to the same statutory requirements in Wisconsin. *See* WIS. STAT. § 971.08. Newman does not challenge the propriety of the trial court's acceptance of the no contest pleas. He contends only that if he had been allowed to enter guilty pleas rather than no contest pleas the result of the plea proceeding would have been different. The trial court disagreed,[5] and so do we.

¶8 The distinction between a plea of guilty and a plea of no contest has been addressed in Wisconsin. In ***Lee v. State Board of Dental Examiners***, 29 Wis. 2d 330, 139 N.W.2d 61 (1966), our supreme court stated that the essential characteristic of a "*nolo contendere*" (no contest) plea is that it cannot be used collaterally as an admission, but when a no contest plea is accepted by the court "it

[5] The trial court in denying the postconviction motion stated, "Whatever plea was made and whatever plea was accepted is the plea that's going to stand at this point. The ultimate fact, I don't see where that makes any difference."

constitutes an implied confession of guilt for the purposes of the case to support a judgment of conviction and in that respect is equivalent to a plea of guilty." ***Id***. at 334. The ***Lee*** court then went on to hold:

> A judgment of conviction based on a plea of *nolo contendere* is a conviction which contains all the consequences of a conviction based on a plea of guilty or a verdict of guilty. There is no difference in the nature, character or force of a judgment of conviction depending upon the nature of the underlying plea.

Id. at 335.

¶9 Newman's contention, that the result of the plea hearing would be different with guilty pleas rather than no contest pleas, fails in light of the ***Lee*** holding that a conviction based upon a no contest plea is no different than a conviction based upon a guilty plea. Because the result of the plea proceeding (a conviction based upon the plea) would not be different, Newman has not established that he was prejudiced by the entry of the no contest pleas. Because no prejudice occurred, Newman is not entitled to relief on the basis that he received ineffective assistance of counsel.[6]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(4).

[6] We need not address whether defense counsel was deficient. The trial court concluded that defense counsel was not deficient in her representation of Newman. We have no disagreement with the trial court as to that determination but choose to dispose of this appeal on the prejudice prong alone.