COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1460 **Cir. Ct. No. 01CM000464**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STACEY R. WILHELM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

¶1 NETTESHEIM, J.[1] Stacey R. Wilhelm pled no contest to a charge of misdemeanor battery as a repeater. He appeals from a trial court order denying

[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.

his motions for postconviction relief pursuant to WIS. STAT. § 974.06 and for sentence modification. Wilhelm sought to withdraw his plea based on his claim of ineffective assistance of counsel. He argues that the trial court erred in denying his request without first conducting a ***Machner***[2] hearing. Because Wilhelm's motions allege facts which, if true, would support a finding of ineffective assistance of counsel, we reverse the trial court's ruling on this issue.

¶2 Wilhelm additionally sought sentence modification based on: (1) a subsequent legislative reduction in the penalty for his convicted offense, and (2) his probation agent's failure to provide him a referral to AODA counseling in keeping with his judgment of conviction. We reject Wilhelm's challenges to the trial court ruling. First, this court is bound by the supreme court's decision in ***State v. Hegwood***, 113 Wis. 2d 544, 548, 335 N.W.2d 399 (1983), which holds that a legislative reduction of the maximum penalty for the crime for which a defendant is incarcerated is not a new factor entitling the defendant to a hearing on the merits of a motion for sentence modification. Second, while a probation agent's failure to provide a referral to AODA counseling may have provided a basis for challenging the revocation of probation, it is not a new factor entitling Wilhelm to sentence modification. We therefore affirm that portion of the trial court's order denying Wilhelm's request for sentence modification.

BACKGROUND

¶3 On September 24, 2001, the State filed a complaint against Wilhelm alleging misdemeanor battery as a repeater. As probable cause, the complaint

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

alleged that the victim stated "he was at the Quik Stop Shoppe North … filling his vehicle with gas when a white male with short blond hair [later identified as Wilhelm] got out of a white Oldsmobile and began striking him, knocking him to the ground." The victim stated that "after he fell to the ground [Wilhelm] continued striking him repeatedly in the head" before fleeing on foot. Wilhelm was on probation at the time of the offense.

¶4 Wilhelm's initial appearance was held on September 27, 2001. His lawyer, Attorney Dominic Frinzi, entered a not guilty plea on his behalf. On October 18, 2001, the court held a status hearing at which Frinzi requested a continuance and a reduction in Wilhelm's bail. The trial court denied Frinzi's requests and set a pretrial for November 1, 2001. At the November 1 hearing, Frinzi appeared, stated that he had met with Wilhelm and asked the court to "pick a date for a plea and I can soften the D.A. up a little." The parties agreed on a hearing date of November 16, 2001. At that hearing, Frinzi informed the court that he was a "poor persuader" and Wilhelm insisted "that he exercise his right to a jury trial." The trial court set the trial for January 14, 2002, with a final status hearing on December 19, 2001.

¶5 On November 28, 2001, Wilhelm filed a pro se motion with the trial court requesting his release pending trial based on WIS. STAT. § 971.10 which provides that a trial in a misdemeanor case shall commence within sixty days of the initial appearance. Frinzi was not aware of Wilhelm's motion.

¶6 At the final status hearing on December 19, Frinzi informed the trial court that he needed to withdraw from the case because Wilhelm's brother, who had agreed to arrange for Frinzi's representation of Wilhelm, had decided against doing so. Frinzi asked that a public defender be appointed. The court then

informed Frinzi that Wilhelm had made a speedy trial demand and therefore it could not adjourn the trial date. The district attorney and Frinzi then discussed whether Wilhelm had in fact filed a speedy trial demand or whether he was simply requesting release pending trial. When the parties asked Wilhelm whether he had requested a speedy trial, the following exchange took place between Frinzi and Wilhelm:

> Wilhelm: Why don't we just plead it out and get it over with.
>
> Attorney Frinzi: What?
>
> Wilhelm: Why don't we just plead it out? I will enter a guilty plea and get it over with.
>
> Attorney Frinzi: You want to do that today?
>
> Wilhelm: Yeah.
>
> Attorney Frinzi: Okay. I got a questionnaire that I have prepared.

¶7 Following this exchange, the trial court engaged in a plea colloquy with Wilhelm.[3] The court then accepted Wilhelm's no contest plea and offered the defense an adjournment to prepare for sentencing. Both Frinzi and Wilhelm informed the court that additional time was not necessary. After hearing arguments from both parties, the court sentenced Wilhelm to three years' imprisonment imposed and stayed pending three years of probation with the first six months of probation to be served in the Ozaukee county jail. Wilhelm's probation was revoked on October 15, 2002.

[3] Wilhelm does not challenge the plea colloquy. Nor does our independent review of the colloquy reveal any grounds for a challenge.

¶8 On March 20, 2003, Wilhelm filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 seeking to withdraw his no contest plea on grounds that he had received ineffective assistance of counsel. In support of his motion, Wilhelm filed an affidavit in which he alleged the following. Frinzi met with him only briefly and only prior to scheduled court proceedings. Frinzi advised him to plead guilty or no contest and that he would "probably only get a one-year sentence." Prior to the entry of Wilhelm's plea, Frinzi did not make a formal request for discovery or provide Wilhelm with copies of court papers other than the criminal complaint. Wilhelm had informed Frinzi that he may not be guilty of battery because the victim had come at him swinging a gasoline nozzle and that Wilhelm had knocked the victim down in response. Prior to the hearing on December 19, Frinzi appeared agitated and was hostile with Wilhelm. Frinzi informed Wilhelm that Wilhelm's brother owed him money and that he would be withdrawing from representation.

¶9 Wilhelm's affidavit further claimed that when he entered his plea, he felt confused and was concerned that his brother would be angry at him for failing to follow Frinzi's advice to enter a plea. Wilhelm was also concerned if a public defender was appointed, the trial might not take place for several months and he was depressed and distraught over being in jail and missing Christmas with his children. Wilhelm stated that if he "had not had the problems with Attorney Frinzi, [he] would have persisted with [his] request for a jury trial…. I am not sure I am guilty of battery."

¶10 On May 16, 2003, Wilhelm additionally filed a motion to modify his sentence on grounds that the legislature had decreased the statutory penalty for his convicted offense, and that his probation agent and the department of corrections

had failed to give him a referral and consent to obtain AODA treatment as ordered by the court.

¶11 The trial court denied both of Wilhelm's motions in a written decision and order issued on May 22, 2003. The court concluded that Wilhelm's "supporting affidavits as they relate to his incompetenc[e] of counsel claim really reflect nothing more than a change of heart based upon his present circumstances." With respect to sentence modification, the court concluded that Wilhelm had not provided a legal basis for sentence modification.

¶12 Wilhelm appeals.

DISCUSSION

¶13 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 250, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, Wilhelm alleges that he received ineffective assistance of counsel. He argues that the trial court erred in denying his claim of ineffective assistance of counsel without first conducting a ***Machner*** hearing.

¶14 A claim of ineffective assistance of counsel presents mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated

the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination which this court decides de novo. ***Id***.

¶15 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 663, 660 N.W.2d 12, *review denied*, 2003 WI 126, ___ Wis. 2d ___, 668 N.W.2d 557 (Wis. Jul. 9, 2003) (No. 02-0396-CR). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. (citation omitted). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id***. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Id***. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id***.

¶16 Before a trial court must grant an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must allege facts which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). "However, if the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Id***. at 309-10 (*citing* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). Upon appeal, we review the defendant's motion de novo to determine whether it alleges facts sufficient to raise a question of fact necessitating a ***Machner*** hearing. *See* ***Bentley***, 201 Wis. 2d at 310.

¶17 The trial court ruled that Wilhelm's motion and affidavit simply revealed a "change of heart" unrelated to any alleged ineffective assistance of counsel. At first blush, this reasoning is understandable since Wilhelm's change of plea appears to have caught everyone—Frinzi, the State and the court—by surprise. But under closer scrutiny, this analysis is incomplete because it begs the crucial underlying question—*why* the change of heart.

¶18 Wilhelm's affidavit in support of his postconviction motion sets out a variety of grounds in support of his ineffective assistance of counsel claim. We see three of these as relevant: (1) Wilhelm's allegation that Frinzi had not investigated and counseled him regarding the potential defense under the law of self-defense; (2) Wilhelm's allegation that just before the December 19 hearing, Frinzi stated that he would be withdrawing; and (3) Frinzi's documented request to withdraw at the hearing itself.

¶19 The defense function standards adopted by the Wisconsin courts mandate a defense lawyer to fully investigate the facts of the case and the courts have emphasized "the duty of a lawyer to investigate adequately the circumstances of the case and to explore all avenues which could lead to facts that are relevant to either guilt or innocence." ***State v. Felton***, 110 Wis. 2d 485, 501, 506, 329 N.W.2d 161 (1983).[4] Coupled with this duty is the obligation to "advise the

[4] In ***State v. Felton***, 110 Wis. 2d 485, 501, 329 N.W.2d 161 (1983), the court noted its adoption of sec. 4.1 of the American Bar Association Standards Relating to The Prosecution Function and The Defense Function which provides:

4.1 **Duty to investigate.**

(continued)

accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome." ***Id***. at 506 (citing ABA Defense Function Standard 5.1(a)). *Defense counsel must do so "regardless of the anticipated plea."* ***Id***. (emphasis added).

¶20 We readily acknowledge that Wilhelm has not made any showing that Frinzi would not have properly performed his investigative and counseling duties had Wilhelm not changed his plea and had the case gone to trial. But those are not the facts of this case. Instead, the facts reflected that up until the moment Wilhelm changed his plea, he had consistently indicated that he desired to exercise his right to a jury trial, even to the point of filing a speedy trial demand without Frinzi's knowledge. Wilhelm had also notified Frinzi of the facts that arguably would support a self-defense claim. However, Frinzi had not taken any steps to investigate or pursue that potential defense, nor had Frinzi counseled Wilhelm as to the viability of such a potential defense. Instead, according to Wilhelm's affidavit, Frinzi had told Wilhelm that the allegations of the complaint were sufficient and that Wilhelm should admit to the offense. In summary, there is nothing in the record to indicate that prior to Wilhelm changing his plea, Frinzi had assessed Wilhelm's assertion that he may have a potential claim of self-defense or even discussed with him the strengths and weaknesses of his case and the alternative outcomes.

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

¶21 Of particular concern is that Wilhelm's change of plea was undertaken without any prior consultation with Frinzi regarding that crucial decision. At a minimum, when Frinzi learned that Wilhelm intended to change his plea, he should have asked for an adjournment to discuss the wisdom of the decision. This would have afforded Frinzi the opportunity, for the first time: (1) to counsel Wilhelm on the viability of a potential defense of self-defense; (2) to determine whether Wilhelm truly wanted to abandon that potential defense; and (3) to assess whether Wilhelm's wish to change his plea was a fully informed decision or rather the product of Wilhelm's frustration with Frinzi. On this final point, we recall Wilhelm's allegation that Frinzi had told him he would be withdrawing from the case and that Frinzi actually made that request to the trial court when the case was called.

¶22 We stress again that we are limited to the allegations made in Wilhelm's motion unless the record before us belies those allegations. ***Bentley***, 201 Wis. 2d at 309-10, 548 N.W.2d 50 (1996). Here, the only other potentially relevant material is the trial court's plea colloquy with Wilhelm. While the colloquy passes muster under ***Bangert***, it does not answer the allegations or issues raised by Wilhelm's postconviction affidavit. Instead, Frinzi's testimony at a ***Machner*** hearing will address those allegations. We therefore conclude that Wilhelm's allegations, if true, would entitle him to relief, *see* ***Felton***, 110 Wis. 2d at 503-04 (finding that the failure of defense counsel to fully investigate the case or to consider a plausible defense constituted ineffective assistance of counsel), and at the very least raises a question of fact as to whether he did indeed receive ineffective assistance of counsel. *See* ***Bentley***, 201 Wis. 2d at 309.

¶23 We further conclude that Wilhelm's petition sufficiently alleges facts which demonstrate that he was prejudiced by Frinzi's actions. *See* ***id.***, 201 at

312 (a defendant must allege facts that show that there is a reasonable probability that but for counsel's errors, he would not have entered a plea and would have insisted on going to trial). The record demonstrates that up until the December 19 hearing and even at the commencement of that hearing, Wilhelm had insisted on going to trial because he was not sure he was guilty. Only when discussion arose regarding Frinzi's withdrawal from the case and a possible trial delay pending the appointment of a public defender did Wilhelm suddenly enter his plea. We therefore conclude that Wilhelm is entitled to a ***Machner*** hearing on his petition and we remand for those proceedings.

¶24 Wilhelm next contends that the trial court erred in denying his motion for sentence modification which was based on a legislative reduction in the penalty for his convicted offense and his probation agent's failure to provide him a referral to AODA counseling in keeping with his judgment of conviction.

¶25 "Whether a set of facts is a 'new factor' is a question of law which we review without deference to the trial court." ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). "Whether a new factor warrants a modification of sentence rests within the trial court's discretion." ***Id***.

¶26 "[T]he phrase 'new factor' refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). However, the case law since ***Rosado*** has limited the "new factor" standard to situations where the new factor frustrates the purpose of the original sentencing. ***Michels***, 150 Wis. 2d at 97. Thus, "[t]here must be some connection between the factor and

the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***Id***. at 99.

¶27 With respect to Wilhelm's first challenge, this court is bound by the supreme court's decision in ***Hegwood***, 113 Wis. 2d at 548, which holds that a legislative reduction of the maximum penalty for the crime for which a defendant is incarcerated is not a new factor entitling the defendant to a hearing on the merits of a motion for sentence modification. Relying on the dissent in ***Hegwood***, Wilhelm requests that this court nevertheless consider his request or certify the issue to the supreme court. However, the supreme court's resolution of this issue in ***Hegwood*** is clear and we are bound by it. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶28 Next, Wilhelm alleges that his probation agent's failure to provide him with a referral to AODA treatment constitutes a new factor entitling him to sentence modification. However, Wilhelm is not challenging the imposition of AODA treatment at the time of sentencing. Nor does Wilhelm allege facts not known to the trial court at the time of sentencing which may have affected the trial court's order for AODA treatment. Rather, Wilhelm is challenging his probation revocation on grounds that it was his agent, not him, who was responsible for his failure to comply with his probation conditions. This fact does not frustrate the purpose of the trial court's sentence. The fact remains that Wilhelm's attorney argued at sentencing that Wilhelm has a "problem with liquor" and in an effort to provide Wilhelm with the opportunity to change his behavior, the trial court ordered AODA treatment.

¶29 In sum, Wilhelm's challenge travels to the propriety of his probation revocation and not to the trial court's sentence. A challenge to a probation

revocation must be made by writ of certiorari. *See* ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, ¶3, 236 Wis. 2d 473, 613 N.W.2d 591.

CONCLUSION

¶30 We conclude that Wilhelm's motions for postconviction relief allege facts pertaining to a claim of ineffective assistance of counsel, which if true, would entitle him to relief. As such, he is entitled to an evidentiary hearing. We therefore reverse that portion of the trial court order denying his request for a ***Machner*** hearing. However, for reasons stated above, we affirm that portion of the trial court order denying Wilhelm's motion for sentence modification.

By the Court.—Order affirmed in part, reversed in part and cause remanded.

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