COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP1685
2004AP1686

Cir. Ct. Nos. 1996CF65
2001CF39

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. ALDERMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Joshua Alderman appeals an order denying his motion for postconviction relief. Alderman was convicted of possession of more than 2500 grams of THC with intent to deliver, as a second or subsequent offense

and as party to a crime. Alderman argues: (1) that he received ineffective assistance of trial counsel; (2) that he should be allowed to withdraw his guilty plea; (3) that the circuit court, at the postconviction motion hearing, improperly allowed testimony regarding statements of a confidential informant in police reports; and (4) that he is entitled to sentence modification due to the misconduct of the government in manipulating his sentence exposure. We reject all of Alderman's arguments and affirm.

¶2 Alderman argues that he received ineffective assistance of trial counsel. To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that defendant was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." ***Id.*** at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." ***Id.***

¶3 Alderman first contends his counsel was ineffective because counsel made a legal error when negotiating the plea agreement. Alderman was charged as both a second or subsequent offender under WIS. STAT. § 961.48 (1999-2000)[1]

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and as a repeater under WIS. STAT. § 939.62 (1999-2000). Under ***State v. Ray***, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992), the circuit court could apply only one of the two enhancers. ***Id.*** at 873. Alderman contends that counsel's failure to obtain dismissal of one of the two enhancers under ***Ray*** prejudiced his bargaining position because counsel incorrectly believed Alderman faced more prison time than Alderman actually faced. We agree that counsel's performance was deficient because counsel did not move to dismiss one of the two enhancers. However, Alderman's claim of ineffective assistance fails because he has not shown that he was prejudiced by counsel's mistake. Alderman contends that he was prejudiced because, had counsel known Alderman was only facing thirty years, rather than forty years, the plea agreement would have been more favorable which, in turn, would have resulted in a more favorable sentence. This claim is based on pure speculation. Alderman has not shown that counsel would have been able to get a better deal if only he had been aware of ***Ray***, especially since counsel felt the prosecutor was unwilling to offer Alderman a reasonable deal and characterized the negotiations by saying, "[e]ssentially the state is giving you no deal."

¶4 Alderman also argues he was prejudiced because he would not have entered the plea agreement had he known that he faced only thirty years. The circuit court rejected this assertion based on its assessment of Alderman's credibility. The court concluded that Alderman's claim that he would not have entered the plea was not credible. Alderman has not shown that this credibility determination was clearly erroneous. We therefore conclude that Alderman did not receive ineffective assistance of counsel based on counsel's failure to move to dismiss one of the two penalty enhancers.

¶5 Alderman next contends that he received ineffective assistance of counsel because counsel did not adequately investigate the issue of sentencing entrapment as a possible defense or plea bargain issue. Alderman contends that the undercover police officer posing as a drug dealer improperly engaged in "sentencing entrapment" or sentencing manipulation because he gave Alderman more drugs than Alderman paid for or requested. As conceded by Alderman, however, sentencing entrapment is not an established defense in Wisconsin. Counsel does not render ineffective assistance for failing to argue a point of law that is unsettled. ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994).

¶6 More specifically, Alderman argues that counsel should have reviewed audio and videotapes made of the drug sale because the tapes would have shown that the undercover police gave Alderman more drugs than he requested. Assuming without deciding that counsel performed deficiently because he did not review the tapes, this argument faces the same stumbling block as Alderman's general claim that his attorney should have done more investigation on sentencing entrapment. Alderman has not shown how he was prejudiced. He has not explained how the information on the tapes would have enabled his counsel to present a *successful* sentencing entrapment argument because Wisconsin law does not recognize this legal defense.

¶7 Alderman's final claim of ineffective assistance of counsel is based on his contention that counsel did not adequately explain the plea agreement to him, which prejudiced Alderman because he believed the recommended extended supervision was to be imposed concurrent to his initial confinement. After considering the evidence presented at the postconviction motion hearing, the circuit court found that Alderman *did* understand what extended supervision was

and that the plea agreement, which included a recommended sentence of both initial confinement and extended supervision, was repeatedly explained to him. Our review of the plea hearing transcript and the postconviction hearing testimony shows that there is ample support for the circuit court's finding. Therefore, we reject this claim.

¶8 Alderman also contends he should be allowed to withdraw his guilty plea because it was not knowingly and voluntarily entered. This claim is premised on the fact that the circuit court did not specifically ask Alderman whether any kind of promise was made in exchange for him to waive his right to a trial. He contends that, had the circuit court asked him, he would have explained that he believed a promise *was* made—that he would receive a total of ten years of imprisonment pursuant to the plea agreement. This line of argument simply rephrases a previously raised issue. Whether raised as an argument that he did not knowingly and voluntarily enter his plea, as here, or as an argument that counsel was ineffective, as it was above, the claim fails because the circuit court found that Alderman understood the agreement, and that finding is not clearly erroneous. In other respects, the circuit court adequately complied with the requirements set forth in WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Therefore, we reject Alderman's claim that his plea was not knowingly and voluntarily entered.

¶9 Alderman next contends that the circuit court, at the postconviction motion hearing, improperly relied on testimony regarding statements of a confidential informant in the police reports. He argues that the testimony regarding the informant's statements violated the confrontation clause, citing ***Crawford v. Washington***, 541 U.S. 36 (2004). Alderman's confrontation clause challenge fails because the right of confrontation is a *trial* right, and we are aware

of no authority, including ***Crawford***, that allows Alderman to assert that right at a postconviction motion hearing. *See* ***Barber v. Page***, 390 U.S. 719, 725 (1968).[2]

¶10 Finally, Alderman argues that he is entitled to sentence modification due to the misconduct of the government in manipulating his sentence exposure. Because we have concluded that there is no established law in Wisconsin recognizing a defense of sentencing entrapment, we reject this argument.

By the Court.—Order affirmed.

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

[2] We do not address the hearsay argument because it is inadequately developed.