COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1400-CR

Cir. Ct. Nos. 2004CM9753
2005CM0332

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALVIN D. YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Alvin D. Young appeals from a judgment entered after he pled guilty to one count of battery and one count of disorderly conduct as a habitual criminal, contrary to WIS. STAT. §§ 940.19(1), 947.01 and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

939.62 (2003-04).[2] He also appeals from the order denying his postconviction motion. Young claims the trial court erroneously exercised its discretion when it: (1) denied his motion seeking to withdraw his guilty plea; and (2) denied his claim of ineffective assistance without conducting an evidentiary hearing. Because the trial court did not erroneously exercise its discretion in either regard, this court affirms.

BACKGROUND

¶2 On December 21, 2004, Young was charged with one count of misdemeanor battery as a habitual criminal. On January 14, 2005, Young was charged with one count of disorderly conduct as a habitual criminal. The cases were consolidated and set for trial on November 1, 2005.

¶3 On the morning of the trial, Young entered into a plea agreement, wherein he agreed to plead guilty to disorderly conduct with a habitual criminality enhancer and battery. In exchange for the plea, the State would dismiss the habitual criminality enhancer originally attached to the battery count and would recommend sixteen months on the disorderly conduct count to run concurrent to Young's felony revocation sentence, and nine months in the House of Correction, stayed, with a one-year probation on the battery count, to be served consecutive to the revocation sentence.

¶4 The plea hearing was conducted without incident and the case proceeded immediately to sentencing. The prosecutor at that point advised the

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

court that the victim had just submitted three different letters from Young, sent during the time he was to have no contact with the victim. The court asked if the prosecutor had just received them, to which the response was, "Yes. I just received [them] in the middle of this morning."

¶5 A short time later, the court offered Young's attorney an opportunity to break for the noon hour so there would be an opportunity for review of the letters. Young's counsel advised the court that Young wanted to proceed with sentencing without delay. Copies of the letters were provided to the court and to the defense. At the conclusion of the sentencing hearing, the trial court sentenced Young to twenty-four months in prison, consisting of eighteen months' initial confinement and six months' extended supervision on the disorderly conduct count and six months in the House of Correction on the battery count, consecutive to the felony revocation.

¶6 Young filed a motion seeking postconviction relief, seeking to withdraw his guilty pleas on the grounds that the State violated the discovery statute, WIS. STAT. § 971.23, and breached its plea agreement by failing to disclose the letters prior to the entry of the guilty pleas. Young further alleged that his trial counsel provided ineffective assistance by failing to object to the introduction of the letters during the sentencing hearing. The trial court denied the motion, ruling that Young was not prejudiced by any violation of the discovery statute, that the State had not breached its plea agreement, and that trial counsel was not ineffective. Young now appeals.

DISCUSSION

¶7 Young raises several issues, whether: (1) he should be allowed to withdraw his guilty plea; (2) the prosecutor breached the plea agreement; and

(3) his claim of ineffective assistance of trial counsel warrants an evidentiary hearing. This court resolves each issue in favor of affirming the trial court for the reasons that follow.

A. Plea Withdrawal.

¶8 Young's first contention is that he should be allowed to withdraw his guilty pleas based on the State's failure to timely disclose the inculpatory materials, namely, the letters sent to the victim. This court is not persuaded.

¶9 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

¶10 Here, Young appears to argue that the manifest injustice was a violation of the discovery statute, WIS. STAT. § 971.23(1)(a), which requires production by the State of "[a]ny written or recorded statement concerning the alleged crime made by the defendant" if it is within the possession, custody or control of the State. The test for determining whether evidence should have been disclosed is "what a reasonable prosecutor should have known and would have done under the circumstances of the case." ***State v. DeLao***, 2002 WI 49, ¶30, 252 Wis. 2d 289, 643 N.W.2d 480.

¶11 The trial court rejected Young's argument, reasoning that even if the State had the letters prior to the plea agreement and even if "the letters fell within the scope of the discovery statute, the defendant has not demonstrated that he was prejudiced by the State's failure to disclose them beforehand." This court agrees with the trial court's assessment of this issue and adopts the trial court's decision on this issue as our own. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003).

B. Breach of Plea Agreement.

¶12 Young next argues that the State breached the plea agreement. In essence, Young contends that the prosecutor "distanced" herself from the plea agreement and presented the previously undislosed letters to effectively cause the trial court to impose a greater sentence than what was recommended. This court is not convinced that any material or substantial breach occurred in this case.

¶13 Whether a prosecutor violated the terms of a plea agreement will depend on the circumstances of every case. If there is a disputed question of fact whether the prosecutor violated the terms of the agreement, we shall give deference to the factual findings of the trial court unless clearly erroneous. ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 163 (1995). If there are no disputed facts, the question is one of law to be reviewed independently. ***Id.*** If, on the other hand, there is both a disputed question of fact and a question of whether the facts establish a breach, then we must first review the facts under the clearly erroneous standard of review and then determine, as a matter of law, independently whether the prosecutor violated the terms of the plea agreement. ***Id.*** at 277-78.

¶14 Here, the trial court found no evidence of breach in the record, reasoning:

> The defendant himself put the letters into the stream of information. He cannot cry foul because his own words have come back to haunt him. These letters demonstrated the defendant's attempts to maniputate the system and to dissuade, if not to intimidate, the victim. This factor, along with the other factors the court considered, support the court's sentencing decision. Consequently, the court finds that trial counsel was not ineffective for failing to raise a claim of breach.

This court agrees with the trial court's analysis and adopts it as our own. There was no breach of the plea agreement. The record demonstrates that the prosecutor neutrally and accurately recited the plea agreement, including the agreed upon sentencing recommendation. In fact, when defense counsel was asked whether the prosecutor's recitation was accurate, defense counsel stated: "That is correct." Accordingly, Young's claim that the prosecutor breached the plea agreement fails.

C. Ineffective Assistance/Evidentiary Hearing.

¶15 Young's last claim is that the trial court erred in summarily denying his claim of ineffective assistance. Young contends that he should have been afforded an evidentiary hearing on his claim that trial counsel provided ineffective assistance by failing to object to the late production of the letters and the State's sentencing argument. This court disagrees.

¶16 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his

or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶17 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶18 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 309-10. To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold

a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶19 This record conclusively demonstrates that Young is not entitled to relief. Objecting to the use of the letters at sentencing or to the prosecutor's sentencing remarks would have been unsuccessful. Accordingly, defense counsel's failure to object cannot constitute ineffective assistance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). The record clearly demonstrates that these letters did not come into the prosecutor's possession until the morning of the plea hearing/sentencing. Thus, the prosecutor did not have them when the negotiated plea agreement was reached. Frankly, this court agrees with the State's assessment that had these letters surfaced earlier, Young would not have received such a lenient plea agreement and, as the trial court pointed out, may have been charged with additional crimes. Because any objections by trial counsel would have been futile, Young's claim of ineffective assistance fails and no evidentiary hearing was needed. Thus, the trial court did not err in summarily denying Young's ineffective assistance of counsel claim.

By the Court.—Judgment and order affirmed.

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