

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1297-CR

Cir. Ct. No. 2004CF1074

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. HOLZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Michael Holz appeals a judgment of conviction and an order denying his motion for postconviction relief. He argues the circuit court should have granted his motion for plea withdrawal because his trial counsel was ineffective. We affirm the judgment and order.

BACKGROUND

¶2 On October 20, 2004, Holz stabbed Nathan Neibert, who was in bed with Holz's ex-girlfriend, Faith Dempsey. After stabbing Neibert, Holz left the room and Dempsey dialed 911. Holz returned and stabbed Dempsey as she was on the phone. Neibert died from a stab wound to his chest, but Dempsey survived a stab wound to her back.

¶3 Dempsey's 911 call was recorded. The recording captures sounds of Neibert dying, as well as incriminating statements attributable to Holz. As Holz stabbed Dempsey, he can be heard saying "you die too" or "you deserve to die." Holz's other recorded statements include "you goddamn cheat," "her lover got stabbed by his girl's boyfriend," and "you both don't deserve to live."

¶4 Holz's trial counsel did not initially realize Holz's statements were in the background of the recording. Counsel previously moved to exclude the recording because it was unfairly prejudicial due to Neibert's dying sounds. Counsel also encouraged the trial court to listen to the recording. At a *Machner*¹ hearing, counsel testified he made cassette tape copies of a compact disc version of the recording. He also testified that, in hindsight, the taped copies were not as clear as the CD version.² Counsel had sent a taped version to a court reporting service to have a transcript made. The resulting transcript contained only one statement attributed to Holz: "her lover got stabbed by his girl's boyfriend." The

¹ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² Neither the CD nor a transcript of it appears in the appellate record. Our recounting of Holz's statements comes from a letter written by Holz's trial counsel to one of his psychological experts, which is also what the parties rely on.

weekend before trial, counsel listened to the CD version and heard Holz's incriminating statements.

¶5 On the morning of trial, Holz's counsel sought to have the transcript admitted in place of the recording. The circuit court pointed out that it had listened to the recording and thought it heard Holz "blurt something out." The State asserted Holz can be heard saying "you die too" on the recording. The court denied the motion to admit the transcript in place of the recording, concluding the recording's probative value outweighed any potential for unfair prejudice. Counsel advised Holz to accept a plea offer, in which the State agreed to amend the first-degree intentional homicide charge to second-degree intentional homicide. Holz accepted the plea offer and was convicted upon his guilty pleas of second-degree intentional homicide using a dangerous weapon and attempted first-degree intentional homicide using a dangerous weapon and as domestic abuse.

¶6 Holz sought postconviction relief, claiming his trial counsel was ineffective. The theme of Holz's motion was that counsel was unprepared for trial and sought to cover up that fact by seeking admission of the transcript in place of the recording and then advising Holz to accept a plea offer. Holz asserted counsel's conduct was not only deficient and prejudicial, but also demonstrated a conflict of interest. The court denied Holz's postconviction motion, concluding counsel was not representing a conflicting interest and was not otherwise ineffective.

DISCUSSION

¶7 A defendant seeking to withdraw a guilty plea after sentencing has the burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *State v. Washington*, 176 Wis. 2d

205, 213, 500 N.W.2d 331 (Ct. App. 1993). A guilty plea must be knowingly, voluntarily, and intelligently entered. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 635-36, 579 N.W.2d 698 (1998). An involuntary plea results in a manifest injustice. *Id.* at 636.

¶8 To show that a plea was involuntary due to the ineffective assistance of trial counsel, a defendant must first show that counsel's performance was deficient. To prove deficient performance, a defendant must show counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Additionally, a defendant must show counsel's deficiencies were prejudicial. *Id.* In the context of plea withdrawal, this requires a defendant to show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because a defendant must show both deficient performance and prejudice, we need not address both if the defendant's showing on one is insufficient. *Strickland*, 466 U.S. at 697.

¶9 When reviewing ineffective assistance of counsel claims, we will not overturn a trial court's findings of fact about the circumstances of the case, including counsel's conduct and strategy, unless clearly erroneous. *State v. Love*, 227 Wis. 2d 60, 67, 594 N.W.2d 806 (1999). However, whether counsel's conduct constituted deficient performance and whether that deficient performance prejudiced the defendant are questions of law that we decide independently. *Id.*

¶10 "In criminal cases, conflict of interest claims involving attorneys are treated analytically as a subspecies of ineffective assistance of counsel." *Id.* at 68. Showing the possibility of a conflict is insufficient to overturn a criminal

conviction. *Id.* “In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* The defendant has the burden of establishing an actual conflict of interest by clear and convincing evidence. *Id.* at 71. However, once a defendant shows an actual conflict existed, that defendant need not show prejudice. *Id.* at 70. An actual conflict entitles the defendant to relief. *Id.* “An actual conflict of interest exists when the defendant’s attorney was actively representing a conflicting interest, such that the attorney’s performance was adversely affected.” *Id.* at 71.

¶11 We first reject Holz’s claim that counsel had an actual conflict of interest. Holz’s claim is defeated by the court’s findings of fact. Regarding the transcript, the court found counsel was not attempting to protect himself or deceive the court when seeking admission of the recording transcript, but instead was attempting to present the recording’s contents in a less emotionally charged manner. The court also found counsel’s advice that Holz accept a plea offer was not driven by a conflict of interest.

¶12 The court’s findings are supported by the record and are not clearly erroneous. Counsel provided the court with a tape recording of the 911 call a few months before trial and filed a motion to exclude the recording, arguing it was unfairly prejudicial due to Neibert’s dying sounds. Counsel subsequently sent the court a letter requesting that it listen to the recording. Further, trial counsel testified he was not attempting to deceive the court by seeking admission of the transcript, nor did he advise Holz to plead guilty to conceal any lack of preparation. Counsel testified he was not concerned about losing business or being reported to the Officer of Lawyer Regulation. He also noted that, had he

been attempting to conceal anything, he would not have referred Holz to postconviction counsel that he perceived to be among the best in the business.³

¶13 The above evidence is sufficient to support the court's finding that counsel was not actively representing a conflicting interest such that it hindered his representation of Holz. See *Love*, 227 Wis.2d at 68, 71. The evidence supported findings that counsel was representing Holz's interests, not his own, when seeking admission of the transcript in place of the recording and when advising Holz to plead guilty to second-degree intentional homicide rather than risk a first-degree intentional homicide conviction.

¶14 Holz's second argument is that trial counsel was ineffective due to the cumulative effect of various claimed errors. Holz argues counsel had no workable defense prepared. Holz also claims counsel's failure to revisit whether Holz should testify at trial was prejudicial because his testimony was critical to the issue of his intent. Holz also relies on counsel's handling of the 911 recording and failure to seek a continuance, asserting counsel was unprepared to confront the recording at trial. Holz weaves into his arguments assertions that reasonably competent counsel could have prepared defenses that were likely to result in convictions on lesser charges, or outright acquittals. Thus, Holz's prejudice argument is that had competent counsel been prepared to present workable

³ Holz contends trial counsel advised him to plead guilty because he was panicked about Holz's statements on the 911 recording and that the court's contrary findings are clearly erroneous. Holz relies on counsel's *Machner* hearing testimony that he initially felt panicked when he realized Holz's statements were on the 911 recording. However, that counsel's initial reaction was panic when first realizing Holz's statements were on the recording the weekend before trial does not establish he advised Holz to plead guilty as the result of any panic on the day of trial.

defenses, revisited whether Holz should testify, and been better prepared to confront the 911 recording, he would not have pled guilty.

¶15 Holz fails to meet his burden of showing there is a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59. Because Holz cannot establish prejudice resulting from any of the claimed errors, we need not address the deficiency prong of the ineffective assistance analysis. *See Strickland*, 466 U.S. at 697.

¶16 At the outset, we emphasize that the overwhelming evidence of Holz’s guilt undermines his assertion that he would not have pled guilty absent counsel’s alleged deficiencies. It is undisputed that Holz stabbed Neibert and Dempsey and caused Neibert’s death. Faith Dempsey was a living witness to the attack. Holz’s intent to kill is established not only by his actions, but also by his statements on the 911 recording. Holz does not dispute that his incriminating statements, such as “you both deserve to die,” are on the recording, nor does he suggest the recording could have been suppressed.

¶17 Notably, Holz did not testify at his *Machner* hearing. He therefore provided no evidence directly addressing the dispositive issue of whether he would have pled guilty absent counsel’s errors. Relying on federal case law from another circuit, Holz contends the prejudice standard is objective, focusing on what a reasonable person would have done in the defendant’s position. *See Meyer v. Branker*, 506 F.3d 358 369 (4th Cir. 2007). The State concedes that no Wisconsin case law directly addresses the nature of proof required to show prejudice when seeking plea withdrawal due to ineffective assistance of counsel, but argues the test is not purely objective. We need not determine the extent to

which the prejudice standard is subjective or objective in the context of plea withdrawal because, even under an objective standard, Holz fails to establish prejudice.

¶18 Applying an objective standard, Holz's failure to testify at the *Machner* hearing is still critical because the alternative defenses he relies on were dependent on his testimony at trial. Holz's claimed alternative defenses are that he could have been found guilty on a lesser charge of homicide by negligent use of a weapon and that he could have asserted a heat of passion defense. Holz was also pursuing a NGI plea, and he suggests his statements on the recording could have been explained in the NGI trial phase. Holz asserts a law professor testified at the *Machner* hearing that these defenses were viable. Yet, Holz does not provide a clear picture of any of these defenses as he only alludes to them generally in his brief and fails to provide necessary citations to the record when referring to the professor's testimony. *See* WIS. STAT. § 809.19(1)(e). Regardless, the State points out, and Holz does not dispute, that these defenses depended on Holz testifying about his state of mind and intentions at trial.

¶19 This brings us to Holz's assertion that counsel's failure to revisit whether Holz should testify was prejudicial. At the *Machner* hearing, trial counsel's testimony suggested that Holz did not want to testify. Holz also had limited recollection of his attack. Holz points to no evidence he would have been willing to testify had counsel acted differently. There is also no evidence Holz had any testimony to offer in support of his claimed alternative defenses. Without evidence Holz would have been willing and able to testify in support of his defenses, there is no basis for concluding a reasonable person in Holz's position would not have pled guilty had counsel revisited the issue of whether Holz should testify.

¶20 Finally, Holz fails to show he would have gone to trial had counsel discovered his statements on the 911 recording earlier or sought a continuance. While Holz suggests counsel should have sought more time to be better prepared to confront the recording, he does not offer any tangible explanation of how that would have made any difference. Given the overwhelming evidence of his guilt, Holz fails to establish he would have done anything other than what he did—accept the State’s plea offer and avoid a first degree intentional homicide conviction.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

