COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP532-CR **Cir. Ct. No. 2007CF4850**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN WOODS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Stephen Woods appeals from a judgment of conviction for drug-related offenses and from a postconviction order denying his motion for plea withdrawal. The issue is whether Woods is entitled to withdraw his guilty plea because he did not knowingly plead guilty in that he did not intend

to deliver the cocaine he possessed, or because his trial counsel failed to fully advise him that possessing the quantity of cocaine he possessed did not necessarily compel the inference that he intended delivery. We conclude that Woods has not clearly and convincingly shown that he did not knowingly plead to the intent-to-deliver aspect of the offense, and that trial counsel's advice on why Woods would likely be found guilty of intent-to-deliver, and her failure to disabuse him of his implicit notion of Illinois law on that aspect of the offense did not constitute ineffective assistance of counsel. Therefore, we affirm.

¶2 Woods, intending to conduct a drug transaction, entered a vehicle that was, unbeknownst to him, an undercover vehicle occupied by a confidential informant. Shortly thereafter, Woods exited the vehicle and ran until he was apprehended, when police forced him to spit out a substance that later tested positive for heroin and cocaine base. Police executed a search warrant of Woods's residence and seized "bundles of U.S. Currency…. [that] totaled approximately $17,400." Officers also seized marijuana, cocaine base, a coffee grinder, clear plastic sandwich bags, a box of latex gloves and other drug paraphernalia.

¶3 Woods ultimately pled guilty to possessing between five and fifteen grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)2. (2007-08), possessing no more than five grams of cocaine with intent to deliver, and possessing between 200 and 1000 grams of marijuana with intent to deliver.[1] He challenges only his guilty plea to the intent-to-deliver aspect of his conviction involving the five-to-fifteen grams of cocaine. For that

[1] Initially, the first count charged Woods with possessing between three and ten grams of heroin with intent to deliver. That charge was amended in substance and amount incident to a plea bargain. All references to the Wisconsin Statutes are to the 2007-08 version.

conviction, the trial court imposed a ten-year sentence to run consecutive to any other sentence, but concurrent to the five- and four-year sentences it imposed for the other cocaine and marijuana convictions.[2]

¶4 Woods moved to withdraw his guilty plea to possessing between five and fifteen grams of cocaine with intent to deliver, alleging that he did not intend to deliver the cocaine, and that his trial counsel was ineffective for failing to fully advise him that the quantity of cocaine found in his possession did not compel the presumption that this amount exceeded that for personal use. The trial court conducted a ***Machner*** hearing and denied the motion.[3] Woods appeals.

¶5 The trial court conducted a ***Machner*** hearing at which Woods and his trial counsel testified about Woods's plea withdrawal claims: his failure to enter a knowing guilty plea, and his trial counsel's failure to fully advise him of the ramifications of pleading guilty to the intent-to-deliver aspect of the cocaine offense.

> A defendant who seeks to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid [a] manifest injustice. The constitution requires that a plea be knowingly, voluntarily and intelligently entered and a manifest injustice occurs when it is not.

[2] For the ten-year sentence, the trial court imposed equal five-year periods of initial confinement and extended supervision. For the five-year cocaine sentence involving the lesser amount, the trial court imposed two- and three-year respective periods of initial confinement and extended supervision; for the marijuana conviction, the court divided the four-year sentence into equal two-year periods of initial confinement and extended supervision.

[3] An evidentiary hearing to determine counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

State v. Brown, 2004 WI App 179, ¶4, 276 Wis. 2d 559, 687 N.W.2d 543 (citations omitted). Woods's direct challenge (as opposed to his ineffective assistance challenge) is that his guilty plea was unknowing in the sense that he did not intend to sell the cocaine.

¶6 The record of the guilty plea hearing clearly demonstrates Woods's quarrel with pleading guilty to the intent-to-deliver part of the offense; he admitted possessing between five and fifteen grams of cocaine, his dispute is that he never intended to sell the cocaine. First, the transcript of the plea hearing demonstrates this dispute. Trial counsel advised the trial court that:

> Mr. Woods would like to make a record with respect to – he's asked about the possession with intent to deliver cocaine in Count 1. He's indicating that it was not his intent to deliver that amount on that date, October 1, 2007.
>
> I did have a discussion with him about on or about that date, or at some point in the future that amount of cocaine, 7.64 grams, was to be delivered, to be shared, given to another, sold to another in any form whatsoever, to be transferred to another person and not used by just himself, and that would qualify [as] possession with intent to deliver a controlled substance.
>
> And he wanted to make a record it was not – it was not in his mind to sell that cocaine on that specific date.
>
> ….
>
> THE COURT: As to count 1, the allegation is that you knowingly possessed it with intent to deliver it, and that was between five and 15 grams of cocaine.
>
> Was that your intent?
>
> THE DEFENDANT: To deliver?
>
> THE COURT: Right.
>
> THE DEFENDANT: No.
>
> THE COURT: All right.

(Discussion between defense attorney and the defendant.)[4]

THE COURT: All right. Sir, I just want to make this clear. You've had some discussions with your lawyer; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel that you're fully understanding what's happening here?

THE DEFENDANT: No. Now I do.

THE COURT: Now you do?

THE DEFENDANT: Yes.

THE COURT: [Defense counsel], you've discussed that matter with your client?

[DEFENSE COUNSEL]: I have.

THE COURT: Does he understand what it means to possess with intent to deliver?

[DEFENSE COUNSEL]: I believe he does understand that possession with intent to deliver encompasses a number of different behaviors, including but not limited to selling, sharing, handing over, giving a substance to another person that's a controlled substance. We have discussed all of those different scenarios, yes.

THE COURT: So, sir, the question comes down then to did you possess that cocaine with intent to deliver it?

THE DEFENDANT: Yes, sir.

THE COURT: You did, all right. All right.

[THE PROSECUTOR]: Judge, can you I guess ask Mr. Woods the question about delivering. Obviously, [defense counsel] just made the record for sale or deliver, delivering, handing over, giving it to. All that encompasses delivery.

[4] For brevity's sake, we do not include the other similar colloquy and off-the-record discussion between Woods and his trial counsel that immediately preceded this one regarding Woods's concern with the intent-to-deliver aspect of this offense.

> Is that what Mr. Woods intended on doing with the cocaine he possessed on October 1, 2007?
>
> THE COURT: Sir, is that –
>
> THE DEFENDANT: Yes, sir.

Woods also said he understood what the State would need to prove, and that the jury would need to be unanimous to find him guilty. During the plea colloquy, Woods also confirmed that he "underst[oo]d what the criminal complaint says [he] did," and that he pled guilty because he was guilty.

¶7 At the ***Machner*** hearing, Woods insisted that he never intended to sell the cocaine he had on the date in question, and that trial counsel never told him that the jury may have considered a lesser included offense, namely, simple possession. He also testified that he only pled guilty because his trial counsel told him that "the amount of drugs you got caught with is intent [to deliver]."

¶8 The transcript of the plea hearing demonstrates precisely the problem Woods had with pleading guilty to intending to deliver the cocaine; after repeated discussions with his lawyer however, he ultimately elected to plead guilty. He admitted his familiarity with "how things work" in the criminal justice system; he has "gone through that plea colloquy or the discussion with the judge about pleading in other cases before." The intent-to-deliver aspect of the offense was extensively questioned, reviewed, and addressed; eventually Woods chose to plead guilty. He has not clearly and convincingly shown that his guilty plea was entered unknowingly.

¶9 Woods's second claim is that he is entitled to withdraw his guilty plea because he received ineffective assistance of trial counsel. To prevail on an ineffective assistance claim, the defendant must show that trial counsel's

performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990).

¶10 Woods claims that he believed that his lawyer told him that the 7.64 grams of cocaine found on his person compelled the inference that he intended to sell the cocaine because it was too large a quantity for personal use. Woods had been convicted of drug-related offenses in Illinois, and claimed to believe that "[i]n Illinois, if you get caught with the 14 grams plus, it's automatic possession with intent." Woods testified that despite repeatedly raising this issue with his lawyer:

> Basically what [trial counsel] was … really telling me what possession with intent mean[t]. Whether I was going to share the drugs with somebody else, whether I had got high with somebody else, but the basis of what she kept telling me was, Stephen, the amount of drugs you got caught with is intent. That's what I walked away from those conversations with was that that amount – I kept telling her in Illinois it ain't like that. She kept telling me it's different up here.

Woods explained his understanding of and problem with the intent-to-deliver charge in the following testimony:

> the big contention with me – and I kept telling her in Illinois you've got to have 14 grams to get charged with

> possession with intent. So I couldn't understand why I was being charged with possession with intent. And that [there] was no overt attempt to make a sale of the cocaine that I was in possession with. So – and her conversation – both times I walked away with the impression basically what she was telling me the amount you got caught with, Stephen, is intent.
>
> ….
>
> That's what she said. She said the amount here, it didn't have to be that much. That's what she was telling me. It don't have to be 14. She said the amount you got caught with, Stephen, the amount you got caught with inferred intent. I'm figuring if that's the case, I can't beat the case.
>
> ….
>
> She was like, Stephen, the amount of drugs you got caught with infers intent.

Woods claims that he was a binge user and that the seven-plus ounces was an amount that would accommodate one of his binges; he claims that he did not intend to sell that cocaine.

¶11 Trial counsel testified that, in conferring with Woods prior to his pleading guilty, she explained:

> That possession with intent to deliver encompassed a number of different behaviors. Those behaviors, you know, could include the intent to distribute to other people either for cash or not for cash. It could be, you know, for instance, he could intend to simply share this with other people at some point. He could intend to sell it to other people. He could intend to – he could be holding it for somebody and simply returning it to someone. That could constitute delivery. And we went through that a number of times.

In specific response to the amount's relevance to a possession with intent to deliver versus a simple possession charge, trial counsel testified that:

> I indicated that along with the weight of the cocaine involved … in addition to the $18,000 that was recovered, the fact that he didn't have a job at the time, and that in combination with his statement that he sold drugs, and that a certain amount of that money was from sales of drugs, that I felt that it was very likely going to be a guilty finding if he took it to trial, yes.

¶12 Trial counsel presented Woods with his options of going to trial or pleading guilty. The problematic aspect of his plea was the intent-to-deliver, as opposed to simple possession.[5] She told Woods, as he acknowledged, that Wisconsin law was different than his view of Illinois law, and that the amount recovered, in combination with other applicable factors would support the inference that he possessed the cocaine with intent to deliver.[6] Trial counsel addressed whether, given the circumstance, a jury might consider Woods a heavy user. Her presentation of options and her advice to Woods was objectively reasonable. Her representation was not deficient. Woods has not established that

[5] Trial counsel also testified that "the big fight in the case was to get … the count that we're discussing, amended from heroin to cocaine[, w]hich we were successful in doing as part of the plea negotiations."

[6] As trial counsel testified:

> It's a totality of the circumstances. The type of situation. You've got to look at the amount of drugs. You've got to look at the packaging. You've got to look at where the drugs were found. Whether or not there w[ere] weapons. Whether or not there were drug – there was drug paraphernalia. If there was indication of personal use: crack pipes, rolling papers, whatever.
>
> ….
>
> I would say that the vast majority of the cases that I prosecuted and defended, possession with intent, cocaine, were well under the amounts involved in this case.

Trial counsel practiced exclusively criminal law. She had been a prosecutor in Maryland and then in Wisconsin until 2003, and was a criminal defense lawyer thereafter.

his guilty plea was unknowing, or that he received ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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