COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2838-CR
2012AP642-CR

Cir. Ct. No. 2007CF105

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON J. MURRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Brandon Murray appeals from a judgment convicting him of possessing cocaine with intent to deliver and orders denying his various postconviction motions seeking sentence

credit and to withdraw his no contest plea due to ineffective assistance of counsel. We affirm.

¶2 Postconviction, Murray argued that his trial counsel was ineffective, and therefore he had a basis to withdraw his no contest plea. As grounds, Murray alleged that his trial counsel failed to disclose a plea offer from the State in which the State agreed to recommend a five-year term. The plea offer that Murray ultimately accepted allowed the State to argue for an unspecified amount of prison time. At sentencing, the court imposed a fifteen-year sentence (five years of initial confinement and ten years of extended supervision). The circuit court rejected Murray's ineffective assistance claim. Murray renews his claim on appeal.

¶3 In order to withdraw a plea after sentencing, a defendant must show a manifest injustice justifying such relief. ***State v. Taylor***, 2013 WI 34, ¶24, ___ Wis. 2d ___, 829 N.W.2d 482. Ineffective assistance of counsel can satisfy the manifest injustice test. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶4 "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court's findings about what counsel did and the basis for the challenged conduct will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's

conduct amounted to ineffective assistance is a question of law that we review de novo. *See* ***id.***

¶5 Murray's ineffective assistance of counsel claim centers around a plea offer prepared by assistant district attorney Adam Gerol that recommended a five-year term in exchange for a plea to one offense. The plea offer was not conveyed to Murray's trial counsel during the time Gerol was the assigned prosecutor. Rather, trial counsel learned of the plea offer after Gerol turned the file over to a successor assistant district attorney. Gerol's successor rejected a plea agreement based on Gerol's offer. Postconviction, Murray claimed that his trial counsel failed to convey Gerol's plea offer to him and he was prejudiced by counsel's deficient performance. The circuit court disagreed and denied Murray's postconviction motion or notice of appeal.

¶6 Gerol was the prosecutor when the complaint was filed in May 2007. Trial counsel testified at the postconviction motion hearing that she was appointed to represent Murray on July 9, 2008, and during the time she represented Murray, she had no contact with Gerol. Gerol never conveyed the plea offer to her. At all times during trial counsel's representation of Murray, assistant district attorney Patti Wabitsch was assigned to the case.

¶7 Trial counsel testified that she did not learn of the plea offer prepared by Gerol until after a June 8, 2009 status hearing. Counsel speculated that Gerol's undated plea offer had been placed in the district attorney's file and someone must have noticed that the offer had not been dated or delivered. Because the parties were in court for a status hearing on June 8, 2009, someone must have affixed that date on the offer. Counsel speculated that she received the offer in a packet of materials delivered to her at that status hearing. Upon learning of the offer, trial counsel

contacted Wabitsch who advised that the offer was no longer available and she would not extend such an offer to Murray. Trial counsel did not convey the offer to Murray because the offer was no longer available. Had Wabitsch not disavowed the offer, counsel would have transmitted the offer to Murray, as is counsel's usual practice. In addition, Murray had directed counsel that he wanted a trial because he was innocent. On the morning of trial, September 22, 2009, Murray decided that he wanted to negotiate a plea.

¶8 Murray testified that he did not see the June 2009 plea offer until 2011. Trial counsel told him about the offer as part of trial preparation on September 22, 2009, but counsel informed Murray that the offer was no longer available. Murray testified that he would have accepted the June 2009 plea offer.

¶9 The circuit court's findings of fact about the circumstances surrounding Gerol's plea offer are not clearly erroneous. *See* ***Sanchez***, 201 Wis. 2d at 236. The circuit court found trial counsel's testimony credible. Trial counsel learned of Gerol's offer after Wabitsch took over the case, and Wabitsch declined to extend the offer prepared by Gerol. Therefore, there was no factual basis for Murray's claim that he would have accepted Gerol's offer had trial counsel conveyed it to him. We agree with the circuit court that counsel's performance in relation to the plea offer was not deficient and Murray was not prejudiced. There was no basis for Murray to withdraw his no contest plea.

¶10 We turn to Murray's sentence credit claim. Murray argues that the circuit court erroneously denied him sentence credit for the period from September 16, 2007, to June 13, 2008, time he spent in custody in Illinois while an Ozaukee county arrest warrant was also in effect. From September 16, 2007, to June 10, 2008, Murray was in custody subject to Illinois charges and an Illinois sentence. On

June 10, 2008, the Wisconsin detainer process began on the Ozaukee county warrant. The circuit court denied sentence credit prior to June 10, 2008, but it granted credit from June 10-16, 2008, when Murray had an Ozaukee county bail hearing. The court found that at the time it sentenced Murray on November 30, 2009, Murray was no longer serving his Illinois sentence and that only the June 10-16 period was related to Murray's Wisconsin conduct and warrant.

¶11 A convicted defendant shall receive credit toward the service of his or her sentence "for all days spent in custody in connection with the course of conduct for which sentence was imposed." ***State v. Carter***, 2010 WI 77, ¶1, 327 Wis. 2d 1, 785 N.W.2d 516 (citation omitted). Sentence credit can be premised on the existence of concurrent sentences. *See* ***id.***, ¶36. We will affirm the circuit court's findings of fact on the sentence credit question unless they are clearly erroneous. *See* ***id.***, ¶79.

¶12 The circuit court's findings are not clearly erroneous. Murray completed the confinement portion of his Illinois sentence, and on June 10, 2008, he became subject to the Ozaukee county warrant. Prior to June 10, Murray was not in custody in connection with his Ozaukee county conduct; he was in custody on Illinois charges and sentence. Murray had an Ozaukee county bail hearing on June 16. Murray was discharged from his Illinois parole on June 10, 2009, and he was sentenced in Ozaukee county on November 30, 2009. Because Murray did not have an outstanding, concurrent Illinois sentence at the time he was sentenced in Ozaukee county, the circuit court did not err in denying him sentence credit because there was no concurrent sentence. Murray is trying to fit the round peg of his case into a square hole.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).