COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP2818-CR
2012AP2819-CR
2012AP2820-CR

Cir. Ct. Nos. 2010CF330
2010CF3305
2010CF5855

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMANDO GARCIA,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Armando Garcia appeals from multiple judgments of conviction, entered upon his guilty pleas following revocation of a global deferred prosecution agreement (DPA). He also appeals from orders denying his

postconviction motion for plea withdrawal or resentencing. Garcia contends he received ineffective assistance of trial counsel because that attorney failed to object when the same judge who supervised Garcia's participation in a drug treatment court imposed his sentences following revocation of the DPA. We reject Garcia's argument and affirm the judgments and orders.

BACKGROUND

¶2 On January 29, 2010, the State charged Garcia with one count of possession with intent to deliver a Schedule I controlled substance, one count of possession with intent to deliver a Schedule IV controlled substance, and one count of theft of less than $2500. This became Milwaukee County Circuit Court case No. 2010CF330. Garcia entered a deferred prosecution agreement on June 9, 2010. One of the conditions of the agreement required Garcia to participate in the Milwaukee County Drug Treatment Court program. Garcia pled guilty to the first and third counts, and the second was dismissed. Sentence was withheld pending Garcia's completion of treatment court.

¶3 On July 6, 2010, the State filed a new complaint against Garcia, charging him with one count of attempting to obtain a controlled substance by misrepresentation and felony bail jumping. This became Milwaukee County Circuit Court case No. 2010CF3305. The case was consolidated with case No. 2010CF330, and the DPA was amended to cover the new case. Garcia pled guilty to both charges and sentencing was again withheld while Garcia participated in treatment court.

¶4 On December 1, 2010, the State filed yet another new complaint against Garcia, charging theft by fraud. This case, Milwaukee County Circuit

Court case No. 2010CF5855, was consolidated with the two prior cases, and the DPA was revised again. Garcia again pled guilty.

¶5 In August 2011, the Honorable Glenn H. Yamahiro replaced the Honorable Carl Ashley in the drug treatment court as a part of routine rotation. Judge Yamahiro thus began presiding over the weekly drug treatment court's review meetings, meant to track Garcia's progress in the program. Judge Yamahiro presided over ten of Garcia's reviews; in three of those, Garcia was sanctioned. In December 2011, Garcia tested positive for drugs, and his participation in drug treatment court was terminated. The DPA was consequently revoked, and sentencing scheduled for Garcia's three cases.

¶6 Judge Yamahiro presided over sentencing. The sentences for each case were set to run concurrently: the controlling sentence, imposed in case No. 2010CF5855, is thirty months' initial confinement and thirty-six months' extended supervision.

¶7 Garcia moved to withdraw his plea or, alternatively, for resentencing. He claimed trial counsel was ineffective for not objecting to Judge Yamahiro imposing sentence when he had been a supervising judge in treatment court. The circuit court denied the motion without a hearing.

DISCUSSION

¶8 Whether Garcia's motion was, on its face, sufficient to entitle him to a hearing is subject to a mixed standard of review. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The sufficiency of the motion is a question of law. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion contains sufficient material facts that, if true, would

entitle Garcia to relief, the circuit court must hold a hearing. *See* ***id.*** If the motion is inadequate, conclusory, or conclusively refuted by the record, the decision whether to hold a hearing is committed to the circuit court's discretion, which we review only for an erroneous exercise. ***Allen***, 274 Wis. 2d 568, ¶9.

¶9 Whether trial counsel was ineffective presents a mixed question of fact and law. ***Balliette***, 336 Wis. 2d 358, ¶19. The circuit court's finding of facts, if any, are upheld unless clearly erroneous, but the ultimate conclusion of whether there is ineffective assistance is a question of law. ***Id.*** There are two components to an ineffective-assistance claim: deficient performance and prejudice. *See* ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show his attorney performed below an objective standard of reasonably effective assistance, although we strongly presume counsel's conduct to fall within that norm. *See* ***Domke***, 337 Wis. 2d 268, ¶36. To establish prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. ***Id.***, ¶54.

¶10 Garcia contends that trial counsel should have objected to having the drug treatment court judge preside over sentencing. Garcia also asserts that the supreme court's recommended best practices for treatment courts suggest the treatment judge should not preside at sentencing. He also contends that the drug treatment court judge "was made privy to personal information that a sentencing judge would not have been privy to prior to sentencing." He therefore claims prejudice, believing it was reasonably certain a different judge would have imposed a lower sentence.

¶11 We discern no ineffective assistance. Garcia agreed, in his third DPA, that if the agreement was revoked, the treatment court judge would sentence him. Therefore, any objection to that arrangement at the sentencing hearing would have been overruled by the sentencing court. An attorney is not ineffective for failing to pursue a meritless objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶12 Garcia counters that the terms of the DPA should not be relied upon because the circuit court did not spend enough time going over it at the plea hearing as it had the other two agreements. However, expressly reviewing the terms of the DPA is neither a statutorily imposed nor court-mandated duty for a circuit court at a plea hearing. *See* WIS. STAT. § 971.08 (2011-12);[1] ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Moreover, Garcia told the court that he had reviewed the DPA three times: he read it once himself, counsel read it once to him, and then they reviewed it together prior to the plea hearing. Garcia informed the circuit court that he had no concerns about the agreement. In short, Garcia offers no valid reason not to be held to the terms of the DPA.

¶13 Garcia points out that a supreme court committee recommends "that a judge should not sentence an offender after participating in … treatment court." *See* WISCONSIN TREATMENT COURTS: BEST PRACTICES FOR RECORD-KEEPING, CONFIDENTIALITY AND EX PARTE INFORMATION at 10 (Dec. 2011); *available at* http://www.wicourts.gov/courts/programs/docs/treatmentbestpractices.pdf.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

However, we do not consider a suggested best practice to be a binding requirement or a basis for counsel to object in this case. A recommended best practice is precisely that—a recommendation. It is not a mandate.

¶14 Moreover, the "recommendation" Garcia points to is part of the discussion of a broader recommendation: "[T]he treatment court judge should carefully consider whether to sentence a defendant after the defendant … is terminated from treatment court. If the judge decides to take part in a subsequent sentencing, a comprehensive waiver should be used." ***Id.*** at 9 (boldface omitted). In preparing the report, the committee had heard from judges who believed that a drug treatment court judge was actually in a *better* place to impose sentence on a revoked defendant than a new sentencing judge, which led to the waiver suggestion. *See* ***id.*** at 10. As that is effectively the process followed here, we discern no deficient performance by trial counsel.

¶15 Though a court considering an ineffective-assistance argument need not address both prongs of the test if a defendant fails to meet one of them, *see* ***Strickland***, 466 U.S. at 697, we also reject Garcia's prejudice claim. Garcia claims the sentencing court had access to information that such a court normally would not have had prior to sentencing, but the only examples of such "improper" information are: "his difficulties with the [drug treatment court] program … a detailed explanation of his drug usage which caused his positive test result, his past drug usage, and his family background in the prison system." However, Garcia does not explain how a defendant's history of difficulty in treatment settings, history of drug use, or family background are unusual or off-limits to a sentencing court. Indeed, by our estimation, these topics are all rather commonplace.

¶16 Garcia further claims prejudice from the sentencing court's access to this information, claiming that "the court transcripts clearly indicate Judge Yamahiro was biased after having access to such personal information about Garcia." However, the only example of bias that Garcia cites—a comment that "there's continuing concerns about honesty issues"—is from a review hearing, not the sentencing hearing. As such, he utterly fails to demonstrate any bias at sentencing. The State notes that the sentencing court did comment that "honesty has been a continuing struggle here," but points out that the comment is merely in response to Garcia's own comments during allocution, where he admitted, "Honesty has been a huge problem for me in the past." We agree that this does not demonstrate bias; it is simply the circuit court acknowledging Garcia's comments.

¶17 Moreover, the sentencing court actually attributed several *positive* points to Garcia based on information gleaned from treatment court. It noted that Garcia had been very organized and had "done better in terms of employment and the discipline involved with the schedule that you set up for yourself I think than almost anybody in the program[.]" In addition, the sentencing court told Garcia that "you're not gonna get nearly as much time as you could…. I'm giving you some credit here for what you've done while you were in the program[.]" Thus, Garcia's argument that "it is reasonably certain that a different judge … would have sentenced Garcia to a lesser term" is nothing more than conclusory.[2]

[2] Garcia faced more than thirty-seven years' imprisonment for his five offenses, broken down as twenty-one years' initial confinement and sixteen years' extended supervision for the four felonies, plus an additional nine months' imprisonment for the misdemeanor offense.

¶18 We also note that, tucked within his ineffective-assistance claim, Garcia asserts he should be able to withdraw his original pleas as a result of the "manifest injustice" of ineffective assistance. *See* ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482. However, Garcia never claims trial counsel was ineffective for encouraging his pleas themselves. *See* ***Tollett v. Henderson***, 411 U.S. 258, 266-67 (1973). Moreover, as noted above, counsel was not ineffective for failing to object to the sentencing judge. Thus, because he has not shown ineffective assistance of counsel, Garcia has not shown any "manifest injustice" warranting plea withdrawal.[3]

¶19 Garcia also claims that he did not receive the sentencing concession called for by the plea agreement However, the State recommended thirty months' initial confinement and eighteen months' extended supervision, just as it had agreed to do. It should be well-known, at least to appellate counsel, that the circuit court is not bound by the parties' agreement. The circuit court so advised Garcia of this limitation to the agreement during the plea colloquy. Ultimately, when the sentencing court imposed sentence, it concluded that Garcia would need extra time on supervision to ensure he received necessary treatment, so it imposed thirty months' initial confinement and thirty-six months' extended supervision. Such was the sentencing court's prerogative. It is not a violation of the plea agreement.

[3] Even if we were to agree that it was ineffective for counsel to fail to object to the sentencing judge, the ineffectiveness at sentencing would, at best, warrant re-sentencing, not wholesale plea withdrawal.

¶20 Garcia has not alleged sufficient facts to entitle him to relief. We discern no erroneous exercise of discretion in the circuit court's denial of the motion without a hearing.

By the Court.—Judgments and orders affirmed.

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