

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2013AP1155-CR

Cir. Ct. No. 2011CF5615

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT ANTHONY MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Affirm.*

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

¶1 PER CURIAM. Robert Anthony Martinez appeals the judgment, entered after a court trial, convicting him of one count of failure to comply with an officer's attempt to take a person into custody and one count of misdemeanor disorderly conduct, domestic abuse, contrary to WIS. STAT. §§ 946.415(2),

947.01(1) and 968.075(1)(a) (2011-12).¹ Martinez also appeals the order denying his postconviction motion alleging that his trial counsel was ineffective. He claims trial counsel gave him ineffective assistance during plea bargaining, which resulted in Martinez rejecting a favorable plea offer. We disagree and affirm.

BACKGROUND

¶2 The charges against Martinez stemmed from a November 2011 domestic incident that resulted in a standoff with police when Martinez refused to come out of his home. By the time Martinez gave himself up, the standoff had lasted approximately six hours, involved more than thirty police officers, and was estimated to have cost local police departments more than \$5000.

¶3 After he rejected a plea offer, a court trial was held and Martinez was convicted of one count of failure to comply with an officer's attempt to take a person into custody and one count of misdemeanor disorderly conduct, domestic abuse. On the count of failure to comply, Martinez was sentenced to one year of initial confinement and two years of extended supervision. On the count of misdemeanor disorderly conduct, he was sentenced to sixty days of jail time, to be served concurrently. Although a police captain provided a detailed estimate at sentencing of the costs to local police departments resulting from the standoff, the court declined to order restitution after the State advised that the costs were not recoverable under Wisconsin law.²

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

² The State explained to the court that it had submitted information as to police costs to demonstrate "the totality of the impact."

¶4 Martinez filed a postconviction motion alleging that trial counsel gave him ineffective assistance during plea bargaining, which resulted in Martinez rejecting a favorable plea offer. In the motion, Martinez asserted that the State's pretrial offer stated that upon a plea of other than not guilty by Martinez and a stipulation to \$6000 restitution for overtime charges and costs for the Franklin and Greendale Police Departments, the State would recommend eighty days imprisonment with work release privileges.³ Martinez claimed that he declined the offer because he did not believe he owed restitution to the police departments. According to Martinez, his trial counsel did not advise him that the court would not honor that restitution request as it was contrary to current law.

¶5 The State, in response to Martinez's motion, did not object to scheduling the matter for a *Machner* hearing.⁴ At the hearing, Martinez and his trial counsel testified. The postconviction court concluded Martinez's trial counsel had not performed deficiently and that even if he had, Martinez was not prejudiced. Consequently, it denied Martinez's motion.

³ The State points out that the precise contents of the plea offer are unknown because the offer itself was not made a part of the appellate record. *See generally State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (It is the appellant's duty to see that the record is sufficient to review the issue raised on appeal.). The motion hearing transcript indicates that the pretrial offer was admitted as evidence. When he testified during the hearing, Martinez acknowledged that no specific dollar amount related to restitution was specified in the written pretrial offer. He also clarified that the pretrial offer consisted of the following: the State would have recommended one year of initial confinement and two years of extended supervision, imposed and stayed, and two years of probation, imposed, with ninety days of conditional time at the House of Corrections with work release privileges. Related to the discrepancies between what was indicated in his written motion and the pretrial offer itself, Martinez's postconviction counsel explained that at the time the motion was submitted, counsel did not have a copy of the written pretrial offer.

⁴ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ANALYSIS

¶6 Martinez argues that his trial counsel’s failure to inform him that aspects of the pretrial offer were unenforceable amounted to ineffective assistance. Specifically, Martinez submits that his trial counsel failed to inform him of the legal consequences of his plea; namely, that restitution could not be awarded to the police department or other state agency. Because he was not aware that a restitution request by a law enforcement agency could not be enforced, Martinez claims he declined the plea offer and chose to go to trial.

¶7 To establish ineffective assistance of counsel, Martinez must show both deficient performance and prejudice to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). He “must show that counsel’s representation fell below an objective standard of reasonableness.” *See id.* at 688. This “court must indulge a strong presumption that counsel’s conduct falls within the wide range of professional assistance.” *See id.* at 689. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Id.* at 691. When the alleged prejudice arises from a defendant’s failure to accept a plea agreement, he must show that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been accepted and the court would have accepted its terms, and that the conviction or sentence or both under the offer’s terms would have been less severe. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

¶8 The State agrees with Martinez that the police departments in this case would not have been entitled to restitution under WIS. STAT. § 973.20 for costs incurred during the standoff with Martinez.

¶9 As noted above, the plea offer itself is not a part of the appellate record. *See supra* n.3. However, the testimony during the *Machner* hearing made clear that no specific dollar amount related to restitution was specified in the written pretrial offer. Notwithstanding, Martinez’s trial counsel acknowledged having advised Martinez that there probably would be some restitution due and that he believed, at the time, the victims were law enforcement agencies.

¶10 When Martinez testified as to why he chose not to accept the plea offer, he cited a number of factors:

It was a combination of things on there. I believed I could get a fair trial and win the trial. I believed that I was not liable for restitution to the victims. The State said that my wife and my son were victims, which I did not believe that they were victims. The only victim—other victims would be the officers, and I didn’t feel that I owed the State or the enforcement agencies any restitution.

Martinez said he “believe[d]” he had talked about restitution with his trial counsel before trial, but acknowledged that he “didn’t get any specific dollar amounts.” He continued: “But I knew that the law enforcement agencies were not cheap, and this would be—it would be approximately \$10,000 for their services.” According to Martinez, restitution “was a major reason” why he chose not to take the plea offer. But, when asked if he would have taken the plea if restitution were not an issue, Martinez said only that he would have “considered it.”

¶11 Even if we were to conclude that Martinez’s trial counsel performed deficiently, Martinez has failed to show prejudice. As stated, to make this showing, Martinez needed to establish, among other things, that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been accepted. *See Lafler*, 132 S. Ct. at 1385. His testimony that he would have “considered” the plea offer without the restitution language falls short.

¶12 Martinez’s testimony revealed that a number of other factors prompted him to reject the offer. These included his belief that he could get a fair trial and win at trial. Additionally, Martinez indicated that he did not believe he committed the crimes charged. His trial counsel testified that Martinez did not take the deal because he felt he did not deserve jail time, did not want a felony record, and did not want to lose his right to own a gun. After listening to the testimony, the postconviction court found: “[Martinez] believed—and he wanted a fair trial and that he would win at trial. While [Martinez] may have believed he wasn’t liable for restitution, I don’t believe that that was his first concern. His first concern was that he hadn’t committed any crime and should not be held accountable for it.” These findings are supported by the record.

¶13 Because Martinez has not established prejudice, we do not further address whether his trial counsel’s performance was deficient. *See Strickland*, 466 U.S. at 697 (“[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

By the Court.—Judgment and order affirmed.

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

