COURT OF APPEALS DECISION DATED AND FILED

September 29, 2015

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. 2015AP475-CR

Cir. Ct. No. 2013CM5412

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN F. KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and REBECCA F. DALLET, Judges.[1] *Order reversed and cause remanded for further proceedings*.

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[1] The Honorable Mel Flanagan presided over the guilty plea. The Honorable Rebecca F. Dallet presided over the sentencing and the postconviction motion.

¶1 CURLEY, P.J.[2] Martin Kennedy appeals the judgment of conviction for disorderly conduct (domestic abuse assessment), contrary to WIS. STAT. §§ 947.01(1) and 968.075(1)(a) (2013-14).[3] He argues that he is entitled to withdraw his guilty plea because he did not knowingly, voluntarily, or intelligently enter his plea. Specifically, he submits that pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), he was never informed by the trial court that the disorderly conduct charge to which he pled guilty was charged as disorderly conduct (domestic abuse assessment), or that he was subject to the domestic abuse assessment, *see* WIS. STAT. § 973.055. Additionally, he argues that pursuant to ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), he should be allowed to withdraw his plea because his trial attorney never informed him of the fact that the disorderly conduct charge to which he pled guilty had a domestic abuse modifier and a domestic abuse assessment. In other words, Kennedy believed he was pleading guilty to a simple charge of disorderly conduct without the domestic abuse modifier and, as a result, his trial attorney provided ineffective assistance of counsel.

¶2 This court has reviewed the record. When Kennedy entered a plea to the amended charge of disorderly conduct there was no mention of the fact that it was being amended to a disorderly conduct (domestic abuse assessment), and not a simple disorderly conduct. There is also no mention of the fact that the trial court entered a conviction to the charge of disorderly conduct (domestic abuse

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[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14).

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

assessment) at the sentencing proceeding.[4] Consequently, this court is reversing and remanding to the trial court for a ***Machner***[5] hearing to determine if Kennedy's trial attorney advised him of the fact that the amended charge of disorderly conduct included the domestic abuse modifier. If his attorney did not so advise him, and the State is unable to prove by other means that Kennedy was aware he was pleading to disorderly conduct (domestic abuse assessment), his withdrawal request must be honored.

BACKGROUND

¶3 On December 6, 2013, the police were dispatched to 2725 North 9th Street in Milwaukee for a "Battery DV" call. Upon arriving, an officer spoke to M.K., who told him that she and her husband, Martin Kennedy, had an argument. She related that Kennedy lunged at her, and in response she splashed him with her beer. Kennedy then struck her in the back of her head, which caused her to fall to the ground, resulting in a broken ankle.

¶4 As a result of this incident Kennedy was charged with misdemeanor battery (domestic abuse assessment). Ultimately, Kennedy pled guilty to what he thought was an amended charge of disorderly conduct. While the judgment roll reflects that this plea was amended to disorderly conduct (domestic abuse assessment), there is no mention of the domestic abuse modifier as part of the

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[4] This court acknowledges that there are two references to domestic abuse in the sentencing transcript: (1) the clerk called the case as "disorderly conduct, domestic abuse"; and (2) the trial court stated "[t]his sounds like it was certainly disorderly conduct. 90 days maximum, a thousand dollars fine or both, and a domestic abuse assessment." However, these references were insufficient to inform Kennedy that he had earlier pled guilty to and was being sentenced for disorderly conduct with a domestic abuse modifier.

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

amended plea in the sentencing transcript. A guilty plea questionnaire and an addendum were also filled out by Kennedy and his attorney and submitted to the trial court. There is no mention of domestic abuse anywhere on the forms. At the time of the guilty plea, the trial court inquired whether it could use the facts as described in the criminal complaint as a factual basis for the plea. Kennedy told the judge that, contrary to what was stated in the complaint, he did not strike his wife, but he agreed that he pushed her, which resulted in her fall. The trial court accepted the correction and found Kennedy guilty to the charge of disorderly conduct and sentencing was adjourned to another date in front of a different judge.

¶5 At the sentencing proceeding, neither the judge nor the prosecutor ever mentioned the domestic abuse modifier or the assessment as part of the amended plea. Although the judgment role entry reads: "Court advised defendant of penalties for violating the no contact order and due to this DV conviction s/he may never possess firearms or ammunition," the transcript only reflects that trial court stated to the defendant: "Okay. You know you can't carry a firearm? You don't carry a firearm for your job now?" The trial court never told Kennedy that the reason he could not own a firearm was because he was being convicted of a crime with a domestic abuse modifier. Ultimately, the trial court placed Kennedy on probation. Although the trial court ordered that he successfully complete Batterers Intervention counseling, this fact would not have alerted Kennedy that he was being convicted of disorderly conduct (domestic abuse assessment).

¶6 On February 13, 2015, Kennedy filed a postconviction motion in which he contends he is entitled to withdraw his plea for the same reasons raised in this appeal; that is, that he had no knowledge that he was pleading to disorderly conduct (domestic abuse assessment) and his lawyer never informed him of that fact. The trial court denied the motion without a hearing. In the decision, the trial

court noted that the original complaint charging him with battery contained information concerning the domestic abuse modifier and domestic abuse assessment. The trial court also observed that Kennedy was told of the domestic abuse modifier and the domestic abuse assessment by the court commissioner at his initial appearance. Under these circumstances, the trial court wrote that the trial court accepting the guilty plea was not required to inform the defendant about the domestic abuse modifier. As to his complaint that his lawyer was ineffective for failing to advise him, the trial court believed that a criminal defense attorney had no duty to inform him of the actual charge under the Sixth Amendment. This appeal follows.

ANALYSIS

¶7 A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that refusal to allow the withdrawal will result in a manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. Ineffective assistance of counsel is a manifest injustice, *see* ***Bentley***, 201 Wis. 2d at 311, as is entry of a plea that is not knowing, intelligent, and voluntary, *see* ***Taylor***, 347 Wis. 2d 30, ¶24.

¶8 On the strength of this record, Kennedy would not have known that he was pleading guilty to disorderly conduct (domestic abuse assessment) and not a simple charge of disorderly conduct. He did not plead to the original charge of battery so he may have believed that the references to domestic abuse no longer applied, particularly since the offending conduct was amended from “striking” to “pushing.” Thus, the advisals given by the complaint and the court commissioner that he was being charged with battery (domestic abuse assessment) do not suffice to establish his knowledge of the charge. As to the fact that Kennedy was advised

he could not own a firearm, he may have believed that this was part of the penalty for disorderly conduct. There was no mention of the fact that the firearm prohibition was a result of a domestic abuse conviction. Consequently, unless Kennedy was given notice of the fact he was pleading guilty to disorderly conduct (domestic abuse assessment) in some other fashion, he is entitled to withdraw his plea.

¶9 As to the claim of ineffective assistance of counsel, "[a] defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance." ***State v. Becker***, 2009 WI App 59, ¶21, 318 Wis. 2d 97, 767 N.W.2d 585 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)), and ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. ***Id.*** (citing ***Strickland***, 466 U.S. at 697).

¶10 To prove prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶11 Kennedy asserts that he would not have pled guilty if he knew the charge contained a domestic abuse modifier. Kennedy was entitled to know the crime to which he was pleading guilty. Supreme Court Rule 20:1.4 requires a lawyer to:

> (a)(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; [and]
>
> (3) keep the client reasonably informed about the status of the matter.
>
> ….
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

It remains to be seen whether his attorney satisfied the rule. If, indeed, his lawyer never informed him of the correct charge, Kennedy will have proven both prongs of the ***Strickland*** test.

¶12 As noted, this matter is remanded to the trial court to conduct a ***Machner*** hearing within forty-five days of this decision.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.