COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP967-CR **Cir. Ct. No. 2015CF4647**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GITAN MBUGUA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ and MICHAEL J. HANRAHAN, Judges. *Affirmed*.

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

¶1 BRENNAN, J. Gitan Mbugua appeals a judgment of conviction and an order denying his postconviction motion.[1] He argues that his attorneys rendered ineffective assistance of counsel and he seeks an order vacating his conviction and an order requiring the State to reinstate option two of its January 2016 plea offer. The first attorney, he argues, was deficient for providing him with incorrect information about option two of the January 2016 offer, and the incorrect information caused him to turn the offer down. He argues that his second attorney was deficient in not seeking a reoffer of that option from the State. He says that deficiency caused him to plead guilty to the State's May 2016 offer, which prejudiced him by exposing him to more incarceration time than option two of the January 2016 plea offer. Therefore, under ***Strickland v. Washington***, 466 U.S. 668 (1984), he argues that he is entitled to have his conviction vacated and to have a reoffer of option two of the State's January 2016 plea offer.

¶2 The State responds that neither attorney was deficient, but that even if they were, Mbugua suffered no prejudice under ***Lafler v. Cooper***, 566 U.S. 156, 164 (2012), because he failed to establish that: (1) he would have pled guilty to the false imprisonment charge in option two of the January 2016 plea offer; (2) the trial court would have accepted the plea; and, (3) the terms of option two of the January 2016 plea offer were less severe than the conviction or sentence he received. *See* ***id.*** In fact, the State argues, his actual conviction and sentence were no greater than the terms he faced on option two of the January 2016 plea offer.

[1] The Honorable Janet C. Protasiewicz entered the judgment of conviction and the Honorable Michael J. Hanrahan issued the order denying the postconviction motion.

¶3 We agree with the State and affirm.[2]

BACKGROUND

¶4 Mbugua's longtime girlfriend, C.C.S., reported to the police on October 21, 2015, that Mbugua had beaten her with his fists and whipped her with an electrical cord on October 18, 2015, and would not let her leave for two days so that he would not get in trouble for her resulting obvious injuries. She was unable to eat due to the injuries to her mouth and lips. Each time C.C.S. asked him to take her to the hospital he refused saying he feared jail. She reported that he stayed next to her on the bed to prevent her from leaving. She was finally able to leave on October 21, 2015, and a friend took her to the hospital where she was found in critical condition due to acute kidney failure. She had also suffered cranial facial fractures, had multiple cuts and bruises, including bruises on the bottoms of her feet, and a right subconjunctional hemorrhage.

¶5 Mbugua was charged with two counts. Count one was first-degree recklessly endangering safety, a Class F felony, carrying a twelve and one-half year maximum sentence. Because count one was charged as a repeater, Mbugua faced an additional six years of imprisonment on that charge, and because it was charged as domestic abuse, he also faced domestic abuse assessments. Count two was false imprisonment, a Class H felony, carrying a six-year maximum sentence. Like count one, count two was charged as a repeater and as domestic abuse, so

[2] We need not reach the deficiency arguments because we resolve the case on the prejudice ground. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "[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." ***Id.*** at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." ***Id.***

Mbugua faced an additional four years of imprisonment on that charge as well as added domestic abuse assessments. The maximum exposure Mbugua faced on these charges was thus twenty-eight and one-half years.

The January 2016 plea offer.

¶6 Mbugua was initially represented by Attorney Cheryl A. Ward. The State offered a plea negotiation, memorialized in a letter, that gave Mbugua two options. Each option was conditioned on Mbugua "*accepting responsibility*, at both plea *and* sentencing, for the criminal conduct attributed to him in the criminal complaint." The State's letter offering the plea options emphasized the requirement of accepting responsibility at both hearings by noting the requirement in bold type. Additionally, the State's offer letter explicitly stated that the offer was conditioned on a plea of "[g]uilty."

¶7 The State advised the court at the final pretrial hearing on January 14, 2016, that Mbugua was offered two options. In the case of option one, in exchange for Mbugua's guilty plea to "both offenses as charged," the State would "agree to leave the sentence within the discretion of the trial court." In the case of option two, in exchange for Mbugua's guilty plea to both counts, the State would dismiss the repeater enhancer on both counts, and the parties would be "free to argue at sentencing." The State also advised the court that in the event that the defendant turned down the offer, the State had additional charges it would pursue and that it had so advised the defendant in the offer letter.

¶8 Through his counsel, Mbugua rejected the offer during the final pretrial hearing. When the court asked Mbugua if he had had enough time to discuss the offer with his attorney, he said that they only had short conversations. Trial counsel advised the court that she had "visited [Mbugua] a couple times for

over two hours at a time" and during their last meeting she learned from Mbugua that he wished to reject the State's offer. The State then advised that the offer was "revoked." The court passed the case until later in the afternoon to give Mbugua more time to speak with his attorney. When the case was recalled, Mbugua, personally and through counsel, advised the court that he was rejecting the offer.

The plea hearing.

¶9 On February 22, 2016, Attorney Ward was permitted to withdraw as counsel and Attorney Matt Ricci was then appointed to represent Mbugua. On May 12, 2016, Mbugua pled guilty per negotiations with the State to count one, first-degree recklessly endangering safety and count two as amended, aggravated battery. The State moved to dismiss the repeater enhancer on count one only. Additionally, the State agreed to make no recommendation and to leave the amount of incarceration up to the court's discretion, but would seek to have the sentences run consecutive to his revocation period on another matter. During the plea colloquy, Mbugua acknowledged that he faced twelve and one-half years of incarceration on count one. On the second count, he acknowledged his exposure was six years plus an additional four years with the repeater. Mbugua advised the court that he understood his sentencing exposure and wanted to plead guilty. He also admitted that he caused the injuries to C.C.S. described in the complaint.

The sentencing hearing.

¶10 At the June 7, 2016 sentencing hearing, after hearing statements from the victim and Mbugua, and arguments of counsel, the trial court explained its reasoning, focusing on the severity of the crimes and the need to protect the community:

I don't think I have ever seen anything like this where the person actually survived. Never seen pictures like this with the kind of injuries that she sustained.

And when I hear that she was only hours from death but for the fact that she was able to get medical treatment, I am not surprised based on what I have seen here.

….

So when I look at the seriousness of the crime, I mean, she is covered head-to-toe in the most serious lacerations. They are hard for me to look at and I think I have seen everything.

….

The criminal complaint outlines the horrifying story of what began on October 18 of last year. We have her asking you to take her to the hospital and you wouldn't do it.

You striking her over and over with that cord. Her trying to sleep on [October] 19 and the pain is so excruciating that she can't sleep. She couldn't eat, her lips and her mouth were too sore.

On [October] 21, she knew things were really awful. When you left she tried to call her sister. She needed help before her phone died and the D.A. talked about the type of phone call she had to make to her sister to gain assistance.

Bruising on the bottoms of her feet, swelling of her eyes, fractures.

Over 100 linear cuts and abrasions. Facial fractures, renal failure, couldn't even have a pillow touch her body, that's the kind of pain that she was in. She feared you were going to stomp on her.

….

Punched, hit, whipped on a continual basis and left in this home for days without any type of medical care and here she is forgiving you. So it doesn't get more serious than this.

Does the public need to be protected? I fear so.

¶11 After expressing its reasoning, the court sentenced Mbugua on count one to the maximum, seven and one-half years of initial confinement and five years of extended supervision, saying, "I think it is only appropriate." On count two, the court sentenced Mbugua to three years of initial confinement and three years of extended supervision. Both sentences were consecutive to each other and the revocation period.

The postconviction motion for plea withdrawal.

¶12 Mbugua filed a postconviction motion arguing that he should be allowed to withdraw his plea and be reoffered option two of the January 2016 plea offer due to ineffective assistance from both trial counsel. He claimed his first attorney falsely advised him that there was a possibility that he would have to register as a sex offender if he pled guilty to false imprisonment in option two of the January 2016 plea offer. He argued that he would testify at a postconviction hearing that if counsel had not misadvised him, he would have pled guilty to option two of the January 2016 plea offer. As to his second attorney, he argued that trial counsel performed deficiently in two regards. First, he failed to explain that option two subjected him to "significantly less exposure than the new offer he negotiated" and second, he erroneously advised him that count two of the amended charges, aggravated battery, was a Class I felony which led him to believe he was getting a more generous concession from the State than he really was receiving. Mbugua claimed he was prejudiced by ultimately receiving a "more serious conviction than he would have had he accepted option two of the original offer."

¶13 The postconviction court denied the motion without a hearing. It held that, assuming without deciding that both counsel were ineffective, Mbugua

had shown no prejudice because the sentence he received was the same as the maximum he faced on option two of the January 2016 plea offer. Additionally, the court found that the record did not support Mbugua's contentions in his motion that he would have pled to option two if properly advised by Attorney Ward or if the State would have reoffered option two after Mbugua first turned it down.

¶14 This appeal follows.

STANDARD OF REVIEW

¶15 We review the trial court's findings of fact on an ineffective assistance of counsel claim for whether they are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We review the legal questions of whether counsel was deficient and whether the appellant has shown prejudice, independently of the trial court. ***Id.*** at 128. The test for prejudice under ***Strickland*** is whether 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." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

¶16 Where the claim is that ineffective assistance of counsel caused the appellant to *reject* a previous plea offer, the appellant must establish the following in order to satisfy the prejudice prong: (1) that but for the ineffective assistance of counsel, the appellant would have accepted the favorable plea offer; (2) that the plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept it; and (3) that the terms of the resulting conviction, sentence, or both would have been less severe under the original offer than that which was ultimately imposed. ***Lafler***, 566 U.S. at 164.

¶17 Whether a postconviction motion sufficiently alleges facts that if true would entitle the defendant to relief is a question of law and we review it independently of the trial court. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

DISCUSSION

¶18 The well-established two-part test for ineffective assistance of counsel as set forth in ***Strickland*** requires the defendant to show that counsel's performance was deficient, and that counsel's errors or omissions prejudiced the defendant. ***Smith***, 207 Wis. 2d at 273. Failure to establish either part of the test defeats the defendant's claim. ***Id.***

¶19 Here, we will assume without deciding that Mbugua has shown that both trial counsel performed deficiently. But even so, he has failed to meet his burden of establishing prejudice under the three prongs of ***Lafler***. First, he has failed to show that he would have accepted an offer to plead guilty to false imprisonment, given his strong dispute of the nonconsensual confinement element. And second, he has failed to show that option two of the January 2016 plea offer would have been made available to him again when he was represented by Attorney Ricci. *See* ***Lafler***, 566 U.S. at 164. Third, and most fatal to his claim, is the fact that the record shows conclusively that the resulting sentence and conviction he received was not more severe than the conviction and sentence he would have received under option two of the January 2016 plea offer.

¶20 We begin with the first ***Lafler*** prong. Mbugua fails to show that he would have pled guilty to false imprisonment in option two of the January 2016 plea offer if he had been properly advised about the sex offender registry. It is true that Attorney Ward misadvised Mbugua about the sex offender registry's

application to count two, false imprisonment, and it is clear in the postconviction record that Mbugua claims he did not want to be subjected to the registry. But conclusory claims are not enough. *See* ***Bentley***, 201 Wis. 2d at 313.

¶21 Mbugua's burden is to show he would have pled guilty to false imprisonment. However, the record shows that Mbugua had maintained he had not confined C.C.S. against her will. Mbugua's second trial counsel advised the court at the plea hearing that the reason the State amended the false imprisonment count in the January 2016 plea offer to aggravated battery in the second offer was that Mbugua denied intentionally confining C.C.S. to the home without consent after the battery.[3] That denial of an essential element of false imprisonment undercuts Mbugua's conclusory claim on appeal that he would have pled guilty to a charge of false imprisonment in option two of the January 2016 plea offer. Thus, he has failed to meet his burden of establishing the first ***Lafler*** prong.

¶22 Next, Mbugua fails to satisfy the third ***Lafler*** prong—that his conviction, sentence, or both, would have been less severe under the terms of option two of the January 2016 plea offer. He bases his argument entirely on the false imprisonment count of the January 2016 plea offer. Because the State offered to dismiss the repeater enhancer of that count in the January 2016 plea offer, he argues that it was "less severe" than the aggravated battery count in the second offer, which still had the repeater enhancer attached.

[3] The five elements of false imprisonment are that the defendant: (1) confined or restrained the victim; (2) did so intentionally; (3) did so without the victim's consent; (4) had no lawful authority to restrain the victim; and, (5) knew that the victim did not consent and that the defendant did not have lawful authority to restrain the victim. *See* WIS. STAT. § 940.30 (2015-16) and ***State v. Long***, 2009 WI 36, ¶26, 317 Wis. 2d 92, 765 N.W.2d 557. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶23 ***Lafler*** requires Mbugua to show that a conviction on the earlier false imprisonment would have been "less severe" than the conviction on aggravated battery. The first flaw in his argument is that both false imprisonment and aggravated battery are Class H felonies carrying the same six-year maximum period of incarceration. Thus, he fails to show his conviction would have been less severe.

¶24 Mbugua argues that ***Lafler***'s "less severe" requirement applies to *sentence exposure* and because the false imprisonment count had no repeater enhancer, its *exposure* was "less severe" than the aggravated battery with the repeater enhancer. This argument fails for several reasons. ***Lafler*** requires him to show that a *conviction* or a *sentence* on the first offer would be "less severe." It is not premised on *exposure*, and Mbugua cites no law that bases the severity analysis on exposure.

¶25 Next, the law is well settled that the *conviction* refers to the crime, not the repeater enhancer. That is true because repeater enhancer is a *status*, not a crime, and because here the repeater enhancer was not invoked. *See* ***State v. Bush***, 185 Wis. 2d 716, 725, 519 N.W.2d 645 (Ct. App. 1994). "Wisconsin courts do not view repeater status, under [WIS. STAT.] § 939.62, as part of the underlying crime for which the defendant was convicted." ***Bush***, 185 Wis. 2d at 725. *See also* ***State v. Harris***, 119 Wis. 2d 612, 618, 350 N.W.2d 633 (1984) ("This court has previously stated that being a repeater is not a crime—it is a status."). When the sentence imposed is within the maximum, then the repeater status is not invoked. *See* ***Harris***, 119 Wis. 2d at 619. Therefore, the fact that the aggravated battery sentence did not exceed the maximum for the Class H felony means that the repeater status was not invoked and is irrelevant to the severity comparison.

¶26 The third flaw in Mbugua's severity argument is that the record establishes that his six-year actual sentence on aggravated battery did not exceed the six-year maximum on false imprisonment. He fails to show that the sentence on the January 2016 plea offer would have been less severe. To this point, Mbugua concedes that he can only speculate as to what his sentence would have been if he had pled guilty to false imprisonment. However, speculation is impermissible to meet his burden. Additionally, the trial court's very strong comments on the terrible nature of the crime, the victim's injuries, and the risk to the public fail to support any speculation that a sentence for false imprisonment would have been "less severe." Rather, it likely would have been more severe, based on the trial court's comments.

¶27 Mbugua makes one last argument in an attempt to show prejudice. He argues that if Attorney Ricci had asked the State to reoffer the January 2016 plea offer, the State would have done so and the court would have accepted his plea to that first offer. Neither is supported in the record.

¶28 The State's plea offer letter clearly required Mbugua to accept full responsibility for the acts described in the complaint and to enter guilty pleas to them. It further clearly stated that if he did not, the plea offer would be withdrawn and additional charges added. Mbugua correctly notes that the State left the door open for modifications to the offer, but it is his burden to show that the State would have permitted him to deny the nonconsensual confinement facts in the complaint, or to enter an ***Alford***[4] or no contest plea. He has not done so.

[4] Circuit courts may, in their discretion, accept ***Alford*** pleas. ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). An ***Alford*** plea is a plea in which the defendant pleads guilty while maintaining actual innocence or refusing to admit to the crime. *See* ***North Carolina v. Alford***, 400 U.S. 25, 38 (1970).

Therefore, he has not met his burden of showing that the State would not have withdrawn its offer while Attorney Ward was representing him, or that the State would have renewed the offer while he was represented by Attorney Ricci.

¶29 Additionally, even if the State had allowed the plea, he has not shown that the trial court would have accepted a plea when he denied the nonconsensual confinement facts in the complaint as to false imprisonment or would have accepted an ***Alford*** plea or no contest plea. The trial court has the discretion to reject a plea absent a factual basis in the record. *See* ***State v. Tourville***, 2016 WI 17, ¶40, 367 Wis. 2d 285, 876 N.W.2d 735.

¶30 For these reasons, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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