COURT OF APPEALS DECISION DATED AND FILED

February 4, 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. 2013AP1004-CR

Cir. Ct. No. 2012CF1325

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN P. O'BOYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Judgment affirmed as modified; surcharge order vacated.*

¶1 CURLEY, P.J.[1] Ryan P. O'Boyle appeals the judgment convicting him of disorderly conduct, as an act of domestic abuse, contrary to WIS. STAT.

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

§§ 947.01(1) and 968.075(1)(a) (2011-12).[2] He also appeals the order denying his postconviction motion. On appeal, O'Boyle argues that he should be allowed to withdraw his plea because his attorney was ineffective for: (1) failing to file a motion to strike any reference to domestic abuse in the complaint; and (2) inadequately explaining to him the charge to which he pled guilty. O'Boyle also argues that he should be allowed to withdraw his plea because it was not knowingly, voluntarily, and intelligently made. Alternatively, he argues that the charge of disorderly conduct as a result of domestic abuse is not a chargeable offense and domestic abuse modifiers are unlawful.

¶2 This court concludes that trial counsel was not ineffective because the specific motion to strike that O'Boyle claims his attorney should have made—a motion seeking removal of any reference to domestic abuse based on a theory that WIS. STAT. § 968.075 is "not a separate and distinguishable prohibited conduct that can be punished"—would not have been granted. This court also concludes that trial counsel was not ineffective because, despite some minor omissions in the guilty plea questionnaire, the record supports the fact that O'Boyle was well aware of the charge to which he was pleading guilty. For this reason, O'Boyle's plea was knowingly, voluntarily, and intelligently made. Additionally, O'Boyle's argument that the charge of disorderly conduct as a result of domestic abuse is not a chargeable offense and domestic abuse modifiers are unlawful fails because it is insufficiently developed. Finally, this court concludes that the only evidence in this record concerning O'Boyle's disorderly conduct fails to fulfill the statutory definition of domestic abuse found in WIS. STAT.

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

§§ 968.075(1) and 973.055. As a consequence, the reference to domestic abuse in the judgment roll should be stricken, and the $100 domestic abuse surcharge, found in § 973.055, should be vacated. *Cf.* ***State v. Cherry***, 2008 WI App 80, ¶11, 312 Wis. 2d 203, 752 N.W.2d 393 (where Court of Appeals remanded for revision of surcharge).

BACKGROUND

¶3 O'Boyle's charges stemmed from an incident that occurred in the early morning hours of March 23, 2012. According to the complaint, O'Boyle had been living with his child's mother, K.E., and K.E.'s mother, N.E., and late in the evening of March 22, 2012, K.E. told O'Boyle to leave. Early the next morning, K.E. awoke to noises that sounded like rocks hitting her second-story window and then heard someone on the roof. Scared and frightened, she called 9-1-1. N.E., who also decided to call the police, advised the police that she awoke at approximately 2:00 a.m. because she heard something hitting the upstairs portion of her house. She looked out the window and saw O'Boyle throwing what she believed to be rocks in the area where K.E. sleeps. This went on for approximately thirty minutes. While on the phone with the police, N.E. heard a loud noise on the roof.

¶4 When the police arrived, they saw a man later identified as O'Boyle on the roof, and with the help of a ladder, he was able to climb down. O'Boyle gave a statement to the police. He said he went to a tavern where he became intoxicated. He then went back to the home of K.E. and N.E., where he had been living. According to O'Boyle, he was unable to find the spare key and he remembers climbing a tree and climbing onto the roof of the home.

¶5 O'Boyle was charged with misdemeanor disorderly conduct as an act of domestic abuse, and, because he was out on bail for two felonies and a condition of his bail was that he was not commit any crimes, he was also charged with felony bail jumping. Because he was charged with disorderly conduct as an act of domestic abuse, as defined in WIS. STAT. § 968.075(1)(a), WIS. STAT. § 973.055(1) required the trial court to impose a domestic abuse surcharge of $100 if O'Boyle were found guilty.

¶6 Several months later O'Boyle pled guilty to disorderly conduct as an act of domestic abuse charge, and the bail jumping charge was dismissed and read into the record. The trial court sentenced O'Boyle to seventy-four days in jail and gave him credit for the seventy-four days he was in jail. In addition, the trial court assessed a $100 domestic abuse surcharge.[3] O'Boyle brought a postconviction motion which was denied.

ANALYSIS

¶7 O'Boyle presents several arguments on appeal. He first argues that he should be allowed to withdraw his plea because his attorney was ineffective for: (1) failing to file a motion to strike any reference to domestic abuse in the complaint; and (2) inadequately explaining to him the charge to which he pled guilty. O'Boyle also argues that he should be allowed to withdraw his plea because it was not knowingly, voluntarily, and intelligently made. Alternatively, he argues that the trial court erred in denying his postconviction motion because

[3] The court originally told O'Boyle that he also could no longer wear body armor. At the postconviction motion, the trial court lifted that condition, and a condition not mentioned at the guilty plea hearing, but placed on the judgment of conviction that he not possess a firearm.

the domestic abuse is not a chargeable offense and domestic abuse modifiers are unlawful. This court addresses each argument in turn.

Standard of Review

¶8 This court determines whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing under a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, this court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *See **id.*** This is a question of law subject to *de novo* review. ***Id.*** If the motion raises such facts, the trial court must hold an evidentiary hearing. ***Id.*** "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***

¶9 A defendant who seeks to withdraw his or her pleas after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998). Ineffective assistance of counsel may constitute a manifest injustice. ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110. Additionally, a manifest injustice occurs when a plea is not voluntarily, knowingly, and intelligently entered. *See* ***Warren***, 219 Wis. 2d at 635-36.

¶10 "Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). This court will not overturn the trial

court's findings of fact unless they are clearly erroneous; however, "whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law which this court decides without deference." *See* ***id.*** To establish a claim for ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. To establish deficient performance, O'Boyle must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "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." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If O'Boyle fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶11 Likewise, whether a plea was knowingly, voluntarily and intelligently entered is a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). The defendant has the burden of making a *prima facie* showing that the court did not comply with WIS. STAT. § 971.08(1) or other court-mandated duties, and must allege he did not know or understand the information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant meets these obligations, the burden shifts to the State to establish by clear and convincing evidence that the plea was knowing, intelligent and voluntary despite the identified inadequacy of the plea colloquy. ***Id.***, ¶40.

¶12 With the proper standards in mind, this court turns to O'Boyle's contentions.

A. O'Boyle's attorney was not ineffective.

¶13 O'Boyle claims his attorney was ineffective, first, for failing to file a motion to strike any reference to domestic abuse in the complaint. Specifically, he argues that his attorney should have moved to strike the domestic abuse reference from the complaint because, "Domestic Violence Sec. 968.075, standing alone, is not a separate and distinguishable prohibited conduct that can be punished," and, had trial counsel made such a motion, "it would have been apparent to the court that domestic abuse is not a separate charge" and "any references to domestic abuse may have been stricken from the complaint."

¶14 This court disagrees. Had trial counsel filed such a motion, the trial court would have denied it because the State was not claiming that WIS. STAT. § 968.075 was a separate charge. The primary purpose of § 968.075 is to establish when an arrest is mandatory, and it also requires law enforcement and prosecutors to establish policies concerning domestic abuse cases. *See **id.*** In addition, the statute defines what conduct constitutes domestic abuse. ***Id.*** According to the statutory scheme, once domestic abuse is proven, the trial court must assess a $100 surcharge pursuant to WIS. STAT. § 973.055(1). The State did not, however, charge O'Boyle with two separate acts. Had trial counsel moved to strike the § 968.075 modifier on the basis O'Boyle now argues, that motion would not have been granted. Consequently, trial counsel was not ineffective for failing to file the motion. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

¶15 O'Boyle next contends that trial counsel was ineffective for inadequately explaining to him the charge to which he pled guilty. O'Boyle claims that he thought he was entering a plea to simple disorderly conduct, and that his attorney was ineffective because he was unaware of the domestic abuse modifier. O'Boyle argues that had his attorney properly explained the charge, he would have pled guilty to disorderly conduct, not disorderly conduct as an act of domestic abuse. O'Boyle claims not to have understood that his plea was to the charge of disorderly conduct as an act of domestic abuse as opposed to just disorderly conduct, and he points to the guilty plea questionnaire as proof.

¶16 Again, this court disagrees. While it is true that the guilty plea questionnaire contains no statutory references to domestic abuse, nor, for that matter, does it list the statute prohibiting disorderly conduct, there were many other references to domestic abuse in the record to support the conclusion that O'Boyle knew he was pleading guilty to disorderly conduct as an act of domestic abuse.

¶17 Assuming that O'Boyle's attorney never mentioned that the disorderly conduct charge would be considered to be a crime of domestic abuse, O'Boyle was repeatedly reminded that his charge was disorderly conduct as an act of domestic abuse. The complaint states that, "further, invoking the provisions of sec. 968.075(1)(a), Wis. Stats., because this charge is an act of domestic abuse, costs upon conviction would include the domestic abuse assessment imposed under § 973.055(1)." Additionally, O'Boyle was informed of the full charge—including the domestic abuse modifier—by the court commissioner at the initial appearance and the judge following the bindover at the preliminary hearing. Also, on the day of his guilty plea, the clerk read the charges when the case was called, and the trial court not only informed O'Boyle that he was charged with disorderly

conduct domestic abuse related, but also told him that he would be responsible for the domestic abuse assessment. Moreover, when O'Boyle was asked if he understood the charge and penalties, he replied that he did. O'Boyle's claim that he was unaware of the actual charge is unavailing. Thus, there was no ineffective assistance of counsel.

B. O'Boyle entered his plea knowingly, intelligently and voluntarily.

¶18 O'Boyle separately argues that he did not enter his plea knowingly, intelligently, and voluntarily. *See* ***Warren***, 219 Wis. 2d at 635-36. This court disagrees for all of the reasons explained more fully above. As is clear from the record, O'Boyle repeatedly was advised of the charge against him, and he understood that information.

C. O'Boyle's argument that the charge of disorderly conduct as a result of domestic abuse is not a chargeable offense and domestic abuse modifiers are unlawful fails because it is insufficiently developed.

¶19 O'Boyle argues that the charge of disorderly conduct as a result of domestic abuse is not a chargeable offense and domestic abuse modifiers are unlawful. This court will not consider this argument because it is insufficiently developed. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322.

D. The domestic abuse surcharge must be vacated because O'Boyle's acts did not fall within the definition of domestic abuse found in WIS. STAT. § 968.075.

¶20 O'Boyle was originally charged with disorderly conduct as an act of domestic abuse and felony bail jumping. He decided to plead guilty to the misdemeanor charge when the State agreed to dismiss the felony charge. The victims did not attend the guilty plea hearing and sentencing. O'Boyle did not testify. Thus, the only information concerning the incident came from the complaint, which was used as a factual basis for the guilty plea.

¶21 WISCONSIN STAT. § 968.075 lists the definition of domestic abuse as follows:

> **(1)** DEFINITIONS. In this section: (a) "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of s. 940.225 (1), (2) or (3).
>
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

¶22 While the relationship between O'Boyle and K.E. appears to qualify under WIS. STAT. § 968.075(1)(a) because O'Boyle resided with K.E. and O'Boyle and K.E. have a child together, it is not enough to constitute domestic abuse here because the complaint does not allege conduct that falls under the statutory definition. The complaint must contain allegations that fit the crimes stated in subparts 1. through 4. in order to qualify for domestic abuse status.

Comparing the allegations in the complaint with the crimes listed in § 968.075(1)(a)1.—4. reveals that: (1) there is no allegation in the complaint that O'Boyle intentionally inflicted physical pain, physical injury or illness; (2) there is no allegation in the complaint that O'Boyle intentionally impaired K.E.'s physical condition; (3) no sexual assault is alleged; and (4) while K.E. may have been frightened, it would not have been reasonable for her to fear *imminent* engagement in any of the conduct described in § 968.075(1)(a)1., 2., or 3., as O'Boyle never entered the dwelling, and no threats or, for that matter, conversation, took place between the parties.

¶23 The statute authorizing the surcharge is WIS. STAT. § 973.055(1). It directs the court to impose the surcharge under certain conditions. One of them is if the domestic abuse occurs between people who currently or formerly lived together or have a child together:

> **(1)** If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse surcharge under ch. 814 of $100 for each offense if:
>
> (a) 1. The court convicts the person of a violation of a crime specified in s. ... 947.01(1) … and
>
> 2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child….

¶24 Although not specifically mentioned, implicit in WIS. STAT. § 973.055 is that the complained of conduct must fall within the definition of domestic abuse found in WIS. STAT. § 968.075(1)(a)1.—4. As noted, none of the crimes listed in subparts 1. through 4. were alleged against O'Boyle.

¶25 Even considering the definition of domestic abuse independent of the definition found in WIS. STAT. § 968.075(1)(a), O'Boyle's conduct did not meet the definition found in WIS. STAT. § 973.055(1)2. because the actions of O'Boyle were not "against an adult with whom the adult person resides … or against an adult with whom the adult person has created a child…." O'Boyle was intoxicated and attempting to enter the house where he resided. None of his actions were directed at K.E. or N.E., nor was he hostile or violent. As the State remarked at the plea hearing:

> [I]n the continuum of disorderly conducts that we see, this case is not the most aggravated. The behavior here, while inappropriate and certainly would leave someone to be very frightened, there was no violence against the victim nor any sort of threats made by the defendant.

Moreover, the trial court apparently agreed, stating that: "[W]e would say it's not that egregious, there weren't any threats or any physical contact." Under either definition, O'Boyle's actions did not qualify as domestic abuse. As a result, the reference to domestic abuse should be removed from the judgment and the surcharge vacated. *Cf.* ***Cherry***, 312 Wis. 2d 203, ¶11 (where Court of Appeals remanded for revision of surcharge).

By the Court.—Judgment affirmed as modified; surcharge order vacated.

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