COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2500-CR **Cir. Ct. No. 2012CF3625**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMAL DESMAR WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and TIMOTHY M. WITKOWIAK, Judges. *Affirmed.*

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

¶1 PER CURIAM. Jamal Desmar Williams appeals from a judgment of conviction entered upon his guilty plea to one count of armed robbery. He also appeals from a postconviction order denying his motion to withdraw his guilty

plea.[1] He claims his trial counsel gave him ineffective assistance and he entered his guilty plea involuntarily because, he alleges, his trial counsel promised that he would receive five years in prison if he pled guilty. The circuit court rejected his claims, and we affirm.

BACKGROUND

¶2 The criminal complaint reflects that at 9:20 p.m. on July 15, 2012, Margaret Johnson complained to police that she had just been robbed outside of her home by a man with a silver handgun. Police arrested Williams twenty-four minutes later as he sat uninvited on a child's swing in a yard approximately one block from Johnson's home. Police found a silver handgun near him, and he had Johnson's cell phone and driver's license in his pants. The State charged Williams with one count of armed robbery by use of force.

¶3 With the assistance of counsel, Williams entered a guilty plea. At sentencing, the State, as it had agreed to do, recommended a prison sentence without specifying a period of confinement. Williams's trial counsel recommended probation or, alternatively, "several years" in prison followed by a lengthy period of extended supervision. The circuit court imposed an eighteen-year term of imprisonment, bifurcated as ten years of initial confinement and eight years of extended supervision.

¶4 Assisted by new counsel, Williams filed a motion for plea withdrawal on the grounds that his trial counsel was ineffective and his plea was

[1] The Honorable David A. Hansher presided over the plea and sentencing in this matter and entered the judgment of conviction. The Honorable Timothy M. Witkowiak presided over the postconviction proceedings and entered the order denying the postconviction motion.

involuntary. In support of the claims, he alleged in an affidavit that he entered his guilty plea only because his trial counsel "promised [Williams] unequivocally that [he] would receive five years in prison if [he] changed [his] plea to guilty."

¶5 The circuit court held a postconviction hearing to consider Williams's claims. Williams and his trial counsel were the only witnesses. Williams testified that he wanted a trial but his trial counsel urged him to plead guilty and promised him that if he entered a plea, counsel would "get [Williams] five years." Trial counsel testified and categorically denied that he ever promised Williams five years in prison if he pled guilty. Trial counsel further testified that he is a public defender who handles approximately 150 felony cases each year and that he has never made a promise to any defendant about the length of the sentence that the circuit court will impose. Trial counsel said that he tells many clients charged with armed robbery that a sentence of five years in prison is a good outcome, but "that's as far as [counsel] would go." Trial counsel readily acknowledged that he recommended to Williams that he plead guilty in this case because, in counsel's view, Williams could not prevail at trial and the facts were "stacked against [him]." The circuit court denied Williams any relief and he appeals.

DISCUSSION

¶6 Williams seeks plea withdrawal on the ground that his trial counsel was ineffective and his guilty plea was involuntary. A defendant who wishes to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883. Both ineffective assistance of counsel and entry of an involuntary plea are circumstances that may

constitute a manifest injustice. *See* ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177.

¶7 We begin by examining the claim that Williams received ineffective assistance from his trial counsel. We review claims of ineffective assistance of counsel under the familiar two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, Williams must prove that his trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***id.*** Williams must satisfy both prongs of the test to be afforded relief. *See* ***id.*** We may address either deficient performance or prejudice first, and if Williams fails to satisfy one prong, we need not address the other. *See* ***id.*** at 697.

¶8 To prove deficiency, a defendant must show that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To prove prejudice, "[t]he 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." ***Id.*** at 694. In the context of a guilty plea, the defendant must show "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

¶9 "'[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Thus, we will not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (quoted source, internal citations, footnote omitted). Whether trial counsel's performance was deficient and whether the

deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.*** at 634.

¶10 In this case, Williams alleged that his trial counsel promised he would receive five years in prison if he pled guilty, and his trial counsel denied the allegation. The circuit court considered the evidence and found trial counsel more credible than Williams. We defer to the credibility assessments of the circuit court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Accordingly, we will not disturb a circuit court's credibility determinations unless they are clearly erroneous. *See* ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. We are satisfied that the circuit court's credibility assessments in this case are not clearly erroneous. To the contrary, they are supported by the record.

¶11 Williams signed a guilty plea questionnaire and waiver of rights form before pleading guilty, and he acknowledged at the postconviction hearing that he reviewed the form with his trial counsel in advance of the guilty plea. The form does not reflect a promise that Williams would receive five years in prison. Rather, the form reflects Williams's understanding that "the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty."

¶12 The transcript of the plea hearing reflects that the circuit court asked Williams on the record if he had reviewed the guilty plea questionnaire with his trial counsel before he signed it and whether he had enough time to talk to his trial counsel before deciding to plead guilty. Williams responded affirmatively. The circuit court then personally advised Williams: "I do not have to follow the recommendation of your attorney, the district attorney or a presentence writer.

And I could sentence you to 40 years in the Wisconsin state prison." The circuit court added: "I know you're making a face but that's the maximum penalty." Williams said that he understood.

¶13 Moreover, the transcript of the sentencing hearing shows that Williams was in court when the State recommended a prison sentence without specifying a period of confinement. He was also present when his trial counsel recommended to the circuit court that it impose either probation or, alternatively, "several years" in prison as the disposition. Williams did not express any surprise about these recommendations, nor did he personally state any expectation that he would receive five years in prison. Instead, he asked the circuit court to impose probation or, alternatively, an unspecified period of incarceration at the House of Correction. The record thus amply supports the circuit court's conclusion that trial counsel rather than Williams credibly described the information and advice that counsel gave to Williams before his guilty plea.

¶14 Because the circuit court did not believe Williams's evidence that trial counsel promised him a sentence of five years in prison, Williams has not shown that his trial counsel performed deficiently. We therefore reject his claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 697 (unnecessary to consider prejudice prong of ineffective assistance analysis if defendant fails to establish deficient performance).

¶15 In light of the foregoing discussion, we need only briefly address Williams's claim that his plea was involuntary and therefore a manifest injustice because his trial counsel gave him inaccurate information about the sentence he would receive. Inaccurate legal information may render a plea unknowing and involuntary. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct.

App. 1992). In this case, however, the circuit court found that Williams's trial counsel did not give Williams inaccurate information. Williams thus did not establish that plea withdrawal is required to correct a manifest injustice. *See* ***id.*** Accordingly, the circuit court properly denied relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).