COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-2925-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDOLPH S. BAUERNFEIND,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Randolph S. Bauernfeind has appealed from a judgment convicting him upon a plea of guilty of first-degree sexual assault in violation of § 948.02(1), STATS., and sentencing him to twenty years in prison. Pursuant to a separate judgment entered the same day imposing a consecutive term of probation, Bauernfeind was convicted upon guilty pleas of one count of incest

in violation of § 948.06(1), STATS., one count of causing substantial bodily harm in violation of § 940.19(3), STATS., and one count of distributing a controlled substance to a person under the age of eighteen in violation of §§ 161.41(h)(1), 161.46(3), and 939.05(1), STATS., 1993-94. He has also appealed from an order denying his motion to withdraw his guilty pleas based on ineffective assistance of trial counsel. We affirm the judgments and the order.

Bauernfeind's arguments on appeal all relate to ineffective assistance of trial counsel. A defendant is entitled to withdraw his or her guilty plea after sentencing only by showing by clear and convincing evidence that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test is met if the defendant was denied effective assistance of counsel. *See* ***id.***

The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311, 548 N.W.2d at 54. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland,*** 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). The second inquiry focuses on whether counsel's performance affected the outcome of the plea process. *See* ***id.*** at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

Application of these standards to this case clearly establishes that Bauernfeind has no basis for relief. Bauernfeind's first argument is that counsel was ineffective because she lacked knowledge of ch. 980, STATS., the sexual predator law, and failed to advise him that his pleas of guilty to the sexual offenses potentially could subject him to commitment under that law.

This argument was properly rejected by the trial court. Initially, we note that ch. 980, STATS., is a relatively new law, and many attorneys, including those with a great deal of criminal law experience, will not yet have handled a sexual predator case. Contrary to Bauernfeind's contention, lack of experience alone cannot be equated with lack of knowledge. Since Bauernfeind never specifies what material knowledge was lacked by counsel or how it affected his pleas, this argument provides no basis for finding deficient performance or prejudice.

Based on the record, the trial court also properly found that trial counsel adequately advised Bauernfeind that his pleas to the sexual assault charges could potentially subject him to a sexual predator commitment in the future. The record contains a guilty plea questionnaire which included a section labeled "Sentencing Considerations--Special Circumstances." Two paragraphs of that

section provided a succinct, accurate summary of the sexual predator law and its potential ramifications.

At the guilty plea hearing, the trial court asked Bauernfeind whether he had gone through these documents, and Bauernfeind replied that he had and that his counsel had read them to him. He specifically acknowledged that he had gone over the items that were checked, which included the sections discussing the sexual predator law.

At the postconviction hearing, Bauernfeind's counsel testified that she recalled discussing a potential sexual predator commitment with Bauernfeind and advised him that he potentially could be committed for the rest of his life. She confirmed that the markings on the checklist were hers, that underlining on the sexual predator section was done by her, and that she would not have checked off any items if she had not discussed them with Bauernfeind. Moreover, while Bauernfeind testified at the postconviction hearing that he never discussed a potential sexual predator commitment with his trial counsel, he admitted that he and his attorney went through the checklist, which included information on the sexual predator law.

Based on this record, the trial court properly rejected Bauernfeind's claim that his counsel did not advise him that a sexual predator commitment was possible and rendered ineffective assistance as a result. In upholding the trial court, we emphasize that not only did Bauernfeind fail to establish by clear and convincing evidence that counsel was ineffective, but the record clearly and convincingly demonstrates that counsel took measures beyond what ordinary representation would

have called for and should be commended for the steps she took to advise Bauernfeind concerning his pleas.[1]

Bauernfeind's next argument is that trial counsel was ineffective for failing to investigate a plea of not guilty by reason of mental disease or defect under § 971.15(1), STATS. However, we need not analyze counsel's performance on this matter absent a showing by Bauernfeind that any alleged deficiencies prejudiced his case. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349 (Ct. App. 1994).

A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***id.*** at 48, 527 N.W.2d at 349-50. Bauernfeind has failed to do so here. Moreover, nothing in the record, including the psychological report prepared for sentencing, provides a basis for concluding that he suffered from a mental disease or defect encompassed within § 971.15(1), STATS., at the time of the offenses.

In support of his claim that his trial counsel should have investigated an insanity defense, Bauernfeind relies on a statement in the presentence psychological report indicating that Bauernfeind's pattern of responding to testing was "extreme enough to effectively hide even severe psychopathology such as thought disorders and alcohol/drug abuse disorders." However, this says nothing more than that Bauernfeind has a problem which might mask a problem. If it masked a problem which would have qualified as the type of mental disease or

[1] In making this determination, we note that in ***State v. Myers***, 199 Wis.2d 391, 395, 544 N.W.2d 609, 611 (Ct. App. 1996), this court held that a criminal defendant who is pleading guilty or no contest to a sexual offense need not have knowledge of the potential for a sexual predator commitment in order to make his or her plea knowing and voluntary.

defect required to establish an insanity defense under § 971.15(1), STATS., it was incumbent upon Bauernfeind to present witnesses or evidence supporting such a conclusion. *See* ***Flynn***, 190 Wis.2d at 48, 527 N.W.2d at 350. Absent a showing that further investigation by his counsel would have uncovered such evidence, his claim that he was prejudiced as a result of trial counsel's failure to investigate the matter is pure speculation. A defendant must base a challenge to his or her representation on more than speculation. *See* ***id.***

By the Court.—Judgments and order affirmed.

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