COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1019-CR **Cir. Ct. No. 2012CF6183**

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

IN RE: THE FINDINGS OF CONTEMPT:
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE M. PRZYTARSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

¶1 FINE, J. Stephanie M. Przytarski appeals the judgment finding her guilty of non-summary criminal contempt, *see* WIS. STAT. §§ 785.03(1)(b) &

785.04(2)(a), and the order denying her motion for postconviction relief.[1] The issue is whether she has shown a post-sentence "manifest injustice" that would allow her to withdraw her guilty plea to non-summary criminal contempt. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 710 (1997) ("After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice."). We affirm.

I.

¶2 Underlying this appeal is a custody dispute between Przytarski and Przytarski's child's father. The State charged Przytarski with violating WIS. STAT. § 948.31(1)(b), which provides:

> Except as provided under chs. 48 and 938, whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian is guilty of a Class F felony. This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph.

Under Section 948.31(4)(a), as material:

> It is an affirmative defense to prosecution for violation of this section if the action:
>
> 1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which

[1] The trial court also commuted Stephanie M. Przytarski's probation consistent with WIS. STAT. § 973.09(2)(a)1r.

> the parent or authorized person reasonably believes that there is a threat of *physical harm* or sexual assault to the child[.]

(Emphasis added.) The trial court ruled, however, as recounted in its Decision and Order denying Przytarski's motion for postconviction relief, that the "threat of emotional harm" to the child that Przytarski claimed "was not a defense under" the statute. *See* ***State v. McCoy***, 143 Wis.2d 274, 296, 421 N.W.2d 107, 115 (1988). The State and Przytarski did not challenge this ruling. Rather, they plea bargained the charge and Przytarski pled guilty to non-summary criminal contempt under WIS. STAT. § 785.03(1)(b) and § 785.04(2)(a).[2]

¶3 The original criminal complaint was the plea's factual basis, and the trial court explored that with Przytarski:

> THE COURT: ….
>
> And the allegation is that on or about Wednesday, December 26, 2012, at 7701 West Verona Court, in the City and County of Milwaukee, Wisconsin, you did intentionally disobey, resist, or obstruct the authority,

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[2] WISCONSIN STAT. § 785.03(1)(b) provides:

> *Punitive sanction.* The district attorney of a county, the attorney general or a special prosecutor appointed by the court may seek the imposition of a punitive sanction by issuing a complaint charging a person with contempt of court and reciting the sanction sought to be imposed. The district attorney, attorney general or special prosecutor may issue the complaint on his or her own initiative or on the request of a party to an action or proceeding in a court or of the judge presiding in an action or proceeding. The complaint shall be processed under chs. 967 to 973. If the contempt alleged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(Emphasis in original.)

> process, or order of a Court, contrary to statute; do you understand that.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And that this is, as an unclassified offense, is punishable by a fine up to $5,000 and incarceration for up to one year or both; do you understand.
>
> THE DEFENDANT: Yes.

The trial court sentenced Przytarski on her guilty plea to WIS. STAT. § 785.03(1)(b), and told her she had the right to appeal. Przytarski claims that she would not have plea bargained the WIS. STAT. § 948.31(4) charge if she had known that she could not challenge the trial court's ruling in connection with that statute, and contends that this is ineffective-assistance of counsel.

II.

¶4 As we have seen, a defendant who has been sentenced may withdraw a plea if he or she shows "by clear and convincing evidence" that withdrawal is necessary to correct a "manifest injustice." ***McCallum***, 208 Wis. 2d at 473, 561 N.W.2d at 710. "There is 'manifest injustice' when a defendant has received ineffective assistance of counsel." ***State v. Butler***, 2009 WI App 52, ¶2, 317 Wis. 2d 515, 520, 768 N.W.2d 46, 48.

¶5 In order to show constitutionally ineffective-assistance of counsel a defendant must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690.

¶6 In order to prove resulting prejudice, the defendant must show that the lawyer's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687. Thus, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶7 We need not address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim is mixed. ***State v. Ward***, 2011 WI App 151, ¶9, 337 Wis. 2d 655, 663–664, 807 N.W.2d 23, 28. "A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. Its legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*." ***Ibid.*** (internal citation omitted). Finally, a defendant is not entitled to an evidentiary hearing on ineffective assistance of counsel claims unless "the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 580, 682 N.W.2d 433, 439.

> To prove prejudice, a defendant is required to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. In other words, "[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. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Under this test, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." However, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." The defendant's

> burden is to show that counsel's errors "actually had an adverse effect on the defense."

State v. Franklin, 2001 WI 104, ¶14, 245 Wis. 2d 582, 589, 629 N.W.2d 289, 293 (internal citations and quoted sources omitted; brackets in ***Franklin***). Even assuming deficient representation by her lawyer, Przytarski has not met this high post-sentence burden to prove ***Strickland*** prejudice.

¶8 First, even though the State no longer charged Przytarski with the felony under WIS. STAT. § 948.31(1)(b), the defendant seeks to re-assert an affirmative defense under § 948.31(4)(a). But that charge has been abandoned and superseded by the misdemeanor charge under WIS. STAT. § 785.03(1)(b). Second, Przytarski has not even attempted to attack § 785.03(1)(b) or its elements.

By the Court.—Judgment and Order affirmed.

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