COURT OF APPEALS DECISION DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3401-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAYMON D. TATE,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Daymon D. Tate appeals from a judgment of conviction entered after he pled guilty to armed robbery, while concealing identity, as a party to the crime. *See* §§ 939.32, 939.641, 939.05, STATS. He also appeals from an order denying his motion for postconviction relief. Tate argues that the trial court erred in denying his postconviction motion to withdraw his

guilty plea because, he alleges: (1) his plea was involuntary; (2) the State breached the plea bargain; and (3) he received ineffective assistance of counsel. We affirm.

BACKGROUND

On February 12, 1996, four armed and masked men robbed an automotive garage, and killed a man in the process. Tate was subsequently identified as one of the four men, and on February 29, 1996, the State charged Tate with felony murder, with a penalty enhancer for concealing his identity during the underlying armed robbery, to which he was a party to the crime. *See* §§ 940.03, 939.641, 943.32, 939.05, STATS.

On April 5, 1996, pursuant to a plea bargain, Tate pled guilty to a reduced charge of armed robbery, while concealing identity, as a party to the crime. The terms of the plea bargain were expressed in a letter from the State to Tate's defense attorney, and provided that, in exchange for Tate's guilty plea and trial testimony against the remaining defendants, the State was amending the information to the reduced charge of armed robbery. The trial court accepted Tate's guilty plea, and on June 12, 1996, entered a judgment of conviction. On July 11, 1996, the trial court sentenced Tate to an indeterminate prison term not to exceed thirty years. The State made no sentencing recommendation at the sentencing hearing.

On May 16, 1997, Tate filed a postconviction motion seeking to withdraw his guilty plea. In support of his motion, Tate alleged, among other things, that his plea was not knowingly, voluntarily, and intelligently entered, that the State breached the plea bargain, and that he received ineffective assistance of

counsel. After a hearing on Tate's claims, the trial court rejected Tate's motion for postconviction relief.

DISCUSSION

Tate claims that his guilty plea was involuntary because it was induced by improper threats and promises. In support of his claim that his plea was involuntary, Tate asserts that the guilty plea colloquy was inadequate under § 971.08, STATS., and ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), because the trial court failed to ask him whether any threats or promises were made in connection with his guilty plea.[1]

After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving 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). A manifest injustice occurs when a plea is not entered knowingly and voluntarily. *See* ***State v. Giebel***, 198 Wis.2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995).

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[1] Section 971.08, STATS., provides, in relevant part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
> (a) Address the defendant personally and determine that the plea is made voluntarily, with understanding of the nature of the charge and the potential punishment if convicted.
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial or naturalization, under federal law."

Whenever the § 971.08(1), STATS., or other court-mandated duties are not fulfilled at a plea hearing, a defendant may move to withdraw his plea. *See* ***Bangert,*** 131 Wis.2d at 274, 389 N.W.2d at 26. The defendant must make a prima facie showing that the court violated its mandatory statutory duties, and allege that he or she did not know or understand the information that the trial court failed to provide. *See* ***id.*** If the defendant asserts that the trial court failed to inquire whether the plea was based on threats or promises, the defendant must allege that the plea was, in fact, based on improper threats or promises. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 829 n.2, 416 N.W.2d 627, 630 n.2 (Ct. App. 1987). Once the defendant makes this showing, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant's plea was knowingly and voluntarily made. *See* ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26.

The issue of whether a plea was knowingly and voluntarily entered is a question of constitutional fact, subject to *de novo* review. *See* ***id.***, 131 Wis.2d at 283, 389 N.W.2d at 30. The trial court's findings of historical or evidentiary facts, however, will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.***, 131 Wis.2d at 283–284, 389 N.W.2d at 30.

At the hearing on Tate's postconviction motion, Tate testified that he accepted the plea bargain and pled guilty because his attorney promised him: (1) that the judge and the State had agreed that he would be sentenced to probation; (2) that he should disregard the portion of the guilty plea questionnaire that informed him that the court was not bound by any plea bargain; and (3) that his family would be relocated through a witness protection program. Tate also testified that his attorney told him that if he did not plead guilty, the State would

seek a sixty-five-year sentence. Tate's attorney, however, denied making any of the foregoing representations. Tate's attorney further testified that he reviewed with Tate the guilty plea questionnaire and waiver of rights form, including the provision that set forth the maximum possible penalties and the provision that stated that the judge was not bound to follow any plea bargain or any offered sentencing recommendation. The trial court also took notice of Tate's comments at his sentencing hearing, in which Tate acknowledged that his conduct "could cost [him] a lot of time out of [his] life."

Based on the foregoing evidence, the trial court found that Tate's attorney did not make the alleged promises and threats. The trial court, therefore, rejected Tate's claim that his plea was involuntary.[2] The trial court determined that Tate's attorney was a more credible witness, and we must defer to the trial court's credibility determination. *See* ***State v. Poellinger***, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990). The record supports the trial court's conclusion that Tate's plea was entered knowingly and voluntarily.

Tate also claims that he is entitled to withdraw his plea because the State breached the plea bargain by not making a sentencing recommendation at his sentencing hearing. Tate argues that the plea bargain required the State to negotiate with the defense and arrive at a specific sentencing recommendation to be offered at his sentencing hearing.

When a defendant pleads guilty pursuant to a plea bargain, due process mandates that the bargain be enforced. *See* ***State v. Smith***, 207 Wis.2d

[2] The trial court found that Tate received threats from one of the defendants against whom Tate had agreed to testify, but that those threats did not induce Tate's guilty plea; rather, they discouraged Tate from pleading guilty. Tate does not challenge this finding on appeal.

258, 271–272, 558 N.W.2d 379, 385–386 (1997). The plea bargain may be vacated if the State materially and substantially breaches the plea bargain, because a material and substantial breach amounts to a manifest injustice. *See* ***id.***, 207 Wis.2d at 272, 558 N.W.2d at 385–386. "Such a breach must deprive the defendant of a material and substantial benefit for which he or she bargained." ***Id.***, 207 Wis.2d at 272, 558 N.W.2d at 385.

"When a prosecutor does not make the negotiated sentencing recommendation, that conduct constitutes a breach of the plea agreement." ***Id.*** If the prosecutor's failure to make the negotiated sentencing recommendation materially and substantially breaches the plea bargain, the defendant is entitled to a new sentencing hearing in accordance with the terms of the plea bargain. *See* ***id.***, 207 Wis.2d at 282, 558 N.W.2d at 389.

As noted, the terms of Tate's plea bargain were expressed in a letter from the State to Tate's defense attorney, and provided that, in exchange for Tate's guilty plea and trial testimony against the remaining defendants, the State was amending the information to the reduced armed robbery charge. With respect to a sentencing recommendation, the letter provided: "As previously noted, the actual State's recommendation has not yet been negotiated, nor am I committed to any particular position. I am willing to discuss this part of the agreement as time allows or after the trial on April 22, 1996." After reviewing the letter, the trial court asked the State if it had made any promises regarding a sentencing recommendation, and the State responded, "I believe the last paragraph refers to the fact that I have not foreclosed negotiation on that point …. I have not made any agreements other than to agree to discuss it." The trial court then confirmed with Tate's defense counsel that Tate was "not relying on any particular recommendation of sentencing or lack of one."

Prior to Tate's sentencing hearing, the State sent Tate's attorney a letter suggesting that the State make no sentencing recommendation at Tate's sentencing hearing because, due to the acquittal of one of the other defendants, the attorney for the State felt that he could not make a sentencing recommendation that was favorable to Tate. The letter invited Tate's attorney to respond to the foregoing suggestion. Tate's attorney did not respond, however, and the State, therefore, made no sentencing recommendation.

We conclude that the State did not materially and substantially breach the plea bargain. As reflected in the letter presented to the trial court, and confirmed by the parties at the guilty plea hearing, the plea bargain did not include any provision with respect to a sentencing recommendation. The State explicitly expressed that the parties had not negotiated regarding a sentencing recommendation. Although the State agreed to discuss a sentencing recommendation at a later date, that bargain did not require the State to offer a sentencing recommendation. We further conclude that the State did not materially and substantially breach the plea bargain by not discussing a potential recommendation with the defense. The State informed the defense of its intended position, and invited the defense to respond. This satisfied any obligation that the State may arguably have had.

Tate's final claim is that he is entitled to withdraw his plea because he received ineffective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311, 548 N.W.2d at 54 (a plea that results from ineffective assistance of counsel is manifestly unjust). To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was

deficient and that the deficient performance produced prejudice.[3] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, Tate must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

In support of his claim that he received ineffective assistance of counsel, Tate asserts that his attorney was deficient in making misrepresentations to Tate in order to induce Tate to plead guilty, in failing to review with Tate the guilty plea questionnaire, in failing to negotiate with the State for a sentencing recommendation, and in failing to object to the State's breach of the plea bargain.[4]

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[3] If we conclude that a defendant fails to satisfy this burden on one prong, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

[4] Tate also asserts that his counsel was ineffective in ignoring his requests to withdraw his plea prior to sentencing, and that he is, therefore, entitled to withdraw his plea upon a showing of a "fair and just reason," rather than a "manifest injustice." If Tate can establish that he received ineffective assistance of counsel, however, he will have succeeded in establishing a manifest injustice. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). Further, Tate fails to identify any particular ground for withdrawal that would have satisfied the "fair and just reason" standard, but does not satisfy the "manifest injustice" standard. Therefore, the lesser standard urged by Tate is of no significance in this case.

As noted, Tate's attorney testified that he did not make any of the alleged misrepresentations to Tate, and that he reviewed the plea questionnaire with Tate. The trial court made a credibility determination and accepted that testimony, and we must defer to the trial court's credibility determination. We have also concluded that the State did not breach the plea bargain. Therefore, the only remaining ground for Tate's ineffective assistance of counsel claim is that his attorney failed to negotiate with the State regarding a sentencing recommendation. We conclude that Tate's attorney was not ineffective in that respect. As noted, the State was not bound to make any specific sentencing recommendation, and the attorney for the State felt that he would not be able to make a recommendation favorable to Tate. Tate's attorney, therefore, reasonably acquiesced in the State's position not to offer any sentencing recommendation. *See* ***Strickland***, 466 U.S. at 689–691 (reasonable strategic decisions do not constitute ineffective assistance of counsel). Further, Tate does not show how he was prejudiced by his attorney's decision not to negotiate a specific sentencing recommendation.

By the Court.—Judgment and order affirmed.

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