

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2015

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. 2014AP1517-CR

Cir. Ct. No. 2012CF2320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM M. STURDEVANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Order reversed and cause remanded for further proceedings.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Adam Sturdevant appeals a judgment of conviction. He also appeals an order denying his postconviction motion. Sturdevant contends that the circuit court erred by denying his postconviction

motion for plea withdrawal without an evidentiary hearing because, Sturdevant argues, his motion alleged sufficient facts to entitle him to such a hearing. We agree. We, therefore, reverse and remand for further proceedings.

¶2 In December 2012, Sturdevant was charged with theft by false representation and unemployment compensation fraud. The criminal complaint alleged that Sturdevant claimed unemployment benefits during a period of time that he was held at the Dane County Jail. The complaint asserted that Sturdevant obtained the unemployment benefits by falsely attesting that he was available to work during that time.

¶3 In April 2013, pursuant to a plea agreement, Sturdevant pled guilty to an amended charge of theft. After sentencing, Sturdevant moved to withdraw his plea. Sturdevant presented multiple issues and arguments. All but one of those have been abandoned. We now recite facts relating to the argument that remains.

¶4 Sturdevant's motion asserted that he was denied the effective assistance of trial counsel because his counsel incorrectly advised him that he had no defense to the charges originally filed against him.¹ The motion asserted that Sturdevant believed he was eligible for unemployment benefits while he was in jail pursuant to a supervision hold because he was applying for jobs and would have been released for work if he had been hired. The motion asserted that Sturdevant informed his counsel that he believed he was eligible for the unemployment benefits, but that his counsel told Sturdevant that he had no viable

¹ Sturdevant also argued that there was no factual basis to support his plea, but has not continued that argument on appeal.

defense because jail inmates are automatically prohibited from collecting unemployment. Sturdevant's motion makes it clear that he now believes he has a viable defense, based on lack of intent, and that, had he known at the time of his plea that he had this viable defense, he would have insisted on going to trial rather than entering a plea.

¶5 The circuit court denied the motion without an evidentiary hearing. We turn to the applicable law and then apply that law to the facts.

¶6 It is well established that, if a defendant's decision to enter a plea is a result of erroneous advice from his or her counsel, and that erroneous advice rises to the level of ineffective assistance, there is a manifest injustice warranting plea withdrawal. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. To show prejudice in a plea withdrawal context, a defendant must show "that there is a reasonable probability that, but for counsel's [deficient performance], he would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 312 (quoted source omitted).

¶7 The specific question here is whether Sturdevant was entitled to an evidentiary hearing on his motion requesting plea withdrawal based on ineffective assistance of trial counsel. The applicable standard was set forth in *Bentley*. An evidentiary hearing is required if a postconviction motion alleges facts that, if true, would entitle the defendant to relief. *Id.* at 310. That is, rather than assess the

credibility of factual allegations, we accept the facts alleged in the postconviction motion as true for purposes of determining whether a defendant is entitled to a hearing. *See id.* Whether a plea withdrawal motion is sufficient to require an evidentiary hearing is a question of law that we decide de novo. *See id.*

¶8 In sum, controlling law requires that we independently assess Sturdevant's motion to decide whether it alleges facts that, if true, demonstrate that Sturdevant is entitled to relief. For the following reasons, we conclude that this relatively low pleading burden is met here.

¶9 According to Sturdevant's motion, at the time Sturdevant was applying for work, and seeking and receiving unemployment compensation benefits, he was in jail on a probation hold without work release privileges. The motion alleges that, because he was not in jail serving a sentence, he did not require work release privileges in order to be released for work. The motion states that, if he had been hired, his probation agent would have released the hold and, therefore, Sturdevant was in fact available for work and eligible to receive benefits.² The motion further asserts that Sturdevant informed his trial counsel that Sturdevant believed he was eligible for the unemployment benefits. Fairly read, the motion alleges that Sturdevant had reason to believe, and did believe, that he was eligible for unemployment compensation benefits, but his trial counsel incorrectly informed Sturdevant that his belief about eligibility was not a defense. Rather, the motion asserts, trial counsel told Sturdevant that he had no "viable defense" because "inmates in jail are automatically prohibited from collecting

² On appeal, Sturdevant no longer relies on the part of this assertion that insists he was actually eligible to receive unemployment benefits.

unemployment benefits.” The motion asserts that Sturdevant accepted a plea deal, rather than go to trial, based on his counsel’s representation that Sturdevant had no defense.

¶10 As the State’s appellate brief demonstrates, there are several reasons to question the credibility of Sturdevant’s assertion that he did not understand that he had a defense to the charges. Indeed, we stress that nothing in this opinion should be read as suggesting that Sturdevant’s asserted ignorance should be believed or not believed. The question here is *not* Sturdevant’s credibility. A supreme court statement in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, is apropos: “If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing.” *Id.*, ¶12 n.6.

¶11 Putting credibility issues to the side, as we must, we perceive no reason why, if true, Sturdevant’s factual allegations do not amount to ineffective assistance of counsel warranting plea withdrawal. Regardless whether Sturdevant’s status as a jail inmate automatically rendered him ineligible for unemployment compensation benefits, the State nonetheless needed to prove, both as to the original charges and as to the simple theft charge of conviction, that Sturdevant knowingly retained benefits to which he was not entitled.³ Thus, if

³ As to the original charges, WIS. STAT. §§ 108.24(1) and 943.20(1)(d) (2011-12), the State would have been required to prove, respectively, that Sturdevant knowingly made a false statement or intended to deceive and defraud.

As to theft under WIS. STAT. § 943.20(1)(a) (2011-12), the State needed to prove that Sturdevant knew that the owner did not consent. *See* WIS JI—CRIMINAL 1441. Here, that would mean proving that Sturdevant knew that he was retaining unemployment benefits that, from the State’s point of view, Sturdevant was not entitled to.

trial counsel informed Sturdevant that because jail inmates are automatically ineligible to receive benefits it was not a viable defense to claim that Sturdevant was entitled to benefits, that advice would have been incorrect. Further, if it is true that Sturdevant relied on this incorrect advice to enter his plea, then Sturdevant's plea was induced by ineffective assistance of counsel.

¶12 On appeal, the State does not argue otherwise, opting instead to attempt to persuade us that the record conclusively shows that Sturdevant was not misled by anything his trial counsel said. According to the State, the record conclusively shows that Sturdevant was aware that he had a viable lack-of-intent defense. *See State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (circuit court may deny a postconviction motion without a hearing ““if the record conclusively demonstrates that the defendant is not entitled to relief”” (quoted source omitted)). We conclude that the record does not conclusively show that Sturdevant's trial counsel gave correct advice or that Sturdevant understood that he could mount a defense based on lack of intent.

¶13 The State gives three primary reasons why we should conclude, as a matter of law, that Sturdevant was not misled by his trial counsel. First, we should infer that Sturdevant read and understood the criminal complaint because Sturdevant is highly educated. Second, Sturdevant's rejection of an apparently favorable plea agreement—thus opting at least temporarily to go to trial—shows that Sturdevant understood that he had a viable defense. Third, because Sturdevant demanded that the “charge of theft by fraud be changed to theft by misappropriation, ... it can reasonably be inferred that [Sturdevant's] attorney correctly explained to him all the elements of the original charge to show why it would be to [Sturdevant's] advantage to plead to the new charge.”

¶14 The State's arguments suggest reasonable inferences and might show why the circuit court would have made quick work of Sturdevant's allegations at an evidentiary hearing, but those arguments do not constitute a conclusive showing that Sturdevant is not entitled to relief. More specifically, the arguments do not conclusively demonstrate that Sturdevant's trial counsel gave him correct advice regarding a lack-of-intent defense or that Sturdevant understood that he had a lack-of-intent defense.

¶15 Even the State's strongest argument—that Sturdevant's rejection of a plea agreement and corresponding decision to go to trial shows that Sturdevant understood that he had a viable defense—is easily rejected. The fact of the matter is that Sturdevant did not follow through and insist on going to trial. So far as the record discloses, Sturdevant might have been holding out in hopes of an even better plea agreement, or he might have been stalling. For that matter, Sturdevant might simply have been acting unreasonably. The dynamics of plea negotiations and the decision making of even well-educated defendants do not lend themselves to the sort of simplistic logical formulation advanced by the State here.

¶16 We could go on, but our point is that it is not enough to demonstrate that a fact finder is highly unlikely to believe allegations in a plea withdrawal motion. To avoid an evidentiary hearing, the State must conclusively demonstrate that the defendant's factual allegations are untrue or that, even if true, those factual allegations do not warrant relief. The State succeeds in casting serious doubt on Sturdevant's veracity, but falls short of conclusively showing that Sturdevant is lying about what his attorney told him or what Sturdevant understood.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

