COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2994-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE NORMAN BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and MARY M. KUHNMUENCH, Judges. *Affirmed.*

WEDEMEYER, P.J.[1] Lee Norman Brown appeals from a judgment entered after he pled guilty to criminal damage to property and criminal trespass to a dwelling, as a habitual criminal, contrary to §§ 943.01(1), 943.14 and 939.62,

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

STATS. He also appeals from a postconviction order denying his claim of ineffective assistance of counsel. He claims his trial counsel provided ineffective assistance by failing to adequately discuss a potential coercion defense. Because Brown was provided effective assistance of trial counsel, this court affirms.

BACKGROUND

On June 8, 1997, at approximately 1:45 a.m., Brown forcibly entered the residence of victim Karen Geraldson. Brown claimed that he was being chased by four individuals in two cars and he believed his life was being threatened. Geraldson called the police and Brown was arrested. Brown was on probation for burglary at the time of this arrest.

Brown was originally charged with felony burglary, which was dismissed and re-charged as criminal damage to property and criminal trespass to a dwelling. As a result, Brown's probation was revoked. Attorney Darryl Kastenson represented Brown in each of these proceedings.

Brown pled guilty. Subsequently, he filed a postconviction motion alleging ineffective assistance of counsel. He alleged that Kastenson had failed to adequately discuss with him a potential coercion defense. The trial court conducted a ***Machner***[2] hearing. During the hearing, Kastenson testified that this defense was discussed with Brown throughout the course of his representation and was presented during the revocation proceedings. Kastenson did indicate that he did not actually use the term coercion, but the essence of this defense was discussed. Brown testified that Kastenson never discussed it. When questioned

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

further by the court, Brown indicated that there was some discussion about the defense and that Kastenson had asked Brown for the names of the individuals who were chasing him so that the defense could be investigated and corroborated. Kastenson testified that he had some concerns about presenting a coercion defense because the State had some "other acts" evidence to use against Brown. Specifically, the State planned to use Brown's earlier burglary, where Brown claimed that he did not steal anything but merely needed a place to sleep, as evidence of plan, motive or scheme. Kastenson was concerned about presenting a coercion defense because Brown could not provide him with sufficient specific information about the individuals who had been chasing him. Thus, Kastenson could not investigate the veracity of the claim. Kastenson also indicated a potential problem with the defense because the victim alleged that Brown had gone into her refrigerator and a closet while in her home.

The trial court found that Kastenson had sufficiently discussed the concept of the coercion defense with Brown. Accordingly, it rejected Brown's claim that he received ineffective assistance. Brown now appeals.

DISCUSSION

To succeed on an ineffective assistance claim, Brown must prove that his counsel's performance was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance exists if counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." ***State v. Foy***, 206 Wis.2d 629, 640, 557 N.W.2d 494, 497 (Ct. App. 1996). To be prejudicial, Brown must show that "there is a reasonable probability that, but for trial counsel's unprofessional

errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 669.

Brown's claim presents mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). Findings of fact concerning the circumstances of the case and the counsel's conduct and strategy will not be reversed unless clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 n.2 (1992). "However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law which this court decides without deference." ***State v. Sanchez***, 201 Wis.2d 219, 236-37, 548 N.W.2d 69, 76 (1996).

The trial court heard both trial counsel and Brown testify as to their recollections in this case. The trial court found trial counsel to be more credible and specifically noted that the defense was adequately discussed with Brown. The trial court reasoned that, although Brown initially testified that trial counsel did not discuss anything, Brown conceded that trial counsel did discuss the defense. The trial court specifically questioned Brown as to whether he discussed with his attorney the fact that four individuals were chasing him, which led him to break into the victim's home. Brown admitted these facts were discussed and that the trial counsel asked for additional information to investigate the potential defense. Accordingly, the trial court found that Brown received effective assistance.

The trial court's findings are not clearly erroneous. This court has reviewed the ***Machner*** hearing transcript, which contains evidence to support the trial court's findings. Trial counsel testified that although the specific word "coercion" was not used, the defense was discussed. Counsel testified that the

defense was presented at the probation revocation hearing, and that going to trial and using the coercion defense was considered, but many facts militated against that strategy. Trial counsel indicated that Brown wanted the case to be resolved, and that Brown was advised regarding the "other acts" evidence the State would use against him should Brown elect to proceed to trial. Brown chose to plead guilty.

This court concludes that the trial court's findings of fact were not clearly erroneous. Trial counsel adequately discussed the concept of the coercion defense with Brown to allow a knowledgeable decision regarding pleading guilty or going to trial. Based on these findings, this court concludes that trial counsel's conduct did not constitute deficient performance. Because Brown has failed to prove deficient performance, it is not necessary to proceed to the prejudicial component of the ***Strickland*** test. Brown's ineffective assistance claim fails.[3]

By the Court.—Judgment and order affirmed.

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

[3] Brown devotes a substantial portion of his brief addressing whether the facts of the case support a coercion defense. Whether the facts would or would not support a defense, however, need not be addressed as the record supports the trial court's determination that trial counsel did discuss this potential defense with Brown. Thus, Brown was adequately informed of the relevant circumstances before he pled guilty, and cannot claim this as the basis for an ineffective assistance claim.