COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-0928-CR & 99-0929-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID GUZMAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MAXINE A. WHITE and DENNIS P. MORONEY,[1] Judges. *Affirmed.*

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

[1] Judge White sentenced Guzman, while Judge Moroney presided over the postconviction motion.

¶1 PER CURIAM. David Guzman appeals the judgments of conviction entered after he pled guilty to two counts of delivery of a controlled substance (cocaine), within 1,000 feet of a school, contrary to WIS. STAT. §§ 961.16(2)(b)1, 961.41(1)(cm)1 & 2, and 961.49(1) & (2)(a),[2] and one count of possession of a controlled substance (cocaine) with intent to deliver, contrary to WIS. STAT. §§ 961.16(2)(b)1 and 961.41(1m)(cm)4.[3] He also appeals from the order denying his postconviction motion. Guzman argues that the trial court's denial of his postconviction motion that sought to withdraw his guilty pleas because of the ineffective assistance of his counsel was in error. He also claims that the trial court erroneously exercised its discretion when it refused to modify his sentence. We affirm.

I. BACKGROUND.

¶2 On October 1, 1996, Guzman sold cocaine to an undercover police officer who met Guzman after conducting an investigation into Guzman's drug dealing. Later, on October 7, 1996, the same officer again purchased cocaine from Guzman at the same address, which was later established to be located within 1,000 feet of a public school. On October 27, 1996, Guzman was arrested for these charges while standing in the doorway of a hotel room rented by Cynthia Mathas, his girlfriend. At the time of his arrest, formal criminal charges had been issued against Guzman, but no arrest warrant had been prepared. The police did, however, have an arrest warrant for Mathas when they entered the hotel. After his

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise specified.

[3] Although the cases had never been formally consolidated by the trial court, they were treated as if they had been. Consequently, this court issued an order consolidating the appeals.

arrest, Guzman was transported to the police station where he was advised of his ***Miranda*** rights.[4] After waiving his rights, Guzman confirmed that he had twice sold cocaine to the undercover officer, and he also revealed the location where he had hidden an amount of cocaine and some money. As a result of his confession, Guzman was charged with an additional count of possession of a controlled substance with intent to deliver.

¶3 Guzman pled guilty to the charges without bringing any pretrial motions challenging his arrest, his confession or the seizure of the drugs and money. He was sentenced to eight years' imprisonment on each of the two counts of delivery of cocaine within 1,000 feet of a school, to be served concurrently, and he was given a consecutive nine-year sentence on the charge of possession of cocaine with intent to deliver. After he was sentenced he brought a postconviction motion requesting the withdrawal of his guilty pleas. In his motion he claimed his trial attorney was ineffective for failing to bring any pretrial motions. He submitted that the motion challenging his warrantless arrest might have been successful and, as a result, his confession and the evidence would have been suppressed. In the alternative, he requested that the trial court modify his sentence, arguing both that the sentence was unduly harsh and that the trial court placed undue weight on his drug dealing and too little weight on his cooperation with the police and his minimal record. The trial court denied the motion without a hearing, stating that Guzman had not shown any prejudice as a result of his attorney's failure to bring any pretrial motions and that the appropriate factors were considered at the time of his sentencing.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

II. ANALYSIS.

A. *Guzman was not denied effective assistance of counsel.*

¶4 Guzman seeks to withdraw his pleas of guilty. In order to withdraw a guilty plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a "manifest injustice." *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991) (citation omitted). The manifest injustice test may be met by establishing the ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to establish ineffective assistance, a defendant must satisfy the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). That is, a defendant must show that counsel's conduct was deficient and that the deficient performance prejudiced the defendant. *See* ***id.*** at 687.

¶5 The trial court observed, relying on ***Strickland***, that Guzman was required to prove both deficient performance and prejudice to prevail in his ineffectiveness claim and that Guzman had failed to show any prejudice as a result of his attorney's omissions. Guzman acknowledges ***Strickland***'s requirements, but he contends that his attorney's failure to file pretrial motions did result in prejudice to him. Guzman argues that his attorney's conduct in failing to file pretrial motions rendered the "proceeding fundamentally unfair" because he was left with no defense to the charges. Citing ***State v. Smith***, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), where the court held that prejudice must be presumed when a prosecutor materially breaches a plea negotiation, Guzman submits that, similarly, prejudice should be presumed here and he should be allowed to withdraw his guilty pleas.

¶6 Guzman submits that when his attorney failed to challenge the warrantless arrest or to move to suppress the evidence and his statement, it resulted in his having "no viable options; he had to plead guilty on whatever terms offered by the State." Guzman then contends that his not having any defenses to the charges is "unfair." As a result, Guzman proclaims that this "failure of trial counsel to challenge his warrantless arrest and move for suppression of the fruit of the arrest is akin to the absence of defense counsel at a critical stage of the proceedings." Guzman observes, pursuant to the holding in ***State v. Behnke***, 155 Wis. 2d 796, 806, 456 N.W.2d 610 (1990), that when defense counsel is absent at a critical stage of the proceedings, prejudice must be presumed. Likewise, he reasons, since his attorney's actions are tantamount to having no attorney at a critical stage of the proceeding, prejudice should also be presumed here. We are not persuaded by Guzman's argument.

¶7 As noted, ***Strickland*** is the seminal case on claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show that trial counsel's performance was deficient and prejudicial. *See* ***Strickland***, 466 U.S. at 687. Questions of deficient performance and prejudice are mixed questions of fact and law. *See* ***Strickland***, 466 U.S. at 698. In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990) (citation omitted). In reviewing claims of ineffective assistance of counsel, there is a strong presumption that counsel acted reasonably and within professional norms. *See* ***Strickland***, 466 U.S. at 690. Under the prejudice prong, the 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." ***Strickland***, 466 U.S. at 694. If this claim can be resolved on the prejudice prong, we need not address the deficient performance prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 The foundation of Guzman's argument is that his attorney should have challenged his warrantless arrest. He believes that if this motion had been successful, his confession and the subsequently discovered contraband and money might have been suppressed under ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963), as "fruit of the poisonous tree." We disagree.

¶9 Our review of the record reveals that had Guzman's attorney filed motions challenging his arrest, his confession or the seizure of the drugs and money, all would have been unsuccessful. A motion contending that Guzman was unlawfully arrested would not have been granted. An officer may arrest someone without a warrant if the officer has probable cause to believe that "the person is committing or has committed a crime." *See* WIS. STAT. § 968.07(1)(d). Here, Guzman had been charged with the two counts of delivery of a controlled substance prior to his arrest and the arresting officer, armed with this knowledge, lawfully arrested Guzman in the doorway of his girlfriend's hotel room. Guzman maintains that the lack of an arrest warrant was fatal to his arrest, but he ignores the fact the officers never entered the hotel room, transforming the lack of an arrest warrant into a moot issue. Moreover, even if the police had entered the hotel room, they could have done so lawfully because the police possessed an arrest warrant for Mathas which would have permitted the police to enter her hotel room. *Cf.* ***Payton v. New York***, 445 U.S. 573, 603 (1980) ("[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly

carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.").

¶10 Further, Guzman's claim of ineffectiveness based upon his counsel's failure to file a motion to suppress his confession or evidence does not constitute the type of prejudice contemplated by ***Strickland***. *Cf.* ***United States v. Williams***, 106 F.3d 1362, 1367 (7th Cir. 1997) ("Recently, we explained that ineffectiveness claims based on counsel's performance at an argument for the suppression of evidence cannot be successful because the damage done by an inept attorney in this context does not constitute prejudice as defined under ***Strickland***."). In ***United States v. Jones***, 152 F.3d 680, 688 (7th Cir. 1998), the court held:

> We have on two recent occasions explained that ineffectiveness claims based on a counsel's performance in connection with a motion to suppress evidence does not constitute the type of prejudice contemplated by ***Strickland***. Evidence that should have been suppressed but for counsel's incompetence nonetheless retains all indicia of reliability, while "prejudice in the ***Strickland*** sense refers to 'unprofessional errors' so egregious 'that the trial was rendered unfair and the verdict rendered suspect.'"

(citations omitted).

¶11 Here, Guzman has not alleged that the police failed to advise him of his ***Miranda*** rights, or that his statement was not freely, knowingly and voluntarily given. Nor has he alleged that the evidence was illegally seized. His only argument is that his warrantless arrest was improper and, as a result, the confession and evidence should have been suppressed. Inasmuch as we have concluded that Guzman's arrest was proper, his confession and the seized evidence would not be suppressed. As a consequence, Guzman could not have prevailed on any pretrial motions had they been filed and heard.

¶12 We also reject Guzman's novel theory that because he had no defense the proceedings were rendered "fundamentally unfair." To satisfy ***Strickland***'s prejudice prong, Guzman has devised a syllogism. First, he equates his attorney's failure to file pretrial motions with the actions of an attorney who fails to appear at a critical stage of the proceedings. Next, he states that when an attorney fails to attend a critical stage of a criminal proceeding, prejudice is presumed. Thus, Guzman concludes, his attorney's failure to file pretrial motions requires prejudice to be presumed.

¶13 Guzman's logic is flawed. As noted, Guzman's pretrial motions would not have been successful. Thus, Guzman's contention that because of his attorney's omissions, he had no alternative but to plead guilty, rendering the proceedings "fundamentally unfair," rings hollow. This is so because had Guzman's attorney filed the motions Guzman now suggests, they would have been denied and Guzman would have been in no better position than he was at the time of his guilty plea.

¶14 Further, Guzman's underlying contention, that his situation was similar to that of a person deprived of a attorney at a critical stage of the proceedings, is simply wrong. Guzman contends that because he had no defensible position, the proceedings were unfair. Implicit in his argument is his view that a criminal defendant should always have a defensible position and, if he or she does not have one, the attorney has been ineffective. This is simply untrue. His attorney was not obligated to create a defense for him when none was available. The reason Guzman had no defense for his criminal violations was because his arrest, confession, and the seizure of his property were all conducted according to law. Thus, his lack of a defense was not the functional equivalent of the lack of an attorney at a critical stage of the proceeding. Consequently,

Guzman is unable to show that any prejudice resulted as a consequence of his attorney's failure to file pretrial motions and, under ***Strickland***, his ineffective assistance of counsel claim remains unproven. Having failed to provide the necessary "manifest injustice" requirement, his motion to withdraw his pleas was properly denied.

B. *The trial court considered the proper factors at sentencing.*

¶15 Guzman next contends that his alternative postconviction motion, asking for a sentence modification, should have been granted. Guzman argues that the sentencing court "placed too much weight on [his] drug dealing in the face of the contravening circumstances of his cooperation with the police leading to recovery of substantial amounts of cocaine which would otherwise be on the street for sale, and second defendant's minimal prior record for one disorderly conduct conviction." Guzman further submits that a sentence of seventeen years out of a possible sixty-five years was harsh and excessive. We disagree.

¶16 A trial court has discretion in determining the length of the sentence within the permissible range set by statute. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The primary sentencing factors are the gravity of the offense, the character of the offender and the need for public protection. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight accorded each factor is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). "There is a strong public policy against interference with the sentencing discretion of the trial court." ***State v. Bizzle***, 222 Wis. 2d 100, 104, 585 N.W.2d 899 (Ct. App. 1998). Thus, when we review the trial court's sentence, we do so under the erroneous

exercise of discretion standard. *See* ***State v. Wuensch***, 69 Wis. 2d 467, 480, 230 N.W.2d 665 (1975).

¶17 "An [erroneous exercise of] discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185. The trial court's placing too much weight on one factor in the face of other contravening considerations can constitute an "abuse of discretion." *Cf.* ***id.*** at 187-88.

¶18 We are satisfied, after reviewing the record, that the trial court properly exercised its discretion in sentencing Guzman. The trial court specifically stated that it had read the presentence report and had considered the lawyers' comments and Guzman's statements. During the hearing, the trial court remarked on the significant level of Guzman's drug dealing: "The only thing that comes through loud and clear is that Mr. Guzman is a substantial drug dealer in this community who had access to substantial amounts of drugs on various dates." The trial court was also aware of Guzman's cooperation, having stated that Guzman "has done something not many people do in any criminal case and, that is, he's substantially cooperated." Moreover, the trial court commented on Guzman's minor criminal record, "I am aware of the fact that he has one prior conviction against him for disorderly conduct." The trial court then concluded,

> [O]n the basis of this record and after having considered the serious nature of the offense against Mr. Guzman, the amount of time that he was involved in this offense, the nature of his involvement, his background and circumstances and the impact of drug dealing on this community, the court would impose on Counts 1 and 2 … eight years concurrent to each other at the state prison. On

> the count charged singly … the court would order nine years consecutive ….

¶19 We are satisfied that the trial court considered the appropriate factors here and gave them proper weight. The information presented to the trial court showed Guzman as a substantial dealer with a long history of selling drugs and the trial court stated that it considered the seriousness of the charge and the public's need for protection. Further, we believe the trial court must have considered Guzman's minor record and his cooperation with the police because, without these mitigating factors, given the seriousness of his charges, the sentences would have been much longer. Finally, Guzman's sentence does not shock public sentiment. The trial court sentenced Guzman, a long-time and significant drug dealer, to a prison term that represented only one-quarter of his maximum sentence.

¶20 For the reasons stated, the judgments of conviction and the order denying his postconviction motions are affirmed.

By the Court.—Judgments and order affirmed.

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