COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP279-CR **Cir. Ct. No. 2003CF446**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY J. KEMPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed and cause remanded with instructions*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Bobby J. Kemper appeals from a judgment[1] convicting him of second-degree sexual assault for having sexual contact with an unconscious person contrary to WIS. STAT. § 940.225(2)(d) (2001-02)[2] and from an order denying his postconviction motion to withdraw his no contest plea. We agree with the circuit court that Kemper's trial counsel was not ineffective, Kemper's plea was properly entered, and the interests of justice do not require plea withdrawal. We affirm and remand to the circuit court for entry of an amended judgment of conviction to correct an error in the judgment of conviction.

¶2 The amended information charged Kemper with second-degree sexual assault for having sexual contact with an unconscious person and third-degree sexual assault, both as a repeat offender. Kemper agreed to plead no contest to the former charge. As part of the plea agreement, the repeater allegations and the third-degree sexual assault charge were dismissed. At the time of the plea hearing, Kemper's dismissal and suppression motions were pending. The State's motion to admit other acts evidence in the form of a statement of Kemper's wife regarding his sexual conduct was also pending. At the conclusion

[1] The judgment of conviction mistakenly recites the offense of conviction as second-degree sexual assault of an intoxicated person contrary to WIS. STAT. § 940.225(2)(cm) (2001-02). On remand, Kemper's counsel shall ensure that the judgment of conviction is corrected to reflect the crime to which Kemper entered his no contest plea: second-degree sexual assault for having sexual contact with an unconscious person contrary to § 940.225(2)(d) (2001-02). The recitation of the plea agreement at the plea colloquy, the plea questionnaire and the amended information all refer to the latter crime. However, at the outset of the plea colloquy, the circuit court mistakenly referred to the assault as having occurred upon an intoxicated person. Later, in reviewing the elements of the crime, the court correctly referred to the person as unconscious, not intoxicated. And, in concluding the plea colloquy, the court again confirmed that Kemper intended to plead no contest to second-degree sexual assault of an unconscious person. The court then found Kemper guilty of that crime.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

of the plea colloquy, the circuit court noted that the pending motions were waived by Kemper's no contest plea. Kemper confirmed that he understood this consequence of his no contest plea.

¶3 Postconviction, Kemper moved to withdraw his plea because his trial counsel failed to: pursue pending motions, seek a psychological evaluation, advise Kemper about the law of other acts relating to the statement of Kemper's wife, communicate with Kemper about discovery and evidence against him, and adequately investigate. Kemper also contended that his plea was not knowingly, voluntarily and knowledgeably entered. Finally, Kemper claimed that the interests of justice would be served by plea withdrawal. The circuit court denied the motion after an evidentiary hearing.

¶4 On appeal, Kemper argues that his trial counsel was ineffective, thereby creating a manifest injustice warranting plea withdrawal. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (ineffective assistance of counsel can satisfy the manifest injustice standard for plea withdrawal). We will address each of Kemper's claims, but our review is informed by the circuit court's determination that trial counsel's testimony was more credible than Kemper's testimony. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (the circuit court's credibility findings are binding on us).

¶5 Kemper argues that his trial counsel did not adequately research and advise him about an evidentiary issue arising from a statement made by Kemper's wife regarding Kemper's sexual conduct, including the likelihood that the statement would be admissible at trial over Kemper's marital privilege objection. We reject this claim without reaching the merits of the evidentiary issue.

¶6 The circuit court found that counsel investigated and prepared the case, which would include consideration of this evidentiary issue. The court also found that Kemper agreed to waive pending motions, including his opposition to the motion in limine, in order to take advantage of the State's plea offer, which trial counsel testified would have been withdrawn had Kemper litigated pending motions.[3] The court found that the decision not to pursue the pending motions had to be understood in the context of the plea offer and that Kemper's interest in the outcome of the motions was only part of his rationale for considering a plea agreement. The court found counsel credible in his description of his interactions with Kemper on the question of whether to take the plea offer. The court's credibility findings are binding on us. *See* ***id.***, ¶2 n.1. Kemper has not shown that his trial counsel was ineffective, i.e., that counsel's performance was deficient and that he was prejudiced by the deficient performance. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752.

¶7 Kemper next argues that his trial counsel was ineffective because he failed to communicate with him about important decisions or investigate the case. Trial counsel testified that he communicated with Kemper, reviewed documents in the case with Kemper, and investigated. The circuit court deemed counsel more credible than Kemper. The court found that counsel thoroughly explained all aspects of the case to Kemper, including his options. The court deemed not credible Kemper's claim that he did not understand the information provided by counsel because Kemper appeared to be "well-versed" in criminal proceedings

[3] Kemper testified at the postconviction motion hearing that he knew that if he litigated the pending motions, the State's plea offer would be withdrawn.

given his history of criminal conduct. The court found that Kemper did not experience any more pressure to consider the State's plea offer than any other defendant who must choose between a plea agreement and a trial. These findings are not clearly erroneous. Kemper has not demonstrated that counsel performed deficiently or that he was prejudiced by counsel's approach to the case.

¶8 Kemper contends that his no contest plea was not voluntarily, knowingly, and intelligently entered. The circuit court found otherwise, and we agree. The court found that during the plea colloquy, Kemper had numerous opportunities to refuse the plea offer. The court found that counsel communicated with Kemper and made Kemper aware of his rights and the ramifications of entering a no contest plea. We agree with the circuit court that Kemper's plea was voluntarily, knowingly and intelligently entered.

¶9 Kemper next argues that there was confusion over whether he was entering a plea to having sexual contact with an intoxicated person or an unconscious person. As we explained in footnote one, this issue was addressed and clarified at the plea colloquy, and the circuit court deemed not credible Kemper's testimony that he did not understand this aspect of the proceeding.

¶10 Kemper claims that he was not informed of and did not understand the definition of "sexual contact," an element of the crime to which he pled no contest. *See* WIS. STAT. § 940.225(2)(d); § 940.225(5)(b)1 (definition of sexual contact); ***State v. Bollig***, 2000 WI 6, ¶¶50-51, 232 Wis. 2d 561, 605 N.W.2d 199 (an element of sexual contact is that the defendant intentionally engaged in the contact for the defendant's sexual gratification or the victim's humiliation). The State concedes on appeal that the circuit court failed to address this aspect of the

charge during the plea colloquy. Therefore, the burden shifts to the State to demonstrate by clear and convincing evidence that Kemper was aware of this element of the offense, even though the plea colloquy was deficient. ***Id.***, ¶¶51-52. The State contends that it has met this burden.

¶11 Trial counsel testified at the postconviction motion hearing that it was his usual practice to review the definition of sexual contact with a sexual assault defendant before a plea hearing and that he did so with Kemper. Kemper testified that he did not know the meaning of sexual contact when he entered his no contest plea but that he better understood the element at the postconviction motion hearing. The latter remark suggests that Kemper had some understanding of the sexual contact element at the plea colloquy. The circuit court found counsel's testimony more credible than Kemper's on the question of whether counsel informed Kemper of this element. Therefore, the record contains clear and convincing evidence that trial counsel informed Kemper of the definition of sexual contact before Kemper entered his plea. *See* ***State v. Jipson,*** 2003 WI App 222, ¶11-12, 267 Wis. 2d 467, 671 N.W.2d 18 (testimony taken at the postconviction motion hearing can be used by the State to meet its burden to show by clear and convincing evidence that a plea was knowingly, intelligently and voluntarily made). We reject Kemper's claim that he was not informed of and did not understand the sexual contact element of the crime to which he pled no contest.

¶12 Finally, Kemper seeks relief from his conviction in the interests of justice. However, he offers nothing new in support of this request, and we reject it. ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989).

¶13 We affirm the judgment of conviction and the order denying Kemper's postconviction motion. We remand to the circuit court for entry of an amended judgment of conviction as set forth in footnote one of this opinion.

By the Court.—Judgment and order affirmed and cause remanded with instructions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).