COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP689-CR **Cir. Ct. No. 2009CF1153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY L. CONYERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: J. D. McKAY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Terry Conyers, pro se, appeals a judgment, entered upon his no contest pleas, convicting him of fourth-degree sexual assault and delivering between 200 and 1000 grams of THC. Conyers also appeals the order denying his postconviction motion for plea withdrawal. Conyers argues he is

entitled to withdraw his pleas based on the ineffective assistance of his trial counsel. We reject Conyers' arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Conyers with first-degree sexual assault by threat of use of a dangerous weapon. The complaint alleged that Conyers had been selling marijuana to a co-worker and, during one of the transactions, he forced the woman to perform oral sex on him after intimating that he had a gun in the car if she refused. As part of a global settlement of this and other pending cases against him, Conyers agreed to plead no contest to an amended charge of fourth-degree sexual assault and an added charge of delivering between 200 and 1,000 grams of THC. As part of the plea agreement, the parties also submitted stipulated facts to support the pleas, and the State agreed to cap its sentence recommendation at three years of probation with one year in jail as a condition.

¶3 The court withheld sentence and imposed concurrent three-year probation terms, with six months' jail as a condition on the sexual assault conviction and a consecutive three-months' jail as a condition on the delivery conviction. Conyers' postconviction motion for plea withdrawal was denied after a hearing. In lieu of a no-merit appeal, Conyers ultimately opted to pursue his appeal pro se.

DISCUSSION

¶4 Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A plea withdrawal motion that is filed after sentencing should only be granted if it is

necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Conyers has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶5 To establish ineffective assistance of counsel, Conyers must prove both "(1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697. To prove prejudice, Conyers 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* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶6 First, Conyers argues his trial counsel was ineffective by failing to adequately investigate his "defense" to the sexual assault charge. Conyers claims he must be innocent of the sexual assault charge because the victim continued to interact normally with him at work, "even joking and laughing with him." Conyers' argument notwithstanding, the victim's alleged behavior after the charged assault would have constituted an anemic defense.

¶7 Indeed, as it turns out, at sentencing the victim stated that after the assault, she did not want to leave her home, but eventually returned to work. When her employer "would not comply with the temporary restraining order that was in place," the victim was placed on medical leave, and eventually resigned "from a job that [she] loved for four years." The victim continued:

> All I do is continue to look over my shoulders and see who's driving by, or even hearing a weird noise would put me in an anxiety attack. Sleeping at night, having nightmares of Conyers standing outside with a gun or hearing a car come by with loud music scares me.
>
> ….
>
> I have been placed in two different hospitals for anxiety, depression, and suicide ideations. I've been placed on medication to try to control the depression and to control the anxiety. And to this day we are still trying to find the correct dose.

Conyers' description of the victim's conduct notwithstanding, her sentencing testimony suggests otherwise. When comparing his claimed grounds for innocence with the victim's description of the assault's effects on her life, counsel was fully justified in recommending that Conyers take the plea agreement.

¶8 Second, Conyers claims he failed to raise the issue of plea withdrawal prior to sentencing because his attorney advised against it.[1] At the postconviction hearing, trial counsel testified that Conyers faced significant prison time if he were found guilty at trial. Counsel continued: "I guess my tendency or my leanings were that [Conyers] should resolve the matter without a trial in order for him to maintain his employment and potentially remain in the community." When asked whether counsel told Conyers what to do, counsel responded:

> It's not normally my course of practice to specifically say you have to do this or you should do that. Normally I try to weigh the pros and the cons … of going to trial versus not going to trial.
>
> Now, if [Conyers] believed that I had advised him that he should take the deal, that could be possible, but I don't

[1] Conyers alleges that prior to sentencing, he wrote a letter requesting to withdraw his plea. As the State indicates in its brief, no such letter is evident in the record or was submitted by Conyers.

> recall specifically telling him you have to take this deal or you should take this deal.

¶9 When asked if he advised Conyers to be quiet and not say anything at sentencing, counsel stated it was possible, noting that it was typical for him to indicate to clients that "they better be very careful in what they say to the court." Counsel explained that there have been occasions where clients will "hurt themselves" during their allocution at sentencing. Notably, counsel did not testify that he told Conyers to be silent about his alleged desire to withdraw his plea. He only told Conyers to be careful in his allocution should he opt to speak at sentencing.

¶10 In any event, the court found Conyers' claim that he wanted to withdraw his plea but felt pressured or instructed not to do so "incredible." The court noted that had Conyers wished to withdraw his plea, he had a number of opportunities to make it known, yet said nothing at either the plea hearing or sentencing. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2) (2009-10). The court's credibility determination is supported by the record, and it reached a conclusion that a reasonable judge could reach.

¶11 Finally, Conyers claims counsel was ineffective for advising him to plead guilty because he was a black male charged with sexually assaulting a white woman in a predominately white city. At the postconviction hearing, counsel testified that he advised Conyers to consider these circumstances as a "factor" in deciding whether to plead or go to trial. Counsel, however, doubted that he told Conyers he would not have much of a chance at trial because of his race. Even

assuming this or any of the other alleged actions by trial counsel constituted deficient performance, Conyers has failed to establish how he was prejudiced by counsel's claimed deficiencies.

¶12 The plea agreement resulted in a substantial reduction of potential incarceration for the sexual assault—from sixty years for the originally charged first-degree sexual assault to nine months for fourth-degree sexual assault. Because Conyers noted the importance of allowing him the opportunity to continue to work and to have contact with his family, he has not shown why he would have proceeded to trial on a considerably more serious charge than the ones to which he pled. We conclude there is no reasonable probability that, but for counsel's claimed errors, Conyers would have pled guilty and would have insisted on going to trial. *See* ***Hill***, 474 U.S. at 59. Conyers, therefore, has failed to establish that his attorney's performance constituted a manifest injustice necessitating plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).