COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3226-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN LONDON BRADSHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. John London Bradshaw appeals from a judgment entered after a jury convicted him of possession of a controlled substance with intent to deliver (cocaine) (second or subsequent offense), and being a felon in possession of a firearm, contrary to §§ 161.16(2)(b)(1), 161.41(1m)(cm)(2), 161.48 and 941.29(2), STATS. He also appeals from an order denying his

postconviction motion. Bradshaw claims: (1) the trial court failed to fully inform him of the ramifications of stipulating to one of the elements of the charge of felon in possession of a firearm; (2) that he received ineffective assistance of trial counsel; and (3) the judgment should be reversed in the interests of justice. Because the trial court properly handled the stipulation to one of the elements of the second charge, because Bradshaw received effective assistance of trial counsel, and because "justice" does not require reversal, we affirm.

I. BACKGROUND

On September 28, 1995, Bradshaw was visiting his parole officer. The parole officer became suspicious when Bradshaw said he had arrived for his appointment by bus because Bradshaw did not have a bus transfer or any money to return home by bus. Bradshaw did have a set of keys with a car alarm activator. The parole officer walked outside to locate the car, which was a 1983 Oldsmobile. The activator unlocked the car and the parole officer found a loaded firearm under the passenger seat. The police were summoned, the weapon was recovered, and a search was conducted of Bradshaw's residence.

When the police arrived at Bradshaw's residence, his mother allowed them to enter. After searching a locked room that Bradshaw had occupied until the day before, the police found 7.86 grams of cocaine, money, and other drug paraphernalia. The lock on the room was opened with a key from Bradshaw's key chain and Bradshaw's ID card, other papers with his name on them, and a title to the 1983 Oldsmobile were found in a nightstand drawer. Based on this, Bradshaw was charged with possession with intent to deliver (cocaine) (second or subsequent offense), and being a felon in possession of a firearm.

Bradshaw was charged with being a felon in possession of a firearm because he had been convicted of a felony, delivery of a controlled substance (cocaine), in December 1994. Prior to trial in the instant case, the trial court noted that the jury would be told that Bradshaw had this previous drug conviction and would be given an opportunity to determine whether this conviction was a felony. Because of this, Bradshaw decided to stipulate to the second element of the possession of a firearm by a felon offense. By doing so, Bradshaw kept the jury from hearing the nature of his prior conviction. The jury would be told only that he admitted to being a convicted felon prior to the time he allegedly possessed the firearm in the instant case.

In placing the stipulation on the record, the trial court asked Bradshaw's counsel whether the stipulation was satisfactory and counsel indicated it was "very satisfactory" to Bradshaw. The trial court then specifically addressed Bradshaw, asking if he understood that he had a right to a jury trial on each element of the offense and by stipulating he was giving up his right to a jury trial on that issue. Bradshaw told the trial court that he understood and wanted to do so.

The jury convicted. Bradshaw now appeals.

II. DISCUSSION

A. Stipulation to Felon Element.

Bradshaw claims that the trial court improperly accepted his "guilty plea" by failing to follow the procedures set forth in ***State v. Bangert***, 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 20-21 (1986). He claims the trial court failed to determine that Bradshaw admitted guilt and failed to explain the effect of pleading guilty. We reject Bradshaw's claim.

The record demonstrates that Bradshaw did not plead guilty. Rather, Bradshaw stipulated to the second element of the felon in possession of a firearm charge. He did so because he had a prior felony conviction for drug possession. Stipulating to the second element prevented the jury from being informed of the nature of this conviction. *See* ***State v. McAllister***, 153 Wis.2d 523, 525, 451 N.W.2d 764, 765 (Ct. App. 1989). Because this was not a guilty plea, the trial court was not required to follow the procedures set forth in ***Bangert***.

Nevertheless, in accepting the stipulation, the trial court did inform Bradshaw that he had the right to a jury trial on each element of the offense and that by stipulating, he was giving up this right. Bradshaw advised the court that he understood and wanted to stipulate to the second element. The trial court also asked Bradshaw's counsel whether the stipulation was satisfactory. Counsel indicated that it was "very satisfactory."

Based on the foregoing, we reject Bradshaw's claim that the trial court improperly handled the "guilty plea."

B. Ineffective Assistance.

Next, Bradshaw claims he received ineffective assistance of trial counsel. Specifically, he claims trial counsel was ineffective: (1) for allowing Bradshaw to stipulate to the "felon" element of the possession of a firearm by a felon charge; (2) for failing to request a jury instruction on Bradshaw's abandonment or non-ownership of the premises where the drugs were found; (3) for calling a defense witness who had five previous criminal convictions; (4) for failing to produce a witness at the suppression hearing to testify that Bradshaw was not the owner of the premises where the cocaine was found; (5) for failing to object to testimony about a telephone conversation between the parole

agent and a defense witness; and (6) for failing to seek severance of the two charges. We reject each in turn.

In order to establish that he did not receive effective assistance of counsel, Bradshaw must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Bradshaw can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, Bradshaw must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

In assessing Bradshaw's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

We conclude that trial counsel was not deficient in allowing Bradshaw to stipulate to the "felon" element of the second charge. This prevented the jury from hearing the nature of the charge, which was a prior drug offense. Bradshaw's defense was that he had no knowledge of the drugs found in his former room. Based on this, stipulating to the "felon" element was a reasonable strategic choice and therefore not deficient performance. *See* ***Strickland***, 466 U.S. at 689.

Next, Bradshaw claims counsel should have requested a jury instruction regarding Bradshaw's non-ownership of the premises where the cocaine was found. He fails, however, to show that the standard jury instructions that were given were incorrect or that they failed to correctly state the law. The instructions given correctly stated the law on the "possession" issue. He also fails to show what additional instructions should have been given. Trial counsel addressed this issue by cross-examining state witnesses in an attempt to prove that Bradshaw had abandoned the room where the cocaine was found. Counsel's performance in this regard was not deficient. Accordingly, we reject this claim.

Next, Bradshaw claims counsel was ineffective for calling a witness who had five prior criminal convictions. Counsel called one witness for the defense, Glenn Cross. Cross admitted on cross-examination that he had five prior criminal convictions. Cross testified on direct examination that Bradshaw was moving out of the room where the cocaine was found the day before the search. He testified that another person had rented the room before the discovery of the drugs. Given Bradshaw's chosen defense, trial counsel's decision to call Cross was not deficient. This witness was available to provide testimony supporting the defense theory. Counsel was faced with the choice of calling a witness who could

provide helpful testimony, but who also had a criminal history, or not calling a witness at all. Counsel's choice was reasonable strategy.[1] *See* ***id.***

Next, Bradshaw claims counsel was ineffective for failing to present a witness during the suppression motion hearing to establish that Bradshaw had moved out of the room before the drugs were found. Bradshaw, however, fails to set forth any factual support for this claim. He does not state that his mother would have testified that he was not the owner of the premises. The only other possible witness would be Cross, who testified that Bradshaw "was moving out," not that Bradshaw had completely moved out. Based on these facts, failing to call these witnesses was not deficient performance.

Next, Bradshaw claims counsel was ineffective for failing to object to testimony from the parole agent about a phone conversation with Cross. The parole agent testified as a state rebuttal witness. He said that he spoke with Cross on September 28 before Bradshaw arrived at the parole office. Cross told the agent that Bradshaw was involved in drug dealing and that Bradshaw had pulled a gun on Cross. Bradshaw alleges that counsel should have objected to this testimony because he did not know if Cross was a reliable source and should have brought Cross back to rebut the parole agent's testimony.

We reject Bradshaw's claims. The parole agent testified that he met Cross personally on the same day as the phone call, heard him speak in person and found that both voices were the same. Accordingly, even if counsel had objected to the testimony, it would have been admitted. Further, Bradshaw fails to submit

[1] We are not persuaded by Bradshaw's suggestion that counsel could have called Bradshaw's mother as a witness to serve the same purpose as Cross. The record demonstrates that the mother also had a prior criminal history.

any factual evidence establishing exactly what Cross would have said had he been recalled. Accordingly, his ineffective assistance claim based on this ground fails.

Finally, Bradshaw claims counsel should have moved to sever the two counts. He argues that the stipulation to the "felon" element destroyed his legal position on the drug charge. We are not persuaded.

As aptly stated by the trial court in its order denying Bradshaw's postconvicion motion:

> He states in conclusory fashion that he was prejudiced by the joinder of both counts; he does not identify how. The joinder of crimes pursuant to sec. 971.12(1), Wis. Stats., is bound to have some prejudicial effect on any defendant. These two crimes arose out of the same transaction. Although it appears that the prejudice of which defendant speaks refers to his mistaken idea that he was formerly convicted of a gun offense, such was not the case. This court would not have severed the counts for trial, nor has defendant offered any coherent explanation of how he was prejudiced.

We echo the trial court's reasoning and reject Bradshaw's claim.

C. Interests of Justice.

Bradshaw makes a final plea to reverse the judgment in the interests of justice. He does not present us with, nor do we find, any reason in the record to do so.

By the Court.—Judgment and order affirmed.

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