COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1208-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN BUCKINGHAM,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Steven Buckingham appeals from a judgment of conviction entered after he pleaded guilty to felony murder, resulting from his commission of attempted armed robbery, as a party to a crime, in violation of

§§ 940.03, 943.32(2), 939.32 and 939.05, STATS.[1] Buckingham also appeals from the trial court's order denying his postconviction motions for plea withdrawal and sentence modification. Buckingham claims that the trial court erred by not granting his postconviction motions. Buckingham's motion to withdraw his plea was based on a claim of ineffective assistance of counsel. Buckingham specifically argued that his trial counsel was ineffective because she failed to request a ruling in limine on the admissibility of a witness's preliminary hearing testimony, and advised Buckingham that the testimony would be admissible at trial. Buckingham's motion for sentence modification alleged that a new factor existed warranting sentence modification. The alleged new factor was an essay prepared by a social worker explaining how "street" culture made a "good kid" like Buckingham "go bad." We conclude that: (1) Buckingham's trial counsel provided Buckingham with effective assistance; and (2) the social worker's report did not constitute a new factor warranting sentence modification. Therefore, we affirm the judgment of conviction and the order denying postconviction relief.

I. BACKGROUND.

On February 13, 1996, the State filed a criminal complaint against Buckingham, charging him with felony murder, party to a crime,[2] as a result of his participation in an unsuccessful armed robbery. The complaint states that on

[1] The judgment of conviction states that Buckingham was convicted of "felony murder, party to a crime." As the supreme court stated in ***State v. Oimen***, 184 Wis.2d 423, 516 N.W.2d 399 (1994), "[c]harging felony murder as a party to a crime is redundant and unnecessary," because "[a] person convicted of a felony as a party to the crime becomes a principal to the murder occurring as a result of that felony." ***Id***. at 449, 516 N.W.2d at 410. Therefore, to avoid confusion in felony murder cases, only the underlying felony should be charged as a party to a crime, if appropriate. *See* ***id***.

[2] *See supra* n.1.

February 6, 1996, Buckingham and his friend, Demetrice Washington, attempted an armed robbery of a grocery store located at 4401 West Lisbon Avenue in the City of Milwaukee. Around 9:00 p.m., a store employee saw two masked men enter the store, and a gunfight ensued between the robbers and the employee. During the gunfight, the employee shot and killed one of the robbers, who was later identified as Washington. The employee also stated that he shot the other robber, who then fled.

The police recovered a gun at the scene, which was later identified by Buckingham's father as belonging to Buckingham. Buckingham was treated for a gunshot wound to his arm at St. Joseph's Hospital, and a bullet was recovered from Buckingham's arm. This bullet was tested and found to be consistent with the gun fired by the store employee during the attempted robbery.

At Buckingham's preliminary hearing, Demetrick Moore testified that, on the night of the robbery, he saw Buckingham at his (Moore's) girlfriend's house. Moore testified that Buckingham was suffering from what appeared to be a gunshot wound to his arm, and that Buckingham told him that he had been shot. Buckingham also told Moore that he had been with Washington, that he believed Washington was still at the grocery store where the attempted robbery occurred, and that he thought Washington was dead.

Buckingham pleaded guilty on April 18, 1996, and was sentenced to thirty years in prison. Buckingham filed postconviction motions for plea withdrawal and sentence modification. In his motion for plea withdrawal, Buckingham alleged that his trial counsel was ineffective for failing to request a motion in limine as to the admissibility of Moore's preliminary hearing testimony, and for advising him that Moore's testimony would be admitted at trial if Moore

was not present to testify. At the motion hearing, Buckingham testified that he did not believe Moore would come to trial because a felony warrant had been issued for his arrest. Buckingham testified that if he thought Moore's preliminary hearing testimony would not have been used against him at trial, he would not have pleaded guilty. Buckingham's motion for sentence modification claimed that a new factor existed warranting sentence modification. The alleged new factor was an essay prepared by a social worker explaining how "street" culture made a "good kid" like Buckingham "go bad." The trial court denied both postconviction motions, and Buckingham now appeals.

II. ANALYSIS.

A. Motion for plea withdrawal.

Buckingham claims that the trial court erred by denying his motion for plea withdrawal, and argues that his plea was entered as the result of the ineffective assistance of his trial counsel. We affirm the trial court.

To withdraw a guilty plea after sentencing, the defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth,*** 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A manifest injustice may occur when a defendant enters a plea as the result of the ineffective assistance of counsel. *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993). The burden of proving a manifest injustice is on the defendant, by clear and convincing evidence, and the court's decision not to allow the defendant to withdraw his plea will only be reversed for an erroneous exercise of discretion. *See* ***Booth***, 142 Wis.2d at 237, 418 N.W.2d at 22.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.*** Additionally, counsel will not be found to be deficient for failing to make meritless motions or arguments. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). To prove prejudice in connection with a guilty plea, the defendant must show that, but for counsel's errors, there is a reasonable probability that he or she would not have pleaded guilty and would have insisted on going to trial. ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

Buckingham claims that his trial counsel was ineffective for failing to request a motion in limine regarding the admissibility of Moore's preliminary hearing testimony, and for advising him that Moore's testimony would likely be admissible if Moore was not present at trial. Buckingham claims that he would not have pleaded guilty had he thought that Moore's testimony would not have

been admissible at trial. We conclude that Moore's testimony would have been admissible at trial, and therefore, that Buckingham's counsel was not ineffective for failing to request a motion in limine, or for advising Buckingham that Moore's testimony would have been admissible at trial.

The Sixth Amendment to the United States Constitution and Article 1, § 7 of the Wisconsin Constitution provide criminal defendants with the right to confront witnesses against them.[3] Although a literal reading of the Confrontation Clause would require exclusion of any statement made by a declarant not present at trial, such a result has long been rejected as unintended and too extreme. *See* ***State v. Bauer***, 109 Wis.2d 204, 209, 325 N.W.2d 857, 860 (1982). Instead, in order to determine the admissibility of such statements, a trial court must apply the following standard:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

[3] The Sixth Amendment to the United States Constitution states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." Article 1, § 7 of the Wisconsin Constitution states, in relevant part, "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face."

Id. at 215, 325 N.W.2d at 863.

In the instant case, the statements at issue are statements made by Moore during a preliminary hearing. Such statements, although hearsay, fit within the recognized "former testimony" hearsay exception, and, if the declarant is unavailable at trial, are admissible "against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered." RULE 908.045(1), STATS.[4] The "former testimony" hearsay exception is "firmly rooted," thus, the reliability of Moore's preliminary hearing testimony can be inferred. ***Bauer***, 109 Wis.2d at 215, 325 N.W.2d at 863. Therefore, in the absence of unusual circumstances, if Moore was unavailable at trial, Moore's preliminary hearing testimony would have been admissible.[5] Buckingham appears to claim that, in this case, unusual circumstances did exist, namely, that Buckingham's counsel was not permitted "a full and complete cross-examination" of Moore at the preliminary hearing. Buckingham fails to note, however, that "'[i]n upholding the introduction of an unavailable witness' preliminary hearing testimony, the Supreme Court has

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[4] RULE 908.045(1), STATS., reads in full:

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

[5] Buckingham does not argue that if Moore did not appear at trial, Moore's preliminary hearing testimony would not have been admissible on the grounds that the State would not have been able to show that Moore was legally "unavailable." Therefore, we will not discuss that issue.

never said that the opportunity for cross-examination afforded at the preliminary hearing must be identical with that required at trial.'" ***Id.*** at 218, 325 N.W.2d at 864 (quoting ***United States ex. rel Haywood v. Wolff***, 658 F.2d 455, 461 (7th Cir. 1981)) (alteration in original). Therefore, the fact that Buckingham's counsel's cross-examination of Moore at the preliminary hearing was more limited than Buckingham's counsel's cross-examination of Moore at trial likely would have been, does not require exclusion of Moore's preliminary hearing testimony on Confrontation Clause grounds. Contrary to Buckingham's claims, if Moore had been unavailable at trial, Moore's preliminary hearing testimony would have been admissible. Consequently, Buckingham's counsel was not deficient for failing to file a meritless motion in limine to exclude the testimony, or for correctly advising Buckingham that the testimony would be admissible. Therefore, Buckingham received effective assistance of counsel and the trial court did not create a manifest injustice by denying Buckingham's motion to withdraw his guilty plea.

B. Motion for sentence modification.

Buckingham also claims that the trial court erred by denying his motion for modification of his sentence. We affirm the trial court.

As the supreme court stated in ***State v. Franklin***, 148 Wis.2d 1, 434 N.W.2d 609 (1989):

> Sentence modification involves a two-step process in Wisconsin. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. A new factor … is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." Whether a fact or set of facts constitutes a

> new factor is a question of law which may be decided without deference to the lower court's determinations.
>
> If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. This determination is committed to the circuit court's discretion and will be reviewed under an [erroneous exercise of] discretion standard.

Id. at 8, 434 N.W.2d at 611.

Buckingham claims that an essay written by Dr. Elijah Anderson, a social worker, which Buckingham submitted to the trial court with his motion for sentence modification, constituted a new factor which the trial court did not consider at sentencing, and which frustrates the purpose of the trial court's sentence. The social worker's essay explains how the conflict between Buckingham's "decent" family, and an "oppositional 'street' culture" caused a "good kid" like Buckingham to "go bad." The trial court, in its written order denying Buckingham's motion, stated:

> While not familiar with the specific work of Dr. Elijah Anderson, I am all too familiar with the notion that decent parents sometimes lose otherwise decent children to the streets. I have commented on this sad reality in any number of sentencing hearings, and did so in this hearing.

The transcript of the sentencing hearing shows that the trial court was well aware of the fact that the "street culture" turns good kids bad, and considered that fact in determining Buckingham's sentence. For example, at the very beginning of the trial court's lengthy and detailed explanation of Buckingham's sentence, the trial court stated:

> I have here in this case one of those truly rare defendants in a case involving criminal violence who comes from an

> intact, biologically intact, family who's, as far as I know, has not been abused or neglected and yet he's here on a murder charge.
>
> *It appears that starting several years back his parents began to lose him to the streets, as we often say, in sort of stages. Perhaps quickly, perhaps bit-by-bit he made choices to listen to the streets and not to his parents.* What really scares me about this case in particular is the thought that maybe even when parents stay together, work hard, set a good example, try to do and say the right things, that even then, even then *whatever the lure of the streets is* and whatever the other difficulties that Steven Buckingham faced in his schooling and his employment opportunities and all those things, it just – It's not enough. That scares me a lot because most of what I see here teaches me that people who commit acts of, violence and that's what this was, come from abusive backgrounds, at least significantly neglectful if not outright abusive.
>
> Part of me, therefore, wants to hope that this picture of the family is wrong, that there's some explanation somewhere for why Steven is where he is today sitting here in that chair. But I don't think that it is wrong. *I think that this is simply one of those cases where the streets simply [won] out.*

Clearly, the trial court explicitly considered the facts conveyed by Dr. Anderson's essay, namely, that Buckingham was a "good kid gone bad," who had been lured by the streets away from his decent upbringing. Thus, the trial court properly found that Buckingham did not show the existence of a new factor warranting sentence modification.

III. CONCLUSION.

Buckingham's counsel was not ineffective for failing to make a meritless motion in limine to exclude Moore's preliminary hearing testimony, or for correctly advising Buckingham that if Moore was unavailable at trial, his testimony would be admissible. Therefore, the trial court properly denied Buckingham's motion to withdraw his guilty plea. Dr. Anderson's essay

concerning the effect of "the streets" upon "decent" children was not a new factor, and thus, the trial court properly denied Buckingham's motion for sentence modification. Consequently, we affirm the trial court's judgment and order.

By the Court.—Judgment and order affirmed.

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