COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2058-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANK PENIGAR, JR.,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Frank Penigar, Jr., appeals from a judgment of conviction entered after he pled no contest to a charge of first-degree intentional homicide. *See* § 940.01(1), STATS. He also appeals from the trial court's order denying his motion for postconviction relief. Penigar argues that the trial court

erred in concluding that his no contest plea did not result from ineffective assistance of counsel. We affirm.

BACKGROUND

On March 10, 1996, Penigar beat and stabbed to death his aunt, with whom he lived. According to the complaint, Penigar told the police that he was high on cocaine, and that he attacked his aunt after she discovered him looking through her belongings for money to buy more cocaine. Penigar also told the police that after he attacked his aunt, he ransacked her home to make it look as if someone had broken in.

On June 19, 1996, Penigar pled no contest to a charge of first-degree intentional homicide. At the plea hearing, Penigar testified that although he did not believe that he had the intent to kill his aunt, he nonetheless wanted to forgo a trial and plead no contest. Penigar explained, "I don't want to have a trial because I don't want to take my family or my fianc[ée] through a trial. I think that would be a little too rough for them." The trial court accepted Penigar's no contest plea, and, on August 6, 1996, sentenced Penigar to the mandatory life sentence, with a parole eligibility date of May 30, 2021.[1]

On March 20, 1997, Penigar filed a motion to withdraw his no contest plea. He asserted that his counsel was ineffective in failing to inform him that a psychiatric expert would have testified that Penigar was so intoxicated by the cocaine that he did not have the capacity to form the intent to kill his aunt.

[1] Section 940.01(1), STATS., provides: "Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." Section 939.50(3)(a), STATS., provides that the penalty for a Class A felony is life imprisonment.

Penigar further asserted that he would not have pled no contest if he had been informed of the expert's opinion. After a hearing, the trial court denied Penigar's motion to withdraw his plea, finding that Penigar would have entered a no contest plea even if he had had full knowledge of the expert's opinion.

DISCUSSION

After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving by clear and convincing evidence that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *See* ***id.***

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice.[2] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, Penigar must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled no contest and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714

[2] If we conclude that a defendant fails to satisfy this burden on one prong, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

(1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

As noted, the trial court denied Penigar's motion to withdraw his plea because it found that Penigar would have pled no contest even in the absence of counsel's alleged deficiency. This finding is not clearly erroneous. Thus, we must uphold the trial court's finding.

At the hearing on Penigar's motion to withdraw his plea, both of the attorneys with whom Penigar conferred before entering his no contest plea testified that Penigar adamantly opposed taking his case to trial. They testified that when they attempted to discuss matters relating to trial with Penigar, he became frustrated and cut them off, telling them that there would be no trial because he did not want to further traumatize his family.[3] This testimony was

[3] Specifically, one of the attorneys testified as follows regarding his partner's and his own interactions with Penigar:

> [H]e's been trying to prepare the case in a workmanlike manner, going through all the defenses and different issues, and he keeps getting told there's going to be no trial.
>
> The third time [the attorney] was going into this, and Mr. Penigar cut him off, Mr. Penigar just about came out of his seat and said very, very loudly, there's no trial, period. I don't want a trial. I'm not going to trial…. He was trying to emphasize perhaps just to me that he – he was very sincere about it. It was very obvious that they had talked about it before and it was – it was just rock solid in his mind that there was not going to be a trial.
>
> I know at one point, to show his sincerity with me, he just about lost it for about 5 or 10 minutes to show how remorseful he was and how concerned he was that the family

(continued)

consistent with Penigar's statement at the time he entered his plea, that he did not want to have a trial because he thought it would be "too rough" for his family.[4]

The trial court found that Penigar had not been prejudiced by the alleged deficiency of his attorneys because Penigar wanted to spare himself and his family from the burdens of a trial, and thus "even if the key opinion [of the psychiatrist] had been read to him verbatim and emphasized, the defendant would have reached no different conclusion in this case." The evidence amply supports the trial court's finding.

By the Court.—Judgment and order affirmed.

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

was not going to be put through any of this and how sad he was about this.

[4] Upon a motion by counsel for the State, the trial court considered the record of Penigar's no contest plea hearing in deciding Penigar's motion to withdraw his plea.