COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2753-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK D. GOAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Mark D. Goad appeals from a judgment and an order denying him postconviction relief from his convictions for five counts of burglary as party to the crime. Goad contends that he should have been allowed to withdraw his no contest plea based upon the ineffective assistance of trial counsel and the incorrect information which he was given regarding potential

impeachment evidence. Because we conclude that counsel's performance was not deficient and that Goad's plea was knowingly given, we affirm.

BACKGROUND

Police apprehended Thomas King with stolen goods obtained from a string of late-night residential burglaries, which had featured forced entry following the sophisticated disablement of home alarm systems and telephone wires. King claimed that he, himself, was not involved in the burglaries, but he implicated Goad, with whom he had been staying. The police contacted Goad's federal probation agent, Janine Frank, to let her know that they were investigating his possible involvement in the burglaries. Frank arranged a home inspection of the Goad residence, accompanied by the police. Frank and the police observed that Goad had a radio scanner set to the frequency of the Madison Police Department and learned that he had been coming home quite late in recent months, but they did not discover any more stolen property. The police later conducted a second search, with the permission of Goad's mother.

On the basis of the police investigation of Goad's suspected connection with the burglaries, Frank prepared a federal warrant to arrest Goad for probation violation. On March 29, 1993, Frank obtained the authorization of a federal district judge to issue the warrant. On the morning of March 31, 1993, two Madison police officers were following Goad's car when they received word from Detective Thomas Kretschman that there was a federal warrant for Goad's arrest. They promptly pulled Goad over to arrest him, and found a jacket which was stained with the substance used to disable the alarms in the burglarized homes. Goad claimed that he had loaned the jacket to King.

Federal authorities revoked Goad's probation, primarily on the strength of King's testimony, and sentenced him to twenty-four months in prison. State prosecutors did not charge Goad with the burglaries until after he had completed his federal sentence. Goad then moved to suppress the jacket and any items observed during the home inspection, on the grounds that the police lacked a warrant for either search. The trial court denied the suppression motion based on Kretschman's testimony that he had not solicited the home inspection and that, although police did not yet have a warrant in their actual possession at the time of Goad's arrest, Frank had informed Kretschman over the phone that the warrant had been issued.

Trial counsel did not subpoena Frank to the suppression hearing. The State did, however, and trial counsel learned from Frank during a conversation in the hall that she did not believe that she had told Kretschman that a warrant had actually been issued, but rather she thought she said that she was anticipating that a warrant would be issued shortly. Her recollection was supported by her contemporaneously-taken notes of her phone conversations with Kretschman. Trial counsel did not call Frank as a witness because he did not see her in the courtroom after their conversation in the hall.

Trial counsel had requested that the State turn over any information which would show that King had received favorable treatment in exchange for implicating Goad. The State told Goad that it had no such information. As it happened, the federal authorities had given King favorable treatment in exchange for his testimony in the federal revocation proceeding, but the State did not have that information in its file. Trial counsel did send an investigator to examine the federal file where the information was located, but he missed it. He erroneously reported that King had not received favorable treatment. Trial counsel advised

Goad about the low probability of successfully impeaching King's credibility at trial based in part upon this incorrect information.

Goad then agreed to plead no contest to five counts of burglary in exchange for the dismissal of a sentence-enhancing repeater allegation and an agreement not to charge any additional burglaries based on prior conduct. The trial court accepted Goad's plea and imposed consecutive five-year prison terms on each count. Several months later, Goad sought to withdraw his plea based on the alleged ineffective performance of trial counsel in failing to call Frank, failing to raise the issue of prosecutorial misconduct or outrageous government conduct, and failing to learn of the favorable treatment accorded to King. The trial court denied Goad's motion after a hearing, and Goad appeals.

DISCUSSION

Standard of Review.

In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991). Ineffective assistance of counsel constitutes manifest injustice, as does evidence that the plea was not knowingly and voluntarily entered. ***Id.***

Whether a plea was knowingly and voluntarily entered is a question of constitutional fact also to be reviewed independently of the trial court's determination. ***State v. Nichelson,*** 220 Wis.2d 214, 218, 582 N.W.2d 460, 462 (Ct. App. 1998).

Ineffective Assistance.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which we review *de novo*. ***Id***. at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "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. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). To satisfy the prejudice prong, the defendant must show that but for counsel's errors, there is a reasonable probability that the defendant would have pleaded not guilty and gone to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1986).

1. Counsel's Failure to Call Probation Agent.

Goad asserts that Frank's testimony would have undermined Kretschman's assertion that he had been told a federal warrant had already been issued (thus removing the only basis for Goad's arrest), and that counsel therefore performed ineffectively by failing to subpoena or call Frank at the suppression

hearing. Counsel testified that he had attempted to reach Frank prior to the suppression hearing, but that she had not returned his call. He therefore had no basis to believe that her testimony would contradict Kretschman's until the day of the hearing, and no compelling reason to attempt to subpoena her. Furthermore, he believed that it would be futile to subpoena a federal probation agent. This belief was supported by statutes and case law, which indicate that a federal officer cannot be required to testify without the consent of the Department of Justice, and his own past experience that consent to appear was routinely denied. *See* ***United States ex rel. Touhy v. Ragen***, 340 U.S. 462 (1951); 5 U.S.C. § 552(b); 28 C.F.R. §§ 16.22, 16.24 and 16.26. Knowing that he had not subpoenaed her, and believing that she was in court voluntarily at the State's request, it was not unreasonable for counsel to assume that Frank had left when he did not see her in the courtroom after their conversation. While, in hindsight, it may appear that counsel could have made a greater effort to secure Frank's testimony, professional norms require only that counsel's performance be adequate, not error free. ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993). Counsel performed adequately by raising the suppression issue and challenging the time at which the police claimed the warrant had been issued.

2. Prosecutorial Misconduct.

Goad also claims that counsel performed ineffectively by failing to raise the issues of outrageous government conduct or prosecutorial misconduct. Goad spends a good portion of his brief detailing what he contends is government misconduct which occurred during his federal revocation proceeding and prior to his indictment in the present case.

It is well established that the Fourteenth Amendment protects a criminal defendant from any misconduct by state authorities which would deprive him of due process of law. ***Mooney v. Holohan***, 294 U.S. 103, 112-13 (1935). The suppression or withholding of material evidence favorable to the defendant (by any part of the prosecution team, including the police) constitutes a due process violation regardless of whether the prosecution acted in good faith. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Here, however, Goad does not allege that information was withheld from him in the present case, but in a prior federal proceeding. For such pre-indictment conduct to have deprived Goad of due process in the present case, it must also have violated a specific constitutional right relating to the state proceeding and have been so outrageous as to "violate fundamental fairness" and be "shocking to the universal sense of justice." ***State v. Hyndman***, 170 Wis.2d 198, 208, 488 N.W.2d 111, 115 (Ct. App. 1992) (citation omitted). Goad does not identify how any of the acts which he alleges to have occurred in the revocation proceeding violated a specifically guaranteed right in his state proceeding. With regard to the delay in charging, counsel did raise a speedy trial issue. The trial court found that the delay was not motivated by the State's desire to gain a tactical advantage and that Goad had not shown that he was actually prejudiced. Therefore, we do not consider counsel to have performed deficiently by failing to raise the issue of outrageous government misconduct in a pretrial motion.

In addition to his allegations of pre-indictment government misconduct, Goad maintains that Kretschman committed prosecutorial misconduct by falsely informing the trial court at the suppression hearing that a federal warrant had been issued for Goad's arrest when Frank said that she had told Kretschman that the warrant had not yet issued. Goad correctly notes that the

presentation of perjured testimony constitutes prosecutorial misconduct if either the prosecutor or the investigating law enforcement officers were aware that the testimony was perjured. ***Pyle v. Kansas***, 317 U.S. 213, 216 (1942).

Here, the trial court appeared to accept Kretchman's postconviction explanation that someone from Frank's office had told him that the warrant had issued, and that he had just assumed it was Frank herself. The court observed, "While the details of Detective Kretchman's testimony are somewhat contradictory between the suppression hearing and the post conviction motion hearing, this court does not find his testimony to be incredible." The credibility of witnesses is for the fact-finder, and we will not disturb the trial court's determination that Kretschman's explanation was believable. Because the trial court did not find that Kretschman willfully perjured himself at the suppression hearing, Goad was not prejudiced by counsel's decision not to raise the issue of prosecutorial misconduct.

3. Concessions Given to Key Witness.

Goad argues that counsel was also ineffective for failing to discover that King had been given certain concessions relating to Goad's revocation proceedings. He asserts that he would not have agreed to the plea on state charges if he had known that King had been given lenient treatment in exchange for his federal testimony. However, Goad's trial counsel made all reasonable inquiries to determine whether King received favorable treatment. He asked the State for this information, and the State turned over its file, not realizing that the information was not included in the file. Counsel then sent an investigator to check the federal file, but the investigator missed the pertinent document. While this turn of events

was unfortunate, because counsel made reasonable attempts to obtain the information, we cannot conclude that his performance was deficient in this regard.

Knowing Plea.

Goad also argues that, regardless of whose fault it was that he did not learn about King's favorable treatment in a timely manner, his plea was rendered unknowingly by the incorrect information which he was given. "A plea of no contest that is not voluntarily, knowingly, and intelligently entered violates fundamental due process. A plea may be involuntary either because the defendant does not have a complete understanding of the charge or because he or she does not understand the nature of the constitutional rights he or she is waiving." ***State v. Van Camp***, 213 Wis.2d 131, 139-40, 569 N.W.2d 577, 582 (1997) (citations omitted). Thus, before accepting a plea, the trial court has an affirmative duty:

> (1) To determine the extent of the defendant's education and general comprehension;
>
> (2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;
>
> (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
>
> (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;
>
> (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him; and
>
> (6) To personally ascertain whether a factual basis exists to support the plea.

State v. Bangert, 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 21 (1986) (citations omitted); *see also* § 971.08, STATS.

Goad does not assert that he did not understand his constitutional rights or the elements which the State was required to prove to convict him of burglary. In fact, the record includes a plea colloquy and signed plea questionnaire which establish that Goad did understand the nature of the charge and the proceedings. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987); ***Bangert***, 131 Wis.2d at 267-72, 389 N.W.2d at 23-25. Rather, Goad claims that his plea was unknowing because he was not advised about information affecting the strength of his case. However, case law does not support his contention that mere ignorance of potentially exculpatory evidence warrants a plea withdrawal.

The principal case upon which Goad relies, ***Giglio v. United States***, 405 U.S. 150 (1972), held that a prosecutor's failure to disclose a government promise of lenient treatment to its key witness constituted a due process violation, mandating a new trial. Unlike ***Giglio***, however, the State prosecutor here had no duty to disclose federal material which was not in its own file. *See, e.g.,* ***United States v. Parks***, 100 F.3d 1300, 1307 (7th Cir. 1996) (prosecution did not "suppress" evidence which was available to the defendant through other means). Furthermore, because the defendant in ***Giglio*** went to trial, the informed nature of his plea was never an issue. While some of the other federal cases Goad cites do deal with plea withdrawal issues, they too arise in the context of the government suppression of evidence. As Goad himself recognizes, the rationale for allowing a defendant to withdraw his plea in such instances is that otherwise "prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." ***United States v. Sanchez***, 50 F.3d 1448, 1453 (9th

Cir. 1995). Since the State had no burden to produce evidence from the federal file, allowing Goad to withdraw his plea would not serve the same function here.

We conclude that nothing in the federal decisions cited by Goad or in Wisconsin law compels the conclusion that a plea is unknowing when based upon a miscalculation of the State's evidence. To the contrary:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

Brady v. United States, 397 U.S. 742, 757 (1970). Goad's plea was knowingly made with an understanding of the charges against him, his right to contest the charges, the factual basis for the charges, and the consequences of the plea.

CONCLUSION

Because we conclude Goad was not denied the effective assistance of counsel and that his right to due process was maintained, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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