COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1154-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND MASSIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

PER CURIAM. Raymond Massie appeals pro se from a judgment of conviction of a second offense of cocaine possession with intent to deliver and from an order denying his postconviction motion to withdraw his guilty plea. He argues that he was denied the effective assistance of counsel, that his plea was not supported by sufficient evidence and that his trial should have been severed from

that of two codefendants. We reject his claims and affirm the judgment and the order.

Massie was present when a search warrant was executed at a residence in the city of Racine and marijuana and cocaine were found. Massie was arrested and charged as a party to the crime of possessing between 40 and 100 grams of cocaine with intent to deliver within 1000 feet of a park as a repeat drug offender and habitual offender. Under a plea agreement, the within 1000 feet of a park and habitual offender enhancers were dropped and the charge was reduced to possession of between 15 and 40 grams of cocaine as a repeat drug offender under § 161.41(1m)(cm)3, STATS., 1993-94.[1] Massie entered a guilty plea and was sentenced to twenty-five years of imprisonment.

In order to withdraw a guilty plea after sentencing, a defendant carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." *See* ***State v. Washington***, 176 Wis.2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). Ineffective assistance of counsel is a recognized factual scenario that could constitute "manifest injustice." *See* ***id.*** at 213-14, 500 N.W.2d 335.

Massie argues that he should be allowed to withdraw his plea because he was denied the effective assistance of counsel. "There are two components to a claim of ineffective trial counsel: a demonstration that counsel's

[1] Massie states that the charge was amended to manufacturing and delivering cocaine under § 161.41(1)(cm)3, STATS., 1993-94. Although the prosecutor referred to that section in her remarks about the plea agreement, the judgment of conviction properly reflects the parties' agreement that the charge was under § 161.41(1m)(cm)3.

performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). When a guilty plea has been entered the prejudice component is satisfied only by a showing that there is a reasonable probability that, but for counsel's errors, the defendant would not have entered the plea and would have insisted on going to trial. *See* ***State v. Harvey***, 139 Wis.2d 353, 378, 407 N.W.2d 235, 246 (1987).

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

Massie generally claims that his trial counsel left him uninformed. One of Massie's particularized claims is that trial counsel did not inform him that under ***State v. Ray***, 166 Wis.2d 855, 872-73, 481 N.W.2d 288, 295-96 (Ct. App. 1992), he could not be charged both as a repeat drug offender and as a habitual offender and, therefore, bargaining away one of the enhancers was no bargain at all. The State concedes that it is unsettled whether Massie's multiple prior offenses could have supported the dual enhancers. Yet there is nothing in the record to suggest that dismissal of the habitual offender enhancer was the only basis for Massie's plea. Indeed, dismissal of the intent to distribute near a park enhancer and the reduction of the quantity of the substance in possession were

more significant benefits of Massie's bargain.[2] Massie has not established that he would have proceeded to trial even if he had knowledge that the habitual offender enhancer was subject to dismissal.

Massie also claims that trial counsel failed to inform him about a possible defense regarding constructive possession. Trial counsel testified that he discussed constructive possession and other possible defenses with Massie. The trial court found that testimony to be credible and we are bound by the credibility determination. *See* ***State v. Lukensmeyer***, 140 Wis.2d 92, 105, 409 N.W.2d 395, 401 (Ct. App. 1987). Counsel was not deficient with respect to informing Massie about possible defenses.

The remainder of Massie's argument about ineffective assistance of counsel does not identify any particular conduct that constituted deficient performance.[3] Massie makes a general complaint that his trial counsel failed to object to constitutional and evidentiary issues. We do not address an issue not argued with specificity. *See* ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

Massie also complains that trial counsel placed Massie's initials on the plea questionnaire and directed Massie to answer appropriately during the plea colloquy or risk the rejection of his plea. Massie attempts to blame trial counsel

[2] The habitual offender enhancer increased Massie's exposure by only six years. Dismissal of the park enhancer decreased his exposure by five years. *See* § 161.49(1), STATS., 1993-94. Reduction of the quantity in possession reduced his exposure by ten years. *See* § 161.41(1m)(cm)3, 4, STATS., 1993-94.

[3] Massie claims that counsel failed to object when the charges were amended to § 161.41(1)(cm)3, STATS., 1993-94, and failed to inform him of the potential challenge. The judgment of conviction reflects the proper amendment to § 161.41(1m)(cm)3. *See supra* note 1. There is no merit to this aspect of Massie's claim of ineffective assistance of counsel.

for his belief that he would receive the six-year sentence the plea agreement required the prosecution to recommend. The record does not support a claim that Massie misunderstood the effect of his plea. Counsel testified that he did not guarantee that Massie would be sentenced to the six-year term and that he went over with Massie that portion of the plea questionnaire that indicated that the plea agreement was not binding on the court. During the plea colloquy, the trial court also explained that it was not bound by any agreement as to sentencing. Massie acknowledged his understanding of that point.

Trial counsel testified that he directed Massie to answer the trial court's plea questions "affirmatively unless the case were otherwise." Counsel indicated that he explained to Massie that the trial court would not accept a no contest plea coupled with an assertion of innocence, and that if innocence were asserted, the trial court would require a trial. It was not deficient performance to instruct Massie on what was necessary to effectively enter his plea and gain the benefit of the plea agreement.

Even if Massie did not place his initials on the plea questionnaire, trial counsel's performance was not deficient. Massie testified that his attorney stood outside the "bullpen" and read the document to him. This explains why the attorney put Massie's initials on the form. Massie signed the document himself. Moreover, the trial court conducted an adequate plea colloquy, with Massie acknowledging an understanding of the waiver of his rights. This was not an instance where the court relied only on the plea questionnaire to establish that

Massie's plea was freely, knowingly and intelligently entered.[4] Massie was not prejudiced by counsel's handling of the plea questionnaire.

We conclude that Massie was not denied the effective assistance of counsel. We turn to his claim that there was an insufficient factual basis to support the plea because he had asserted his innocence.

The failure of the trial court to determine that a sufficient factual basis exists that the defendant committed the offense to which a guilty plea is entered can constitute a manifest injustice justifying plea withdrawal. *See* ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 233-34 (1996). "The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." ***Id.*** at 25, 549 N.W.2d at 234. When there is a negotiated guilty plea, the court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Id.*** (quoted source omitted).

The record demonstrates a sufficient factual basis. A witness at the preliminary hearing testified that when the police arrived to execute the search warrant, Massie exited the room with a plastic bag containing crack cocaine. Cocaine was recovered from the couch where Massie had been sitting and making furtive motions. Massie was in possession of $2100 cash in denominations consistent with controlled substances. Reasonable inferences exist that Massie

[4] Massie contends that the plea colloquy and his answers amounted to nothing more than perfunctory and ritualistic questioning. Giving deference to the trial court's assessment of Massie's demeanor during the plea hearing, the trial court's finding that Massie understood the proceeding is not clearly erroneous.

knew the substance in the bag was cocaine, that he was attempting to conceal it and that he intended to sell the cocaine.

Massie's final claim is that his trial should have been severed from that of two codefendants. A valid guilty plea waives the right to review the denial of a motion for severance. *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). Application of waiver is particularly appropriate in this case where the trial court denied the motion for severance but indicated a willingness to reconsider depending on further developments in the case. Massie's plea terminated a possible further ruling by the trial court.

By the Court.—Judgment and order affirmed.

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