COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2975-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES YOUNG-COOPER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Charles Young-Cooper has appealed from a judgment convicting him upon a guilty plea of four counts of forcing a child under the age of thirteen to view sexually explicit conduct in violation of

§ 940.227(3)(a), STATS., 1989-90, and from an order denying his motion for postconviction relief. We affirm the judgment and the order of the trial court.

¶2 Young-Cooper's first argument on appeal is that the trial court incorrectly explained the elements of § 940.227(3)(a), STATS., 1989-90, to him when he entered his guilty plea, rendering that plea unknowing and involuntary. He also contends that he was deprived of effective assistance of counsel when his trial attorney failed to object to the trial court's erroneous summarization of the elements.

¶3 A defendant is entitled to withdraw his or her guilty plea after sentencing only by showing, 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). A trial court's decision denying a motion to withdraw a guilty plea will not be disturbed by this court unless the trial court erroneously exercised its discretion. *See* ***State v. Van Camp***, 213 Wis.2d 131, 139, 569 N.W.2d 577, 582 (1997). However, when a defendant establishes a denial of a relevant constitutional right, plea withdrawal is a matter of right. *See* ***id.***

¶4 A guilty plea which is not knowingly, voluntarily and intelligently entered violates due process and provides a basis for withdrawal of the plea. *See* ***id.*** To be knowing and voluntary, a defendant must understand the nature of the crime to which he or she is pleading, including an awareness of the essential elements of the crime. *See* ***State v. Brandt***, 226 Wis.2d 610, 618-19, 594 N.W.2d 759, 763 (1999).

¶5 To establish a violation of this requirement, the defendant initially must make a prima facie showing that the circuit court failed to establish at the guilty plea hearing that he or she understood the elements of the crime to which

the defendant was pleading. *See* ***id.*** at 617-18, 594 N.W.2d at 763. Young-Cooper contends that he met this burden because at the guilty plea hearing the trial court read him the elements of § 948.055, STATS., the current codification of the crime of causing a child to view sexual activity, rather than the elements of § 940.227, STATS., 1989-90, the statute under which he was charged.

¶6 Initially, we point out that Young-Cooper never alleged in his postconviction motion that he did not know or understand the information which the trial court allegedly failed to provide, as required to prevail on his motion. *See* ***Brandt***, 226 Wis.2d at 618 n.5, 594 N.W.2d at 763. Moreover, while Young-Cooper is correct that the trial court read the elements from the newer version of the statute, no basis exists to conclude that he was misinformed of the nature of the crime. The charges were identified at the guilty plea hearing as four counts of forced viewing of sexual activity. Prior to entering his guilty plea, Young-Cooper executed a guilty plea questionnaire and waiver of rights form which, consistent with § 940.227, STATS., 1989-90, indicated that the elements of the offense were that he: (1) intentionally; (2) by use of force; (3) caused a child; (4) to view sexually explicit conduct.[1] In the form, Young-Cooper indicated that he was giving up his right to have the State prove him guilty beyond a reasonable doubt as to each of these elements.

¶7 At the guilty plea hearing, the trial court informed Young-Cooper that, absent his guilty plea, the State would have to prove that he intentionally caused a child under the age of thirteen to view sexually explicit conduct for the

[1] The guilty plea questionnaire indicated that the State had to prove that the child was under the age of eighteen, rather than under the age of thirteen as required for conviction under § 940.227(3)(a), STATS., 1989-90. However, Young-Cooper makes no claim that he misunderstood this element, nor does the record support such a conclusion.

purpose of sexually arousing or gratifying himself or humiliating or degrading the child. *See* § 948.055(1), (2)(a), STATS. By including the requirement that the State prove that the forced viewing was for the purpose of sexually arousing or gratifying the defendant or humiliating the victim, the trial court was informing Young-Cooper that the State had a higher burden than it actually had. While possibly unfair to the State, this misinformation cannot be deemed to have misled Young-Cooper into entering a guilty plea. In addition, while the trial court stated that causing the child to view the conduct had to be intentional, but did not state that it had to be by use or threat of use of force, that element was fully set forth in the guilty plea questionnaire. Because Young-Cooper executed the guilty plea questionnaire and at the guilty plea hearing acknowledged going over it with his attorney and understanding what he was doing, no basis exists to conclude that he was not completely and accurately informed of the nature of the charges, or that he did not understand them. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 828, 416 N.W.2d 627, 630 (Ct. App. 1987).

¶8 The manifest injustice test is also met if the defendant was denied effective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that,

but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

¶9 Because the record establishes that Young-Cooper was correctly informed of all of the elements of the offenses, no basis exists to conclude that he was prejudiced by his trial counsel's failure to object when the trial court referred to the newer version of the statute at the guilty plea hearing. Young-Cooper's claim of ineffective assistance on this ground also fails because he never alleged that, but for counsel's failure to object, he would not have pled guilty and would have insisted on going to trial.

¶10 Young-Cooper next contends that the charges and sentences were multiplicitous and duplicitous, and that his trial counsel rendered ineffective assistance when he failed to seek relief on these grounds. He also contends that his trial attorney rendered ineffective assistance by failing to move to dismiss the charges on the ground that the prosecutor engaged in selective and discriminatory prosecution when he charged Young-Cooper with these offenses, but not his sister. Young-Cooper also contends that trial counsel was ineffective because he "failed to enforce the prosecutor's plea agreement at sentencing" and failed to object when the trial court sentenced him outside the plea agreement.

¶11 Young-Cooper's claims regarding multiplicity, duplicity and selective prosecution were not raised in his postconviction motion or at the hearing on his postconviction motion.[2] The same is true for his claim regarding a breach of the plea agreement and his claim that counsel was ineffective for failing to

[2] Young-Cooper argues that the transcript of the postconviction hearing is fraudulent and does not accurately reflect his arguments. However, this claim is not supported by any facts of record and will not be addressed further.

object when the trial court sentenced him. Issues which are raised for the first time on appeal are waived. *See* ***State v. Lipke***, 186 Wis.2d 358, 369 n.3, 521 N.W.2d 444, 448 (Ct. App. 1994). We therefore decline to address these issues further.[3]

¶12 We also reject Young-Cooper's contention that his trial counsel rendered ineffective assistance because he was not prepared to go to trial. Counsel testified at the postconviction hearing that he was prepared to try the case. Although Young-Cooper argued that this was not true, nothing in the record supports his claim. Consequently, no relief can be granted based upon it.

¶13 Young-Cooper also contends that his trial counsel was ineffective because he "failed by his non-performance to move the trial court for the state to make more definite the dates within the Information and Amended Information." This argument fails because the record reveals that counsel filed a motion to make more definite and certain the dates of the offenses alleged in the complaint. The trial court granted some relief pursuant to the request. Counsel's performance cannot be deemed deficient merely because the trial court did not grant greater relief.

¶14 Young-Cooper's next argument is that his trial counsel rendered ineffective assistance when he failed to appear at the hearing initially scheduled for September 11, 1998, on the postconviction motion and acted unprofessionally when he testified at the rescheduled hearing held on September 15, 1998.

[3] Although these issues are waived, we point out to Young-Cooper that a trial court is not bound to follow the recommendations of the defense or prosecution, even when the recommendations are the result of a plea agreement. *See* ***Young v. State***, 49 Wis.2d 361, 367, 182 Wis.2d 262, 265 (1971). The record indicates that Young-Cooper was informed of this fact both in the guilty plea questionnaire and by the court when he entered his guilty pleas.

However, the postconviction hearing was held pursuant to ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), to preserve trial counsel's testimony on the ineffective assistance of counsel claims. Because counsel was appearing as a witness at this hearing rather than representing Young-Cooper at it, no claim can be made that he provided ineffective representation during these proceedings.

¶15 Young-Cooper also objects that his trial counsel failed to appear with him at hearings held in the trial court on January 24 and 27, 1997. However, it was at the January 24 hearing that Young-Cooper first notified the trial court that he had retained counsel. At the January 27 hearing, the trial court merely set the date for the preliminary hearing. Even if counsel's failure to appear at these hearings could be deemed deficient, nothing in the record provides a basis to conclude that it prejudiced the defense. Consequently, no basis for granting relief based on ineffective assistance exists. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990).

By the Court.—Judgment and order affirmed.

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