COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0503-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN N. DORNBROOK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Kevin N. Dornbrook appeals from a judgment and an order denying his motion for postconviction relief. The issue on appeal is whether the circuit court erred when it denied Dornbrook's motion to withdraw his plea of no contest. Because we conclude that the circuit court did not err, we affirm.

¶2 Dornbrook pled no contest to two counts of second-degree sexual assault with the use of force. As part of the plea agreement, four other counts were dismissed and read in. Prior to sentencing, Dornbrook's counsel asked to be allowed to withdraw because Dornbrook wished to be represented by a different attorney. The court allowed the substitution. Dornbrook then moved to withdraw his plea. After an extensive hearing, the circuit court denied the motion for plea withdrawal.

¶3 The circuit court made findings of fact concerning both Dornbrook's reasons for entering the plea and moving for plea withdrawal. Specifically, the court found that Dornbrook entered the plea voluntarily based on his attorney's advice that he would likely lose at trial, that he did not have a real defense because it would be the victim's word against his claimed lack of recollection, that avoiding a trial would spare "re-victimization" and that pleading might lead to a less severe sentence.

¶4 The court further found that while Dornbrook had offered approximately twenty-one reasons for withdrawing his plea, the real reasons were: (1) he was unhappy with the PSI recommendation of thirty-five years; (2) his new attorney gave him more optimistic legal advice; and (3) he wanted a trial. The court specifically rejected his claim that he pled because his original attorney was not prepared to go to trial and found that Dornbrook had not offered evidence to support his claim that his plea was entered in haste or confusion. The court then sentenced Dornbrook to twenty years in prison on count one and to twenty years consecutive, sentence withheld, on count two.

¶5 The issue on appeal is whether the circuit court erred when it refused to allow Dornbrook to withdraw his plea before sentencing. Dornbrook

incorrectly states the standard of review to be applied to this issue. He contends that the standard of review to be applied is de novo, citing to ***State v. Shanks***, 152 Wis. 2d 284, 448 N.W.2d 264 (Ct. App. 1989). The court in ***Shanks*** stated that "Wisconsin precedent teaches that the criterion for withdrawal of a guilty plea prior to sentencing is whether defendant has shown a fair and just reason for withdrawal. This determination rests within the trial court's discretion." ***Id.*** at 288 (citations omitted). The court went on to conclude that the trial court's decision in that appeal was inadequate to show an application of the facts to the fair and just standard. *See* ***id.*** at 289. The court, therefore, independently reviewed the record. *See* ***id.***

¶6 In this case, however, the circuit court thoroughly analyzed the application of the facts to the fair and just standard. Therefore, we review the circuit court's decision for an erroneous exercise of discretion. "We will uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards." ***Id.*** (citation omitted).

¶7 Dornbrook offers a number of reasons why the circuit court's decision was in error. First, he asserts generally that there were fair and just reasons which entitled him to relief. Specifically, he asserts that he consistently asserted his innocence. Whether a defendant has asserted a fair and just reason for withdrawal of his or her plea involves the consideration of a number of factors. *See* ***id.*** at 290. One factor to be considered is the assertion of innocence. *See* ***id.***

¶8 Contrary to his claim on appeal, Dornbrook did not assert his innocence. Rather, he stated that he did not remember if he committed the offense. This is far from an assertion of innocence. It is, more likely, a powerful

piece of evidence against Dornbrook. This factor does not require that Dornbrook be allowed to withdraw his plea.

¶9 Dornbrook next asserts that his plea was entered in haste and confusion. "Hasty entry of the pleas, confusion on the defendant's part and coercion on the part of trial counsel are also factors for consideration." ***Id.*** Dornbrook specifically asserts that he entered the plea because he was rushed and because his plea attorney was "ill prepared" to try the case. The circuit court specifically rejected that contention, finding that the attorney's statement that he was prepared to try the case was credible and Dornbrook's assertions that the attorney was not prepared were incredible. We see no reason to disturb this finding.

¶10 The record also does not support Dornbrook's contention that the plea was hurried or confused. Dornbrook was at liberty during the time he received the offer and decided to accept it. The circuit court found that he had plenty of opportunity to discuss and consider the agreement. The evidence showed that Dornbrook accepted the offer because he was advised by his counsel that he had a tough case. Based on the fact that Dornbrook stated that he could not remember whether he committed the crime charged and that the victim was prepared to testify that he had, we cannot conclude that this advice was inappropriate.

¶11 Another factor to be considered in determining whether the plea was entered in haste or confusion is whether the motion to withdraw the plea "was expeditiously brought or was delayed." ***Id.*** (citation omitted). Dornbrook asserts that he testified that he decided to withdraw the plea shortly after he entered it, but

was advised by his friends and family that plea withdrawal was not possible.[1] The circuit court rejected Dornbrook's assertion that he acted promptly to withdraw the plea. The court stated: "[I]t stands uncontroverted that when Kevin Dornbrook testified on his own behalf, he testified that he did not make his decision to withdraw his pleas until after he reviewed the presentence investigation. The defendant's testimony was void of any credible evidence that he was confused, pressured or acted in haste." Again, these findings are supported by the record and we see no reason to disturb them.

¶12 The circuit court considered the appropriate facts and law when it determined that Dornbrook had not offered a fair and just reason for withdrawing his plea. This determination is supported by the record and involved a logical application of the law to the facts. We affirm.

¶13 Dornbrook next asserts that he should have been allowed to withdraw his plea on various grounds of ineffective assistance of counsel. Citing to ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), Dornbrook asserts again that the standard of review is de novo. Once again, Dornbrook is mistaken. ***Bentley*** considered the standard of review applicable to a decision by a circuit court not to hold an evidentiary hearing on a motion to withdraw a plea after sentencing based on a claim of ineffective assistance of counsel. *See* ***id.*** at 308-311.[2] In this case, the circuit court held a hearing and concluded that counsel was not ineffective.

[1] Dornbrook entered the plea on September 22, 1997. His motion to withdraw was filed on April 17, 1998.

[2] Even in that situation, the standard of review is not a straight de novo review. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308-11, 548 N.W.2d 50 (1996).

¶14 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶15 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶16 There is a strong presumption that counsel rendered adequate assistance. *See* ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

¶17 Dornbrook asserts that his plea counsel was ineffective for failing to advise him of the shortcomings of the State's case.[3] Dornbrook asserts, among

[3] The State asserts that this argument was waived. While the State is correct that this particular ground for asserting ineffective assistance of counsel was not raised in the motion, Dornbrook's counsel did elicit testimony concerning the issue at the hearing, and the circuit court did address the issue in its decision in the context of whether Dornbrook had offered a fair and just reason for withdrawing his plea. We will, therefore, consider it.

other things, that counsel should have explained to him inconsistencies in the hospital and police reports. The circuit court, however, found that the State's case was very strong against Dornbrook. The court stated that an attorney is not required to go over "line by line with the client every police report, hospital record, or crime lab report." The court further found that "[r]emarkably, the defendant testified that he in fact received copies of the scientific evidence from the crime lab, copies of the police reports, and at the time the plea offer was given to him was when he had everything that the State had." The court went on to find that, based on all of this, Dornbrook had not established that his plea attorney was ineffective. We agree.

¶18 Dornbrook next asserts that his attorney was ineffective for failing to challenge counts one through three of the information as multiplicitous. The circuit court also rejected this claim, relying on ***State v. Kruzycki***, 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995), to find that the acts were sufficiently different in fact to be charged separately. The court further concluded that Dornbrook's counsel was not ineffective for failing to challenge these counts as multiplicitous because the court would have rejected the challenge. We agree.

¶19 Dornbrook also asserts that these claims of ineffective assistance of counsel establish fair and just reasons why he should be allowed to withdraw his plea. Because we have concluded that counsel was not ineffective, we also reject his claim that these factors constitute fair and just reasons to withdraw his plea.

¶20 Finally, Dornbrook contends that his plea colloquy was inadequate under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The circuit court agreed with this argument, but concluded that the State had met its burden of showing that the plea was knowingly, intelligently and voluntarily entered despite

the deficiency in the colloquy. *See* ***id.*** at 274. Without specifically addressing the question of whether the colloquy was, in fact, inadequate, we will affirm on the grounds that the State met its burden of showing that the plea was properly entered.

¶21 The circuit court specifically found that the plea attorney testified that he had gone through the elements with his client and that his client stated that he understood. The court also found that Dornbrook had the information and complaint. And finally, the court noted that Dornbrook never testified that he did not understand the elements. Based on all of this, the circuit court concluded that the State had demonstrated that the plea was knowingly, voluntarily and intelligently entered. We agree. Therefore, we affirm the judgment and the order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).