COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0773-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. WOMBLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

VERGERONT, J.[1] David Womble appeals his judgment of conviction for two counts of resisting or obstructing an officer, and the order denying his motion for postconviction relief. Womble argues his conviction should be reversed because his trial counsel was ineffective, and his guilty plea

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

was not knowingly, voluntarily and intelligently entered. We conclude Womble's trial counsel's actions were not outside the range of professionally competent assistance, and he knowingly, voluntarily and intelligently pleaded guilty pursuant to a plea agreement.[2] We therefore affirm.

BACKGROUND

Based on incidents that occurred during a traffic stop, Womble was charged in a criminal complaint with two counts of resisting or obstructing an officer, one count of false imprisonment and one count of possessing a concealed weapon, all with a habitual criminality enhancer. Rodney Kimes, trial counsel, testified at the postconviction hearing that he met with Womble, subpoenaed witnesses, and prepared for a trial on these counts.

On the day scheduled for trial the judge began voir dire of the jury panel by asking, "Is there anyone of you … who is acquainted with David Womble?" When one of the potential jurors, Mr. Mitchell, raised his hand to this question, the judge asked, "where do you know Mr. Womble from?" Mitchell answered, in front of the entire jury pool, "I've arrested him," and explained that he was a retired police officer. Another juror who also raised his hand acknowledged that he too was a police officer and that he had similar contact with Womble. Both of these potential jurors were eventually struck from the jury panel for cause by the court.

[2] Womble also argues he should be permitted to withdraw his plea because of a manifest injustice. However, the substance of that argument is that his plea was not knowingly, voluntarily and intelligently entered. Our conclusion that the plea was not infirm therefore disposes of the manifest injustice argument.

Kimes objected to Mitchell's comment (on Womble's behalf) because he thought it was highly prejudicial to the rest of the jury panel—that it was essentially allowing the jury to hear otherwise inadmissible evidence of other bad acts. The court overruled the objection and denied Kimes' motion for a mistrial based on Mitchell's comment. After the jury was selected, the court adjourned for a brief recess before starting the trial.

During that recess, Kimes and Womble negotiated a plea agreement with the district attorney. Womble testified at the postconviction hearing that "Kimes told me that I wasn't going to get a fair trial, that there was prejudice [and] … you might as well go for the deal." When the court session reconvened, the judge accepted Womble's pleas of guilty to two counts of resisting or obstructing an officer and, after the plea colloquy, immediately moved to sentencing.

Womble argued at his postconviction motion hearing, and argues again on appeal, that Kimes was ineffective because he did not file a motion to conduct an individual voir dire of the officers on the jury panel as an effort to avoid "jury contamination." He also contends the court's plea colloquy did not meet the statutory and case law requirements, and the State failed to prove that the plea was knowingly, voluntarily and intelligently entered.

DISCUSSION

Ineffective Assistance of Counsel

The question of whether counsel was ineffective is one of both fact and law. ***Strickland v. Washington***, 466 U.S. 668, 698. The trial court's findings as to what the attorney did, what happened at trial, and the basis for the challenged conduct, are factual and will be upheld on appeal unless they are clearly

erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient is a question of law to be determined independently by the reviewing court. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992).

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland***, 466 U.S. at 687. Representation is not constitutionally ineffective unless both elements of the test are satisfied. ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993). Thus, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). In this case, we conclude the attorney's performance was not deficient and therefore do not consider the prejudice element.

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38. In our review of counsel's performance, we give great deference to the attorney, and every effort is made to avoid determinations of ineffectiveness based on hindsight. Instead the case is reviewed from counsel's perspective at the time of trial, and "the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48.

Womble argues that his trial counsel was ineffective because he did not take any prophylactic action to prevent jury contamination. The afternoon

before the scheduled trial, Kimes received a list of potential jurors that included their occupation. The next morning, prior to voir dire, he received cards with more detailed information on each potential juror. Kimes testified that he reviewed the list with Womble, and Womble did not say he knew anyone on the panel.[3] Womble asserts that, since Kimes knew prior to voir dire that police officers were on the panel, and also knew that Womble had an extensive criminal record,[4] Kimes should have taken some action to prevent the police officers from answering potentially prejudicial questions in the presence of the other jurors. Womble argues that Kimes should have made a motion to conduct an individual voir dire of the officers outside the presence of the jury pool. With the advantage of hindsight, it seems that this may have been a good idea. However, Womble has not provided us with any evidence that such a precautionary measure is expected by counsel acting "reasonably within professional norms."[5] ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. We conclude Womble has not established that Kimes' failure to prevent this potential prejudice was "outside the wide range of professionally competent assistance"; and he has therefore not overcome the presumption that Kimes' performance was not deficient.

[3] Womble testified that Kimes did not review the list with him, but the court stated that when there were discrepancies between the testimony of Kimes and Womble, it believed Kimes. A trial court has the discretion to make such credibility decisions in finding the facts. *See* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977).

[4] The record reveals that Womble had seventeen previous convictions.

[5] Kimes acknowledged that it is "accepted in the profession" that what jurors know may influence how they decide a case, but there was no evidence that it is accepted in the profession that attorneys should request individual voir dire of potential jurors under circumstances similar to those here.

Plea Withdrawal

For a plea to be knowingly entered, the defendant must understand the charges against him or her and understand the constitutional rights that he or she is waiving, including the right against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. ***State v. Bangert***, 131 Wis.2d 246, 265, 389 N.W.2d 12, 22 (1986). A plea may be involuntary either because the defendant does not have a complete understanding of the charge or because he does not understand the nature of the constitutional rights he is waiving. ***Id.***

To establish lack of a knowing, voluntary and intelligent plea, Womble must first make a prima facie showing that the trial court violated § 971.08, STATS., and allege that he did not know or understand the information that the trial court should have provided at the plea hearing. ***State v. Brandt***, 226 Wis.2d 610, 618 n.5, 594 N.W.2d 759, 763 (1999). If he is able to demonstrate both of these items, the State must then show, by clear and convincing evidence, that the defendant nevertheless knowingly entered the plea. ***Id.*** The State may utilize any evidence in the record to substantiate that the plea was knowingly, voluntarily and intelligently made. ***Bangert***, 131 Wis.2d at 274-75, 389 N.W.2d at 26.

Whether a defendant has made a prima facie showing that his plea was accepted without compliance with § 971.08, STATS.,[6] or other mandatory

[6] Section 971.08, STATS., provides, in pertinent part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

duties is a question of law, which we review de novo. ***State v. Hansen***, 168 Wis.2d 749, 755, 485 N.W.2d 74, 77 (Ct. App. 1992).

Womble argues the plea colloquy in this case did not meet the statutory and case law requirements and the State did not establish that the plea was knowingly, voluntarily and intelligently entered. We disagree.

The court reviewed the elements of the two counts to which Womble pleaded guilty, as required by § 971.08(1)(a), STATS., and informed Womble that the State would have to prove each element beyond a reasonable doubt.[7] The court told Womble that it was not bound by the plea agreement. Then, after explaining what the State would need to prove for the habitual criminality enhancer charge, the court informed Womble of his potential punishment as follows:

> THE COURT: And the maximum penalty then for each of these offenses is six years in the Wisconsin State Prison and a $10,000 fine on each offense. Do you understand that?
>
> THE DEFENDANT: Oh, yes.
>
> THE COURT: Okay. You understand that. And, knowing all of those facts, knowing that to be true, it's still your intention to enter those guilty pleas?
>
> THE DEFENDANT: For the two?
>
> THE COURT: Yes.
>
> THE DEFENDANT: Yes, sir.

[7] Womble asserts that the trial court did not advise him that the State needed to prove every element beyond a reasonable doubt. However, the trial court, in describing the right to trial Womble would waive, did say "the State would have to prove that you are guilty beyond a reasonable doubt," and then proceeded to describe each element the State would need to prove.

According to §§ 946.41(1) and 939.62(1)(a), STATS., the correct maximum penalties for each count would be three years and $10,000, or a total of six years and $20,000. The court, therefore, overstated the maximum penalty by six years. However, Womble did not argue at his postconviction motion, and he does not develop an argument on appeal, that the court's misstatement prevented him from gaining an "understanding of the nature of the charge and the potential punishment if convicted." Section 971.08(1)(a).[8] We therefore do not consider further this aspect of the plea colloquy. *See* ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 171, 288 N.W.2d 129, 138-39 (1980) (we do not generally consider issues not raised in the trial court); ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) (we do not consider undeveloped arguments).

The trial court also ensured that Womble knew what constitutional rights he was waiving with his guilty plea by stating those rights in the plea colloquy. It is not necessary for a defendant to complete a plea questionnaire and waiver of rights form. *See* ***Brandt***, 226 Wis.2d at 621, 594 N.W.2d at 764. We conclude Womble's plea was knowingly, voluntarily and intelligently entered.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* § 809.23(1)(b)4, STATS.

[8] We note that the maximums were overstated by the court, not understated, and the defendant was not sentenced to the misstated maximum penalties, but was sentenced in accord with the plea agreement. We also note that the correct maximum penalties were represented on the criminal complaint and the information.