COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP26-CR
2015AP27-CR
2015AP28-CR

Cir. Ct. Nos. 2012CF121
2012CF163
2013CF33

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON A. SODEMANN,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Fond du Lac County: JEFFREY S. FROEHLICH, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Jason A. Sodemann pled no contest to three counts of burglary as a repeater and one count of robbery with use of force. He asks that

we allow him to withdraw his pleas, reverse the judgments of conviction and the order denying his motion for postconviction relief, and remand for reinstatement of the original charges in the three underlying cases and for further proceedings. The gist of his claim is that his two appointed attorneys rendered ineffective assistance, the first by failing to seek a proffer, or limited immunity, agreement before Sodemann voluntarily gave an inculpatory interview to police, and the second, assuming the first's ineffectiveness, by failing to move to dismiss the case or to suppress the unprotected statement. We disagree and affirm.

¶2 A March 2012 criminal complaint charged Sodemann with three counts each of burglary of a dwelling and misdemeanor theft, all as a repeater; a later information added three more counts of misdemeanor theft. An April 2012 complaint charged him with substantial battery and robbery with use of force. Assistant State Public Defender Laurel Munger was appointed to represent him.

¶3 Sodemann was returned to prison on an extended supervision sanction. The State sought to delay his impending release by moving to modify his bond. Sodemann repeatedly asked Munger to arrange a meeting with law enforcement to provide information he claimed to have about other criminal activity, including an as-yet uncharged November 2011 burglary and theft. Sodemann hoped his cooperation would gain his release from his current imprisonment and that he would avoid prison in the November 2011 matter should charges be filed. Sodemann also wanted to implicate Ryan Tessmann in that event, as Tessmann had told police Sodemann was solely responsible.

¶4 Munger knew Sodemann was motivated by a desire to be released from prison and to avoid future imprisonment but cautioned him that implicating Tessmann necessarily would implicate himself. While Munger told Sodemann she

hoped the State would not file additional charges, she did not say that the State had made any promises or guarantees that his cooperation would accomplish those ends or that he definitely would not face new charges. To the contrary, she told him that the prosecutor had made clear that the State would offer him no consideration before he gave his statement.

¶5 Sodemann nonetheless wanted to proceed. In November 2012, police officers met with Sodemann and Munger at the prison. Munger told police before the interview began that she hoped Sodemann would not accrue additional charges. As anticipated, Sodemann implicated himself in the November 2011 matter, as well as in other incidents.

¶6 As Sodemann had hoped, the State withdrew its earlier motion to modify bond and he was released. Two months later, however, the State, through a different prosecutor, filed a complaint in the November 2011 matter (case no. 13-CF-33), charging Sodemann with party-to-a-crime burglary of a dwelling and misdemeanor theft. The complaint was based on Sodemann's interview, Tessmann's statement, and the fact that police found some of the stolen items—two safes—in Sodemann's hotel room.

¶7 Munger withdrew as counsel. Attorney Anthony Nehls was appointed to represent Sodemann on all three cases.

¶8 Sodemann told Nehls he thought the State had agreed not to charge him in 13-CF-33. After speaking to Munger and the prosecutor and listening to the recorded interview, Nehls concluded that the State had made no such deal. When Nehls asked Sodemann why he made a statement without any promises, Sodemann just "shook his head and said he was stupid." Nehls considered an

ineffective-assistance-of-counsel claim for allowing the interview without first securing an agreement from the State, but concluded it was not possible at the trial level. Also, his investigation convinced Nehls that a motion to suppress the statement had no legal basis.

¶9 Sodemann entered no-contest pleas to the three burglary charges in the first complaint and to the robbery with use of force in the second. All remaining charges, including those in 13-CF-33, were dismissed and read in at sentencing. The court sentenced Sodemann to three consecutive four-year terms for the burglaries plus a consecutive thirteen years for the robbery. He also was ordered to pay $1000 in restitution in 13-CF-33. *See* WIS. STAT. § 973.20(1g)(a), (2) (2013-14)[1]; ***State v. Lee***, 2008 WI App 185, ¶9, 314 Wis. 2d 764, 762 N.W.2d 431 (restitution may be ordered in any crime considered at sentencing, which includes read-ins).

¶10 Sodemann filed a postconviction motion seeking either resentencing or to withdraw his plea, asserting ineffective assistance of both Munger and Nehls. Sodemann claimed Munger had not told him that 13-CF-33 would be discussed during his interview, that he "trusted" that he would not face additional charges and was surprised when he was arrested, and that he would not have agreed to the read-in had he known Nehls could have filed a motion to suppress his statement. The motion was denied after a ***Machner***[2] hearing. Sodemann appealed. This court consolidated the cases for briefing and disposition.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶11 "A defendant is entitled to withdraw a guilty [or no-contest] plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***Id.***

¶12 To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, the defendant must demonstrate that counsel's errors were so serious that, but for the errors, "there is a reasonable probability that … the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 687, 694. We uphold the circuit court's factual findings regarding deficient performance and prejudice unless they are clearly erroneous. ***Johnson***, 153 Wis. 2d at 127. Determining deficiency and prejudice, however, are questions of law that we review independently. ***Id.*** at 128. We need not consider both prongs if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶13 Sodemann contends Munger ineffectively allowed him to meet with law enforcement without first seeking, much less obtaining, a proffer agreement to shield him from additional charges. We cannot agree.

¶14 The circuit court implicitly concluded that Munger's failure to seek a proffer agreement was not deficient. Because the State had made clear it would offer no advance consideration, pursuing one would have been a futile exercise.

¶15 The court noted, however, that even if Munger's performance was deficient, it was not prejudicial. It found not credible Sodemann's claim that he was unaware 13-CF-33 would be discussed with the police, as his multiple requests to meet with them evinced a last-ditch effort to improve his bleak situation. He also got released from prison on bond, as he wanted. Further, although his statement did lead to new charges, the court found that it was not necessary to them as he could have been charged due to the discovery of the burglary proceeds in his possession and to Tessmann's statement. Further, Sodemann's conduct in 13-CF-33 could be considered at sentencing even if, as occurred, the charges were dismissed and read in or, indeed, had he not been charged at all. *See* ***State v. Frey***, 2012 WI 99, ¶¶47-48, 343 Wis. 2d 358, 817 N.W.2d 436.[3] These findings are not clearly erroneous.

¶16 We independently conclude that Sodemann has not established deficient performance. Munger testified that it is not the "custom and practice" in Fond du lac county to use them—indeed, that in her fifteen-year career with the SPD she has been involved in only one case (and that involving federal charges) in which one was used. Sodemann himself concedes that proffer agreements are more common in federal court and, in fact, that "no Wisconsin cases discuss[] the

[3] We recognize that Sodermann would have avoided the restitution order had he not been charged. We nonetheless decline to hold that he is prejudiced because, as noted, he easily could have been charged even without the statement.

necessity for such agreements in fulfilment of a defense attorney's obligations to provide effective assistance of counsel, probably because so few cases need it." An ineffective-assistance-of-counsel claim does not lie where counsel's duty to act is not clear. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). More importantly, the State already had said it would make no promises before hearing Sodemann's statement. We will not fault Munger for not pursuing a meritless action. *See* ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291. Sodemann has not shown that not seeking a proffer agreement was "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690-91.

¶17 Beyond that, Munger conveyed the State's position to Sodemann and emphasized that implicating Tessmann meant implicating himself. Although aware that he had received no promises as to what the State would do with that information, Sodemann opted to hedge his bets and meet with law enforcement. The results of a choice Sodemann now regrets cannot be laid at Munger's feet.

¶18 Sodemann next contends Nehls rendered ineffective assistance by failing to seek to dismiss 13-CF-33 or to suppress his interview with law enforcement.[4] Nehls explained at the ***Machner*** hearing why he decided not to file a motion to suppress. Matters of reasonably sound strategy are "virtually unchallengeable" and do not constitute ineffective assistance. *See* ***Strickland***, 466 U.S. at 690-91.

[4] Sodemann tacitly concedes that a motion to dismiss was contingent upon a successful motion to suppress. We agree with the circuit court that a motion to suppress would have been unfounded. We therefore do not discuss the motion to dismiss any further.

¶19 In addition, the circuit court concluded that no basis existed for Nehls to have filed a motion to suppress. Nehls therefore cannot have been ineffective for failing to challenge Munger's performance through a suppression motion for which the circuit court saw no basis. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (no ineffectiveness in not making motion that would have been denied).

¶20 Sodemann has not shown that Munger and Nehls were ineffective. Accordingly, plea withdrawal is not necessary to correct a manifest injustice.

By the Court.—Judgments and orders affirmed.

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