COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP801-CR **Cir. Ct. No. 2011CF2754**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTERIO MARTEZ GIRLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Onterio Martez Girley appeals from a corrected judgment of conviction for one count of conspiracy to commit armed robbery with

the threat of force, contrary to WIS. STAT. §§ 939.31 and 943.32(2) (2011-12), and from an order denying his motion for postconviction relief.[1] Girley argues that his trial counsel coerced him into pleading guilty by promising him that he would be released on bail before sentencing, that his trial counsel should have moved to withdraw Girley's guilty plea prior to sentencing, and that the trial court should have granted Girley's postsentencing motion to withdraw his guilty plea. We affirm.

BACKGROUND

¶2 Girley and two other men were charged with several crimes in connection with plans they made to rob a drug dealer. In January 2012, Girley reached a plea agreement with the State pursuant to which he pled guilty to one count of conspiracy to commit armed robbery with the threat of force. In exchange for Girley's guilty plea, the State agreed to dismiss and read in one count of being a felon in possession of a firearm. The State further agreed "to leave the sentence up to the court."

¶3 The trial court conducted a plea colloquy with Girley.[2] It asked Girley about threats and promises:

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[1] The original judgment of conviction erroneously indicated that Girley was convicted of armed robbery, rather than conspiracy to commit armed robbery. The judgment was subsequently corrected.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Jeffrey Conen accepted Girley's guilty plea. The Honorable Jeffrey A. Wagner presided over the trial of Girley's co-defendants and Girley's motion to withdraw his guilty plea, sentenced Girley, and denied Girley's postconviction motions.

> [Trial court]: Anyone threaten you at all or promise[] you anything to give up your rights here today?
>
> [Girley]: No one has threatened me at all.
>
> [Trial court]: Has anyone promised you anything outside of any plea agreement?
>
> [Girley]: Yes, just the opportunity to have the prosecutor's consideration.
>
> [Trial court]: But outside the plea agreement has anyone promised you anything?
>
> [Girley]: No.

¶4 At the conclusion of the plea colloquy, the trial court found Girley guilty and asked about ordering a presentence investigation and scheduling the sentencing hearing. At that point, trial counsel informed the trial court that Girley had been "[d]ebriefed" by law enforcement and would be testifying against his co-defendants at their upcoming trial. The trial court asked: "That will be[,] if he does testify[,] I'm assuming that will be a factor that is going to be made known to the sentencing Judge?" Trial counsel answered affirmatively.

¶5 At the April 2012 trial of Girley's co-defendants, Girley's testimony was different than his trial counsel and the State expected. Specifically, Girley testified that he "was actually forced to plead guilty" and had been "threatened" by trial counsel. He further testified that he remembered very little about the day the crime was committed and said that when he was debriefed by law enforcement officers, he "made up a story so I could have the story to testify in court to help myself out." Girley explained:

> My attorney told me that if I testified[,] that I would be going home that day. The day that I ple[d] guilty, I would be going home. I didn't go home…. I told [my attorney] that I feel as though I was forced to plead guilty because I was promised to go home…. I told him I would like to

> withdraw my guilty plea as soon as possible, and I would like him to withdraw from my case.

¶6 Trial counsel, who was present for Girley's testimony, moved to withdraw as counsel for Girley. The trial court granted the motion and new counsel was appointed for Girley.

¶7 Newly appointed counsel did not file a motion to withdraw Girley's guilty plea. Instead, Girley and his counsel appeared for sentencing. At that hearing, neither counsel nor Girley mentioned Girley's past statements about wanting to withdraw his guilty plea. Counsel told the trial court that Girley "had a little more than cold feet during the [co-defendants'] trial," explaining that Girley and his family were "receiving threats on [F]acebook and he was under a lot of pressure." The trial court sentenced Girley to eight years of initial confinement and four years of extended supervision.

¶8 Two different postconviction attorneys were ultimately appointed for Girley over the next three years.[3] In August 2013, the first postconviction attorney filed a one-page motion to withdraw Girley's guilty plea on grounds that the attorney who represented him at sentencing erroneously told him the day before sentencing "that it was too late to withdraw his guilty plea." The trial court denied the motion in a written order, explaining that even if counsel had performed deficiently, Girley had "not shown that he had a sufficient basis for withdrawing his plea."

[3] The record indicates that there were various delays in the postconviction litigation process caused by attorney illness, attorney workload, and other factors.

¶9 The first postconviction attorney did not file an appeal and was later replaced with another attorney. This court granted the second postconviction attorney's request for additional time to file another postconviction motion or an appeal. A new postconviction motion was filed. It asserted that Girley should be allowed to withdraw his guilty plea because he was denied the effective assistance of trial counsel. The motion alleged that the trial counsel who represented him at the plea hearing provided ineffective assistance by telling Girley "that he would be released if he entered a guilty plea," thereby coercing him into entering a guilty plea. The motion explained: "[Girley's trial counsel] told him that if he pled guilty, he would be released on bond after the plea hearing … [and] that after he was released on bond, he would be able to work in the community for several months to show the court that he could be a responsible member of society." The motion further alleged that the attorney who represented Girley at sentencing provided ineffective assistance by failing to file a motion to withdraw Girley's plea prior to sentencing, when plea withdrawal is more liberally granted.

¶10 In its response, the State conceded that if the attorney who represented Girley at sentencing told Girley that it was too late to move for plea withdrawal prior to sentencing, then counsel performed deficiently. The issue would then become whether Girley was prejudiced by that deficient performance.

¶11 After reviewing the State's response, the trial court issued a written order discussing the motion and scheduling a ***Machner*** hearing.[4] In that order, the trial court agreed with the State that even if the attorney who represented Girley at sentencing performed deficiently by not seeking presentence plea withdrawal,

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

Girley would not be entitled to relief unless he could demonstrate prejudice: that a presentence motion to withdraw his guilty plea would have been granted because there was a "fair and just reason" for him to withdraw his plea prior to sentencing. Accordingly, the trial court said it would hear testimony from both Girley and the attorney who represented Girley at the plea hearing.

¶12 The ***Machner*** hearing was held three years after the plea was taken. Trial counsel was unable to remember some details, but he testified that while he "may have told [Girley] that as a result of his cooperation and after his testimony that his bail could be lowered and that we could get him out into the community," trial counsel never promised Girley or any other client that he would be released on bail. Trial counsel said he would never do so because "I have no control over it. It's all up to the discretion of the Court."[5]

¶13 In contrast, Girley testified that trial counsel "explained to me that as soon as I got finished taking the plea, I would be released on $5,000 cash bail." On cross-examination, the State asked Girley why, if a reduction in bail was so crucial to his decision to plead guilty, he did not mention bail during the plea colloquy and instead said only that he had been promised "the opportunity to have the prosecutor's consideration." Girley responded: "Because I didn't know that I was being tricked. I just wanted it to be on the record that I knew that I was being promised something."

[5] Trial counsel, as well as Girley, also provided testimony about what trial counsel predicted Girley's sentence might be. On appeal, Girley does not argue that he was entitled to withdraw his plea based on his trial counsel's advice about potential sentence length, so we do not discuss this testimony.

¶14 After the motion hearing, the parties submitted written arguments to the trial court. The trial court denied the motion in a seven-page written order that discussed the testimony at length.[6] The trial court found:

> Having listened to the testimony and observed the witnesses, the court finds that the defendant's claim that [trial counsel] promised him that he would be released on lower bail if he pled guilty is not credible. It is important to note that the plea agreement did not provide for the defendant's release on a lower bail. The defendant testified that the only thing he was thinking about when he decided to accept the State's plea offer was getting his bail lowered so that he could be released into the community to work and help his fiancée. If that is the only thing the defendant was thinking about, then it defies all logic that the defendant would fail to mention the all-important promise of a lower bail when the [plea] court asked him if anyone had made any promises to him outside the plea agreement.

(Footnote omitted.) The trial court implicitly accepted trial counsel's testimony, stating:

> Even though counsel could not recall many of the specifics of his representation in this case, he was very clear that he would not have promised this defendant or any other defendant that he represented a particular cash bail because he knows, as all experienced practicing criminal defense attorneys do, that the issue of bail is up to the discretion of the court. While [trial counsel] may have told the defendant that he *could* get a lower bail if he pled guilty and cooperated against his co-defendants, such a representation is not the equivalent of a promise. Consequently, even if the defendant entered his guilty plea in this case because he *thought* he would get a lower bail, it does not support a finding that the defendant's plea was the product of coercion.

[6] This court will not attempt to summarize the parties' posthearing briefs or the trial court's thorough written decision.

¶15 The trial court concluded that trial counsel did not coerce Girley to enter his plea and therefore did not provide ineffective assistance. It further concluded that the attorney who failed to seek plea withdrawal before sentencing did not provide ineffective assistance because Girley "did not have a fair and just reason to withdraw his plea on this basis." This appeal follows.

DISCUSSION

¶16 We begin our discussion with the relevant legal standards. "A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show that there is a 'fair and just reason,' for allowing him or her to withdraw the plea."[7] ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999) (citation omitted). If a defendant makes this necessary showing, the trial court "should permit the defendant to withdraw his or her plea unless the prosecution has been substantially prejudiced." ***Id.*** at 283-84. One "fair and just reason" for plea withdrawal that courts have recognized is "coercion on the part of trial counsel," *see* ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999), which is the basis Girley asserted in his postconviction motion.

¶17 On appeal, when we consider a trial court's decision on a motion to withdraw a plea prior to sentencing, "we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact." ***State v. Jenkins***, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. ***Jenkins*** continued: "The standard also applies to credibility determinations. In reviewing factual

[7] In contrast, a defendant seeking to withdraw a plea after sentencing faces a higher burden. To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

determinations as part of a review of discretion, we look to whether the court has examined the relevant facts and whether the court's examination is supported by the record." ***Id.*** (citations omitted).

¶18 In this case, the issue of whether Girley had a "fair and just reason" to withdraw his plea *prior* to sentencing was decided *after* sentencing, because Girley's trial counsel failed to move to withdraw his guilty plea prior to sentencing. Thus, whether there was a "fair and just reason" for plea withdrawal was decided in the context of an ineffective-assistance-of-counsel claim. To demonstrate ineffective assistance, a defendant must prove two things: "First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted).

¶19 With those legal standards in mind, we consider Girley's arguments on appeal. He continues to assert that the attorney who represented him at the plea hearing coerced him into entering the plea. In his brief, Girley details a variety of allegations, all of which he raised in his testimony at the ***Machner*** hearing. He further argues that his trial counsel's testimony lacked credibility because counsel could not recall the specifics of the case and "made no attempt to refresh his memory by reviewing the file or timesheets." Girley's brief also asserts that

Girley "had a clearer recollection of what happened, but still did not remember every single detail, which indicates he was likely telling the truth." Girley argues that he "was the more credible witness at the ***Machner*** hearing." (Bolding added.)

¶20 In summary, Girley's challenge to the trial court's order denying his motion to withdraw his guilty plea is a challenge to the trial court's credibility determinations and findings of fact. As explained above, this court will not overturn a trial court's credibility assessments or findings of fact unless they are clearly erroneous. *See* ***Jenkins***, 303 Wis. 2d 157, ¶33. In this case, the trial court heard the testimony of both Girley and his trial counsel. It issued a lengthy decision summarizing that testimony and explicitly found that Girley was not credible and that Girley had not been coerced into pleading guilty. The trial court explained the basis for its credibility assessments and findings. Having reviewed the hearing transcript, the parties' trial court briefs, and the trial court's written decision, we discern no basis to overturn those assessments and findings; they are supported by the testimony and are not clearly erroneous.

¶21 Based on the trial court's credibility assessments and findings, it concluded that Girley had failed to demonstrate a "fair and just reason" to withdraw his plea prior to sentencing. *See* ***Kivioja***, 225 Wis. 2d at 283. Accordingly, it concluded that Girley was not prejudiced when trial counsel failed to file a plea withdrawal motion prior to sentencing. We agree with the trial court's analysis; Girley is not entitled to relief. We affirm the corrected judgment and the order denying Girley's postconviction motion.

By the Court.—Judgment and order affirmed.

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