COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2970-CR **Cir. Ct. No. 2011CF653**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS L. COOPER,

DEFENDANT-APPELLANT.

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

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Demetrius Cooper appeals the circuit court's judgment convicting him of two counts of delivering heroin as a party to the crime. Cooper also appeals the court's order denying his motion for postconviction relief. Cooper argues that he is entitled to plea withdrawal because

the prosecution violated a legal obligation to disclose information. For the reasons below, we affirm.

Background

¶2 Cooper was charged with a number of crimes, including four counts of delivering heroin as a party to the crime. According to the criminal complaint and the preliminary hearing transcript, each of the four delivery counts involved a similar pattern. A confidential informant (CI) working with police would call one of two cell phone numbers the CI associated with Cooper; police would record the call; during the call, the CI and Cooper would arrange for the CI to purchase heroin; and, shortly thereafter, Cooper would send a "runner" to physically deliver the heroin to the CI.

¶3 At the preliminary hearing, the CI testified that he had purchased heroin from Cooper more than 50 times in the past, that he recognized Cooper's voice on the phone, and that he spoke with Cooper during the phone calls when they arranged the controlled buys. In addition, a police officer testified at the preliminary hearing that he had heard Cooper's voice on the phone on other occasions and recognized Cooper's voice on the calls arranging the controlled buys.

¶4 Cooper pled guilty to two of the four delivery counts. Other charges against Cooper were dismissed.

¶5 In a postconviction motion seeking plea withdrawal, Cooper alleged that the prosecution improperly failed to disclose four categories of information. Cooper further alleged that he would not have entered his plea had he had access to this information prior to his plea.

¶6 After holding evidentiary hearings, the circuit court denied Cooper's motion. The court agreed with the State that Cooper failed to prove that the prosecution engaged in any discovery violations. The court further agreed with the State that, even if the prosecution improperly failed to disclose information, Cooper failed to show that he would not have pled guilty but for the nondisclosure. We reference additional facts as needed below.

Discussion

¶7 Cooper argues that he is entitled to plea withdrawal because the prosecution failed to meet constitutional or statutory duties to disclose information. We need not and do not discuss the specifics of the underlying obligation or obligations that Cooper alleges the prosecution failed to meet. On that topic, Cooper's briefing lacks clarity and, regardless of the source of the alleged underlying obligation, Cooper's arguments fail for the reasons that follow.

¶8 "When a motion to withdraw a plea is made after sentencing, the defendant must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Sturgeon***, 231 Wis. 2d 487, 495, 605 N.W.2d 589 (Ct. App. 1999). Here, as we understand the parties' briefing, they agree that a defendant may establish a manifest injustice if the defendant shows both that the prosecution failed to meet its obligations to disclose information *and* that there was a causal connection between the nondisclosure and the defendant's decision to enter a plea. We follow this two-part framework in analyzing Cooper's arguments.

A. Whether The Prosecution Improperly Failed To Disclose Information

¶9 As noted above, Cooper alleged that the prosecution improperly failed to disclose four categories of information. More specifically, Cooper alleged that the prosecution failed to disclose:

> (1) discs containing recordings of the phone calls arranging the controlled buys;
>
> (2) phone records for one of the cell phone numbers the CI associated with Cooper;
>
> (3) a recording of a police interview with the "runner" who physically delivered the heroin to the CI; and
>
> (4) written statements the CI made after each controlled buy.

¶10 We will assume without deciding that, in order to comply with its discovery obligations, the prosecution had to disclose all of this information by the time of Cooper's plea. Regardless, as we explain below, with the possible exception of the first category of information, Cooper's briefing fails to persuade us that the prosecution failed to disclose any of the information.

¶11 As to the second, third, and fourth categories of information, Cooper's briefing loses sight of the fact that Cooper cannot now rest on mere allegations. As noted, the circuit court held evidentiary hearings at which Cooper had the burden to show nondisclosure by clear and convincing evidence; it was not the State's burden to affirmatively show disclosure. *See* ***id.*** ("defendant must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice"). Cooper's briefing provides no discussion, based on *evidence*, as to how he met his burden as to the second, third, and fourth categories of information.

¶12 Thus, Cooper fails to demonstrate that the record shows non-disclosure as to these three categories. Moreover, we observe that, even if the prosecution improperly failed to disclose these three categories of information, Cooper's briefing does not demonstrate how he met his burden to show a causal connection between nondisclosure and his decision to enter his plea. Rather, as reflected in the discussion below, Cooper's causal connection argument appears directed mainly at the first category of information. Accordingly, we discuss the second, third, and fourth categories no further.

¶13 As to the first category of information—discs that contain recordings of the controlled-buy phone calls—Cooper *does* direct us to pertinent evidence of possible nondisclosure, mainly in the form of his plea counsel's postconviction testimony. But even this evidence is problematic. Cooper does not dispute his plea counsel's testimony that she recalled receiving and reviewing at least one disc, which contained a recording of one of the controlled-buy calls. And counsel's testimony left unclear whether the prosecution disclosed discs containing recordings of the other controlled-buy calls.

¶14 Although there is no clear evidence that the prosecution failed to disclose discs containing recordings of all four controlled-buy phone calls, we will assume for purposes of this decision that the prosecution failed to disclose recordings of three of the controlled-buy calls. We turn, then, to whether Cooper demonstrates a causal connection between this assumed nondisclosure and Cooper's decision to enter his plea.

B. Whether There Was A Causal Connection Between Nondisclosure And Cooper's Decision To Enter His Plea

¶15 In addressing whether there was a causal connection between nondisclosure and Cooper's decision to enter his plea, Cooper relies on a test from ***Sturgeon***. That test asks whether "there is a reasonable probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial." *See* ***id.*** at 503-04. Although ***State v. Harris***, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737, discusses case law subsequent to ***Sturgeon*** and suggests that the test may differ depending on the nature of the information or the type of discovery violation alleged, *see* ***Harris***, 272 Wis. 2d 80, ¶¶2, 11-40, ¶23 n.15, we will assume here that Cooper points to the correct test.

¶16 ***Sturgeon*** lists several factors for courts to consider in addressing this "reasonable probability" inquiry:

> (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy.

Sturgeon, 231 Wis. 2d at 504.

¶17 As to the first, second, and third ***Sturgeon*** factors, Cooper's entire argument, not including a supporting quotation from his plea counsel's postconviction testimony, is as follows:

> The relative strength and weakness of the State's case and the defendant's case. The case appeared strong against Mr. Cooper at the time of the plea …. Appearances were deceiving, however, because Mr. Cooper did not know at the time of the plea that the State's representations were false that the State had him recorded discussing a drug deal.

> The reasons, if any, expressed by the defendant for choosing to plead guilty. The reasons were that he feared he would be found guilty if he went to trial. Trial counsel testified … that one prime consideration was that there were "audio recordings of phone calls that were alleged to be the defendant's voice."[1]

(Footnote added.) To be clear, Cooper's assertion in the passage above that it was "false that the State had him recorded discussing a drug deal" is not an assertion that the recordings did not exist, but rather an assertion that it was false that the recordings captured his voice on the other end of the calls.

¶18 This is not a developed argument as to the first three ***Sturgeon*** factors and, therefore, not a developed argument as to the ***Sturgeon*** test more generally. We affirm based on this lack of a developed argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately developed arguments).

¶19 Our analysis could end here. However, we choose to briefly comment on Cooper's ***Sturgeon*** argument.

¶20 First, Cooper seems to assume that there is now no dispute that his voice was not on the recordings of the phone calls arranging the controlled buys. We fail to see how we could make that same assumption. The circuit court made no express factual findings on the topic, and evidence in the record was mixed. As noted, the prosecution had two witnesses—the CI and a police officer—who identified Cooper's voice on the recordings. In addition, the postconviction testimony by Cooper's plea counsel supported a reasonable inference that counsel

[1] Cooper provides no distinct argument on the second factor in ***State v. Sturgeon***, 231 Wis. 2d 487, 504, 605 N.W.2d 589 (Ct. App. 1999).

determined that the voice on the recording or recordings that she reviewed sounded like Cooper's. Cooper, in contrast, submitted testimony that he describes as a "[f]orensic analysis" indicating an "unlikeliness" that Cooper's voice was on the recordings. We cannot tell what weight, if any, the court gave this latter testimony, but we see no basis to conclude that the court credited it. In sum, to the extent that Cooper's ***Sturgeon*** argument relies on the premise that Cooper's voice was not on the recordings, Cooper's argument fails because it presupposes as true a disputed factual premise.

¶21 Second, even if we assumed that Cooper's voice was not on the recordings, Cooper does not address the unrefuted testimony of his plea counsel, noted above, that counsel received and reviewed at least one disc containing one of the four recordings of the phone calls arranging the controlled buys. Cooper does not explain why more than one of the four recordings was necessary for counsel and Cooper to decide how damaging the recordings might be. Cooper does not, for example, argue that there was some plausible reason to think that the recording that counsel received contained a voice sounding like Cooper's while the other recordings did not. In short, Cooper fails to explain how the additional recordings might have affected his decision to enter a plea.[2]

¶22 Turning to the fourth ***Sturgeon*** factor, the benefits Cooper received in exchange for his plea, Cooper concedes that a number of charges were dismissed and read in. This included not only seven counts in the instant case but,

[2] We note that some of Cooper's allegations in his motion and assertions on appeal suggest a possible disconnect between the information that counsel received and the information that Cooper personally reviewed. But Cooper does not claim ineffective assistance of counsel; thus, we spend no time on this possible disconnect.

according to Cooper, seven *additional* counts in a separate circuit court case that, as far as we can tell, were unrelated to the allegedly undisclosed information here. Cooper nonetheless asserts that the benefits of his plea were not "astronomical" because there was no agreement on sentencing. "Astronomical" or not, we conclude, based on the dismissed charges, that Cooper received a significant benefit in exchange for his plea and, therefore, that this ***Sturgeon*** factor cuts against Cooper.

¶23 All that remains is the fifth ***Sturgeon*** factor, the thoroughness of the plea colloquy. Cooper concedes that he is not relying on this factor.

¶24 In sum, Cooper fails to demonstrate the requisite causal connection between any nondisclosure of information and his decision to enter his plea. Cooper, therefore, fails to persuade us that he is entitled to plea withdrawal.

Conclusion

¶25 For the reasons above, we affirm the judgment convicting Cooper of two counts of delivery of heroin as a party to the crime, and we also affirm the order denying Cooper's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (2013-14).