COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1905 **Cir. Ct. No. 2012CF2385**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTON DEPAUL WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Anton Depaul Williams appeals the order denying his postconviction motion seeking plea withdrawal. He contends that the postconviction court erred in denying his motion, which was based on the ineffective assistance of counsel.[1] We affirm.

I. BACKGROUND

¶2 In a complaint filed in October 2012, Williams was charged with possession of a controlled substance, cocaine (more than forty grams), with intent to deliver and with two counts of being a felon in possession of a firearm. He was represented by Attorney Michael Chernin.

¶3 The three counts were based upon cocaine and firearms found during a search of a residence. According to the complaint, which served as the factual basis for Williams' pleas, in April 2011, Milwaukee Police Officer Bodo Gajevic received information from a confidential informant that Williams was trafficking cocaine. Gajevic identified the residence, located at 4911 North 84th Street in Milwaukee, as Williams' home, and identified Christina Davis as Williams' girlfriend. Officer Gajevic had previously conducted surveillance of the 84th Street address and observed a brown Dodge Charger, registered to Williams, parked at the address. Gajevic also observed a silver Cadillac Escalade, registered to Davis, parked at the address.

¶4 On April 23, 2011, Officer Gajevic again surveilled the address and saw the Dodge Charger parked outside of the home. Around 2:00 p.m. that day,

[1] The Honorable Timothy G. Dugan presided over Williams' plea and sentencing hearings. The Honorable Timothy M. Witkowiak issued the order denying Williams' motion for postconviction relief.

Gajevic saw Williams exit the address, get into his vehicle, and drive away. Later that afternoon, Gajevic observed the Charger parked near the 2300 block of North 10th Street and received word that Williams had a half-pound of marijuana inside of the vehicle that was to be sold to a person at the Speedway gas station on West Appleton Avenue in Milwaukee.

¶5 That evening, Officer Gajevic observed the Charger pull into the Speedway parking lot. Williams got out of the driver's seat and walked into the Speedway store. Gajevic then approached Williams and told him about his investigation. Gajevic asked for and received consent to search the Charger. Gajevic found a plastic Ziploc bag filled with suspected marijuana.

¶6 Williams was arrested, and Officer Gajevic asked him where he lived. Williams told Gajevic that he lived on 92nd Street. Gajevic then asked Williams about the 84th Street address, and Williams denied any knowledge of that location. Gajevic nevertheless took Williams to the 84th Street address. When they arrived, Gajevic knocked on the doors but no one answered. Gajevic again asked Williams about his connections to the address, and Williams continued to deny knowing anyone associated with the location. Williams was searched for keys, and the police discovered that one of the keys he had on a key ring could be used to unlock the doors at the residence.[2]

¶7 Officer Gajevic confronted Williams with the keys. Williams said that he was involved with a woman who resided at the address, but he would not provide her name or her phone number. Williams denied living at the address or

[2] The complaint stated that the police did not, however, open the doors to the residence.

having any property there. When asked if he would provide consent to search the residence, Williams said he could not because it was not his home.

¶8 While police were at the 84th Street address, a silver Escalade drove past several times. Officer Gajevic asked that the Escalade be stopped. It was, and the driver, Davis, was brought to the address. Gajevic spoke with Davis and asked for consent to search the address. Davis provided consent in writing and verbally. Pursuant to the search, police recovered, among other things, two semi-automatic pistols, suspected marijuana and cocaine, and nearly $20,000 in cash.

¶9 Williams ultimately entered guilty pleas to the three counts in the complaint. Pursuant to the negotiations, the State agreed to recommend a global sentence of twenty years.

¶10 Between the plea and sentencing hearings, Williams retained new trial counsel. At the sentencing hearing, the State, for reasons stated off the record, amended its recommendation to a global sentence of fifteen years. Williams' trial counsel argued for a global sentence of six years.

¶11 The circuit court sentenced Williams to nineteen years of imprisonment. Williams did not pursue a direct appeal. Instead, acting *pro se*, he filed the underlying postconviction motion for plea withdrawal based on the ineffective assistance of counsel.[3]

¶12 As relevant to this appeal, Williams argued that Attorney Chernin was ineffective for failing to adequately consult with him about potential

[3] A supplemental brief was later submitted on Williams' behalf by counsel.

constitutional challenges to the State's case because of what he contends was an illegal search and seizure.[4] According to Williams, if Attorney Chernin had properly investigated the case, he would have discovered that the consent to search the 84th Street address was invalid. Williams accused Attorney Chernin of providing ineffective assistance by failing to file a motion to suppress.

¶13 The postconviction court held a ***Machner*** hearing.[5] Attorney Chernin testified that the strategy was to cooperate fully with both state and federal authorities.[6] Through his efforts, Attorney Chernin facilitated Williams' release while his case was pending and secured a proffer letter from the State. The proffer letter provided that in order to move forward, Williams could not be in a litigation posture.

¶14 Attorney Chernin explained that the State's charges against Williams were "more like a snapshot of what his drug dealing was at the time as opposed to the bigger picture of what he would have been prosecuted for federally[.]" When Attorney Chernin was asked whether he would have told Williams if he felt Williams had a valid legal basis to challenge the search of the 84th Street address, he responded: "Well, the answer is I guess so, but I would have been arguing with him at that point because—why I say arguing with him is because he wanted to cooperate at the time." Attorney Chernin explained: "Whatever the facts were we talked about the facts, but again, I'm going to tell you that at that time, even when

[4] Williams additionally argued that his subsequently retained trial counsel and postconviction counsel were ineffective for repeating and for failing to recognize Attorney Chernin's errors.

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

[6] Williams' previously appointed postconviction counsel also testified at the hearing.

we talked about the facts, Mr. Williams wanted to cooperate and that's—that was his choice at the time." When questioned about whether Williams ever denied telling Office Gajevic he did not live at the 84th Street address, Attorney Chernin responded: "[T]he honest answer is I don't think he did tell me that, but I can't be certain."

¶15 Williams also testified. According to Williams, Officer Gajevic never asked him where he lived and Williams never denied living at the 84th Street address. Williams testified that he had been living at the 84th Street address for two to three months before his arrest. He claimed Attorney Chernin never discussed whether the search of the 84th Street address was legal or whether it would be worthwhile to pursue a suppression motion.

¶16 The postconviction court found that Williams was not credible. Additionally, the postconviction court found that Attorney Chernin dismissed the idea of a suppression motion because Williams never told Attorney Chernin that he lived at the 84th Street address. In light of these findings, the postconviction court concluded that Williams' ineffective assistance of counsel claim failed because Attorney Chernin had executed the "strategy to work on the cooperation agreement and get the best deal possible" for Williams. The postconviction court denied Williams' motion to withdraw his guilty pleas.

II. DISCUSSION

¶17 A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to establish a manifest injustice is to demonstrate that the

defendant received ineffective assistance of counsel. ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44.

¶18 To prevail on an ineffective assistance claim, a defendant must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice in the context of a request for plea withdrawal, a defendant must demonstrate "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

¶19 Our review of an ineffective assistance claim presents a mixed question of fact and law. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We uphold the postconviction court's findings of fact unless they are clearly erroneous. *See* ***id.*** However, the ultimate determinations of whether counsel's performance was deficient and prejudicial are questions of law that we review independently**.** *See* ***id.*** The decision to deny a request for post-sentencing plea withdrawal is subject to the erroneous exercise of discretion standard. *See* ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836.

¶20 Although Williams frames the appeal differently, the sole issue is whether he is entitled to plea withdrawal based on the ineffective assistance of

Attorney Chernin.[7] Specifically, Williams asserts that Attorney Chernin was ineffective because he did not adequately advise him as to whether there was a meritorious suppression issue.

¶21 During the ***Machner*** hearing, Attorney Chernin aptly noted that the decision to plead guilty and to cooperate with authorities was a decision that rested solely with Williams. *See* ***State v. Myrick***, 2014 WI 55, ¶24, 354 Wis. 2d 828, 848 N.W.2d 743. Attorney Chernin additionally indicated that the concepts of standing and consent were considered.[8]

¶22 Williams argues that trial counsel "never discusse[d] the strong points of a suppression motion." Insofar as Williams relies on his own testimony from the ***Machner*** hearing to make this point, he glosses over the fact that the

[7] In his reply brief, Williams does not address let alone refute the State's explanation of the sole issue on appeal and its conclusion that the various issues Williams' raises are either encompassed within the overarching plea withdrawal issue or are based on a misunderstanding of how the procedural posture impacts our review. We deem this approach conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (explaining where an issue is not addressed in the reply brief, we assume the point is conceded).

[8] When asked whether he discussed pretrial motions with Williams, Attorney Chernin testified:

> We discussed some of the discovery early on in the case, and there were two issues there. There was … his … statement at the scene that he did not reside in the house, and that was reported in a police report by one of the arresting officers.
>
> And then there was the consent given by his girlfriend—and because of his statement at the time, it would seem that he did not have standing to raise the issue of suppression of the evidence in the house.

In a follow-up question, Attorney Chernin clarified that he and Williams "generally spoke about" a motion to suppress.

postconviction court found his testimony was not credible. We are bound by those credibility findings. *See* ***State v. Peppertree Resort Villas, Inc.,*** 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (explaining that the trial court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony").

¶23 In contrast, the postconviction court found credible Attorney Chernin's testimony that he recalled discussing standing as it related to a possible suppression motion and that Williams "clearly wanted to move ahead with the cooperation versus the litigation." The postconviction court further found that Attorney Chernin's recollections were that Williams had indicated he did not live at the 84th Street address and concluded, "[a]n attorney can't make a decision to file a motion to suppress if the defendant tells him I did not—I didn't live there."[9] These findings are not clearly erroneous.

¶24 The testimony that the postconviction court deemed credible at the ***Machner*** hearing suggests that Williams was aware of the potential suppression

[9] Attorney Chernin was questioned by Williams' counsel as follows:

> Q … Did Mr. Williams ever deny telling the police officer that it was not his house?
>
> A Not when I was representing him.
>
> Q Did you ever ask him if he told the police officer it was not his house?
>
> A I don't recall asking him that question. I mean, I know it was reported and he said it, and I know that we talked about what was said.

Implicit in this exchange is that if Williams denied what was said, he would have relayed this information to Attorney Chernin.

issue and chose to have Attorney Chernin proceed with securing cooperation agreements. Attorney Chernin followed this directive, and a condition of the State's cooperation agreement was that Williams would not challenge the search of the 84th Street address. Because Williams has not established deficient performance by Attorney Chernin in following through with the strategic decision of obtaining cooperation agreements, we need not analyze prejudice. *See* ***Strickland***, 466 U.S. at 690-91 (holding that matters of reasonably sound strategy are "virtually unchallengeable" and do not constitute ineffective assistance); *see also* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this [ineffective assistance of counsel] inquiry if the defendant does not make a sufficient showing on one."). Accordingly, plea withdrawal is not necessary to correct a manifest injustice.

By the Court.—Order affirmed.

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