COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP375-CR **Cir. Ct. No. 2011CF2815**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRUS LEE COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Tyrus Lee Cooper appeals a judgment of conviction entered upon his guilty plea to one count of armed robbery. He claims

the circuit court erroneously denied his motion to withdraw the plea before sentencing. We affirm.

Background

¶2 The State alleged in a criminal complaint that on June 12, 2011, a group of men robbed L.C. by use of force and a dangerous weapon. According to L.C., she opened the front door of her home and was confronted by a gunman with a tattoo on his forearm. The gunman struck her with his weapon and when she fell, the other men swarmed into the home and took her property. Cooper's forearm is marked with a tattoo like the one L.C. described, and L.C. subsequently identified Cooper as the tattooed robber. Police determined that at the time of the robbery, Cooper was wearing a global positioning system (GPS) tracking device. Information collected by the device reflected that Cooper was at L.C.'s home at the time of the armed robbery. Police spoke with Cooper, who admitted that he was present during the robbery but claimed that he merely observed while four other men committed the crime. The State charged Cooper with one count of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32(2) (2011-12),[1] 939.05.

¶3 Cooper's first lawyer withdrew, and on December 18, 2012, the State Public Defender appointed Attorney Michael John Hicks as successor counsel. Following a number of adjournments, the matter was set for trial on October 21, 2013. Shortly before the trial date, Cooper submitted a letter to the circuit court. The letter, dated October 8, 2013, included Cooper's complaints that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Hicks had not given Cooper a copy of the discovery or interviewed witnesses. Nonetheless, on the day of trial Hicks appeared with Cooper and advised the circuit court that Cooper wanted to plead guilty. In conjunction with the guilty plea colloquy, the circuit court, the Honorable Dennis Flynn presiding, questioned Cooper about his October 8, 2013 letter. Cooper stated that he did not want to take any action on it and that the concerns in it were "disposed." The circuit court accepted Cooper's guilty plea and adjourned the matter for sentencing.

¶4 On January 2, 2014, Cooper filed a letter indicating that he wanted to withdraw his guilty plea, and he requested the appointment of new counsel. Cooper complained that Hicks was ineffective, and in support Cooper asserted that Hicks's law license had been suspended during a portion of the time that Hicks represented Cooper. Further, Cooper said he mistrusted Hicks and indicated that Hicks was under investigation by the Office of Lawyer Regulation. Hick's law license was in fact temporarily suspended from February 12, 2013, through March 11, 2013, for reasons unrelated to his representation of Cooper. *See* ***OLR v. Hicks*** (***Hicks I***), 2016 WI 9, ¶14, 366 Wis. 2d 512, 875 N.W.2d 117. The circuit court permitted Hicks to withdraw, and the State Public Defender appointed another attorney for Cooper.

¶5 Represented by new counsel, Cooper filed a motion for plea withdrawal in April 2014. By that time, a successor judge, the Honorable M. Joseph Donald, had assumed responsibility for Cooper's case. The circuit court conducted a hearing on Cooper's motion and denied it, concluding that Cooper failed to demonstrate a fair and just reason for plea withdrawal.

¶6 The matter proceeded to sentencing in July 2014, and the State made the recommendation required by the plea agreement, namely, an evenly-

bifurcated, six-year term of imprisonment to be served concurrently with the sentence Cooper was already serving. Cooper asked the circuit court to follow the State's recommendation, but the circuit court declined and instead imposed an evenly bifurcated, concurrent, ten-year term of imprisonment.

¶7 Meanwhile, Hicks pled no contest in a separate proceeding to nineteen counts of professional misconduct. *See* ***OLR v. Hicks*** (***Hicks II***), 2016 WI 31, ¶1, 368 Wis. 2d 108, 877 N.W.2d 848. Five of those counts involved Hicks's representation of Cooper in this case.[2] Specifically, Hicks did not dispute that he violated the Wisconsin Rules of Professional Conduct by failing to: (1) communicate and consult with Cooper about trial strategy and preparation; (2) provide Cooper with a copy of the discovery materials; (3) give notice to Cooper regarding the law license suspension imposed in February 2013; (4) give notice to opposing counsel and the circuit court regarding the license suspension; and (5) timely respond to Cooper's grievance. *See* ***id.***, ¶28. In April 2016, the supreme court suspended Hick's law license for one year based in part on Hicks's representation of Cooper. *See* ***id.***, ¶¶28, 49.

¶8 Cooper now appeals his conviction. He alleges that the circuit court erred by denying his motion for plea withdrawal and that he received ineffective assistance from Hicks.

[2] The parties agree that Cooper is the person identified as "T.C." in ***OLR v. Hicks*** (***Hicks II***), 2016 WI 31, ¶¶23-28, 368 Wis. 2d 108, 877 N.W.2d 848.

Discussion

¶9 The decision to permit plea withdrawal prior to sentencing is committed to the sound discretion of the circuit court. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. We will uphold the circuit court's discretionary decision if "'the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (citations omitted).

¶10 When a defendant seeks to withdraw a guilty plea prior to sentencing, the defendant has the burden to prove, by a preponderance of the evidence, that he or she has a fair and just reason for plea withdrawal. *See* ***State v. Canedy***, 161 Wis. 2d 565, 584, 469 N.W.2d 163 (1991). "While the 'fair and just' reason test is a liberal test, the defendant must still demonstrate a 'genuine misunderstanding of the plea's consequences' or 'haste and confusion in entering the plea' or 'coercion on the part of trial counsel.'" ***State v. Timblin***, 2002 WI App 304, ¶20, 259 Wis. 2d 299, 657 N.W.2d 89 (citing ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999)). Other reasons might also satisfy the defendant's burden, *see* ***Shimek***, 230 Wis. 2d at 739-40, but whatever reason the defendant offers, more is required "than the desire to have a trial or belated misgivings about the plea," *see* ***Jenkins***, 303 Wis. 2d 157, ¶32 (internal citations omitted).

¶11 In considering a defendant's claim to have a fair and just reason for plea withdrawal, the circuit court may resolve disputed facts and assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 290-91, 592 N.W.2d 220 (1999). "'[I]f the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea,

there is no fair and just reason to allow withdrawal of the plea.'" ***Id.*** at 291 (citation and emphasis omitted).

¶12 In this case, Cooper offered the circuit court several interrelated grounds for plea withdrawal that he asserted were fair and just reasons for relief. On appeal, he places particular emphasis on his contention that at the time of the plea, he was confused about the charge to which he was pleading guilty and the range of punishments he faced. *See* ***Timblin***, 259 Wis. 2d 299, ¶20.

¶13 The circuit court considered at some length Cooper's allegations of confusion and uncertainty about the charge and the potential punishments. The circuit court began by observing that, at the time of the guilty plea, Cooper confirmed that he knew he was charged with armed robbery as a party to a crime and said he had reviewed the elements of that crime with his trial counsel. Further, the circuit court noted that before Cooper entered his plea, he received an explanation on the record about the elements of armed robbery as a party to a crime, and he received a reminder that if he went to trial, the State would be required to prove those elements beyond a reasonable doubt. Cooper responded to those advisements by stating that he understood the elements and the burden of proof. Additionally, Cooper affirmatively stated during the plea hearing that he understood he faced a maximum fine of $100,000.00 and a maximum forty-year term of imprisonment if convicted of armed robbery as a party to a crime, *see* WIS. STAT. § 939.50(3)(c), and he said he understood that the sentencing court would be free to impose those maximum penalties.

¶14 After reviewing the foregoing aspects of the plea colloquy on the record, the circuit court questioned Cooper regarding the allegations in his motion for plea withdrawal. The circuit court particularly explored Cooper's assertions

that he thought he was pleading guilty to an amended charge, given the thoroughness of the plea colloquy in regard to the actual charge of armed robbery. In response, Cooper said he thought "the judge is reading off to me just the original – charges that was set for me. I'm not knowing this is what I was still facing." The circuit court questioned Cooper further, and Cooper reiterated that he thought the plea colloquy addressed "the initial charges [and] ... not the plea deal that was set forth."

¶15 The circuit court considered but rejected Cooper's answers in light of the plea colloquy. The circuit court found "that it is clear that [] Cooper understood what rights he was giving up, he understood what the maximum penalties were, he understood the negotiations," and the circuit court therefore rejected Cooper's contrary assertions. The circuit court's credibility assessments are "crucial" in this proceeding and we defer to them. *See* ***Kivioja***, 225 Wis. 2d at 291. Accordingly, Cooper's claimed confusion about the crime of conviction and its potential consequences cannot serve as a "fair and just reason" for plea withdrawal.

¶16 As a second reason for plea withdrawal, Cooper asserted that he pled guilty without first obtaining a resolution of the allegations in his October 8, 2013 letter. The circuit court observed, however, that at the time of the plea, Cooper expressly responded to inquiries about the letter by stating that he wanted "no actions" taken in response. The circuit court probed for the reasons that Cooper gave that response rather than demanding a trial. Cooper reiterated his claims that he "never knew the charges were still set at armed robbery use of force, party to a crime, and [that he] was still facing forty years or anything as such." As we have seen, the circuit court did not believe these claims. Accordingly, the circuit court rejected them as an explanation for Cooper's response to the inquiries about his

letter. Instead, the circuit court concluded that at the time of the plea, Cooper had resolved his concerns in favor of accepting a favorable plea bargain. The circuit court was in the best position to make this assessment, and we must accept it. *See* ***id.***; *see also* ***State v. Owens***, 148 Wis. 2d 922, 930-31, 436 N.W.2d 869 (1989) (reviewing court defers to the credibility assessments of the circuit court because it is able to see and evaluate the parties and the evidence they provide).

¶17 As a third basis for plea withdrawal, Cooper pointed to the temporary, twenty-seven-day suspension of Hicks's law license for a period during February 2013–March 2013, and to Hicks's failure to disclose that suspension. We recognize that Hicks had an obligation to disclose his law license suspension and that his failure to do so warranted censure. *See* ***Hicks II***, 368 Wis. 2d 108, ¶¶28, 46. For Cooper to obtain relief, however, he needed to articulate a reason that the license suspension—which occurred early in the course of Hicks's involvement in Cooper's case and for reasons unrelated to that matter—constituted a fair and just reason to permit Cooper to withdraw the guilty plea he entered more than seven months after the suspension ended.

¶18 Cooper sought to carry his burden by alleging that "had he known that [] Hicks' license was suspended at any point during [the] representation ... [Cooper] would not have wanted to proceed with [] Hicks" and would have requested another attorney. The circuit court, however, found nothing in the record to show that disclosure of the license suspension that ended in March 2013 would have mattered to Cooper in October 2013. To the contrary, the circuit court observed that at the time of the guilty plea, Cooper said he wished to abandon the complaints about Hicks that arose earlier in the representation and that Cooper described in his October 8, 2013 letter. The circuit court therefore determined that, notwithstanding earlier concerns, Cooper "wanted to take advantage of the

State's offer," which the circuit court observed was "a very reasonable recommendation for armed robbery." The circuit court went on to find that, with the passage of time, Cooper became "a little frustrated and upset" that Hicks did not reveal the temporary license suspension. Mere dissatisfaction with trial counsel's actions, however, does not constitute a fair and just reason for plea withdrawal. *See* ***State v. Rhodes***, 2008 WI App 32, ¶¶10-11, 307 Wis. 2d 350, 746 N.W.2d 599 (stating that trial counsel's "'forceful advice'" did not entitle defendant to plea withdrawal when counsel's actions were not coercive).

¶19 The record shows that the circuit court fully assessed Cooper's claim that fair and just reasons warranted plea withdrawal. After thorough consideration of the record and the evidence presented during the post-plea proceedings, the circuit court disbelieved the reasons that Cooper offered to support his claim. Although another court might have reached a different conclusion from the one that the circuit court reached here, our role is to determine whether discretion was exercised, not whether it might have been exercised differently. *See* ***Canedy***, 161 Wis. 2d at 586. Because the circuit court properly exercised discretion in concluding that Cooper failed to offer fair and just reasons for plea withdrawal, we uphold the circuit court's decision.[3] *See* ***id.***

[3] On appeal, Cooper argues that the circuit court erred in concluding that the State would be unfairly prejudiced if he were permitted to withdraw his plea. The question of prejudice to the State arises only if the defendant demonstrates a fair and just reason for plea withdrawal. *See* ***State v. Bollig***, 2000 WI 6, ¶34, 232 Wis. 2d 561, 605 N.W.2d 199. Because Cooper failed to present a fair and just reason to withdraw his plea, we decline to consider how plea withdrawal might affect the State. *See* ***State v. Christensen***, 2007 WI App 170, ¶18, 304 Wis. 2d 147, 737 N.W.2d 38 (this court resolves cases on narrowest possible grounds).

¶20 Cooper alternatively argues that he is entitled to plea withdrawal because Hicks provided constitutionally ineffective assistance. The claim must fail.[4]

¶21 To prevail on a claim of ineffective assistance of counsel, a defendant must make a two-prong showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a respondent fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Id.*** at 697. To prove deficient performance, a defendant must show that counsel's actions or omissions fell below an objective standard of reasonableness. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove 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.'" ***Id.*** (citation and one set of quotation marks omitted). In the context of a motion for plea withdrawal, a defendant must show prejudice by demonstrating '"a reasonable probability that, but for the counsel's errors, [the defendant] 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).

¶22 When reviewing a claim that counsel was ineffective, we defer to the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Berggren***, 2009 WI App 82, ¶12, 320 Wis. 2d 209, 769 N.W.2d 110. Whether

[4] The State addresses the claim of ineffective assistance of counsel on the merits but questions whether Cooper adequately raised this claim in the circuit court. We are satisfied that he did so.

counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we consider *de novo*. *See* ***id.***

¶23 Cooper asserts that the supreme court's decision in ***Hicks II*** demonstrates that Hicks performed deficiently during the course of his representation of Cooper in this case. *See* ***id.***, 368 Wis. 2d 108, ¶¶28, 39. We begin, however, by considering ***Strickland***'s prejudice prong, because it is dispositive.

¶24 As proof of prejudice, Cooper argues that his October 8, 2013 letter reflects his concerns about Hicks, and therefore "it is reasonable to believe" that Hicks's actions "forced [Cooper] to accept a plea deal he did not want." The circuit court found, however, that Cooper wanted to plead guilty. The record supports that conclusion. The evidence that the State could have presented at trial included an eye-witness who identified Cooper as the armed robber, GPS tracking data that placed Cooper at the scene of the crime, and Cooper's confession. In the face of this overwhelming evidence, Hicks negotiated a favorable plea bargain. During the plea colloquy, Cooper stated that no one was forcing him to plead guilty and that he wanted to enter such a plea. The circuit court's factual determination that Cooper pled guilty because he chose to do so is thus not clearly erroneous, and we therefore accept it. *See* ***Berggren***, 320 Wis. 2d 209, ¶12. Accordingly, Cooper fails to show that Hicks "forced" Cooper to enter a plea against his wishes.

¶25 Further, and perhaps most importantly, Cooper did not allege that, but for the claimed deficiencies in Hicks's representation, Cooper would likely have demanded a trial. *See* ***Bentley***, 201 Wis. 2d at 312. Indeed, at the hearing on his motion, he expressly acknowledged that if the circuit court permitted him to

withdraw his plea, he might decide to plead guilty again because he was satisfied with the plea bargain. A defendant seeking relief on the ground that trial counsel was ineffective must show "a 'substantial, not just conceivable, likelihood of a different result.'" ***State v. Starks***, 2013 WI 69, ¶55, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted). Here, Cooper wholly failed to make such a showing. For all the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).