COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0013-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL F. HICKMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Carl Hickman appeals a judgment convicting him of second-degree sexual assault by use of force as a repeat offender and an order denying his motion for postconviction relief. He claims he should have been allowed to withdraw his ***Alford*** plea prior to sentencing because: (1) he did not

understand the elements of the offense or the nature of his plea; (2) the State withheld exculpatory evidence which would have supported a defense; (3) there was an insufficient factual basis to support the plea; and (4) counsel was ineffective in several regards. We affirm based on the trial court's assessment that Hickman's assertions about counsel's performance and his own lack of understanding were not credible, and the strong evidence of guilt in the record.

BACKGROUND

¶2 Hickman was charged with one count of second-degree sexual assault, one count of theft of movable property and one count of bail jumping, all as a repeat offender. At the preliminary hearing, the complaining witness testified that Hickman observed her tap the bumper of the car behind her while parallel parking. He told her the other car was his, and demanded twenty dollars in exchange for not calling the police. The complaining witness and her cousin, who was a passenger in her car, sat down at a nearby picnic table with Hickman and attempted to calm him down. The complaining witness mentioned that she had to go to the bathroom. Hickman took her across the street to a place he said he was staying. When no one answered his knock, Hickman suggested that the complaining witness relieve herself in a secluded area behind the building, which she did. Hickman accompanied her, told her he was turned on by her urinating, pushed her down from behind as she was attempting to pull up her pants, climbed on top of her and penetrated her vagina with his penis. The complaining witness pushed at him and yelled for him to stop. After a minute or two, upon hearing someone yelling, Hickman got up and ran away with the complaining witness' wallet, which had fallen out of her purse onto the ground during the assault.

¶3 The complaining witness contacted the police and was taken to the hospital for an evaluation. The hospital report described her labia as reddened, and noted scratches and bruises on her hips, thighs and buttocks. The abrasions were documented with photographs. Various samples were also taken, but a State Crime Lab report found no semen or DNA match. The prosecutor informed defense counsel of the lab results over the telephone and showed him a contact sheet of the photographs.

¶4 Hickman admitted to the police that he took his penis out of his pants and had sexual contact with the complaining witness, but denied having intercourse. He also admitted that he ran away with her wallet after hearing her cousin calling out for her. He agreed to enter a no contest plea to the sexual assault charge in exchange for dismissal of the theft and bail jumping charges and the State's promise to recommend no more than twelve years out of the thirty year maximum which applied with the habitual criminality enhancer. Counsel described the plea as a "modified ***Alford*** plea" because Hickman was admitting to forced sexual contact, but was maintaining innocence in regard to the State's theory of forced sexual intercourse.

¶5 Shortly after entering his plea, Hickman moved to withdraw it. He claimed that he would not have entered the plea if he had seen the crime lab report or the photographs taken at the hospital, and alleged that counsel had "tricked" him into entering the plea, despite his denial of intercourse, by leading him to believe that he had no chance of winning at trial. The trial court determined that the State had not withheld evidence, that Hickman did understand the elements of the offense and the nature and the consequences of his plea, and that the plea was supported by strong evidence of guilt.

STANDARD OF REVIEW

¶6 A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his change of heart, beyond the simple desire to have a trial. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal may include a genuine misunderstanding of the consequences of the plea, or any constitutional violation which would result in a manifest injustice.[1] *See* ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989); ***State v. Krieger***, 163 Wis. 2d 241, 249-51, 471 N.W.2d 599 (Ct. App. 1991).

¶7 In considering whether a fair and just reason exists, the trial court may assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, ¶43, 592 N.W.2d 220 (1999). Credibility determinations are more appropriately left to the trial. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Once the facts are established, we review the trial court's determination regarding whether a plea was knowingly and voluntarily entered under the erroneous exercise of discretion standard.

¶8 We will not disturb the trial court's finding of a factual basis for a plea unless it is clearly erroneous. *See* ***State v. [Robert] Johnson***, 200 Wis. 2d 704, 709, 548 N.W.2d 91 (Ct. App. 1996), *aff'd,* 207 Wis. 2d 239, 558 N.W.2d 375 (1997). Similarly, we will not set aside the circuit court's findings regarding counsel's actions and the reasons for them, unless they are clearly erroneous. *See*

[1] The defendant must meet the higher manifest injustice standard when attempting to withdraw a plea after sentencing. As a practical matter, however, any error which results in manifest injustice would also provide a fair and just reason for plea withdrawal.

WIS. STAT. § 805.17(2) (1997-98);[2] ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See* ***Pritsch,*** 124 Wis. 2d at 634.

ANALYSIS

Nature and Consequences of the Plea

¶9 Second-degree sexual assault is committed by one who "[h]as sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence." WIS. STAT. § 940.225(2)(a). The consequences of Hickman's ***Alford*** plea to second-degree sexual assault were that Hickman waived a trial and proceeded to sentencing, and in return, his penal exposure was limited to thirty years imprisonment due to the dismissal of other charges, and the prosecutor agreed to cap the State's recommendation at twelve years. Hickman was free to argue at sentencing that the conduct forming the basis for the conviction was sexual contact, while the State could argue that it was sexual intercourse.

¶10 Hickman repeatedly asserts that he did not understand the elements of second-degree sexual assault or what a "modified" ***Alford*** plea meant, and that the trial court failed to conduct a proper colloquy to ensure his understanding, in violation of ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Hickman does not, however, explain what he thought the elements of the crime

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

were, or how his understanding of the consequences of his plea differed from the actual consequences. Indeed, the record shows that Hickman was agreeing to enter a plea and proceed to sentencing precisely because he understood that his conduct could satisfy all of the elements of the charged crime, even if no actual penetration occurred. After considering the testimony given by Hickman and trial counsel at the postconviction hearing, as well as the responses Hickman provided during the plea colloquy, the trial court reasonably determined that Hickman had no genuine misunderstanding of the nature or consequences of his plea.

Exculpatory Evidence

¶11 Even if Hickman understood the elements of the offense charged and the consequences of entering an ***Alford*** plea, he argues that his decision to enter the plea was still unknowing because the State had withheld, and/or trial counsel had failed to obtain, important exculpatory evidence which affected Hickman's analysis of the strength of the State's case and the possible defenses available to him. Hickman contends that the absence of semen in the complaining witness's vagina and the pattern of the scratches on her body both support his contention that no intercourse occurred.

¶12 The State informed defense counsel of the results of the crime lab testing and showed him the contact sheet of the pictures taken at the hospital, and defense counsel discussed with his client the significance of the absence of semen and presence of scratches on the victim. Therefore, this information was not newly discovered by Hickman after he had entered his plea, and Hickman's claim that his plea was unknowing because he had not seen actual copies of the lab report or the photographs is of no avail. Furthermore, Hickman has failed to

provide any authority which would require trial counsel to turn over actual reports or evidence to a client, rather than just discussing them.

Factual Basis for the Plea

¶13 Before accepting a plea, the trial court should "personally determine that the conduct which the defendant admits constitutes the offense." *See* ***[Robert] Johnson,*** 200 Wis. 2d at 708 (citation omitted). In the context of an ***Alford*** plea, the record must show strong proof of guilt to overcome the defendant's protestations of innocence. *See* ***State v. Smith***, 202 Wis. 2d 21, 27, 549 N.W.2d 232 (1996). Strong proof means more than the minimum amount of evidence needed to establish a factual basis for a standard guilty plea, but does not require proof beyond a reasonable doubt. *See* ***id***.

¶14 Hickman argues that, in the absence of semen, there was no strong proof that he had forced intercourse with the complaining witness. However, as the trial court noted, the emission of semen is not required to show intercourse under Wisconsin's sexual assault statute. *See* WIS. STAT. § 940.225(5)(c). The victim's testimony by itself constituted strong proof of guilt. In addition, the hospital report showed the victim's labia minora was reddened and that the victim's hips, thighs and buttocks were scratched and bruised, consistent with having been pushed down onto rocky terrain. Finally, the story which Hickman told to the police kept changing, and included admissions of sexual contact. Given this evidence, the trial court's determination that there was a factual basis for the ***Alford*** plea was not clearly erroneous.

Counsel's Performance

¶15 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. The defendant must overcome a strong presumption that his or her counsel acted reasonably and within professional norms. *See* ***State v. [Edward] Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. *See* ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *See* ***id.*** at 688.

¶16 Hickman claims trial counsel was ineffective for failing to obtain the lab results and photographs, for failing to consider a defense based on the lack of semen, for failing to conduct a proper investigation, for failing to adequately explain the elements of the charges, for pressuring Hickman into entering a hasty plea, and for recommending a "modified" ***Alford*** plea. We see no functional difference for the purpose of evaluating a plea offer between obtaining the actual lab report and photographs, as opposed to obtaining the information presented therein. Counsel's assessment that the lack of semen did little to promote the likelihood of an acquittal given the other evidence against his client was a sound professional judgment. The trial court credited trial counsel's assertion that he did conduct an investigation, and Hickman has not presented any specific evidence that counsel failed to reveal which would have any significant impact on the case.

The trial court also credited counsel's assertions that he did explain the elements of the crime to Hickman, and did not recommend, but merely presented, the ***Alford*** plea option. We will not disturb these findings, which are based on credibility assessments. In sum, we are satisfied that counsel's performance provides no basis for plea withdrawal.

By the Court.—Judgment and order affirmed.

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