COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1177

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

IN THE INTEREST OF THOMAS V.C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS V.C.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Thomas V.C. appeals an order denying his motion for post-adjudication relief. Thomas claims that his admission to the single count in a delinquency petition was not knowingly entered because of his attorney's ineffective assistance. He argues that the trial court erred by not permitting him to withdraw his admission. Because Thomas did not show that he would have insisted on a fact-finding hearing but for his attorney's alleged deficient assistance, he is not entitled to withdraw his admission. The order denying post-adjudication relief is thus affirmed.

¶2 A delinquency petition alleged that Thomas violated WIS. STAT. § 948.02(1) (first-degree sexual assault of a child). Thomas, then fourteen years old, appeared at the plea hearing[2] with his father and attorney Warren Brandt. Thomas admitted the allegation in the petition. A post-adjudication motion was later filed alleging that Brandt was ineffective because he failed to advise Thomas about many of the serious consequences of his plea. Brandt and Thomas testified at the post-adjudication motion hearing. Their testimony was at odds on certain critical points, but their main area of disagreement was whether Thomas insisted upon admitting the assault. Upon hearing the evidence and assessing the witnesses' credibility, the trial court made exhaustive findings. These include:

> Thomas's post-adjudication motion hearing testimony was not credible.
>
> Brandt would not have permitted Thomas to admit at the plea hearing unless Thomas insisted.
>
> Brandt never advised Thomas to "plead guilty."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1997-98 version.

[2] An alleged delinquent's first court appearance is the plea hearing. *See* WIS. STAT. § 938.30.

> The evidence against Thomas was "very strong."
>
> Thomas's father was present at the pre-plea hearing meeting between Thomas and Brandt, yet did not testify at the post-adjudication motion hearing to corroborate Thomas's testimony.
>
> Thomas knew that he would be required to register as a sex offender if he admitted the charge. At the time Thomas entered his plea, this requirement was not important to him.
>
> Thomas was ashamed and remorseful. He did not want a fact-finding hearing but, rather, wanted to admit the allegation. He did not even want Brandt to investigate possible defenses or explore plea negotiations. Thomas "pled guilty … because he absolutely wanted to ...."
>
> Thomas would not have gone to trial, the sex offender registration requirement or other consequences notwithstanding. "[H]e was going to plead guilty no matter what, no matter what his attorney did, to say, to talk him out of it, it wasn't going to happen."

STANDARD OF REVIEW

¶3 Appellate review of a trial court's conclusion about ineffective assistance claims involves a mixed question of law and fact. The trial court's assessment of what actually happened, the historical facts, will not be set aside unless clearly erroneous.[3] The overall question whether the representation was deficient and prejudicial, however, is a question of law the appellate court reviews de novo. ***State v. Behnke,*** 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996).

[3] The trial court, not the appellate court, is the ultimate arbiter of weight and credibility. *See* WIS. STAT. § 805.17(2). Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

ANALYSIS

¶4 Thomas agrees that the admission-withdrawal issue should be determined under the law applicable under criminal cases.[4] A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of "manifest injustice" by clear and convincing evidence. *See* ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). This court has recognized that the "manifest injustice" test is met if the defendant was denied the effective assistance of counsel. ***Id.*** at 558.

¶5 For ineffective assistance of counsel claims, the Wisconsin Supreme Court has adopted the standard enunciated by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to show that counsel's performance constituted ineffective representation, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). This court need not, however, address the two prongs in any particular order "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ...." ***Strickland***, 466 U.S. at 697.

¶6 In order to satisfy the prejudice prong of the ***Strickland*** test, the defendant seeking to withdraw his or her plea must allege facts to show "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).

[4] This was the approach employed by the supreme court in ***In re Kywanda F.***, 200 Wis. 2d 26, 42-43, 546 N.W.2d 440 (1996).

¶7 Thomas is critical of the lack of time, preparation, investigation, evaluation, negotiations and consultation Brandt provided on his behalf. He poses, however, only two discernable arguments. First, he contends that his attorney did not properly advise him of the consequences of his plea. Thomas seems to focus particularly on counsel's failure to inform him he would have to provide a DNA sample and register as a sex offender. Under ***Strickland***, however, this court need not address Thomas's claim that Brandt was ineffective because the prejudice prong of Thomas's ineffective assistance claim is dispositive. *See* ***id.*** at 697.

¶8 He further suggests that, but for counsel's deficiency, he may have insisted on having a fact-finding hearing instead of admitting the delinquent act:

> Next, regarding the second prong of prejudice or, rather, whether there is a reasonable probability that but for counsel's errors, Thomas would not have entered and [sic] admission but would have insisted on having a trial, that is somewhat more difficult to assess because it is of course difficult to identify what someone would have done when one or more variables are changed.

¶9 It may be somewhat more difficult, but it was not beyond the court's ability, as demonstrated by the trial court's finding on this issue. Yet Thomas, by revisiting evidence the trial court did not accept, treats the prejudice issue as though this court reviews the trial court's findings de novo. This court does not find facts; the weight and credibility of testimony is for the fact-finder. Regardless what relevance Thomas's observations, reliance on evidence the court specifically found incredible, erroneous assertions and speculation might have in some other context or forum, they do not present an appellate argument under this court's "clearly erroneous" standard of review. Because the trial court, while implicitly rejecting Thomas's claims of deficiency, found as fact that under no circumstances

would Thomas have insisted upon a fact-finding hearing, he has failed to prove prejudice.[5] The order denying his post-adjudication motion is therefore affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4.

[5] As indicated, Thomas does not approach the issue within the context of the appropriate standard of review. Thus, without reviewing in detail the evidence supporting the trial court's findings, suffice it to say that the record demonstrates support therefor.