COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-1703-CR
00-1704-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY P. WILLIAMSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Jeffrey P. Williamson appeals his judgments of conviction and an order denying his postconviction motion to withdraw his guilty and no contest pleas. Williamson was convicted after pleading guilty to one count

of cocaine possession with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(c4)4, and no contest to three counts of delivering cocaine, contrary to WIS. STAT. § 961.41(1)(CM).[1] After sentencing, Williamson moved to withdraw his pleas, alleging that he was denied effective assistance of counsel. Specifically, he alleged that his two previous attorneys deficiently failed to move to dismiss the three delivery counts on grounds that the charges were the result of vindictive prosecution. The trial court denied his motion and this appeal followed.

¶2 Williamson presents a single issue on appeal: whether the trial court erred when it denied his motion to withdraw his pleas. We agree with the trial court's conclusion that there is insufficient evidence to warrant a finding of presumed or actual prosecutorial vindictiveness in this case. Accordingly, we affirm the trial court's conclusion that Williamson was not prejudiced by his attorneys' failure to file a motion to dismiss the three delivery charges on prosecutorial vindictiveness grounds. We also affirm the trial court's denial of Williamson's request that the trial court dismiss outright, also on prosecutorial vindictiveness grounds, the three delivery charges.[2]

BACKGROUND

¶3 On March 6, 1997, a confidential informant notified law enforcement that Williamson had arranged to sell cocaine to the informant later in

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

[2] Williamson's postconviction motion included a single sentence in which he asked the trial court to dismiss outright the three delivery counts on prosecutorial vindictiveness grounds. On appeal, Williamson repeats this request in the conclusion of his brief. Because we affirm the trial court's conclusion that there is insufficient evidence of prosecutorial vindictiveness to warrant withdrawal of Williamson's pleas, we likewise affirm, without further discussion, the trial court's decision to deny Williamson's request that the three delivery charges be dismissed outright.

the day. Law enforcement officers provided the informant with cash to purchase the cocaine and a wire transmitter so that they could listen to the parties' conversation. The officers observed as Williamson met the informant and then arrested Williamson, who had 117.9 grams of cocaine with him. Williamson was charged with possession of and intent to deliver more than 100 grams of cocaine.

¶4 At the April 25, 1997, preliminary hearing, the State presented testimony from an arresting officer. When Williamson indicated that he planned to call the confidential informant as a witness at the preliminary hearing, the prosecutor objected. A motion hearing was scheduled so that the parties could debate whether Williamson could call the confidential informant and thereby expose his identity.

¶5 Although the record is unclear whether a motion hearing occurred, the parties and the court apparently resolved the issue in Williamson's favor. The confidential informant testified at the continued preliminary hearing on August 15, 1997. Williamson questioned the informant about his interactions with law enforcement and the events that led to Williamson's arrest. At the conclusion of the hearing, the trial court found probable cause to bind Williamson over for trial.

¶6 Several weeks after the hearing, on September 10, the State filed a second criminal complaint, alleging that Williamson delivered cocaine to the same confidential informant on October 15, October 24 and November 7, 1996. An information charging Williamson with three counts of delivering a controlled substance on these three occasions was filed November 13, 1997.

¶7 On March 20, 1998, Williamson's case was scheduled for a plea hearing. Williamson changed his mind, however, and decided not to plead guilty.

Williamson's attorney moved to withdraw from the case. The trial court allowed the withdrawal, and Williamson subsequently obtained new counsel.

¶8 On August 20, 1998, Williamson and the State reached a settlement on both of the criminal cases. In exchange for Williamson's pleas to the single count of possession in the first case and the three counts of delivery in the second case, the prosecutor agreed to reduce the possession charge and to recommend probation on the three remaining charges. The reduction in the possession charge lowered the presumptive minimum sentence on that charge from ten years to five years. The trial court sentenced Williamson to ten years in prison on the possession charge and twenty years' probation on the three delivery charges.

¶9 Williamson obtained new counsel and, on February 28, 2000, filed a motion for postconviction relief. Williamson sought to withdraw his pleas, alleging that he was prejudiced by ineffective assistance of counsel. Specifically, he alleged that both of his previous attorneys acted deficiently when they failed to move to dismiss the second complaint on prosecutorial vindictiveness grounds. After the trial court denied Williamson's motion, this appeal followed.

LEGAL STANDARDS

¶10 Williamson argues that the trial court erroneously denied his motion to withdraw his pleas. Generally, on a motion to withdraw a plea, a defendant must show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). A manifest injustice may occur when a defendant enters a plea as the result of the ineffective assistance of counsel. *See* ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993).

¶11 Determining whether a defendant who has entered a plea has been denied effective assistance of counsel requires the application of the two-part test established in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). The first inquiry is whether counsel's performance fell below the objective standard of reasonableness. *See* ***id.***

¶12 The second inquiry focuses on whether counsel's constitutionally-ineffective performance affected the outcome of the plea. *See* ***id.*** at 59. In order to satisfy this second prong of the ***Strickland*** test, referred to as the "prejudice prong," 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." *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶13 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we independently review the two-pronged determination of trial counsel's performance as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697; ***Johnson***, 153 Wis. 2d at 127.

DISCUSSION

¶14 At his postconviction motion hearing, Williamson testified that if his two previous attorneys had moved the court to strike the second complaint and the motion had been granted, Williamson would not have pled guilty to the single count alleged in the first complaint. Williamson explained that he nearly went to

trial on all four counts, and would have definitely done so if there had been only a single count. He said that the additional exposure provided by the three counts alleged in the second complaint induced him to plead guilty or no contest to the four counts.

¶15 Even if we accept as true Williamson's testimony that he would not have pled guilty if there was only a single count against him, his argument is based on the premise that the motion to strike the three counts in the second complaint would have been successful. Because we agree with the trial court's conclusion that there was no basis to strike the second complaint on grounds of prosecutorial vindictiveness, we reject Williamson's argument.

A. Prosecutorial Vindictiveness

¶16 Our supreme court recently examined the issue of prosecutorial vindictiveness in ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846. ***Johnson*** explained that in order to decide whether a prosecutor's decision to bring additional charges constituted prosecutorial vindictiveness in violation of the defendant's due process rights, the trial court first must determine whether a realistic likelihood of vindictiveness exists; if indeed it does exist, then a rebuttable presumption of prosecutorial vindictiveness applies. *See* ***id.*** at ¶17. If the court concludes that no presumption of vindictiveness applies, it next must determine whether the defendant has established actual prosecutorial vindictiveness. *See* ***id.***

¶17 On appeal, the legal principles surrounding prosecutorial vindictiveness claims present questions of law that appellate courts review de novo. *See* ***id.*** at ¶18. However, the trial court's finding of fact regarding

whether the defendant established actual vindictiveness is reviewed under the clearly erroneous standard. *See* ***id.***

¶18 ***Johnson***'s analysis was based on United States Supreme Court precedent, including ***United States v. Goodwin***, 457 U.S. 368 (1982). ***Goodwin*** is especially instructive. In ***Goodwin***, after the defendant requested a trial by jury on pending misdemeanor charges, he was indicted and convicted on a felony charge. ***Id.*** at 370. The United States Court of Appeals for the Fourth Circuit concluded that the sequence of events gave rise to an impermissible appearance of prosecutorial retaliation against the defendant's exercise of his right to be tried by a jury. ***Id.***

¶19 The Supreme Court rejected this conclusion, noting that the defendant presented no evidence "that could give rise to a claim of actual vindictiveness; the prosecutor never suggested that the charge was brought to influence the [defendant's] conduct." ***Id.*** at 380-81. The Court observed that the conviction, therefore, "may be reversed only if a presumption of vindictiveness—applicable in all cases—is warranted." ***Id.*** at 381.

¶20 The Court explained why a presumption of vindictiveness was unwarranted:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins–and certainly by the time a conviction has been obtained–it is much more likely that the State has discovered and assessed all of the information against an accused and has

> made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.
>
> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
>
> Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in ***Bordenkircher*** [***v. Hayes***, 434 U.S. 357 (1978)], the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution

Id. at 381-82.

¶21 Here, as in ***Goodwin***, the trial court found no evidence of actual prosecutorial vindictiveness. Williamson produced no objective evidence that the prosecutor filed the additional charges to discourage him from exercising his legal rights or "to punish [him] for standing on his legal rights." *See* ***United States v. Whaley***, 830 F.2d 1469, 1479-80 (7th Cir. 1987). Instead, the only evidence Williamson produced is the undisputed timing of the three additional charges: they were filed twenty-six days after the preliminary hearing, at which Williamson examined the confidential informant over the prosecutor's objection. We see no reason to disturb the trial court's finding that there was insufficient evidence of

actual prosecutorial vindictiveness to justify dismissal of Williamson's three delivery charges.

¶22 Furthermore, we agree with the trial court that the filing of additional charges twenty-six days after a preliminary hearing is insufficient evidence to warrant a presumption of prosecutorial vindictiveness. The possibility that a prosecutor would respond to a defendant's examination of a confidential informant at a preliminary hearing "by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so unlikely that a presumption of vindictiveness certainly is not warranted." *See* ***Goodwin***, 457 U.S. at 384. "[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." ***Id.***

B. Ineffective Assistance of Counsel

¶23 Williamson alleges that his first two attorneys provided ineffective assistance by failing to file motions to dismiss the second complaint on prosecutorial vindictiveness grounds. He testified at his postconviction motion hearing that if the motion had been brought and granted, he would not have pled guilty to the possession with intent to deliver charge. Again, assuming this testimony is true, we must reject Williamson's claim that he was prejudiced by his attorneys' alleged error, because we have concluded that the motion, even if brought, would not have been unsuccessful.

¶24 Because Williamson has not shown by clear and convincing evidence that he was prejudiced by the alleged ineffective assistance of counsel, the trial court properly denied Williamson's postconviction motion to withdraw his pleas. *See* ***Krieger***, 163 Wis.2d at 249 (to withdraw a plea, a defendant must

show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice).

By the Court.—Judgments and order affirmed.

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