COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2136-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEBASTIAN C. RANSOM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Sebastian C. Ransom appeals from a judgment of conviction for possession of cocaine with intent to deliver and from an order denying his motion for postconviction relief. On appeal, Ransom asserts that he should be allowed to withdraw his no contest plea because there was insufficient

evidence to support the plea and because of ineffective assistance of counsel. We resolve both issues against Ransom and affirm.

¶2 A criminal complaint charged Ransom with possession of cocaine with intent to deliver within 1000 feet of a park or school and obstructing an officer. Habitual offender repeater and drug repeater allegations were also attached. The complaint alleged that Officers Zuelke and Terry were on patrol when several independent sources reported drug sales occurring at 715 Hamilton Street in Racine, Wisconsin. Upon arrival, the police observed a person selling crack cocaine who matched the description provided by the sources. The officers tried to speak with the suspect, but he fled. The suspect had his hands in his pockets, and as he ran, Officer Terry observed him throwing a plastic baggy. The officer recovered the baggy and it contained approximately seventeen individually wrapped packets of crack cocaine.

¶3 Ransom first argues that he should be allowed to withdraw his no contest plea because there was not a sufficient factual basis to support the plea. Citing ***State v. Smith***, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), Ransom asks this court to go "behind the facts of the complaint to discover there was no basis for the crime charged." Ransom asserts that the evidence presented at the preliminary hearing did not establish a nexus between him and the baggy, and therein lies the deficiency in the factual basis.

> Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice. Historically, one type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads…. However, in the context of a negotiated guilty plea, this court has held that a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea."

> The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous.

Id. at 25 (citations omitted).

¶4 We conclude that ***Smith*** is not controlling. Ransom cites ***Smith*** for the proposition that this court can go "behind the facts of the complaint to discover there was no basis for the crime charged." In ***Smith***, the defendant was charged with second-degree sexual assault. Ultimately, he entered an ***Alford*** plea to the charge of child enticement as part of a plea bargain.[1] Some months later, Smith moved to withdraw his plea, contending that there was no factual basis to support that charge since child enticement requires that the victim be under the age of sixteen.

¶5 The Wisconsin Supreme Court concluded that the factual basis requirement for an ***Alford*** plea had not been met because it was a legal impossibility for Smith to have committed the crime. The victim in ***Smith*** was unquestionably sixteen years old at the time of the incident. Child enticement, however, requires that the victim be under sixteen years old. Therefore, the court did not go behind the facts of the complaint as Ransom suggests. It merely looked

[1] "An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his innocence or does not admit to having committed the crime. The plea derives its name from the United States Supreme Court's decision in ***North Carolina v. Alford***, 400 U.S. 25 (1970)." ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

at the statute for child enticement that required as an element of the offense that the victim be under sixteen years of age.[2]

¶6 Additionally, the defendant in ***Smith*** entered an ***Alford*** plea. ***Alford*** pleas are treated differently than guilty or no contest pleas. The Wisconsin Supreme Court held that in order to accept an ***Alford*** plea, a court must find that there is *strong proof of guilt* as to each element of the crime to which the defendant is pleading. ***Smith***, 202 Wis. 2d at 23. "The requirement of a higher level of proof in ***Alford*** pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence. Although strong proof of guilt is less than proof beyond a reasonable doubt, it is clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Smith***, 202 Wis. 2d at 27 (citation omitted).

¶7 Ransom entered a plea of no contest to the charge of possession of cocaine with intent to deliver, and given the plea colloquy provided at the plea hearing, the plea was adequate and no manifest injustice occurred.[3] ***Id.*** *See*

[2] In ***Smith***, the evidence could not be disputed that the victim was sixteen. It was a legal impossibility to have committed the crime because an element of child enticement is that the victim is *under* sixteen. There was no way to argue otherwise concerning this element of the statute. The error was clear on its face. However, in Ransom's case, a judge or jury could reasonably infer from the testimony that the baggie full of cocaine was in Ransom's possession. A jury could not reasonably infer that a child is under sixteen when he or she is sixteen. Therefore, ***Smith*** cannot be used for the proposition that the court can go "behind the facts of the complaint." That is simply not what occurred in ***Smith***.

[3] Ransom originally pled guilty to possession of cocaine with intent to deliver. Before sentencing, the court granted Ransom's motion to withdraw his guilty plea. After further negotiations, the State stipulated that in lieu of a guilty plea to the charge, Ransom would plead no contest and the remainder of the plea agreement associated with the earlier guilty plea would be left intact. The plea agreement stated that Ransom would plead to one count of possession with intent to deliver as a habitual offender and that the obstruction charge, the school enhancer and the drug repeater allegations would be dismissed. Additionally, the State would recommend four years in prison at sentencing. Ransom faced twenty-nine years in prison.

generally ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). At the plea hearing, the following colloquy took place:

> THE COURT: Have you reviewed the facts that are set forth in this criminal complaint?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: And is the request that the Court use the complaint as the factual basis here?
>
> DEFENSE COUNSEL: No objection, Judge.
>
> ASSISTANT DISTRICT ATTORNEY: That's fine from the state.
>
> THE COURT: And there also was a preliminary hearing. Mr. Ransom, in order to accept a plea of either guilty or no contest that you have indicated that you want to make here, the Court has been satisfied that there's some kind of factual basis for your plea. On a no contest plea, although you are not admitting to the charge, I still need to have a factual basis. Do you understand that upon a no contest plea, I would still be looking at the facts set forth in the complaint and the preliminary hearing and I would assume that the state would be able to prove those facts at trial. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And are you satisfied with that?
>
> THE DEFENDANT: Yes.
>
> ….
>
> THE COURT: Do you need any more time to speak with your attorney before entering a plea, Mr. Ransom?
>
> THE DEFENDANT: No.
>
> THE COURT: As to count 1, then, a charge of possession of cocaine in an amount less than five grams with intent to deliver and as a habitual offender, what is your plea?
>
> THE DEFENDANT: No contest.
>
> THE COURT: The Court accepts the plea of no contest. I do take as a basis for the plea the facts set forth in the complaint and adduced at the preliminary hearing. I further find that the plea is made freely, knowingly and voluntarily, and I do make a finding of guilt.

¶8 Additionally, the circuit court addressed the sufficiency of the preliminary hearing at the postconviction motion hearing to withdraw Ransom's no contest plea. The reviewing court may look to the entire record to assist in determining whether a plea was knowingly and intelligently entered at a plea hearing. ***Id.*** at 281-83. The circuit court stated:

> THE COURT: We are still here, Mr. Ransom. On the first issue regarding the threshold of the motion to withdraw the guilty plea, on the basis of manifest injustice, and this is separate and apart from the ineffective assistance of counsel, the request is that he be able to withdraw his plea because there was no factual basis for the plea. Mr. Ransom did indeed enter a plea of no contest stating that he believed that there was a factual basis or that the Court could use, I believe, the complaint as a factual basis for the plea.
>
> Under the Dietzen case, a motion – the issue of the sufficiency of the preliminary hearing I believe is waived by the fact of the no contest plea itself if accompanied by an appropriate colloquy. In addition to that, the Court has reviewed the preliminary hearing, and although the evidence was relatively slim the issue at a prelim is the plausibility of the story essentially. Here the information was that the officers had received information that Mr. Ransom was or that –
>
> THE DEFENDANT: Hello?
>
> THE COURT: I'm looking at the transcript so I can specifically indicate. The transcript reveals that the officer testified that he had received information earlier in the night that defendant was holding and selling crack cocaine out in front of 715 Hamilton Street and they give a physical description of Mr. Ransom, the clothing description. The officers proceed there. He's standing there. He has his hands in his pocket. They try to stop him and he flees. They eventually catch him and within the area in which he was running the officer uses a flashlight and seems to find something that I thought was a baggy. I'm looking at the preliminary hearing now and it says I proceeded up the driveway and stopped, I think that he proceeded up the driveway and stopped, but, nevertheless, there's testimony later indicating that the cocaine is found, that it is not covered with dirt, it's not wet in a manner indicating that it had been there for a long period of time, and I believe that

> the Court was permitted to draw the inference that this was cocaine that was dropped by the defendant as he fled.
>
> When there are competing inferences the Court can accept an inference at the stage of the preliminary hearing and there's an extent to which competing inferences go to the State. That I believe is what occurred here. So on the basis of manifest injustice, that being that there was no factual basis for this plea, that I believe on its face must fail and as to that prong without testimony the Court will deny the motion.

¶9 The factual basis determination was sufficient. Ransom agreed that the court could assume that the State could prove the elements necessary to demonstrate possession of cocaine with intent to deliver. In addition, he signed, dated and initialed a Plea Questionnaire and Waiver of Rights form, which stated, "I truthfully state to the Court that I also understand ... [e]ach element of the crime(s) to which I am pleading." This statement on the form is initialed by Ransom and a box marked "see attached sheet" is checked. The attached sheet states the elements necessary to demonstrate the crime of possession of cocaine with intent to deliver. Additionally, above the signature line on the form, it states, "I have read or have had read to me both sides of this document and any attachments." The Plea Questionnaire is signed by Ransom and dated October 18, 1999.

¶10 The circuit court depended on both Ransom's oral and written statements that he was acknowledging that the court could assume that the State, at trial, could have proven that Ransom possessed cocaine with intent to deliver. The circuit court was entitled to depend on Ransom's representations. The court need not go to the same length to determine whether the facts would sustain the charge as it would where there was no negotiated plea. ***Smith***, 202 Wis. 2d at 25. The circuit court's determination is not clearly erroneous. ***Id.***

¶11 Ransom next argues that he received ineffective assistance of counsel because his attorney failed to file a motion to dismiss based on the insufficiency of the preliminary hearing and ignored Ransom's wishes to go to trial instead of pleading to the charge. Ransom's motion also asserted that the attorney did not inform him that the police officer's testimony at the preliminary hearing could be challenged at trial, creating a reasonable doubt as to his guilt of the charge.

¶12 Ransom had four attorneys throughout his trial court proceedings. All four of his attorneys withdrew from the case. In the circuit court, Ransom asserted that all four of his attorneys were ineffective. His supporting affidavit avers that he told all of his attorneys that he was innocent and wanted to go to trial. Ransom further asserts that they told him he was facing twenty-nine years in prison and the better strategy would be to strike a favorable agreement with the State. He also contends that he told all of his attorneys that there was no evidence at the preliminary hearing to connect him with the cocaine.

¶13 At the postconviction hearing, Ransom focused on the actions of the attorney who represented him at the time of the no contest plea. Ransom faulted that attorney for not challenging the sufficiency of the preliminary hearing. Ransom further asserted that counsel intimidated him into pleading no contest to the charge, ignoring Ransom's desire to go to trial.

> [I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. However, if the defendant fails to allege sufficient facts in his motion to *raise* a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

State v. Bentley, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (emphasis added). Whether a motion alleges facts which, if true, would entitle the moving party to relief is a question of law which this court reviews de novo. ***Id.*** at 310. If the motion fails to allege sufficient facts, the circuit court has the discretion to deny the motion without a hearing based on any of the three factors discussed above. ***Id.*** at 310-11. We use the deferential erroneous exercise of discretion standard when we review a circuit court's discretionary acts. ***Id.*** at 311. Under this standard of review, we conclude that the motion does not allege sufficient facts to warrant a hearing nor did the circuit court erroneously exercise its discretion in denying the hearing.

¶14 To determine whether the motion raised sufficient facts to warrant a hearing, we must apply the two-part ***Strickland*** test for challenges to guilty pleas based on ineffective assistance of counsel. ***Bentley***, 201 Wis. 2d at 311-12. *See also* ***Strickland v. Washington,*** 466 U.S. 668 (1984). ***Strickland*** requires a showing by the defendant that counsel's performance was both deficient and prejudicial. ***Bentley***, 201 Wis. 2d at 312. In the instant case, counsel's performance was neither deficient nor prejudicial.

¶15 Testimony at the preliminary hearing from Officer Terry was that he and Officer Zuelke had received information from three or four independent sources that an African-American male was selling crack cocaine outside of 715 Hamilton Street and they had been provided a physical description of the suspect, including clothing. The police observed a person who fit the description next door at 717 Hamilton Street. The suspect had his hands in his pockets and he fled when the police tried to stop him. Additionally, the officer reported, "[w]hen he first took off running, I proceeded up the driveway and stopped and at which time I used my flashlight and seemed to find something which I thought was a baggy."

Officer Terry further stated that he later recovered the baggy which contained "13 or 17 individually wrapped rocks of what I presumed to be crack cocaine." Finally, he testified that he weighed and tested the evidence and tests revealed that it was cocaine base.

¶16 On cross-examination, Officer Terry testified that he found the baggy on the driveway between 715 and 717 Hamilton Street. He further stated that the baggy was clean and dry, with no dirt on it. Finally, the officer testified that when "Mr. Ransom stopped and basically gave up, that's when my partner arrived and watched him while I went in back and recovered the cocaine."

¶17 The court granted the State's motion for a bindover, stating that "[t]he evidence shows that Officer Terry pursued a person he identified as the defendant, someone who had been described to him prior to that time. As the Defendant fled from him, the defendant threw out a package that when recovered and tested turned out to be cocaine."

¶18 Faced with the facts in the complaint and the reasonable inferences drawn from the officer's testimony at the preliminary hearing, Ransom's counsel did not advise him to go to trial with the defense that he was not the person who dropped the cocaine. Counsel instead informed Ransom that he was facing twenty-nine years in prison and that trying to reach a favorable plea agreement with the State was a better course of action. Under the facts presented and the inferences drawn therefrom, we conclude, as a matter of law, that any reasonable attorney could believe that taking the offered plea was a better risk than going to trial and having the jury reject Ransom's defense. A jury could certainly infer that Ransom threw the cocaine away when he was running. A reasonable attorney

would not, therefore, be deficient for failing to advise Ransom to go to trial on this theory rather than take the plea offer.

¶19 Additionally, Ransom did not proffer sufficient facts to support the conclusory allegation that he was intimidated into pleading when his attorney told him that he faced many years in prison if he lost at trial. This is a statement that many lawyers make to their clients when discussing the best strategy in defense of a case.

¶20 As to the link between Ransom and the crack cocaine, the circuit court had previously concluded that the evidence was sufficient for a bindover. Moreover, despite his belief that the link between him and the drugs was tenuous, Ransom still provided two knowing and voluntary plea entries.[4] At no time in either plea colloquy did Ransom indicate that he did not wish to plead.

¶21 Finally, Ransom did not raise sufficient facts to demonstrate that his counsel was deficient. Because we conclude that counsel's performance was not deficient, we need not address the second prong of ineffective assistance of counsel. Even if all the facts provided by Ransom were true, they do not demonstrate that he is entitled to relief. It necessarily follows then that the circuit court's decision to deny the hearing was based on relevant facts, proper application of the law and the use of rational decision-making. ***Id.*** at 318. We conclude that the circuit court did not erroneously exercise its discretion when it denied the motion without a hearing. ***Id.*** at 318-19.

[4] The complaint unequivocally states that the officer saw Ransom throw a baggy as he pursued him. When Ransom told the circuit court that the facts in the complaint could form the basis of his plea of no contest, he agreed that the State could demonstrate at trial a connection between him and the cocaine.

By the Court.—Judgment and order affirmed.

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