COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2361-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. REINHARDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven J. Reinhardt appeals from a judgment convicting him of one count of theft by contractor, WIS. STAT. §§ 943.20(1)(b) and 779.02(5) (1997-98), and three counts of unfair home improvement trade practices, WIS. STAT. § 100.20(2) (1997-98). Reinhardt also appeals from the

order denying his postconviction motions for plea withdrawal and sentence modification.[1] On appeal, Reinhardt argues that the circuit court erred when it declined to permit him to withdraw his ***Alford***[2] pleas. We reject this claim and affirm.

¶2 The criminal complaint alleged that in June and July 1997, Reinhardt entered into three contracts with a homeowner for construction work at her residence. The homeowner gave Reinhardt checks totaling $19,889, but Reinhardt did not complete the work. In an interview with a police officer, Reinhardt admitted that he received money from the homeowner. The complaint further stated:

> Although [Reinhardt] tried to account for some of the money and where it was spent, he also indicated that he had pooled the money with other money to pay off other debts not related to work on [the homeowner's] house. He specifically stated that one of the debts was to pay his attorney. After discussing the items which were to be purchased with the money, [the officer] determined that approximately $10,000 to $15,000 of [the homeowner's] money was unaccounted for by [Reinhardt's] estimates on what the money was spent on. [Reinhardt] further stated that he had only approximately $500 of the money remaining.[3]

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[1] The sentence modification motion related to a postsentencing cancer diagnosis. Reinhardt died on June 2, 2001. Therefore, any challenge to the sentence would be moot, and we do not address it. However, we address the plea withdrawal claims because under ***State v. McDonald***, 144 Wis. 2d 531, 539, 424 N.W.2d 411 (1988), the defendant's death does not terminate a pending appeal. Moreover, Reinhardt's appellate counsel, citing ***McDonald***, has moved the court to decide this appeal.

[2] An ***Alford*** plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970).

[3] Reinhardt did not move to suppress this statement.

¶3 The complaint also alleged that the contracts Reinhardt supplied to the homeowner did not comply with the requirements for home improvement contracts. It is undisputed that at the time Reinhardt entered into the contracts, he was on probation and his probation rules prohibited him from engaging in home improvement work.

¶4 Reinhardt entered ***Alford*** pleas to all of the charges against him. At the plea hearing, Reinhardt affirmed that he had not been promised anything in exchange for his pleas and acknowledged that he entered into contracts with the homeowner and took money from her. Counsel conceded that Reinhardt was unable to account for the homeowner's money and did not have receipts, even though he had searched for them.

¶5 The State outlined the evidence against Reinhardt, including Reinhardt's statement to police that he took the homeowner's money and used it to pay other debts unrelated to the homeowner's construction project. The State also offered evidence of the unlawful form of the home improvement contracts. Reinhardt agreed that his ***Alford*** pleas would result in a conviction even though he was not admitting the allegations against him.

¶6 The circuit court accepted the facts in the criminal complaint as a factual basis for the pleas. The circuit court found that Reinhardt entered his ***Alford*** pleas knowingly, voluntarily and intelligently and that there was strong proof of guilt.

¶7 Before sentencing, Reinhardt moved to withdraw his ***Alford*** pleas. Reinhardt alleged that the day before he entered his pleas, he and his counsel discussed whether Reinhardt could move the court to withdraw his pleas on the grounds of newly discovered evidence if receipts or funds were located. Reinhardt

believed that a cash box missing from his desk might contain receipts and cash. Reinhardt also believed that his probation agent had documents in his possession which might be relevant to the case. Counsel told Reinhardt that if such evidence was discovered, Reinhardt could try to reopen the case based on such newly discovered evidence. At the motion hearing, counsel stated that after Reinhardt entered his pleas, he and an investigator went with Reinhardt family members to a storage shed and found some receipts for the period including the dealings with the homeowner.

¶8 The circuit court found that even if such evidence existed, there was no proof that it was exculpatory or related to this case. The court noted that Reinhardt disclosed the existence of the shed to counsel immediately before he entered his ***Alford*** pleas. The court ruled that the evidence was not newly discovered because Reinhardt knew about its possible existence before he entered his ***Alford*** pleas,[4] and the ***Alford*** pleas did not require Reinhardt to admit to the charges. The court denied the plea withdrawal motion and sentenced Reinhardt to prison.

¶9 Postsentencing, Reinhardt again moved to withdraw his ***Alford*** pleas because he did not receive effective assistance from his counsel. Reinhardt claimed that trial counsel erroneously told him that if money or receipts were discovered, Reinhardt could easily seek plea withdrawal on the grounds of newly discovered evidence. Reinhardt alleged that counsel was wrong on the law of

[4] Newly discovered evidence must meet five requirements: (1) the evidence must have come to light after disposition; (2) the party seeking new proceedings must not have been negligent in seeking to discover it; (3) the evidence must be material; (4) the evidence cannot be cumulative to evidence already presented; and (5) it must be reasonably probable that a different result would be reached in new proceedings. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

newly discovered evidence and inaccurately described the plea withdrawal process to him.

¶10 At the hearing on the postconviction motion, Reinhardt testified that he told trial counsel of the existence of possible records relating to the case. Counsel advised him to enter ***Alford*** pleas and stated that the pleas could easily be withdrawn if records were discovered. Reinhardt testified that had he known he would not have been able to withdraw his pleas based on recently discovered records, he would not have entered them. On cross-examination, Reinhardt could not enlighten the court about the number or type of receipts he claimed to have found. He estimated that he had approximately $5000 of receipts but did not produce them at the hearing. Reinhardt conceded that he did not have receipts for the $14,000 balance due the homeowner.

¶11 Trial counsel testified that Reinhardt waited until the day before the scheduled trial to inform him that he might have receipts. Reinhardt entered his pleas a day later. Counsel believed that if Reinhardt located receipts, the State would be willing to reopen the case. Counsel conceded that he was not familiar with the elements of newly discovered evidence. Reinhardt never turned any cash over to counsel and counsel saw receipts amounting to approximately $3000.

¶12 The court denied Reinhardt's plea withdrawal motion on the following grounds. First, the ***Alford*** plea colloquy was sufficient. Second, the court did not agree that counsel had an obligation to advise Reinhardt of all of the potential collateral consequences of his pleas, including the standards for withdrawal. Third, and most importantly, the court found that Reinhardt still had not established anything that would negate his guilt or change the outcome:

Reinhardt had not produced money or receipts relating to the homeowner's project. Reinhardt appeals.

¶13 To establish an ineffective assistance claim, Reinhardt must show that his counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Even if counsel's performance was deficient, which we need not decide, we will not reverse Reinhardt's judgment of conviction unless he proves that the deficiency prejudiced his defense. ***Id.*** "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶14 An ineffective assistance claim presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court is the ultimate arbiter of witness credibility, ***Johnson v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980), and we will not disturb that court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous, ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law we decide without deference to the lower court. ***Id***.

¶15 Resolution of this appeal turns on the prejudice prong of the ***Strickland*** test. To establish prejudice, Reinhardt must show that but for counsel's deficient performance or error, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. Reinhardt cannot do so here for as the circuit court found, Reinhardt never offered proof that he could account for all of

the $19,889 he received from the homeowner. This finding is not clearly erroneous. Therefore, Reinhardt could not have avoided the conviction on the theft by contractor charge.[5] Reinhardt has not established ineffective assistance of counsel and therefore has no basis to withdraw his ***Alford*** pleas.

By the Court.—Judgment and order affirmed.

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

[5] Reinhardt argues that the test for prejudice is whether there is a reasonable probability that but for counsel's errors, he would not have entered a plea and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). To demonstrate prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Here, Reinhardt has not demonstrated that the outcome, conviction, would have been avoided had he gone to trial.