COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0206-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY D. POLK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Johnny D. Polk appeals from a judgment entered on no contest pleas to two counts of battery as a habitual criminal, contrary to WIS. STAT. § 940.19(1) and 939.62 (1999-2000).[2] Polk also appeals

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

from an order denying his postconviction motion. Polk claims: (1) he received ineffective assistance of counsel from Attorneys Thomas Bartell and Leroy Jones; (2) the trial court should have conducted a ***Machner***[3] hearing on the ineffective assistance claim; (3) the trial court erroneously exercised its discretion when it denied the third requested adjournment; and (4) he should be allowed to withdraw his pleas, either because they were coerced or because there was an insufficient factual basis to accept the pleas. Because Polk failed to demonstrate a valid ineffective assistance of counsel claim, because the trial court was not required to hold a ***Machner*** hearing, because the trial court did not erroneously exercise its discretion when it denied the request for an adjournment, and because Polk has failed to demonstrate a manifest injustice necessary for plea withdrawal, this court affirms.

I. BACKGROUND

¶2 On February 20, 2000, Polk engaged in a scuffle with Karen Coman and Bradley Smith. Coman told police that when she arrived to pick up her son, Polk was angry, swore at her, and told her she could not take their son. Polk then pushed Coman down, punched her in the face, and bit her hand. After observing the confrontation, Smith, who was waiting in the car for Coman, approached Polk. Smith told police that Polk then punched him. Polk was charged with two counts of battery arising from this incident.

¶3 Polk hired Bartell to defend him. Polk claimed that his actions were taken in self-defense because Coman touched him first. A trial was set for

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

April 12, 2000. On March 21, 2000, Polk moved to adjourn the matter to accommodate Bartell's vacation. The new trial date was set for May 4, 2000. On May 1, 2000, Bartell filed a motion to withdraw as counsel on the grounds that Polk failed to communicate with counsel despite numerous attempts to contact him, and that Polk failed to cooperate in preparation of his defense.

¶4 On the May 4th trial date, Polk moved to adjourn again, although the State was ready for trial. The court granted the motion to adjourn, but denied the motion to withdraw. It ordered Polk to have contact two times a week with Bartell in order to prepare for trial. Trial was reset for May 31, 2000. The trial court indicated that this was a firm date and the case would not be adjourned again. At this point, Polk fired Bartell and paid a $500 retainer fee to Attorney Jones. However, Jones never filed a substitution of counsel. Accordingly, both attorneys appeared on Polk's behalf on the trial date. Jones moved the court to adjourn the trial, but the trial court denied the motion. The court ordered Bartell to defend Polk at trial.

¶5 Bartell presented the claim of self-defense to the jury during opening statements, and cross-examined the State's witnesses focusing on the self-defense theory. He also called one witness, April Pope, who testified that she saw Coman poke Polk in the eye. Bartell indicated he intended to call three more witnesses but, during a recess, Polk decided he wanted to enter no contest pleas. Accordingly, the trial court held a plea hearing where Polk entered no contest pleas. Judgment was entered and Polk was sentenced. Six months later, Polk filed his postconviction motion alleging ineffective assistance of counsel and seeking to withdraw his pleas. The trial court summarily denied the motion. Polk now appeals.

II. DISCUSSION

A. Ineffective Assistance of Counsel.

¶6 Polk claims that both Attorneys Bartell and Jones provided ineffective assistance of trial counsel. He claims that Bartell was ineffective for failing to be prepared for trial, failing to investigate, and failing to subpoena witnesses. The trial court ruled that any problems with Bartell's representation were caused by Polk's failure to cooperate and assist in the defense and, therefore, he could not constitute ineffective assistance. Polk claims that Jones provided ineffective assistance of trial counsel because he accepted the retainer knowing he could not try the case on the May 31st trial date, and because he failed to move for an adjournment prior to the trial date. The trial court ruled that an earlier request for an adjournment would not have been granted and, therefore, any failure by Jones did not alter the outcome of the proceeding. This court agrees with the trial court's decision.

¶7 In order to establish that he or she did not receive effective assistance of counsel, a defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a

trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶8 In assessing Polk's claim, this court does not need to address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues this court reviews independently. *See* ***id.*** at 236-37.

¶9 The trial court found that Polk failed to cooperate with Bartell, and that Polk's own actions hampered Bartell's ability to investigate and prepare. These findings are not clearly erroneous, but are supported by documents in the record. Polk failed to communicate with Bartell, told a witness not to come to court, and hired another attorney despite the court's refusal to let Bartell withdraw. A defendant has an obligation to provide counsel with information and to cooperate with his or her own defense. Polk sabotaged Bartell's attempt to prepare and investigate. He cannot now use that sabotage to claim his trial counsel was ineffective.

¶10 Moreover, a review of the trial transcript demonstrates that despite Polk's lack of cooperation, Bartell adequately presented the self-defense theory. Accordingly, the record conclusively shows that Bartell provided effective assistance.

¶11 Similarly, Polk failed to show that Jones provided ineffective assistance. Even if Jones had sought an adjournment earlier, the trial court would not have granted it. The case had already been postponed two times, and the trial court indicated no further adjournments would be entertained.

B. Machner Hearing.

¶12 Next, Polk contends that the trial court should have conducted a ***Machner*** hearing. This court disagrees.

¶13 A defendant alleging ineffective assistance is not automatically entitled to an evidentiary hearing. If the claim is conclusory in nature, or if the record conclusively shows the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of such a determination is limited to whether the court erroneously exercised its discretion. ***Id.*** at 318.

¶14 Here, the record conclusively demonstrated that Polk was not entitled to relief. The record reflects that Polk's own conduct was responsible for the failures he alleges constituted ineffective assistance. Accordingly, the trial court did not erroneously exercise its discretion when it summarily denied his postconviction motion.

C. Adjournment.

¶15 Next, Polk contends the trial court erroneously exercised its discretion when it denied the motion for adjournment requested on the date of trial. This court disagrees.

¶16 The decision to grant a continuance is a discretionary decision of the circuit court. ***State v. White***, 53 Wis. 2d 549, 554, 193 N.W.2d 36 (1972). When we review a discretionary decision, we examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a rational judge could reach. ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999).

¶17 A trial court balances the following six factors in determining whether to grant a continuance: (1) the length of the delay requested; (2) whether the lead counsel has associates prepared to try the case in his or her absence; (3) whether other continuances have been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; and (6) other relevant factors. ***State v. Leighton***, 2000 WI App 156, ¶28, 237 Wis. 2d 709, 616 N.W.2d 126.

¶18 Here, although the trial court did not explicitly address each factor, inferences can be drawn from the record to support the trial court's decision. Two other adjournments had been granted at the request of the defendant: one to accommodate counsel's vacation; and the second because Polk was refusing to cooperate. The trial court made it clear when it granted the second continuance, that the case was not going to be continued again. In addition, the trial court

referred to the inconvenience of making the victims and witnesses accept yet another adjournment. The trial court also referenced its concern that the adjournments were being controlled by Polk's actions and his desire to control or manipulate the trial date. Although the length of the delay did not weigh against Polk, the remaining factors did. Accordingly, the trial court's denial of the third request for an adjournment did not constitute an erroneous exercise of discretion.

D. Plea Withdrawal.

¶19 Polk also seeks to withdraw his no contest pleas on two grounds: (1) they were not entered knowingly, intelligently and voluntarily; and (2) there was an insufficient factual basis to support the pleas. This court rejects both contentions in turn.

¶20 Because Polk's request to withdraw his pleas occurred after sentencing, he is required to prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). Polk claims that the manifest injustice here can be shown in two ways. First, he was coerced into entering his pleas and second, he received ineffective assistance of counsel.

¶21 There is no support in the record for his contentions. Polk claims that Bartell coerced him into pleading guilty, told him he was not going to win, and that he should just end the trial. These conclusory allegations, however, are not substantiated by facts of record. After the testimony of the first defense witness, Polk indicated he wanted to enter no contest pleas. The trial court advised him of the charges and the maximum possible penalties. Polk indicated he had not been promised anything for entering pleas. When Polk started talking about his problems with the lawyers, the trial court indicated that Polk could

choose to plead no contest or go to trial. Polk indicated he wanted to plead no contest. Polk told the court that no one had threatened him in order to convince him to enter pleas. The trial court reviewed the plea questionnaire and waiver of rights form, which Polk signed, after reading the form with Bartell. The trial court asked Polk if he understood all the constitutional rights he was giving up by entering a plea, and Polk responded affirmatively. Counsel indicated that Polk was entering his pleas freely, voluntarily and intelligently. The colloquy satisfies the dictates of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶22 Moreover, the trial transcript shows that Bartell provided an adequate defense despite Polk's lack of cooperation and desire for a new attorney. Bartell presented the self-defense theory during the opening statement, effectively cross-examined the State's witnesses on this theory, and called a witness who testified in support of this theory. Bartell indicated the defense had three additional witnesses to call but, before that happened, Polk chose to enter no contest pleas.

¶23 The record fails to reflect any evidence to support Polk's claim that he was coerced into entering the pleas, or that Bartell provided ineffective assistance. Accordingly, Polk cannot prove the requisite manifest injustice standard and he will not be permitted to withdraw his pleas.

¶24 Polk also claims that his pleas were infirm because there was an insufficient factual basis on which to accept them. This court disagrees. Whether or not to grant a motion to withdraw a plea based on the lack of a factual basis is a discretionary determination, which this court reviews under the erroneous exercise of discretion standard. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶25 At the time the plea was entered, Polk admitted that he intentionally caused bodily harm to the victims without their consent. Polk also personally acknowledged that the information in the complaint was accurate, with the exception that Polk claimed Coman pushed him first. The complaint in this case alleged that when Coman arrived to pick up their son, Polk swore at her and said she could not take the boy. "Coman told officers that Polk then pushed her down causing her to fall to the ground." The complaint further alleged that:

> Bradley Smith told police officers that he had been in the car waiting for Karen Coman when he saw Polk push Coman down and so he got out of the car to try to break things up. Smith indicated that at this time he witnessed Polk punch Coman in the face, causing her to fall down in the snow. Coman got up and Polk again pushed and punched her in the face causing her to fall down. Polk then punched Bradley Smith in the face, at which time, Coman and Smith both pushed Polk down so they could get away from him. While Coman was on the ground, Polk also bit her to the left hand.

¶26 Polk did not contest these allegations, but admitted that these statements were accurate. This provided a sufficient factual basis for the trial court to accept the no contest pleas to two counts of battery.

By the Court.—Judgment and order affirmed.

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