COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2205-CR **Cir. Ct. No. 00CF2839**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. BOWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. David E. Bowers appeals from the judgment entered after he pled guilty to two counts of first-degree sexual assault of a child,

contrary to WIS. STAT. § 948.02(1).[1] Bowers also appeals from the order denying his motion to withdraw his guilty pleas. Bowers submits that the trial court erred in denying his request to withdraw his guilty pleas because the ineffectiveness of his lawyer resulted in a manifest injustice. We affirm.

I. BACKGROUND.

¶2 In 1987, Bowers was charged with one count of first-degree sexual assault. The victim of the crime, S.B., was eleven years old at the time. Bowers appeared in court on the charge, but absconded before trial. Bowers was arrested in Michigan in 1999 and extradited back to Wisconsin. He appeared in court several times on preliminary matters, and after his first attorney withdrew, the public defender's office appointed Attorney Thomas Tylicki to represent him. While the original 1987 case was pending, the State issued seven additional charges against Bowers for offenses that occurred prior to his disappearance. These new charges, involving S.B., consisted of four counts of incest and two counts of first-degree sexual assault. Ultimately, Bowers pled guilty to two counts of first-degree sexual assault, and all the other counts, including the count in the earlier case, were dismissed.

[1] Bowers was originally charged with one count, and after being apprehended twelve years later, the additional counts were added. Although the complaint references WIS. STAT. § 948.02(1), found in the 1999-2000 version of the Wisconsin Statutes, the correct statute is the since-repealed WIS. STAT. § 940.225(1)(d), found in the 1985-86 version of the Wisconsin Statutes, as WIS. STAT. § 948.02 was not effective until July, 1989. Bowers faced the same penalty for either crime. Further, the elements are the same for both statutes, except that in the later version, the victim needed to be under the age of thirteen, while in the former statute the victim had to be twelve years of age or younger. Here, the victim was eleven years old at the time of the first incident, and twelve years old at the time of the second incident. Upon remand, the trial court is ordered to amend the judgment to reflect the correct statute.

¶3 At the time of the guilty plea, there existed some confusion as to which two counts Bowers was going to enter pleas to, and whether the pleas would be guilty pleas or ***Alford*** pleas.[2] Eventually, Bowers entered guilty pleas, with the State recommending an unspecified term of imprisonment, after a presentence investigation. Bowers was sentenced to twenty years' imprisonment on the first count, and given an eighteen-year prison sentence on the other count, to be served consecutively.

¶4 Bowers then brought a postconviction motion seeking to withdraw his guilty pleas, claiming that a manifest injustice had occurred because of the ineffectiveness of his attorney. The trial court held a ***Machner***[3] hearing and denied his request, concluding that his attorney was not ineffective and, thus, no manifest injustice had occurred.

II. ANALYSIS.

¶5 Bowers contends his attorney was deficient in several respects. He argues that his attorney failed to spend sufficient time with him explaining the charges and never discussed any possible defenses; failed to investigate the case; was careless in his communications with him, misleading him into believing that the State had initially recommended probation, and was careless in not knowing which counts he was to plead guilty to; failed to carefully explain to him what an ***Alford*** plea was and its advantages; and was not knowledgeable about how to

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

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

enter an ***Alford*** plea. As a result, Bowers claims he failed to have effective counsel when he entered his guilty pleas, and this created a manifest injustice.

¶6 A motion to withdraw a plea filed after sentencing should only be granted if it is necessary to correct a manifest injustice. *See* ***State v. Quiroz***, 2002 WI App 52, ¶7, 251 Wis. 2d 245, 641 N.W.2d 715. A defendant who seeks to withdraw a guilty plea after sentence has been imposed carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice; the "manifest injustice" test is met if the defendant was denied the effective assistance of counsel. *See* ***State v. Jackson***, 229 Wis. 2d 328, 340-41, 600 N.W.2d 39 (Ct. App. 1999).

¶7 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶8 Our review of the record reveals that Bowers' attorney had a poor recollection of the events that occurred up to the date of Bowers' guilty pleas, and a particularly bad memory of the guilty plea proceeding itself. Further, the

attorney was not well-versed on which counts Bowers was admitting to. However, nothing in the record supports Bowers' contention that his attorney's performance was fatally deficient or that his actions prejudiced Bowers.

¶9 First, contrary to Bowers' present argument that his attorney never spent more than ten minutes with him prior to the plea, which is unsupported by any record citations, Tylicki testified that he met with Bowers to explain the negotiations for "an hour or two." Tylicki was unable to determine how often he had seen Bowers prior to the day of the plea hearing; however, the assistant district attorney who handled the case testified that Tylicki was in court with his client on a prior date and that he spent a great deal of time consulting with his client on the morning the guilty pleas were entered. Moreover, in response to questions posed by the court at the guilty plea hearing, Bowers stated that his attorney had explained the charges to him and possible defenses and that he understood them. While there is no set time that a lawyer needs to spend with his client, here, it is apparent that Tylicki spent a sufficient amount of time explaining the proceedings to Bowers. Further, other than offering rank speculation, Bowers fails to state how he was prejudiced by his attorney's alleged failure to meet with him more often.

¶10 Second, with regard to Bowers' allegation that Tylicki was careless, although Tylicki's recollection was mistaken that the State recommended probation, the assistant district attorney testified that she never offered to recommend probation if Bowers pled guilty, and even if a such an offer had been made, the State was free to modify it before Bowers accepted it. Moreover, at the time of the plea, all parties acknowledged on the record that the State was recommending an unspecified prison sentence after a presentence investigation was conducted.

¶11 Bowers argues that his attorney was also careless in not knowing which of the seven charges Bowers was going to plead guilty to, and evidenced that carelessness at the ***Machner*** hearing when, after claiming to have read the transcript of the guilty plea hearing, incorrectly stated that the State had recommended probation. We disagree. Whatever problem was posed by the attorney's failure to know which two counts would form the basis for Bowers' guilty pleas was easily corrected and all the parties were aware of the actual counts Bowers was admitting he committed. While Tylicki held to his mistaken belief at the ***Machner*** hearing that the State had recommended probation, the record belies his recollection.

¶12 Third, Bowers claims that his attorney did not investigate the claims and he was harmed by his actions. Again, we disagree. Tylicki testified that there was little to investigate, as there were no witnesses except the victim and Bowers, there was no physical evidence, and twelve years had passed since the crimes had occurred. Bowers has failed to state what a more thorough investigation would have revealed or how he was prejudiced by his attorney's alleged inadequate investigation.

¶13 Finally, Bowers is most critical of Tylicki's handling of the ***Alford*** plea. He argues that after Tylicki bargained for the more advantageous ***Alford*** pleas, due to his deficient performance, he permitted Bowers to enter guilty pleas instead. There was some discussion at the guilty plea proceeding about whether Bowers would enter an ***Alford*** plea, and the assistant district attorney initially was under the impression that Bowers was going to enter an ***Alford*** plea. At the ***Machner*** hearing, Tylicki explained that he had discussed that possibility with Bowers, but he "discouraged" him from entering ***Alford*** pleas because he believed

that these pleas "aggravated" judges. Bowers claims that he was prejudiced by not being able to enter an ***Alford*** plea. Again, we are not persuaded.

¶14 First, we note that Tylicki's undisputed testimony was that the decision was left up to Bowers whether to enter guilty pleas or ***Alford*** pleas. Further, his advice that Bowers not enter ***Alford*** pleas was for a legitimate reason – because he felt the trial court would be annoyed with a party who pled guilty but would not admit his guilt. The record also reflects that Bowers had no reservations about pleading guilty. When the court asked Bowers what his plea was, he blurted out, "I am guilty, sir, and I am sorry, so sorry. Lord knows I am." Moreover, despite Bowers' belief that ***Alford*** pleas were beneficial, he can point to no prejudice caused by his lack of an ***Alford*** plea. Whether he entered an ***Alford*** plea or a guilty plea, eventually he would have been found guilty by the trial court. Thus, there was no prejudice.

¶15 In sum, while the proceedings that led to Bowers' sentencing were not picture perfect, Bowers suffered no prejudice for the minor mishaps that occurred along the way. Thus, we conclude that Bowers failed to carry his heavy burden of establishing, by clear and convincing evidence, that withdrawal of the pleas is necessary to correct a manifest injustice and the trial court's denial of Bowers' motion is affirmed.

By the Court.—Judgment and order affirmed.

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