COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0668-CR **Cir. Ct. No. 97CF000295**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN W. OTTMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

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

¶1 PER CURIAM. Sean Ottman appeals an order denying his motion to withdraw his no contest plea. Ottman argues the circuit court erred by denying his motion to withdraw his plea based upon claims of ineffective assistance of counsel. We reject Ottman's arguments and affirm the order.

BACKGROUND

¶2 In July 1997, the State charged Ottman with uttering a forged check. The complaint alleged that Ottman presented a forged check made out to "Sean Ottman" for $1,000 to be cashed on Randy Wibel's account. The check had been stolen from the dining room table in Wibel's home. Although Ottman never confessed to the crime, he was an acquaintance of Wibel's daughter and had been in the Wibel home during the week before the check was cashed. According to the complaint, Ottman's bank account number was utilized to cash the check and the bank teller would have been required to view the bank account card before cashing the check. Although Ottman claimed that his wallet had been stolen prior to the incident, he did not report the bank account card stolen.

¶3 In exchange for his no contest plea, the State agreed to join defense counsel's recommendation for three years' probation with thirty days' jail time as a condition of probation. Ottman was convicted upon his no contest plea and the court imposed a sentence consistent with the joint recommendation. Ottman's probation was later revoked and he was sentenced to five years in prison. The circuit court denied Ottman's postconviction motion for sentence credit and on appeal, this court reversed that order. *See* ***State v. Ottman***, No. 99-2396, unpublished slip op. (Wis. Ct. App. April 11, 2000). Ottman's subsequent motion for plea withdrawal was denied and this appeal follows.

DISCUSSION

¶4 Ottman argues that the circuit court erred by denying his motion to withdraw his no contest plea based upon claims of ineffective assistance of counsel. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v.***

Spears, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Ottman has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶5 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Ottman must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶6 To prove prejudice, Ottman must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Id.*** at 690. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id.***

¶7 Here, Ottman argues counsel was ineffective for failing to reasonably investigate. Specifically, Ottman claims counsel was not adequately informed when she recommended that Ottman accept the plea agreement. To that end, Ottman contends counsel failed to match the check endorsement with Ottman's handwriting or investigate a videotape mentioned in the police report. Ottman also challenges the size of counsel's file in this matter, noting that the file "was only thirty-three pages long and contained no police report." We are not persuaded.

¶8 The following exchange between the prosecutor and trial counsel occurred at the ***Machner***[1] hearing:

> [Prosecutor]: Do you recall what, specifically, you found in those reports that made you believe that he would be convicted if he took this to trial?
>
> [Trial counsel]: Well, that there were witnesses that put him in the place where the check had been taken at approximately the time period that the check had been taken, that his signature on the back of the check seemed to match his signature that the police had from other documents I think provided by the bank, and that he – that the person that cashed the check had to show an identification that would have only been in his possession in order to cash the check.
>
> [Prosecutor]: So in reviewing his signatures that were contained on the check and other signatures of Mr. Ottman's in the file, you believe that they seemed to be consistent with one another?
>
> [Trial counsel]: They appeared to be. I'm not a handwriting expert by any means, but they certainly appeared to be.
>
> ….

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> [Prosecutor]: Did the defendant ever ask you about having a handwriting analysis done on these – this check?
>
> [Trial counsel]: Not that I recall.
>
> [Prosecutor]: Did he ever tell you anything about the fact that he had lost his wallet prior to this forgery?
>
> [Trial counsel]: No, not that I recall, and I think that had he told me that, I would have made a note of it because that would have been, obviously, very important.

¶9 The court then questioned trial counsel, asking: "Is there anything in these police reports or your notes or anything else in the file that makes you question your judgment about how you proceeded in the case at the time?" Counsel responded:

> No. I am quite certain that I was never told anything about a lost wallet, and had I been told about that, I would have thought that it was a remarkable coincidence that whoever found Mr. Ottman's wallet and thus had his credit union identification card also had access to Randy Wibel's checkbook. So I think I would have made notes had I known anything about a lost wallet.

¶10 To prove that his trial counsel was ineffective for failing to pursue the handwriting analysis, Ottman would need to show that had counsel obtained a handwriting analysis, he would have opted against pleading no contest. Thus, a handwriting analysis would need to raise sufficient doubt that the forged check bore Ottman's signature. At the postconviction hearing, however, Ottman failed to present the court with evidence to support his claim. He did not present the forged check, any contemporaneous samples of his handwriting, or expert witness analysis. Rather, Ottman presented only his opinion that the signature on the check did not match his signature—an assessment his trial counsel disputed. Ottman's speculation regarding the possible result of a non-existent handwriting analysis is insufficient to establish ineffective assistance on the part of his trial

counsel. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation does not satisfy the prejudice prong of ***Strickland***).

¶11 Likewise, Ottman fails to establish how he was prejudiced by his counsel's failure to investigate a non-existent videotape mistakenly mentioned in police reports. Counsel testified at the ***Machner*** hearing:

> Well, it appears from the police reports that there was a video camera at the drive-up that wasn't working and then later on there seems to be something in the police reports that said that there may have been a video. But … I'm sure I would have remembered if I had seen a video of what had been provided to me.

¶12 In fact, in Ottman's later attempts to obtain the videotape, the Eau Claire Police Department informed him that no videotape exists for this incident. Ottman has failed to establish how his counsel's alleged failure to investigate a non-existent videotape prejudiced him. To the extent Ottman claims counsel should not have advised him to plead no contest in the absence of the videotape, Ottman has failed to show that witness testimony alone would have been insufficient to convict him.

¶13 Finally, Ottman fails to establish how the length of his file evidences inadequate investigation on the part of his trial attorney. The lack of police reports in the file does not demonstrate that counsel failed to review and consider these reports. Counsel, in fact, testified at the ***Machner*** hearing that she read the police reports. Because Ottman has failed to show how he was prejudiced by any claimed deficiency of trial counsel, we conclude the circuit court properly denied his motion for plea withdrawal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).