COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2947-CR **Cir. Ct. No. 2008CF3313**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE BERNARD JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Tyrone Bernard Johnson appeals from a judgment of conviction of second-degree recklessly endangering safety while armed and by use of a dangerous weapon, and from an order denying his postconviction motion. He argues that he should be allowed to withdraw his guilty plea because the trial

court improperly rejected his plea to the amended charge of substantial battery while armed and his trial counsel was ineffective in not advising him about timely challenging the rejected plea. He also argues that imposition of the fifteen-year maximum sentence was an erroneous exercise of discretion and resulted in an excessive sentence. We affirm the judgment and order.

¶2 Johnson entered the home of a female friend and repeatedly stabbed her in the head and chest with a knife when she refused his demand for $200 he had given her several years earlier. He was charged with first-degree recklessly endangering safety while armed and by use of a dangerous weapon. A plea colloquy was conducted on Johnson's agreement to enter a guilty plea to the reduced charge of substantial battery while armed. When asked if he understood that the penalty enhancer could increase the maximum penalty by four years, Johnson replied, "I guess so." When asked if he understood that the judge was free to sentence him no matter what the parties recommended, Johnson replied, "You can judge it any way." When asked for his plea to the amended charge, Johnson replied, "He can get a guilty plea." When the trial court indicated that it was trying to ascertain if Johnson was freely and voluntarily entering his plea and suggested the court needed an unequivocal answer, Johnson affirmatively stated that his plea was "guilty." The trial court then inquired about Johnson's execution and reading of the plea questionnaire and related forms. Johnson indicated he had signed the forms and that counsel had read them to him. When asked if he understood everything on the forms, Johnson replied, "Not really, but I want to over—." At that point the trial court indicated that Johnson was having a difficult time understanding and that the plea could not go forward or be accepted. The case was set for a jury trial.

¶3 On the day of the jury trial, just over two months after the first plea hearing, Johnson entered a guilty plea to the amended charge of second-degree recklessly endangering safety while armed and by use of a dangerous weapon.[1] At sentencing, the court indicated it would impose the maximum sentence based on Johnson's pattern of offenses involving substance abuse and extreme violence and the paramount need to protect the public. As the court stated that the sentence would be ten years, the prosecutor interjected that the maximum penalty was actually fifteen years because of the penalty enhancer. The court clarified that Johnson had entered a guilty plea to the penalty enhancer and sentenced Johnson to the maximum consisting of ten years' initial confinement and five years' extended supervision.

¶4 Johnson filed a postconviction motion to withdraw his plea and reinstate the opportunity to plead guilty to the substantial battery charge because the trial court had erroneously exercised its discretion in refusing to accept his plea to that charge. He also claimed that his trial counsel was ineffective for not advising him about the possibility of seeking an interlocutory appeal on the trial court's rejection of his plea. He challenged his sentence as an erroneous exercise of discretion in light of mitigating factors, such as the State's acknowledgement at sentencing that the victim's injuries "were not of an extremely serious nature," that the presentence investigation report recommended a five-year sentence, that he accepted responsibility by his plea, and that his prior convictions were very old.

[1] The Honorable Daniel L. Konkol presided over the first plea hearing. The Honorable Rebecca F. Dallet presided over the start of the jury trial and accepted Johnson's guilty plea.

¶5 At the ***Machner***[2] hearing, trial counsel testified that after Johnson's plea was rejected, he explained to Johnson that they could wait a couple days for things to cool off and then apologize to the court and try to enter the plea again. Johnson replied to that suggestion with an expletive directed at the trial court judge. After that discussion, counsel wrote Johnson suggesting that Johnson write a letter to present to the court indicating that Johnson was sorry and wanted to plead guilty. Counsel recognized seeking an interlocutory appeal was a remedy but he thought the best option was to re-approach the court. Counsel indicated that Johnson had made clear he did not want to approach the court again with the plea and counsel focused his efforts on getting ready for trial. Johnson never asked counsel to return to the court with the original plea. Counsel never mentioned the possibility of an interlocutory appeal to Johnson. Counsel concluded that if Johnson did not want to plead guilty, there was no sense in pursuing an interlocutory appeal.

¶6 In denying Johnson's postconviction motion, the trial court found that Johnson had indicated he did not understand the plea proceeding and that the trial court properly rejected the plea as unknowing and involuntary. It also found that after the plea was rejected, Johnson was in no state of mind to discuss options with his trial counsel. It concluded that Johnson had little likelihood of success in having an interlocutory appeal granted and trial counsel was not ineffective in not pursuing an interlocutory appeal or discussing it with Johnson. It concluded the sentence was a proper exercise of discretion. Johnson's postconviction motion to withdraw his plea and for sentence modification was denied.

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶7 We review the denial of a motion to withdraw a plea for an erroneous exercise of discretion. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). We consider whether the trial court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Salentine***, 206 Wis. 2d 419, 429-30, 557 N.W.2d 439 (Ct. App. 1996). A plea may be withdrawn after sentencing if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *See* ***id.***

¶8 Citing ***State v. Conger***, 2010 WI 56, ¶14, 325 Wis. 2d 664, 797 N.W.2d 341, Johnson first argues that the trial court erroneously exercised its discretion in rejecting his guilty plea to the amended charge of substantial battery while armed. In ***Conger*** the court addressed under what circumstances a court may reject a plea agreement. ***Id.***, ¶1. This is not a case where the trial court rejected the plea agreement. ***Conger*** and its exercise of discretion standard of review has no application.

¶9 Here the trial court rejected the guilty plea as not knowingly and voluntarily made. Whether a plea was knowingly, intelligently, and voluntarily made is a question of constitutional fact and independently reviewed on appeal. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. The underlying findings of historical or evidentiary facts are upheld unless clearly erroneous. ***Id.*** During the plea colloquy on the substantial battery charge, the trial court made a finding of fact that Johnson did not understand the plea questionnaire and related forms. *See* ***State v. Cain***, 2012 WI 68, ¶20, 342 Wis. 2d 1, 816 N.W.2d 177 ("in accepting a plea, the circuit court must make findings of fact").

That finding is not clearly erroneous in light of Johnson's indication that he did not really understand the forms that had been read to him and that he had signed.[3]

¶10 On Johnson's motion to withdraw his plea, the trial court determined that the finding that Johnson did not understand was not clearly erroneous. As the trial court observed in ruling on Johnson's postconviction motion, when a defendant indicates that he does not understand the proceeding, the thing for the trial court to do is to not accept the plea. *See* ***id.***, ¶23 ("in order for a trial court to accept a defendant's plea, the court must find that the defendant's plea was knowingly, intelligently, and voluntarily made"). Johnson has not established that the trial court's rejection of his plea was improper.

¶11 Johnson contends he was denied the effective assistance of counsel after his plea to the substantial battery charge was rejected because counsel did not advise him of the possibility of seeking an interlocutory appeal to challenge the

[3] Johnson suggests that the trial court could have been more patient and further explored his lack of understanding of the information provided on the forms. However, whether Johnson was fully engaged in the plea proceeding was already under suspicion. Prior to Johnson's response that he did not understand the forms, the trial court had expressed concerns about Johnson's responses to questions about his understanding other aspects of the plea proceeding. The court had also explained to Johnson the requirement that the court find that the plea was knowing and voluntary. When Johnson responded that he did not understand the information in the forms provided to him prior to the plea hearing, the court could determine that further in-court discussion would not establish an adequate understanding. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea colloquy cannot be reduced to determining if a defendant has read and filled out the plea questionnaire, a completed plea questionnaire can be "a very useful instrument to help ensure a knowing, intelligent, and voluntary plea"); ***State v. Moederndorfer***, 141 Wis. 2d 823, 828, 416 N.W.2d 627 (Ct. App. 1987) (recognizing that the trial court's ability to assess a defendant's understanding of the rights being waived is enhanced by the plea questionnaire because "[p]eople can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting").

trial court's rejection of the plea.[4] *See* ***State v. Williams***, 2000 WI App 123, ¶12, 237 Wis. 2d 591, 614 N.W.2d 11 (a defendant who believes his plea was improperly rejected may seek leave for an interlocutory appeal). In order for the court to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶12 The trial court found that after his plea was rejected, Johnson was not interested in talking about how to further pursue the plea. That finding is not clearly erroneous given Johnson's expletive directed toward the trial court judge, trial counsel's belief that Johnson wanted to go to trial, and that Johnson never asked about pursuing the plea after it was rejected. Additionally, based on Johnson's lack of interest in pursuing the plea, counsel decided to focus his attention on getting ready for trial. Counsel chose that strategy over the possibility of discussing with Johnson an interlocutory appeal and pursuing an interlocutory appeal. A trial attorney may select a particular strategy from the available alternatives, and need not undermine the chosen strategy by presenting

[4] In Johnson's brief, the heading to this argument states that trial counsel was ineffective "for failing to raise a challenge regarding the court's rejection of the guilty plea." Nowhere in his discussion does Johnson directly challenge trial counsel's failure to file a petition for interlocutory appeal. Johnson confines his claim to the failure of trial counsel to advise him of his legal right to challenge the rejected plea.

inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Finally, we have determined that the trial court properly rejected Johnson's plea. An interlocutory appeal lacked merit. Johnson was not prejudiced by trial counsel's failure to advise him of his right to an interlocutory appeal. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, trial counsel is not deficient for not filing it).

¶13 Johnson has not established deficient performance or prejudice and his ineffective assistance of counsel claim does not support withdrawal of his plea. The denial of Johnson's motion to withdraw his plea because of the rejection of his plea to the substantial battery charge was based on the facts of record and application of the proper legal standard regarding a trial court's duty to ascertain a defendant's understanding to enter a valid plea. The trial court properly exercised its discretion in denying Johnson's motion for plea withdrawal.

¶14 Johnson's final claim is that his sentence is excessive and the sentencing court failed to account for mitigating factors. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. ***Id.***, ¶18.

¶15 Permissible objectives of the sentence include the protection of the community. ***Id.***, ¶40. The sentencing court identified protecting the public as the primary sentencing objective in light of Johnson's pattern of conduct involving

violence. Johnson merely asserts that in light of the mitigating circumstances identified in his postconviction motion, the sentence is excessive.[5] The sentencing court was aware of those circumstances, but afforded more weight to Johnson's pattern of violent conduct. The weight to be given each factor is a determination particularly within the wide discretion of the sentencing judge. ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364. Moreover, the imposition of the maximum sentence does not mean that the sentence is excessive; a sentence is excessive only if it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Johnson's sentence is not disproportionate to the offense, given his criminal history.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[5] Johnson attempts to assign significance to the fact that the sentencing court started to pronounce a ten-year sentence but "jumped" to a fifteen-year sentence when the prosecutor interjected the actual maximum penalty. The sentencing court had already stated its intent to impose the maximum sentence and it was not bound by the mistaken belief that the maximum was ten years.