COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1144-CR **Cir. Ct. No. 2011CM13**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN L. KOHLHOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Ryan L. Kohlhoff appeals a judgment of conviction and order denying postconviction relief. The issues presented are

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

whether: (1) Kohlhoff is entitled to withdraw his no contest plea to a misdemeanor crime involving domestic violence because the court did not accurately inform him that his plea would result in him losing the right to possess a firearm; and (2) Kohlhoff is entitled to a ***Machner***[2] hearing on whether defense counsel was ineffective by failing to request a deferred prosecution agreement during plea negotiations. For the reasons explained below, we affirm.

BACKGROUND

¶2 The State charged Kohlhoff with misdemeanor battery following an incident involving domestic violence. The complaint alleges that Kohlhoff, while intoxicated, got into a fight with his girlfriend with whom he resided. During the fight, Kohlhoff allegedly pushed his girlfriend against a wall, shoved her, and bit her right index and middle fingers.

¶3 Kohlhoff pled no contest to a reduced charge of disorderly conduct. At the plea colloquy, the court informed Kohlhoff that, if he pled no contest to a misdemeanor crime involving domestic violence, he would "lose [his] right to carry a firearm under federal law." *See* 18 U.S.C. § 922(g)(9).[3] The court asked

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

[3] 18 U.S.C. § 922(g)(9) provides that,

> It shall be unlawful for any person—
>
> ….
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Kohlhoff whether he understood this and, following an off-the-record discussion with defense counsel, Kohlhoff stated that he did. The court accepted the plea, and, in accordance with the recommended plea agreement, imposed a fine of $100, plus costs. Kohlhoff filed a postconviction motion to withdraw his no contest plea or, at a minimum, for an evidentiary hearing. The court denied the postconviction motion.[4] Kohlhoff appeals.

DISCUSSION

¶4 Kohlhoff raises two issues on appeal: (1) whether he is entitled to withdraw his no contest plea because the court misinformed him about the nature and scope of the federal firearm prohibition; and (2) whether he is entitled to a ***Machner*** hearing on whether defense counsel was ineffective by failing to request a deferred prosecution agreement. We address and reject each argument in turn.

A. Plea Colloquy

¶5 As we have indicated, Kohlhoff argues that he is entitled to withdraw his no contest plea because the court conducted a defective plea colloquy. This is because, according to Kohlhoff, the court did not accurately inform him about the collateral consequences of his plea when it stated that he would "lose [his] right to *carry* a firearm" by entering a plea. (Emphasis added.) Kohlhoff contends that, while the court's statement was true, the court should have conveyed to him that he would lose his right not only to "carry" a firearm but to "possess" a firearm. Kohlhoff argues that the distinction between "carry" and

[4] We note that the court granted Kohlhoff a ***Machner*** hearing on the limited issue of whether counsel was ineffective by failing to inform Kohlhoff of the federal firearm prohibition. Prior to the hearing, Kohlhoff withdrew that claim. Accordingly, we do not address it.

"possess" is significant because the term "possess" signifies "a complete prohibition on firearm ownership and use" that the term "carry" does not. Kohlhoff contends that a manifest injustice has occurred because the court's statement that he would not be permitted to "carry" a firearm failed to inform him that he was relinquishing his right to "use firearms for hunting purposes." Kohlhoff asserts that, had the court properly informed him that he was losing the right to use firearms for hunting purposes, he would not have entered a plea.

¶6 Kohlhoff carries the heavy burden to establish, by clear and convincing evidence, that the withdrawal of his plea will correct a manifest injustice. ***State v. Cain,*** 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177. A manifest injustice occurs when a plea is not entered knowingly, intelligently and voluntarily. ***State v. Lange***, 2003 WI App 2, ¶15, 259 Wis. 2d 774, 656 N.W.2d 480. A court is not required to inform a defendant about the collateral consequences of a plea in order for the plea to be entered knowingly and intelligently. ***State v. Byrge***, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. Collateral consequences are those that "do not flow from the conviction" and may rest "not with the sentencing court, but instead with a different tribunal." ***Id.*** Although a court is not required to disclose the collateral consequences of entering a plea, a manifest injustice may occur when a court misinforms the defendant about the collateral consequences of a plea. *See* ***State v. Brown***, 2004 WI App 179, ¶8, 276 Wis. 2d 559, 687 N.W.2d 543.

¶7 We begin our discussion by noting that there is no dispute that the court was not required to inform Kohlhoff about the federal firearm prohibition because it was a collateral consequence of entering a plea to a misdemeanor crime involving domestic violence. *See* ***State v. Kosina***, 226 Wis. 2d 482, 486-89, 595 N.W.2d 464 (Ct. App. 1999). There is also no meaningful dispute that, once the

court decided to inform Kohlhoff about the federal firearm prohibition, it was required to provide accurate information.[5] The dispute boils down to whether the court misinformed Kohlhoff about the nature and scope of the federal firearm prohibition in the context of this case. We conclude that it did not.

¶8 We acknowledge that the court was imprecise in its language and should have informed Kohlhoff that the federal firearm prohibition is not limited to the carrying of firearms but includes the possession of firearms. However, we do not see any significant difference between the terms "carry" and "possess" in the context of this case. To "carry" a firearm is generally understood to mean "to go armed with" a firearm. *See, e.g.*, WIS. STAT. § 175.60(1)(ag). To "possess" a firearm is generally understood to mean having actual control of a firearm. *See, e.g.*, ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. Kohlhoff's complaint on appeal is that the court did not inform him that by entering a plea he would lose the right to "own and use firearms for hunting purposes." What Kohlhoff complains about is that he cannot "go armed with" a firearm for hunting purposes, and the court clearly explained to him that by entering a plea he would lose the right to "go armed with" a firearm. Because it is impossible to hunt without "going armed with" a firearm, we reject Kohlhoff's contention that the colloquy was defective because the court failed to inform him that he would be prohibited from "us[ing] firearms for hunting purposes."

[5] The State appears to argue that, while it is true that the court in ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, and other cases have held that once a court chooses to inform a defendant of a collateral consequence in a plea colloquy, the court cannot misinform a defendant of those consequences, this duty is limited to circumstances where a breach of a plea agreement is at issue. We do not read ***Brown*** or the other cases the State relies on as limiting the application of this rule to those circumstances. For purposes of this appeal, we will assume the State is correct; however, that does not change our analysis here.

¶9 Kohlhoff relies primarily on ***Brown*** to argue that a manifest injustice has occurred because he misunderstood the collateral consequences of his plea. In ***Brown***, the court concluded that a defendant was entitled to withdraw his plea when the prosecutor and defense counsel made affirmative, incorrect statements that led the defendant to erroneously believe that he was pleading to a charge that would not require him to register as a sex offender or be subject to post-incarceration commitment. ***Brown***, 276 Wis. 2d 559, ¶13. Kohlhoff's reliance is misplaced. No manifest injustice occurs where, as here, a defendant misunderstands the collateral consequences of a plea based on his or her own "inaccurate interpretation" of what the court explained during the plea colloquy, and not based on misleading statements made by the court. *See* ***State v. Rodriguez***, 221 Wis. 2d 487, 495-99, 585 N.W.2d 701 (Ct. App. 1998) (providing that a defendant who erroneously believed that his plea could not result in his deportation because of his own inaccurate interpretation of his citizenship status was not entitled to withdraw his plea).

¶10 Kohlhoff next contends that he is entitled to withdraw his plea because the court failed to inform him that the firearm prohibition "encompasses a lifetime ban on possession of all firearms and ammunition in the entire country." We disagree. Kohlhoff cites to no case law, and we find none, that provides that, if a court chooses to inform a defendant about the federal firearm prohibition, the court must inform the defendant that the ban is permanent and applies in all states. We conclude that no manifest injustice has occurred because the court reasonably, albeit imprecisely, informed Kohlhoff that, by entering a plea to a misdemeanor crime involving domestic violence, he would be subject to the federal firearm prohibition.

¶11 Our conclusion that Kohlhoff entered his plea knowingly and intelligently is supported by the record. Kohlhoff does not dispute that he understood the contents of the plea questionnaire form and that he signed his initials next to the following statement: "I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm." While this statement refers only to felony crimes, the court explained to Kohlhoff at the plea hearing that the same prohibition that applies under federal law to felony crimes also applies to misdemeanor crimes involving domestic violence. Kohlhoff stated to the court that he understood that information. Under these facts, we conclude that Kohlhoff may not withdraw his plea because his misunderstanding was based on his own inaccurate interpretation of the collateral consequences of his plea.

B. Deferred Prosecution Agreement

¶12 The next issue we address is whether Kohlhoff is entitled to a ***Machner*** hearing on the ground that his postconviction motion establishes sufficient facts to show that counsel was ineffective by failing to request a deferred prosecution agreement during plea negotiations.

¶13 Kohlhoff contends that defense counsel was deficient in failing to "seek out the most favorable disposition possible in plea negotiation," which, according to Kohlhoff, would have been a deferred prosecution agreement. Kohlhoff further contends that defense counsel's deficiency prejudiced him because, had defense counsel requested a deferred prosecution agreement, the State likely would have agreed to allow Kohlhoff to enter into one.

¶14 Whether Kohlhoff's postconviction motion alleges sufficient facts to entitle him to an evidentiary hearing is a mixed question of law and fact. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine

whether Kohlhoff's postconviction motion alleges sufficient material facts that, if true, would entitle him to relief as a matter of law. ***Id.*** When the postconviction motion raises such facts, a defendant is entitled to an evidentiary hearing. ***Id.*** However, if Kohlhoff's motion "fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," a court has discretion to grant or deny an evidentiary hearing. ***State v. Howell***, 2007 WI 75, ¶79, 301 Wis. 2d 350, 734 N.W.2d 48. We uphold a discretionary decision unless clearly erroneous. ***Id.***

¶15 A defendant is entitled to effective assistance during plea negotiations. ***Padilla v. Kentucky***, 130 S. Ct. 1473, 1486 (2010); *see also* ***State v. Frey***, 2012 WI 99, ¶89, 343 Wis. 2d 358, 817 N.W.2d 436. To succeed on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A court deciding an ineffective assistance claim is not required to "address both components of the inquiry if the defendant makes an insufficient showing on one." ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶16 To prove deficient performance, Kohlhoff must establish that defense counsel's performance "fell below an objective standard of reasonableness" under all the circumstances. ***Id.*** at 688. We must give "great deference to counsel's performance, and, therefore, a defendant must overcome 'a strong presumption that counsel acted reasonably within professional norms.'" ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801 (quoting another source).

¶17 To prove prejudice, the defendant must establish a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** It is not enough that the defendant show that counsel's deficient performance had "some conceivable effect on the outcome of the proceeding." ***Id.*** at 693. Rather, the defendant must show that counsel's deficient performance "actually had an adverse effect" on the outcome. ***Id.***

¶18 As we have indicated, Kohlhoff presents only a single allegation in his postconviction motion related to his ineffective assistance claim. Kohlhoff states that counsel was ineffective because he "was not aware that cases similar to the instant matter were routinely handled with deferred prosecution agreements by the Dodge County District Attorney's office" and that, had defense counsel "known to ask for such a disposition, it most likely would have been granted." The State responds that Kohlhoff's single conclusory allegation is insufficient to entitle him to an evidentiary hearing because "Kohlhoff does not look at the facts and circumstances of his case, [and] he merely makes the conclusory statement that most similar cases in Dodge County were resolved in this fashion." We agree with the State.

¶19 Kohlhoff's postconviction motion does not provide "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true" would establish that Kohlhoff was prejudiced by defense counsel's alleged failure to request a deferred prosecution agreement. ***Allen***, 274 Wis. 2d 568, ¶2. Specifically, Kohlhoff fails to allege sufficient facts as to why he believes that, had counsel known to seek a deferred prosecution agreement, "it most likely would have been granted." This assertion is conclusory and fails to explain

Kohlhoff's basis for believing that the prosecutor would have agreed to a deferred prosecution agreement. Even assuming that what Kohlhoff alleges is true, that is that cases similar to this one "were routinely handled with deferred prosecution agreements by the Dodge County District Attorney's office," Kohlhoff fails to allege facts that would support a reasonable belief that the prosecutor in this case, consistent with the practice in this district attorney's office, would have entered into such an agreement. Kohlhoff alleges facts that demonstrate that, had he entered into a deferred prosecution agreement, the charge likely would have been dismissed because Kohlhoff "has not been involved in any further criminal activity." However, Kohlhoff does not present any specific facts that relate to whether the prosecutor, under the facts of this case, would have agreed to enter into a deferred prosecution agreement. Notably, Kohlhoff alleges no facts to suggest that the prosecutor ever entertained the idea of entering into a deferred prosecution agreement.

¶20 Because Kohlhoff fails to allege sufficient facts in his postconviction motion that warrant an evidentiary hearing on his ineffective assistance of counsel claim, we conclude that he has failed to establish that he is entitled to any relief on this issue.

CONCLUSION

¶21 In sum, we conclude that: (1) Kohlhoff is not entitled to withdraw his no contest plea on the basis that the court failed to accurately inform him about the collateral consequences of his plea; and (2) Kohlhoff is not entitled to a ***Machner*** hearing on the ground that counsel was ineffective in failing to ask for a deferred prosecution agreement during plea negotiations. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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