RECEIVED
05-12-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2015AP475CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN KENNEDY

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON MAY 16, 2014 AND SENTENCE IMPOSED ON MAY 12, 2014 AND ORDER DENYING KENNEDY'S MOTION FOR POSTCONVICTION RELIEF, ENTERED ON FEBRUARY 17, 2015, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Cheryl A. Ward
State Bar No. 1052318
Attorneys for Defendant-Appellant
Martin Kennedy

Ward Law Office
10533 W. National Ave. Suite 304
West Allis, Wisconsin 53227
Phone: (414) 546-1444
Fax: (414) 446-3812

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

Wisconsin Cases

Wisconsin Statutes

ISSUES PRESENTED

Did the trial court err by finding that Kennedy is not entitled to withdraw his plea due to Bangert?

Answer by Circuit Court: No

Did the trial court err by finding that Kennedy is not entitled to withdraw his plea due to Nelson-Bentley?

Answer by Circuit Court: No

Did the trial court err by finding that Kennedy is not entitled to withdraw his plea due to ineffective assistance of counsel?

Answer by Circuit Court: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The claims raised by Martin Kennedy do not present any change in law or warrant an extension in existing law therefore, oral argument and publication are not requested.

STATEMENT OF THE CASE

This is an appeal from a misdemeanor case in the circuit court for Milwaukee County. On March 13 2014, the Honorable Mel Flanagan presiding, Kennedy plead guilty to an amended Count 1, of Disorderly Conduct (15AP475:23). On May 12, 2014, the Honorable Rebecca Dallet presiding sentenced Kennedy on Count 1, Disorderly Conduct to 90 days imposed and stayed for 18 months probation. (15AP475:24). On November 14, 2014 Kennedy's first postconviction counsel filed a motion for extension. (15AP475:14). On November 18, 2014, the Court of Appeals granted the extension motion. (15AP475:15). Then successor counsel was

appointed. (15AP475:16). On February 13, 2015, a postconviction motion was filed requesting that Kennedy be allowed to withdraw his plea. (15AP475:17; App. 101-110). Without holding any hearing on the motion, the circuit court, the Honorable Rebecca Dallet, presiding, denied the motion in an order dated February 17, 2015. (15AP475:18, App. 111-115). Kennedy now appeals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In a criminal complaint in case 13CM5412, filed on December 11, 2013, Kennedy, was charged with Battery. (15AP475:2). The charges in case 13CM5412, arose when Mr. Kennedy's wife stated that Mr. Kennedy lunged at her and struck her. (15AP475:2).

On March 13, 2014, Kennedy plead guilty to an amended Count 1, Disorderly Conduct (15AP475:23). On May 12, 2014 , the trial court sentenced Kennedy on Count 1, Disorderly Conduct to 90 days imposed and stayed for 18 months probation. (15AP475:24).

Trial counsel timely filed a Notice of Intent to Pursue Postconviction Relief on May 19, 2014. On November 14, 2014 Kennedy's first postconviction counsel filed a motion for extension. (15AP475:14). On November 18, 2014, the Court of Appeals granted the extension motion. (15AP475:15). Then successor counsel was appointed. (15AP475:16). On February 13, 2015, a postconviction motion was filed requesting that Kennedy be allowed to withdraw his plea. (15AP475:17; App. 101-110).

Without holding any hearing on the motion, the circuit court, the Honorable Rebecca Dallet, presiding, denied the motion in an order dated February 17, 2015. (15AP475:18, App.111-115.) A timely Notice of Appeal was filed on March 6, 2015. (15AP475:20).

ARGUMENT

I. KENNEDY IS ENTITLED TO WITHDRAW HIS PLEA DUE TO THE FACT THAT HIS PLEA WAS NOT KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY ENTERED UNDER BANGERT

A defendant seeking to withdraw his plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***State ex rel. Warren v. Schwarz,*** 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. Under Wis. Stat. §971.08(1)(a), the court is required to "determine that a plea is made voluntarily and with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. §971.08(1)(a). Upon entering a plea of guilty or no contest, the court must satisfy itself by addressing the defendant personally on the record that his plea was entered knowingly and willingly. ***State v. Bangert,*** 131 Wis.2d 246, 389 N.W.2d 12 (1986). The court must address the elements of the charge and whether the defendant understands the elements of the charge. ***Bangert,*** 131 Wis.2d 267-68. During the course of a plea hearing the court must address the defendant personally and establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea, and notify the defendant of the direct consequences of his plea. ***State v. Brown,*** 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906. A direct consequence is a consequence that has a "definite, immediate and largely automatic effect on the range of defendant's punishment." ***State v. Bollig,*** 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199. Kennedy alleges that his plea was not knowing, intelligent or voluntary because he was not informed that the disorderly conduct charge

was related to domestic abuse or the domestic abuse assessment. Kennedy's plea colloquy was defective as there was no mention of the domestic abuse or domestic abuse assessment anywhere in the plea colloquy. (15AP475:20; App. 116-126). The case was not called on the record as a domestic abuse case. (15AP475:20:2; App. 117). The court asked Kennedy specifically if it was his decision to admit to the disorderly conduct charge with no mention of the domestic abuse modifier. (15AP475:20:3; App. 118). The court asked Kennedy again if he was admitting to the charge of disorderly conduct with no mention of the domestic abuse modifier. (15AP475:20:6; App. 121). The court went over the elements of the crime which only related to the elements of disorderly conduct. (15AP475:20:7; App. 122). Further the court went over the penalties which did not include the domestic abuse assessment. (15AP475:20:7; App. 122). The court once again went over the fact that Kennedy was pleading guilty to a disorderly conduct with no mention of the domestic abuse modifier or domestic abuse assessment. (15AP475:20:9; App. 124). Based on the fact that Kennedy was not informed of the charge being domestic abuse related or of the domestic abuse assessment, his plea was not knowing, intelligent or voluntary.

Kennedy did not understand that he was pleading to a disorderly conduct domestic abuse. Throughout the entire plea colloquy no mention was made of the charge having a domestic abuse modifier or of the domestic abuse assessment. Kennedy thought that he was pleading to a disorderly conduct only based on the fact that the charge was amended to a disorderly conduct with no mention of the domestic abuse modifier or of the domestic abuse assessment. Further, the plea form does not indicate the statutes involved or that the charge was a domestic abuse charge. (15AP475:7; App. 109-110). Also, in the statement of the offer and the statement of penalties there is no mention of a domestic abuse assessment. (15AP475:7; App. 109-110). Kennedy was not given any information related to the domestic abuse modifier

or assessment and did not understand that the disorderly conduct was a domestic abuse charge.

The trial court opines that the court was not required to inform Kennedy of the domestic abuse modifier as there is no criminal liability regarding the domestic abuse assessment. (15AP475:18; App. 111-115). Even if the domestic abuse assessment only has a monetary consequence from the court, there is a direct consequence from the domestic abuse assessment in real life. In the fact that Kennedy asserts that the domestic abuse modifier impacts his security license and his hunting license wherein a disorderly conduct without the domestic abuse modifier would not. Therefore, the court should have informed Kennedy of the fact that his charge still had a domestic abuse modifier as to the disorderly conduct.

II. KENNEDY SHOULD BE ALLOWED TO WITHDRAW HIS PLEA DUE TO THE FACT THAT HIS PLEA WAS NOT KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY ENTERED UNDER NELSON/BENTLEY

A defendant seeking to withdraw his plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***State ex rel. Warren v. Schwarz,*** 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. A defendant is entitled to a hearing to address a plea withdrawal if sufficient facts are alleged that would entitle the Defendant to the relief sought. ***Nelson v. State,*** 54 Wis.2d 489, 195 N.W.2d 629(1972); ***State v. Bentley,*** 201 Wis. 2d 303, 548 N.W.2d 50(1996).

Kennedy alleges that his trial counsel never informed him of the fact that the disorderly conduct charge had a domestic abuse modifier or a domestic abuse assessment. Kennedy thought that he was pleading to a disorderly conduct only. In further

support of his lack of knowledge, Kennedy alleges that the plea form does not indicate the statutes involved or that the charge was a domestic abuse charge. (15AP475:7; App. 109-110). Also, in the statement of the offer and the statement of penalties there is no mention of a domestic abuse assessment. (15AP475:7; App. 109-110). Kennedy was not given any information related to the domestic abuse modifier or assessment and did not understand that the disorderly conduct was a domestic abuse charge.

III. KENNEDY SHOULD BE ALLOWED TO WITHDRAW HIS PLEA DUE TO THE FACT THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant seeking to withdraw his plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***State ex rel. Warren v. Schwarz,*** 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. Ineffective assistance of counsel may constitute a manifest injustice. ***State v. Berggren,*** 2009 WI App 82 ¶10, 320 Wis.2d 209, 769 N.W.2d 110. To establish ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington,*** 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. ***See State v. Sanchez,*** 201 Wis.2d 219, 235-36, 548 N.W.2d 69 (1996). Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. ***State v. Pitsch,*** 124Wis.2d 628, 636-37, 369 N.W.2d 711

(1985). Prejudice is demonstrated where, but for counsel's deficient performance, there was a reasonable probability that but for counsel's errors, he would have insisted on going to trial. ***Hill v. Lockhart,*** 474 U.S. 52 (1985).

Attorney Dluzak's performance was deficient because he did not inform Kennedy of the fact that the disorderly conduct had a domestic abuse modifier and a domestic abuse assessment would be assessed against him. A reasonably prudent attorney would inform their client of all possible penalties and consequences of the plea. There is a reasonable probability that if Kennedy was informed of the modifier and assessment ahead of time, he would not have plead to the charge due to the fact that it impacts his security license and his hunting license. Further, Kennedy disputes the fact that he struck the alleged victim. (15AP475:8; App. 123). If Kennedy had been aware of the penalties ahead of time, he would have taken the case to trial because of the impact on his licenses and he disputes the allegations that he struck the victim.

The trial court states that there are references to the domestic abuse modifier or assessment that would support that Kennedy knew he was pleading to a charge with a domestic abuse modifier or assessment. The trial court cites to the criminal complaint which Kennedy reviewed with his attorney. The criminal complaint that Kennedy reviewed with his attorney was for the charge of battery not disorderly conduct. (15AP475:2). Therefore, Kennedy would have no way of knowing that the disorderly conduct had a domestic abuse modifier or assessment attached unless the court or his attorney would have informed him. The trial court also discussed the fact that the court commissioner informed Kennedy of the full charge. (15AP475:22). Once again that relates to the charge of battery not disorderly conduct and Kennedy would have not known that the domestic abuse modifier or assessment related to the disorderly conduct unless he was told. Further, a reasonable prudent attorney would

inform a client that the domestic abuse modifier or assessment was still attached to the disorderly conduct.

CONCLUSION

For, the reasons stated above Kennedy asks this Court to allow Kennedy to withdraw his plea or remand the case to the circuit court for a hearing to address plea withdrawal.

Respectfully submitted this
8th day of May, 2015.

_____
Cheryl A. Ward
State Bar No. 1052318

Ward Law Office
10533 W. National Ave. Suite304
West Allis, WI 53227
Telephone: (414) 546-1444
Facsimile: (414) 446-3812

Attorney for Appellant-Defendant

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **1,964** words.

Respectfully submitted this
8 th day of May, 2015.

_____
Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief report filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 8, 2015

_____
Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

APPENDIX CERTIFICATION

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings, or opinion of the trial court; (3) a copy of any unpublished opinion cited under §909.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken for a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juvenile and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: May 8, 2015

_____

Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 15AP475

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN KENNEDY,

Defendant-Appellant.

INDEX TO APPENDIX
