COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2239-CR **Cir. Ct. No. 2011CF3780**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICAL THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. BOROWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mical Thomas appeals from a judgment of conviction on two counts of first-degree reckless homicide as party to a crime and from an order denying his motion for postconviction relief. Thomas contends the circuit court "improperly negated [his] ability to meaningfully participate" in the

postconviction evidentiary hearing because it had "prejudged" Thomas's testimony and because the court "improperly 'cut off'" his testimony before its completion. We reject Thomas's contentions and affirm the judgment and order.

BACKGROUND

¶2 Then-sixteen-year-old Thomas and a fifteen-year-old co-actor approached a pregnant woman and her thirteen-year-old son, demanding the woman's purse. When she refused to surrender it, Thomas shot her in the side. He ran off but came back and grabbed the purse. The woman, and her fetus, died before getting to the hospital. The woman's son identified Thomas as the shooter from a lineup.

¶3 Thomas was charged with one count of first-degree reckless homicide, one count of first-degree reckless homicide of an unborn child, one count of armed robbery, and one count of attempted armed robbery,[1] all as party to a crime. Thomas agreed to plead guilty to the homicide charges and in exchange, the State recommended "substantial prison time" and moved to dismiss the armed robbery charges. The circuit court accepted the pleas to the two charges and imposed consecutive sentences totaling thirty-five years' initial confinement and ten years' extended supervision out of a maximum possible 120 years' imprisonment.

¶4 Thomas filed a postconviction motion seeking to withdraw his plea. He alleged that trial counsel was ineffective because that attorney "told him that

[1] The attempted armed robbery charge involved a different incident and a different victim; it is not necessary for us to recite the facts underlying the charge.

the deal with the District Attorney was for ten years initial confinement plus ten years extended supervision," a promise that induced his pleas. Thomas therefore claimed counsel's ineffective communication caused his pleas to be unknowing, a manifest injustice warranting plea withdrawal.

¶5 After briefing, the circuit court ordered an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Trial counsel and Thomas both testified. Further details of the proceedings will be described herein, but for now it suffices to say that trial counsel denied making any representation to Thomas about a specific sentence. At the close of the hearing, the circuit court determined trial counsel was more credible than Thomas and denied the motion. Thomas appeals.

DISCUSSION

¶6 Thomas alleged that counsel was ineffective because he purportedly promised Thomas a specific sentence. This false promise then improperly induced Thomas to enter his guilty pleas, making them unknowing, unintelligent, and involuntary. An unknowing, unintelligent, and involuntary plea is a manifest injustice, and a defendant is entitled to withdraw a guilty plea after sentencing if he can show refusal to allow the withdrawal would work a manifest injustice. *See* ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794.

¶7 A defendant alleging ineffective assistance of counsel must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Ineffective assistance claims present mixed questions of fact and law. *See* ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364. We uphold the circuit court's findings of fact unless clearly erroneous. *See* ***id.***

The ultimate conclusion of whether counsel was ineffective is a question of law we review *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334.

¶8 Trial counsel testified first at the ***Machner*** hearing. He explained that he had reviewed the State's offer with Thomas, including the State's intention to recommend a "substantial amount" of prison time. Counsel further testified:

> In my entire career, I have never promised a client a certain outcome at a sentencing because, for one thing, it is not in my interest to do that because I wind up back here testifying, you know, like I am here today. And, second of all, I would be made out a liar when during the plea colloquy the judge says has anybody made you any promises or told you what your sentence would be, and so I have just never done it.

¶9 Thomas also testified. He claimed that trial counsel "told me I wouldn't get no more than at least 10 initial confinement, 10 years extended supervision and no more than 15 years, in any event." Thomas later reiterated that he pled guilty to the homicide counts because counsel "being experienced with his job that he basically tell me -- he said, you will get 10 years in and 10 years out, and it won't be more than 15 years in any event."

¶10 The circuit court, after summarizing the testimony and arguments, concluded, "I believe [trial counsel]. I do not believe a word that has come out of Mr. Thomas' mouth today. He is a liar and as I said not a good one at that. He has every reason to lie. He has no credibility[.]" In other words, the circuit court concluded that trial counsel had made no promise regarding sentence—thus, he had not performed deficiently—so there was no ineffective assistance that undermined the plea.

¶11 In addition, the circuit court noted that it had reviewed the plea colloquy transcript. At that hearing, Thomas had acknowledged that: there was a sixty-year maximum sentence on each count; the State was going to recommend substantial prison terms to be served consecutively and he was facing "a very, very long prison sentence"; the circuit court was under no obligation to follow the recommendations of the State or of Thomas's trial counsel; no one had made promises or threatened him to get him to plead guilty; and he was pleading guilty because he was guilty. Accordingly, the circuit court denied Thomas's motion for plea withdrawal.

¶12 On appeal, Thomas does not directly challenge the circuit court's decision in this regard. That claim would be a losing proposition, as the circuit court decision basically boils down to a credibility assessment, something that we generally do not disturb. *See* ***State v. Denson***, 2011 WI 70, ¶73, 335 Wis. 2d 681, 799 N.W.2d 831. Instead, Thomas claims that two incidents at the ***Machner*** hearing caused the circuit court to improperly negate Thomas's right to meaningfully participate in the hearing, thereby rendering the circuit court's decision invalid and warranting a new ***Machner*** hearing. We reject this argument.

¶13 We note first that Thomas has not established that he has a right to participate in a ***Machner*** hearing. He cites, without pinpoints, only two cases but, as we read them, neither case supports the contention that a defendant has a right to participate in a postconviction evidentiary hearing. The first case, ***State v. Vennemann***, 180 Wis. 2d 81, 508 N.W.2d 404 (1993), stands only for the proposition that a defendant has the right to be present at a postconviction evidentiary hearing where there are substantial issues of fact as to events in which the defendant participated. *See* ***id.*** at 93-95. The second case, ***State v. Wesley***, 2009 WI App 118, 321 Wis. 2d 151, 772 N.W.2d 232, is even less persuasive.

The only holding in that case regarding a ***Machner*** hearing was that Wesley was entitled to have one. *See* ***Wesley***, 321 Wis. 2d 151, ¶¶1, 24.

¶14 In any event, the first incident with which Thomas takes issue is what he perceives as the circuit court prejudging his testimony. After trial counsel testified, but before Thomas did, postconviction counsel asked to exclude trial counsel from the courtroom during Thomas's testimony. The circuit court denied the request, explaining:

> [T]his is a rather perfunctory, as far as I'm concerned, [***Machner***] hearing that arguably could have been denied on its face.
>
> I'm conducting this hearing for purposes of completing the record, for purposes of not having to go through this any further because I know that the Court of Appeals is not going to make factual determinations, so I need to make a determination relative between [trial counsel], who has been a defense attorney for 20 to 25 years, and a defendant who admittedly murdered someone and her unborn child and is now doing decades in prison.
>
> The defendant can testify. [Trial counsel] can stay here. There's no chance on earth, practical, likely or otherwise, that he's going to conform his testimony or modify it based on what Mr. Thomas says.

¶15 Based on these comments, particularly the contrast between trial counsel and Thomas, Thomas claims that the circuit court prejudged his testimony. We disagree. In context, the comments are nothing more than the circuit court explaining its reasoning for rejecting what was, under the circumstances, a rather unreasonable objection to trial counsel remaining in the courtroom for Thomas's testimony.

¶16 The second incident occurred during Thomas's testimony. First, the following exchange occurred:

> Q Why did you plead guilty to those two counts?
>
> A Because him being experienced with his job that he basically tell me - - he said you will get 10 years in and 10 years out, and it won't be more than 15 years, in any event.
>
> **THE COURT:** No more than 15 years, in any event? I don't even know what that means. Maybe we'll clarify since he just said the one alleged promise was 20 years, so how there was no more than 15 years, in any event, I don't get. Maybe counsel will clarify this.
>
> **THE DEFENDANT:** Well, you should ask him that.
>
> [**COUNSEL**]: No, no, we're asking you that.
>
> **THE COURT:** Mr. Thomas, right now -- counsel, you will tell your client to lose his attitude.
>
> **THE DEFENDANT:** I don't got no attitude, sir.
>
> **THE COURT:** Get his rear end out of here right now. When he cleans up his attitude, we'll continue this hearing.
>
> (Whereupon, the defendant was unruly, and there were outbursts from the gallery).

¶17 Thomas was removed from the courtroom, and the hearing resumed a short time later. However, rather than continue with Thomas's testimony, the circuit court pronounced its decision. Thomas complains that he was not allowed to clarify the circuit court's "confusion as to the plea promise as well as explaining his comment to the trial court during the plea colloquy concerning the maximum possible penalties."

¶18 The way Thomas tells it, the circuit court had asked for clarification, then refused to allow him to answer. When Thomas "politely indicated" to the circuit court that he did not have an attitude, the circuit court ordered him forcibly removed from the courtroom "[d]espite this politeness," then refused to allow him to continue with his testimony when the hearing reconvened.

¶19 However, Thomas omits any mention of the record the circuit court made when the hearing resumed:

> Mr. Thomas was removed from court about 20 minutes ago due to his belligerent, out-of-control attitude and behavior. He was kicking back in his chair, presenting a potential risk to court staff, potential risk really to [postconviction counsel] who is sitting next to him. On his way out of court, he told the Court, told me to "fuck off" on multiple occasions.

¶20 "A defendant has a right to be present in the courtroom at every stage of the proceedings." ***State v. Pirtle***, 2011 WI App 89, ¶21, 334 Wis. 2d 211, 799 N.W.2d 492. "That right, however, can be waived by consent or forfeited by conduct 'so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.'" ***Id.*** (citation omitted). In other words, the circuit court can, in some instances, remove a defendant from the courtroom, notwithstanding a right to otherwise be present. Thus, given the record made after the fact, we discern no error from the circuit court's removal of Thomas from the courtroom.

¶21 Of course, Thomas's removal from the courtroom is only part of his complaint; he also contends that the circuit court improperly failed to continue his testimony when he was brought back into the courtroom. We still discern no error. As noted, a defendant can forfeit his right to be present at proceedings by his behavior. *See* ***id.*** A defendant can also forfeit his right to counsel by his behavior. *See* ***State v. Cummings***, 199 Wis. 2d 721, 756-57, 546 N.W.2d 406 (1996). It therefore follows that even if Thomas had a right to participate in his postconviction hearing, he could forfeit that right through his behavior, and clearly did so here.

¶22 Moreover, the primary question for the ***Machner*** hearing was whether trial counsel promised Thomas a certain sentence if he entered guilty pleas. By the time Thomas was removed from the courtroom, the essential testimony on that question had already been presented. We are not convinced that additional testimony from Thomas would have made a difference: it is clear that even without his profane outburst or evidence of the plea colloquy, the circuit court simply did not believe Thomas's allegations against trial counsel. Thomas offers nothing on appeal that would cause us to think otherwise.[2]

¶23 The circuit court did not err in the manner in which it conducted the ***Machner*** hearing. Once the circuit court determined that there was no deficient performance by trial counsel in the guise of a promised sentence, it necessarily followed that there was no ineffectiveness that tainted Thomas's plea. The circuit court properly denied the postconviction motion for plea withdrawal.

By the Court.—Judgment and order affirmed.

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

[2] Thomas merely asserts that if testimony had continued, he could have answered the circuit court's question regarding whether the promise was for fifteen or twenty years, and he could have provided an explanation of the answers he gave at the plea colloquy. Thomas does not, however, tell us what that answer or explanation would have been.