COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0024-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDOLPH SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Randolph Scott appeals from a judgment of conviction entered after he pled guilty to first-degree recklessly endangering safety. *See* § 941.30(1), STATS. He also appeals from an order denying his motion for postconviction relief. Scott argues: (1) that the trial court erred in denying his postconviction motion for plea withdrawal without a hearing because

he allegedly pled guilty as a result of ineffective assistance of counsel; (2) that the trial court was not apprised of all of the information relevant to sentencing; (3) that the trial court based his sentence on inaccurate information; and (4) that the trial court imposed an unduly harsh and excessive sentence. We affirm.

BACKGROUND

The facts, as set forth in the criminal complaint, are as follows. On the evening of July 25, 1996, Scott and his uncle, Roger Retic, began arguing. The argument escalated, and Scott stabbed Retic, once in the stomach and twice in the left arm. When the police arrived, Scott and Retic were still struggling, and Scott was holding a small folding knife. The police ordered Scott to drop the knife, but Scott refused. The police, therefore, sprayed Scott with pepper spray, and Scott dropped the knife. Scott attempted to pick up the knife, but the police restrained him and handcuffed him.

Scott then told the police that Retic had raped his mother, and that Retic had provoked the current confrontation. Scott said that he was arguing with Retic about whether Retic had gone into Scott's room, and that Retic said: "Yeah I was in your bedroom, and in your mama too!" Scott's aunt (Retic's sister), with whom both Scott and Retic lived, told the police that, before stabbing Retic, Scott had warned her: "You better call the police [be]cause I'm gonna kill him."

The State initially charged Scott with first-degree recklessly endangering safety, while armed with a dangerous weapon. Pursuant to a plea bargain, however, the penalty enhancer for committing the crime while armed with a dangerous weapon was dropped, and on October 30, 1996, Scott pled guilty to first-degree recklessly endangering safety. The trial court accepted the guilty

plea and thereafter sentenced Scott to a five-year prison term, consecutive to his sentence on a prior conviction, for which his probation had been revoked.

On December 1, 1997, Scott filed a motion for postconviction relief. In the motion, Scott sought to withdraw his guilty plea, asserting that he pled guilty as a result of ineffective assistance of counsel. Scott also sought re-sentencing, arguing that the trial court had not been apprised of all of the relevant facts, that the trial court relied on inaccurate information, and that his sentence was unduly harsh and excessive. The trial court denied Scott's postconviction motion without a hearing.

DISCUSSION

Scott argues that the trial court erred in denying his postconviction motion for plea withdrawal without a hearing because he allegedly pled guilty as a result of ineffective assistance of counsel. Scott claims that his counsel was deficient because counsel allegedly did not advise Scott that he could have raised self-defense as a defense at trial. Scott claims that he would not have pled guilty if his counsel had properly advised him. We conclude that the record conclusively refutes Scott's claim, and that the trial court properly denied Scott's motion without a hearing.

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See* ***id.***

> However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only

> conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only if the trial court erroneously exercises that discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving a manifest injustice by clear and convincing evidence. *See* ***Bentley***, 201 Wis.2d at 311, 548 N.W.2d at 54. The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *See* ***id.***

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice.[1] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, Scott 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. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714

[1] If we conclude that a defendant fails to satisfy this burden on one prong, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

(1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

As noted, Scott asserts that his counsel did not inform him that he could have asserted self-defense at trial. Scott asserts that he and his counsel discussed self-defense only "in the context of mitigation of sentence." Contrary to Scott's assertions, however, the guilty plea questionnaire and waiver of rights form that Scott reviewed with his counsel and then signed specifically provides: "I understand that by pleading guilty I will be giving up any possible defenses, including but not limited to self-defense …." Before accepting Scott's guilty plea, the trial court asked Scott whether he had reviewed the guilty plea and waiver of rights form with his attorney. Scott confirmed that he had reviewed the form and that he understood it. The trial court also asked Scott's attorney whether he and Scott had discussed the guilty plea, the elements that the State would have to prove if the case proceeded to trial, and any defenses that Scott had to the charge. Scott's attorney confirmed that he and Scott had discussed those matters, that Scott understood his rights and that Scott was pleading guilty voluntarily. Thus, the record clearly discloses that Scott and his attorney discussed the availability of self-defense, and that Scott chose to plead guilty and forgo asserting that defense

at trial. The trial court properly denied Scott's motion to withdraw his plea without a hearing.[2] *See* ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53.

Scott next argues that the trial court did not have all of the relevant information when it sentenced him, and that the sentence was based on inaccurate information. *See* ***Bruneau v. State***, 77 Wis.2d 166, 174–175, 252 N.W.2d 347, 351 (1977) (a defendant has a constitutional due process right to be sentenced on the basis of true and accurate information). Specifically, Scott asserts that the trial court inaccurately determined that Scott was not acting in self-defense when he stabbed Retic because the trial court was allegedly unaware of the following evidence, which, Scott claims, indicates that he feared Retic:

> 1. Mr. Scott made previous efforts to avoid Mr. Retic.
>
> 2. Mr. Retic was not only violent based on raping Mr. Scott's mother and stabbing Mr. Scott, but based on having attacked Mr. Scott on the street soon after getting released from prison on the stabbing. Also, Mr. Scott was under threats of further violence from Mr. Retic at the time of the incident herein. (Mr. Scott also had reason to believe that another aunt/sister had been assaulted by Mr. Retic.)
>
> 3. Mr. Retic's previous physical attacks on Mr. Scott were both vicious and sudden, so that fear of Mr. Retic informed everything Mr. Scott did in relation to Mr. Retic.

[2] The trial court concluded both that the record conclusively demonstrated that Scott had knowingly waived the self-defense claim, and that, in any event, Scott was not prejudiced because there was no reasonable probability that a self-defense claim would have been successful at trial. Scott correctly asserts that the appropriate standard for prejudice is not whether the defense would have been successful at trial, but whether the defendant would have insisted on a trial if not for counsel's alleged deficiency. *See* ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). Nonetheless, the trial court properly denied Scott's motion for plea withdrawal without a hearing because the record conclusively establishes that Scott and his counsel discussed the availability of self-defense, and that Scott's ineffective-assistance-of-counsel claim is thus without merit.

The record reveals that the trial court knew that Retic and Scott had an antagonistic relationship, that Retic had previously stabbed Scott, that Scott allegedly feared Retic, and that Scott allegedly attempted to avoid Retic. We therefore conclude that the trial court did not sentence Scott based on inaccurate information.

A trial court has discretion to modify a criminal sentence upon a showing of a new factor. *See* ***State v. Michels***, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). A new factor is:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

Id. (citation omitted). A new factor must also be an event or development which frustrates the purpose of the original sentence. *See* ***id.***, 150 Wis.2d at 99, 441 N.W.2d at 280. A defendant has the burden to establish the existence of a new factor by clear and convincing evidence. *See* ***id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. Whether a particular fact or set of facts constitutes a new factor is a question of law, subject to *de novo* review. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

At Scott's guilty plea hearing, Scott's attorney informed the trial court that Retic had previously stabbed Scott, and that it was his "contention that [Scott] was provoked, verbally provoked over a period of time, traumatized by this guy." Scott's counsel again explained the violent relationship between Scott and Retic at the sentencing hearing: "Back in 1994 [Retic] was actually convicted of stabbing [Scott]. He stabbed him and the stab wound went right underneath the heart. There's a history between these two guys. There's a history between

[Retic] and [Scott's] mother." The trial court acknowledged this history in sentencing Scott, when it made the following assessment of the crime:

> It is a very brutal stabbing that was committed, apparently upon some verbal provocation by the victim, and the victim has a history of not only this sort of verbal provocation as regards to you, but also a history of physical assault and a past episode of violence against you and so I need to take into consideration all of the surrounding circumstances ….

Moreover, the presentence investigation report, which the trial court reviewed before imposing sentence, informed the court that Scott claimed that he feared Retic, and that Retic had previously stabbed him near the heart "for no reason." The presentence investigation report also reflected Scott's claim that, although he and Retic lived in the same house, he tried to stay away from Retic, as well as Scott's claim that Retic had raped a family member other than Scott's mother. Thus, as the trial court observed in its order denying Scott's motion for postconviction relief, "[t]he additional history presented by the defendant [in his postconviction motion] adds little to what [the trial court] had known previously." The allegations set forth in Scott's motion are not new factors, and the allegations do not support Scott's assertion that the trial court sentenced him based on inaccurate information.

Scott's final argument is that the trial court imposed an unduly harsh and excessive sentence. The trial court considered the appropriate sentencing factors, and that the sentence imposed was not unduly harsh or excessive.

Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court erroneously exercised discretion. *See* ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence,

and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. ***Id.***, 119 Wis.2d at 622–623, 350 N.W.2d at 638–639. The primary factors to be considered in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984); ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality, and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See* ***Curbello-Rodriguez***, 119 Wis.2d at 433, 351 N.W.2d at 767. A trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992).

The trial court imposed a five-year sentence, consecutive both to the sentence Scott was serving as a result of the revocation of his probation and to any other sentence. This was the maximum potential sentence for Scott's first-degree recklessly-endangering-safety conviction. *See* § 939.50(3)(d), STATS. In imposing this sentence, the trial court first considered the gravity of the offense. The trial court observed that, based upon the witnesses' accounts of the stabbing, Scott could have been charged with a much more serious crime. The record reveals that Scott stabbed Retic three times, once in the stomach and twice in the left arm. The trial court observed that Scott's aunt said that Scott had warned her

to call the police because he intended to kill Retic. The trial court further noted that Retic was unarmed, and that Scott stabbed Retic because he was angry about what Retic was saying.[3]

The trial court also considered Scott's criminal history, including a prior conviction for second-degree recklessly endangering safety, where Scott stabbed the victim after they got into an argument over the Super Bowl. The victim suffered very serious injuries, including the loss of part of his kidney. Scott's criminal history also included a battery conviction, a conviction for carrying a concealed weapon, and two forgery convictions. The trial court determined that Scott had significant rehabilitative needs, and that, based on Scott's history of violent behavior, a significant period of incarceration was necessary to protect the public. We conclude that the trial court properly exercised its discretion in sentencing Scott, and that Scott's sentence is not unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] The trial court rejected Scott's assertion that Retic originally had the knife, and that Scott wrestled it away and stabbed Retic in self-defense. In doing so, the trial court observed that Scott's belated self-defense claim conflicted with both Scott's original version of the stabbing, and the other witnesses' accounts. Indeed, Scott's aunt said that Scott warned her that he intended to kill Retic, and the criminal complaint reflected that Scott was reluctant to give up the knife he used to stab Retic, even after the police had arrived and ordered him at gun-point to drop the knife. The decision to reject Scott's self-defense claim and credit the accounts given by the other witnesses was within the trial court's province. *See* § 805.17(2), STATS. (the trial court's findings of fact shall not be set aside unless clearly erroneous).