COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1246-CR **Cir. Ct. No. 2008CF1117**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROMY MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY and STEPHANIE ROTHSTEIN, Judges. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge

¶1 CANE, J. Jeromy Miller appeals the judgment entered on his no contest plea to one count of first-degree sexual assault of a child and the order denying his postconviction motion seeking plea withdrawal.[1] Miller contends the circuit court erred when it denied his postconviction motion without an evidentiary hearing to determine whether a manifest injustice occurred when the circuit court and his trial lawyer incorrectly told him that his plea would not affect his right to appeal the circuit court's denial of his pretrial motion to dismiss. He believes that the circuit court's misstatement rendered his plea defective and his lawyer's misstatement and decision to bring the motion to dismiss the complaint as a pretrial motion as opposed to challenging the lack of corroboration at trial resulted in ineffective assistance. Because there was no merit to the pretrial motion to dismiss and because the motion was untimely, the misstatements by the circuit court and his lawyer were harmless and cannot constitute a manifest injustice. Further, Miller failed to establish sufficient facts to show that he received ineffective assistance of counsel. Therefore, no evidentiary hearing was needed and we affirm.

BACKGROUND

¶2 In March 2008, Miller confessed to the police that about a year earlier, he was in his bedroom watching a pornographic movie and masturbating. He was home alone except that he was babysitting his then eight-month-old daughter, who was sitting on his bed. Miller told the police that he took his erect penis and put it to his daughter's mouth for a couple of seconds. The child's

[1] The Hon. Carl Ashley presided over Miller's case through sentencing. The Hon. Stephanie Rothstein handled Miller's postconviction motion.

mother told the police during their investigation that near the time the assault occurred, she found a pornographic video in the PlayStation that Miller had in his bedroom.

¶3 The State issued a complaint charging Miller with one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2007-08).[2] Miller waived the preliminary hearing that had been scheduled for March 14, 2008, and the State issued an information charging Miller with first-degree sexual assault of a child. In September 2008, Miller filed a motion to suppress his statements and a motion to dismiss. Miller argued the complaint should be dismissed because his confession was not corroborated and the complaint could not survive on the confession alone. The circuit court denied both motions specifically ruling that the confession was sufficiently corroborated by the mother's statement.[3]

¶4 Subsequently, Miller entered into a plea bargain with the State and pled no contest to first-degree sexual assault of a child. At the plea hearing, the circuit court told Miller:

> You also need to know that you have the right to challenge certain legal matters such as you are the identified person that committed this offense, challenges to the sufficiency of the complaint, suppression of statements you might have made to law enforcement, or suppression of other evidence. Now, you have had some motion hearings and those issues are preserved. So if you appeal, the Court will look at those issues. Those issues that you haven't addressed though, you are waiving; do you understand that?

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] Miller does not appeal the circuit court's decision on the suppression motion.

After accepting Miller's no contest plea, the circuit court sentenced him to five years' initial confinement, followed by five years' extended supervision, but stayed the sentence and put him on probation for eight years.

¶5 Although Miller's trial lawyer filed a notice of intent to pursue postconviction relief, ultimately no further postconviction action or appeal occurred. When Miller's probation was revoked years later, however, he sought to reinstate his postconviction/appeal rights and we granted his request. In February 2014, Miller filed a postconviction motion seeking to withdraw his guilty plea on the grounds that: (1) the circuit court gave him erroneous information about his right to appeal the motion to dismiss and that if he had known his plea waived that right, he would have taken the case to trial; and (2) his trial lawyer also told him that he could appeal the ruling on the motion to dismiss even after his plea and that his trial lawyer gave him ineffective assistance by raising the corroboration issue in a pretrial motion to dismiss instead of raising this issue at trial. The circuit court denied Miller's motion without holding a hearing, ruling that no manifest injustice existed and any errors were harmless.

DISCUSSION

¶6 Miller claims the circuit court erred when it denied his motion to withdraw his plea without holding an evidentiary hearing. He contends that he alleged sufficient facts to entitle him to relief: (1) the complaint did not have any facts to corroborate his confession; (2) both the circuit court and his trial lawyer told him that he could raise the corroboration issue on appeal even after he entered a no contest plea; and (3) his trial lawyer was ineffective for raising the corroboration issue in a pretrial motion to dismiss instead of at trial. We reject Miller's claims and affirm.

¶7 The circuit court must conduct an evidentiary hearing when a postconviction motion alleges facts that, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** at 310. "[T]he circuit court has the discretion to deny a postconviction motion without a hearing" "'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.'" ***Id.*** at 309-11 (citation omitted).

¶8 The issue here involves a plea withdrawal after sentencing. To withdraw a plea after sentencing, Miller must show by clear and convincing evidence that failure to permit plea withdrawal would result in a manifest injustice. *See* ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. A manifest injustice exists when there has been "'a serious flaw in the fundamental integrity of the plea.'" ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (citation and one set of quotation marks omitted). Examples of manifest injustice include where a defendant did not knowingly, intelligently, and voluntarily enter the plea, *see* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891, or where the defendant received ineffective assistance of counsel, *see* ***Bentley***, 201 Wis. 2d at 311. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), sets forth the standards addressing valid and defective pleas. If a defendant asserts the circuit court did not comply with the proper plea requirements under WIS. STAT. § 971.08, the defendant has the burden to "make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures." ***Bangert***, 131 Wis. 2d at 274. If the defendant satisfies that burden, then the burden shifts to the

State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered." ***Id.*** Defects in plea colloquies are subject to the harmless error test. ***State v. Cross***, 2010 WI 70, ¶36, 326 Wis. 2d 492, 786 N.W.2d 64.

A. *Knowing Plea.*

¶9 Miller claims he alleged sufficient facts to require a hearing on whether his plea was entered unknowingly because the circuit court and his lawyer gave him incorrect information about his appeal rights. He argues that this rendered his plea colloquy defective and withdrawal of his plea is required to correct a manifest injustice.

¶10 The State concedes that the circuit court's statement during the plea colloquy suggesting that Miller could appeal the motion to dismiss was incorrect. Guilty pleas waive all non-jurisdictional issues except motions to suppress. *See* ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. Further, if Miller's lawyer also told him the same thing, that was also incorrect. We say "if" here because Miller's motion did not include an affidavit swearing to this fact. Regardless, the record conclusively shows both that the motion to dismiss should not have been addressed at all because it was untimely, and that even if the motion to dismiss had been timely, it was meritless. Accordingly, any misstatements about Miller's right to appeal the motion to dismiss were harmless.[4]

[4] Miller cites ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), in support of his claim that he should be allowed to withdraw his plea. ***Riekkoff*** addressed whether a defendant and the prosecutor could "explicitly condition[a] plea upon the right to appeal a losing motion" if the circuit court "took the position that the guilty plea would not waive the right of appeal." ***Id.*** at 126. ***Riekkoff*** rejected that idea but determined that because the prosecutor, defendant, and court all *explicitly conditioned* the plea on Riekkoff's right to appeal a motion, (continued)

¶11 First, WIS. STAT. § 971.31(5)(c) provides: "In felony actions, objections based on the insufficiency of the complaint *shall* be made prior to the preliminary examination or waiver thereof or *be deemed waived*." (Emphasis added); *see also* ***State v. Berg***, 116 Wis. 2d 360, 365, 342 N.W.2d 258 (Ct. App. 1983) ("Challenges to the sufficiency of a complaint must be made prior to the preliminary hearing."). The record shows that Miller waived his preliminary examination on March 14, 2008, and he brought the motion to dismiss based on the insufficiency of the complaint on September 9, 2008. Thus, the motion to dismiss was untimely.

¶12 Second, even if Miller had filed this motion before the preliminary hearing date, the motion would have been denied for two reasons. First, as recognized by the circuit court, the complaint was not based *solely* on Miller's confession, but was corroborated by the mother's statement about the pornographic video found in the PlayStation in Miller's bedroom near the time of this incident. Second, the corroboration rule does not apply to the complaint because the standard for a complaint is probable cause that the defendant committed the crime alleged. *See* ***State v. Reed***, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315. The corroboration rule, instead, applies to convictions at trial:

> The corroboration rule ensures that a conviction does not stand when there is an absence of any evidence

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Riekkoff's plea was not knowing or voluntary and he could move to withdraw his plea if he so desired. ***Id.*** at 128.

The circuit court in the case before us found Miller's case distinguishable from ***Riekkoff*** and found that Miller did not prove any prejudice occurred as a result of the circuit court and Miller's lawyer giving Miller incorrect information. We agree with the circuit court's ruling. There is no evidence in the record that the prosecutor and Miller "explicitly conditioned" his plea on his right to appeal the motion to dismiss as was the case in ***Riekkoff***. Accordingly, ***Riekkoff*** does not apply.

> independent of the defendant's confession that the crime in fact occurred. The corroboration rule functions as a "restriction on the power of the jury to convict." A conviction will not stand on the basis of a defendant's confession alone.

State v. Bannister, 2007 WI 86, ¶23, 302 Wis. 2d 158, 734 N.W.2d 892 (citations omitted). Miller conceded this point in his "Memorandum of Law in Support of Postconviction Motion to Withdraw Guilty Plea" when he argued that the corroboration rule "applies *only* to evidence presented at trial." (Emphasis added.) For these reasons, the motion to dismiss based on the corroboration rule had no merit and a misstatement about Miller's right to appeal the denial of the motion to dismiss cannot constitute a manifest injustice.

B. *Ineffective Assistance.*

¶13 Next, Miller claims his motion alleged sufficient facts to require a hearing because his trial lawyer gave him bad advice and because his trial lawyer should have waited to raise the corroboration issue at trial instead of making the motion to dismiss pretrial.[5] The circuit court rejected this argument, finding that Miller failed to show his trial lawyer's actions prejudiced him. We agree with the circuit court.

¶14 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The ultimate determinations based upon those findings of whether counsel's

[5] Of course, in this case, there was no trial because Miller entered a plea. The argument, therefore, assumes a hypothetical situation.

performance was constitutionally deficient and prejudicial are questions of law subject to our independent review. ***Id.*** The defendants bear the burden of proving both that counsel's performance was deficient and, if so, such performance prejudiced their defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Defendants must overcome a strong presumption that their counsel acted reasonably within professional norms. ***Johnson***, 153 Wis. 2d at 127. Prejudice is proven when the defendant shows that his counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687.

¶15 Here, Miller fails to show how his trial lawyer's incorrect advice or pretrial motion to dismiss prejudiced him. First, even if his trial lawyer had correctly told Miller that the motion to dismiss would not survive his plea, Miller cannot establish prejudice because there was no merit to the motion to dismiss. Second, regarding the timing of the filing of the motion to dismiss, Miller essentially is arguing that his trial lawyer raised the corroboration issue too early and should have waited to make this argument at trial. This contention, however, does not establish prejudice for filing the motion to dismiss before trial.

¶16 As the State points out: "a premature effort to litigate the issue cannot cause any prejudice. At worst, the judge denies the motion as premature, leaving counsel to litigate the issue when it becomes ripe." We agree. Miller has not alleged sufficient facts to show that his lawyer's pretrial motion to dismiss prejudiced him. His trial lawyer successfully negotiated a plea bargain resulting in Miller getting a ten-year stayed sentence (five years' initial confinement, five

years' extended supervision) that put him on eight years' probation.[6] Therefore, these claimed errors against his trial lawyer do not rise to the level of ineffective assistance of counsel.

¶17 Accordingly, the circuit court did not err when it denied Miller's motion without a hearing because the record conclusively shows that Miller is not entitled to relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] Miller initially faced sixty years in prison with a mandatory minimum of twenty-five years.