COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3177

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON S. PETRI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jason Petri, pro se, appeals an order denying his § 974.06, STATS., motion for postconviction relief. Petri argues that he received ineffective assistance of trial counsel and postconviction counsel, and that the trial

court erroneously exercised its discretion by denying his motion for postconviction relief. Because the record fails to support his assertions, we affirm the order.

¶2 Petri was charged with shooting Christopher Zittlow in a rural Marinette County cabin on December 16, 1991. He was also charged with operating a motor vehicle without the owner's consent, theft and criminal trespassing/damage to property, party to a crime. The criminal complaint contained statements of Petri and his co-defendants. These statements described how Petri and five acquaintances, including Zittlow, spent a weekend drinking at the cabin. Petri and the others stated that on Monday, Petri shot Zittlow as he was sleeping. They fled the cabin in Zittlow's car and were later apprehended in Michigan.

¶3 In 1992, Petri pled no contest to attempted first-degree intentional homicide, party to a crime. As part of his plea agreement, the State did not ask for restitution, and the weapons penalty enhancer and remaining charges were dismissed and read into the record at sentencing. Petri was sentenced to twenty years in prison.

¶4 In 1995, Petri's appellate counsel filed a motion to modify his sentence based on a new factor. The trial court denied the motion. In 1998, Petri filed a pro se § 974.06, STATS., motion seeking to withdraw his plea on the basis of ineffective assistance of trial and appellate counsel. At the ***Machner*** hearing, Petri called Bryan Dehn, a former co-defendant, to testify at the postconviction hearing. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). Dehn testified that everyone was drinking that weekend and that he had supplied the alcohol. He remembered that Petri wanted to leave but that everybody stopped

him. One time Petri jumped out of an upstairs window and was brought back in the cabin by one of the youths. Dehn vaguely remembered a hitting contest.

¶5 Dehn testified that the alcohol ran out Sunday night. The shooting took place on Monday. Dehn remembered hearing a gun go off. When he turned and looked, "I seen you shooting with your head looking away." Dehn further stated: "I just remember you looking away and just shooting randomly, not knowing where you were shooting, just in the direction of Chris sleeping on the bed."

¶6 On cross-examination, Dehn testified that two in their group wanted Zittlow's car and that his 1991 statement gave an account of Petri agreeing with others that Zittlow should be killed. Dehn also testified that in March 1992, he gave the following statement:

> In early February or late January, 1992, I received a telephone call at home from Jason Petri who was in jail in Marinette. Jason told me to say that John Braden held a gun up to Jason—Jason's head and told Jason to shoot Chris or that John would shoot Jason if he didn't. I told him I would not—I would not say that because it was a lie. The truth is that Jason Petri shot Chris Zittlow. Jason told me he could not get a hold of [co-defendant] Sara Miller, but that I was to tell her the same thing, to put the blame on [co-defendant] John Braden. I told Jason I would not do that. I told Sara about this and also John Braden when he called me.

After the hearing, the trial court denied the motion. Petri appeals the order denying his § 974.06, STATS., motion.[1]

[1] On the same day he filed his notice of appeal, Petri filed in the circuit court a motion to reconsider the denial of his § 974.06, STATS., motion. The trial court denied the reconsideration motion, and no subsequent notice of appeal was filed.

¶7 Ineffective assistance of counsel constitutes manifest injustice warranting withdrawal of a guilty plea. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The test for ineffective assistance of counsel requires a demonstration that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***Id***. at 636, 369 N.W.2d at 716. Counsel need not be perfect to be constitutionally adequate. ***State v. Mosley***, 201 Wis.2d 36, 49, 547 N.W.2d 806, 811-12 (Ct. App. 1996). To establish prejudice, Petri must show there is a reasonable probability that but for counsel's errors, he would not have pled no contest, but would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

¶8 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. *See* ***Pitsch***, 124 Wis.2d at 633-34, 369 N.W.2d at 714. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. *See* ***id***. at 634, 369, N.W.2d at 714. However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. *See* ***id***. at 634, 369 N.W.2d at 715.

¶9 Petri argues that trial counsel was ineffective for failing to conduct an adequate investigation. We disagree. Counsel testified that he reviewed all the discovery material, including Petri's statement, his co-defendants' statements and the victim's statements. He determined that the facts would not support self-defense, coercion or an intoxication defense. Counsel explained that his defense team was able to interview only one of the co-defendants because the lawyers for the other co-defendants refused to permit their clients to discuss the case with him.

Counsel believed it would have been unrealistic to subpoena the co-defendants to see if they would have testified without pleading the Fifth Amendment. Because Petri fails to demonstrate what additional investigation would have revealed and how it would have affected the outcome of his case, his argument fails. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994).

¶10 Petri argues without explanation that Dehn's testimony, as revealed at the postconviction hearing, would have aided his defense. It is not apparent how this testimony would have supported Petri's defense. To the contrary, Dehn testified that he saw Petri shoot the victim and that he later tried to get Dehn to lie about the facts. Petri does not show how Dehn's testimony would have assisted his defense and he therefore has failed to show that counsel was ineffective for not pursuing Dehn as a potential trial witness. *See* ***id***.

¶11 Petri makes several additional complaints regarding counsel's performance but fails to show prejudice. He complains that at the initial appearance, defense counsel stated that he had not yet read the entire complaint thoroughly but that "it appears to be almost identical to the juvenile petition which I have reviewed with my client." He also contends that defense counsel advised him to waive his preliminary hearing because it would be the same as a co-defendant's. Because Petri fails to demonstrate prejudice, we do not reach the question of deficient performance. *See* ***State v. Wirts***, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993).

¶12 Next, Petri contends that postconviction counsel was constitutionally inadequate. He argues that postconviction counsel failed to investigate the case. As before, Petri fails to identify specifically what the investigation would have revealed or how it would have aided his defense. *See* ***Flynn***, 190 Wis.2d at 48,

527 N.W.2d at 350. Petri alludes to an intoxication defense. At the postconviction hearing, counsel explained why this avenue was not pursued:

> You told me at the meeting that we had at the prison that you had been drinking all weekend, but—but the night before you had finished off all the booze … you hadn't had anything to drink for at least since the previous evening. I don't know if it was 12 or 14 hours, and that you – the most you felt was kind of hung over."

Based on his interview with Petri, postconviction counsel concluded that the facts failed to indicate that Petri had been utterly incapable of forming the intent to commit the crime and therefore would not support an intoxication defense. *See* ***State v. Guiden***, 46 Wis.2d 328, 174 N.W.2d 488 (1970).

¶13 Petri also contends that postconviction counsel was ineffective for failing to pursue a defense based upon impeaching the credibility of co-defendants with inconsistencies in their statements. We are unpersuaded. Petri fails to disclose how minor discrepancies in the substantially consistent statements of the five co-defendants would have altered the outcome. *See* ***Flynn***, 190 Wis.2d at 48, 527 N.W.2d at 350.

¶14 Finally, Petri argues that the trial court erroneously exercised its discretion when it failed to grant postconviction relief on the ground that his plea hearing did not satisfy ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Petri's postconviction motion concerned itself only with ineffective assistance of counsel. Because this issue was not raised in the circuit court, we do not address it on appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 677-78, 556 N.W.2d 136, 137 (Ct. App. 1996).

¶15 To the extent Petri's argument may be construed to imply that counsel ineffectively represented him at the plea hearing, this avenue was not pursued at the ***Machner*** hearing. Therefore, it is not preserved for appeal.[2] *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968).

By the Court.—Order affirmed.

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

[2] In any event, a review of the plea hearing itself discloses that the trial court conducted a careful colloquy. Petri contends that counsel was ineffective because he answered some of the court's questions on behalf of Petri relating to the elements of the offense as described in jury instructions. Petri argues that counsel should have given Petri the opportunity to answer them himself. Our review of the plea hearing satisfies us that the questions answered by counsel were merely cumulative to those addressed to Petri personally. As a result, there was no deficient performance.