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September 16, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1990-CR State of Wisconsin v. Robert Daniel Chairse (L.C. #2011CF3921)

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

Robert Daniel Chairse, *pro se*, appeals from an order of the circuit court that denied his postconviction motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] The order is summarily affirmed.

A criminal complaint dated August 20, 2011, charged Chairse with one count of armed robbery with the threat of force and one count of possession of a firearm by a felon. An initial appearance was held on August 21, 2011, and bond was set at $10,000. The preliminary hearing was

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

set for August 29, 2011, but, on that day, the State moved for an adjournment because the victim-witness was being uncooperative. The court commissioner granted the adjournment and rescheduled the preliminary hearing, which took place on September 15, 2011.

After multiple other reschedulings, Chairse entered a guilty plea to the armed robbery charge on December 12, 2011. The felon-in-possession charge was dismissed and read in. On February 15, 2012, the circuit court sentenced Chairse to eight years' initial confinement and seven years' extended supervision, with no eligibility for either the substance abuse or challenge incarceration early release programs.

Appointed postconviction counsel filed a postconviction motion seeking plea withdrawal on the grounds that Chairse did not understand the impact of a dismissed and read-in charge. The motion also sought eligibility for the early release programs and asked to have the DNA surcharge vacated. The circuit court removed the DNA surcharge but denied the rest of the motion. Appointed counsel filed a no-merit notice of appeal, but Chairse sought to discharge counsel and proceed *pro se*. We dismissed the no-merit appeal on April 11, 2014, and gave Chairse leave to file a new postconviction motion. In July 2014, Chairse filed a *pro se* postconviction motion, alleging ineffective assistance of trial and appellate counsel and claiming that his plea was not voluntary because of trial counsel's coercion. The circuit court denied the motion without a hearing.

A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that refusal to allow the withdrawal will result in a manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. Ineffective assistance of counsel is a manifest injustice, *see* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), as is entry of a plea that is not knowing, intelligent, and voluntary, *see* ***Taylor***, 347 Wis. 2d 30, ¶24.

As Chairse alleges ineffective assistance of counsel, he is subject to the ***Nelson/Bentley*** pleading standard. *See* ***State v. Burton***, 2013 WI 61, ¶40, 349 Wis. 2d 1, 832 N.W.2d 611; *see also* ***Bentley***, 201 Wis. 2d at 309-10; ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Thus, if Chairse's motion alleged sufficient material facts that, if true, entitled him to relief, the circuit court was required to grant a hearing on the motion. *See* ***Bentley***, 201 Wis. 2d at 309-10. If the motion did not raise sufficient facts or contained only conclusory allegations, or if the record conclusively shows Chairse was not entitled to relief, then the decision to grant or deny a hearing was a matter for the circuit court's discretion. *See* ***id.***; *see also* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient facts to warrant a hearing is a question of law. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We review only the allegations within the four corners of the motion itself. *See* ***id.***, ¶27.

Chairse's postconviction motion focuses primarily on claims of ineffective assistance of trial counsel. A defendant claiming trial counsel was ineffective must show that counsel's performance was both deficient and prejudicial. *See* ***id.***, ¶26; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Chairse's first claim of ineffective trial counsel was that trial counsel improperly "waived the time limits for the preliminary hearing over defendant's objection."[2] He further asserts that "[n]o prudent counsel would have turned down a chance to free their client once it was shown that the State could not meet its burden" for bindover.

[2] Chairse's brief is written with small caps formatting. In quotations, we remove that formatting. We have also revised punctuation where appropriate without necessarily noting the change.

WISCONSIN STAT. § 970.03(2) requires preliminary examination on a felony charge be held within twenty days of the initial appearance if the defendant is not in custody, or within ten days if the defendant is in custody and bail exceeds $500. The initial appearance was held on August 21, 2011. The preliminary examination was scheduled within appropriate time limits for August 29, 2011, but the State requested an adjournment on that day because the victim-witness had failed to appear on the subpoena. Defense counsel objected to the adjournment request.

The court commissioner reduced Chairse's bail to $500 from $10,000, so as to change the deadline for the preliminary hearing from ten to twenty days. The court then offered new hearing dates within the twenty days, but those dates were incompatible with defense counsel's schedule. The court told counsel, "If you can't do it, then we'll do it outside the 20 days, but the record will reflect, [counsel], that you're waiving the time limits for an adjournment for a preliminary hearing." Chairse believes his attorney should have attempted to get the charges dropped and get him released from prison rather than acquiescing to the waiver of the timelines.

Assuming without deciding that trial counsel was deficient,[3] Chairse's motion does not adequately allege any prejudice from trial counsel's "failure" to seek dismissal of the charges. Indeed, we can discern no possible prejudice. For one thing, the circuit court is permitted to extend the time for a preliminary examination upon motion and for cause. WIS. STAT. § 970.03(2). It is clear that the circuit court determined there was cause for the State's motion to adjourn, so the extension, which was granted over counsel's objection, would have been granted over any motion to dismiss. Additionally, as the circuit court noted in rejecting Chairse's postconviction motion, even if

[3] We note again that trial counsel objected to the State's request for an adjournment.

the pending charges had been dismissed, the State could have simply reissued the complaint. *See* ***State v. Johnson***, 231 Wis. 2d 58, 65, 604 N.W.2d 902 (Ct. App. 1999).

Chairse also claims trial counsel was ineffective because counsel "went out of his way to make sure defendant did not [appear] at any of the crucial hearings held." The postconviction motion refers to a scheduling conference set for September 27, 2011, and a hearing on November 8, 2011. The appellate brief also references a September 15, 2011 date.[4] Chairse claims in his motion that the hearings were critical because "they all involved a promise that the defendant wanted to enter into a plea deal with the State." The postconviction motion alleged that counsel, by waiving Chairse's appearances, "made sure defendant was not present to challenge [counsel's] words to the court that defendant wanted to plea out to the charges." Chairse insists that he wanted a trial.

A state statute specifies when a defendant must be present in court. These times include the arraignment, trial, *voir dire* of the trial jury, any evidentiary hearing, any view by the jury, when the jury returns its verdict, the pronouncement of judgment and the imposition of sentence, and any other proceeding when ordered by the court. *See* WIS. STAT. § 971.04(1)(a)-(h).

The record reflects Chairse was present for the September 15, 2011 hearing—it was the preliminary examination. The court bound Chairse over for trial, accepted a request for judicial substitution, heard Chairse's not-guilty pleas, and set the matter over for a scheduling conference on September 27, 2011.

On September 27, it appears that much of the scheduling discussion occurred off the record. After the State made its appearance, and the circuit court noted that the district attorney appearing

[4] We could disregard this assertion, as it is not within the four corners of Chairse's motion.

was there because of the unavailability of the district attorney assigned to the case, the court asked simply, "So we have a date for a plea?" The clerk responded with the date and time. Defense counsel agreed that the clerk gave the agreed upon date and time; he did not promise that Chairse was going to enter a plea, even if that was what counsel anticipated. In any event, a scheduling hearing does not require a defendant's presence. *See* ***id.***

The next hearing had to be rescheduled because of counsel's illness and rescheduled again at the circuit court's request. When the hearing was finally held on November 8, 2011, defense counsel noted the case was scheduled for a projected guilty plea and told the court that he "just had discussions" with the State and needed to sit down with Chairse again "and see if he is in agreement with the plea." In response, the court gave Chairse dates for a final pre-trial conference and for a trial. Again, counsel did not promise Chairse would be entering a plea or even that he had agreed to one. This date was used for nothing more than scheduling, meaning Chairse's presence was not required. Thus, we discern no adequate allegations of deficient performance. To the extent that Chairse asserts prejudice because he believes his nonappearance allowed counsel to conspire with the court to force him into a guilty plea by denying him the chance to insist on a trial, this claim is belied by the fact that the circuit court did not set a new plea date but instead set a trial date, anticipating proceeding to trial if the matter remained unresolved by the trial date.

Relatedly, Chairse claims his plea was not voluntary because his trial attorney was threatening him and coercing him into a plea, a coercion enhanced by all of counsel's "waivers" of Chairse's appearance. The postconviction motion actually contains no such allegations, so we need not consider this issue further. *See* ***Allen***, 274 Wis. 2d 568, ¶27. We note, however, that while Chairse claims "[t]here is no record of the circuit court asking the defendant whether or not threats had been made to him during the plea hearing," the record in fact does contain such a question. On

page four of the plea colloquy transcript, the circuit court asked, "Nobody made any promises or threats to you to plead?" Chairse responded, "No, sir."

Based on the foregoing, we conclude that Chairse's motion was inadequate to warrant a hearing on it.[5] Either the allegations are too conclusory to demonstrate a manifest injustice requiring plea withdrawal or the record shows Chairse is not entitled to relief. The circuit court did not erroneously exercise its discretion in denying the motion without a hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

[5] Chairse's postconviction motion also alleged "ineffective counsel during direct appeal, where, as here, counsel failed to address the issues now being addressed." To the extent this is meant to be an independent claim for relief, as opposed to Chairse's explanation for why the issues were not raised in the first postconviction motion filed by appointed counsel, we note that the motion makes no further allegations against appellate counsel, and a single conclusory sentence will not suffice to obtain relief.