COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0567-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN P. LYNCH,

DEFENDANT-APPELLANT,

CURTIS A. STELDT, JR.,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Shaun P. Lynch appeals from a judgment entered after he pled guilty to substantial battery, false imprisonment, and first-degree

intentional homicide, while armed, all as party to a crime and gang-related, contrary to WIS. STAT. §§ 940.19(3), 939.625(1)(b)3., 940.30, 939.625(1)(b)4., 940.01(1), 939.63, 939.625(1)(b)2., and 939.05 (1995-96). He also appeals from an order denying his postconviction motion seeking sentence modification. Lynch claims that the trial court: (1) erroneously exercised its discretion when it denied his motion seeking plea withdrawal made prior to sentencing; (2) erroneously exercised its discretion when it denied his motion seeking to adjourn the sentencing; and (3) erred in denying his postconviction motion seeking sentence modification without conducting an evidentiary hearing where he claimed trial counsel provided ineffective assistance at the sentencing hearing, new factors exist that warrant sentence modification, and the sentence should be modified in the interest of justice. Because the trial court did not erroneously exercise its discretion when it decided Lynch's motion to withdraw his plea, and when it denied his motion for adjournment, and because the trial court did not err in summarily denying his postconviction motion seeking sentence modification, we affirm.

I. BACKGROUND

¶2 On December 11, 1996, Lynch and his accomplice, Curtis A. Steldt, Jr., together with other members of the Simon City Royals gang, beat Anthony Socha into semi-consciousness for allegedly failing to follow gang rules. Lynch then participated in transporting Socha to an outdoor location in Milwaukee where Lynch shot Socha in the head, killing him.

¶3 Lynch and Steldt were charged with substantial battery, false imprisonment, and first-degree intentional homicide, while armed, all as party to a crime and gang-related. The two were bound over for trial. On December 8,

1997, the date the trial was supposed to commence, Lynch entered guilty pleas pursuant to a plea agreement. The State agreed to make no recommendation on Lynch's parole eligibility date if Lynch pled guilty. As part of the plea agreement, Lynch agreed to testify against Steldt. The trial court accepted the pleas, and ordered a presentence investigation. Sentencing was adjourned until after Steldt's trial. Steldt, who claimed surprise at Lynch's plea, moved to adjourn the trial. The motion was granted and Steldt's trial occurred on February 9, 1998. However, the testimony Lynch offered contradicted the statement he made to his attorney and the district attorney regarding who shot the victim. His testimony was cut short and a stipulation was read to the jury. Steldt was ultimately found guilty on all counts.

¶4 On February 19, 1998, Lynch's attorney filed a motion to withdraw on the basis that Lynch was now claiming he pressured Lynch into pleading guilty. The motion was granted and the case was adjourned to allow time to appoint a new attorney. On March 2, 1998, newly appointed counsel appeared on Lynch's behalf. Sentencing was set for March 18, 1998. On that date, the new attorney advised the court that he needed an adjournment because he had not yet received the file from the former attorney and there was some question as to whether Lynch would be moving to withdraw his plea. The court granted the request and adjourned sentencing until April 20, 1998. On that date, Lynch's attorney again moved for an adjournment stating that he would be filing a motion to withdraw the guilty pleas. The trial court granted the motion and reset sentencing for May 18, 1998.

¶5 On May 14, 1998, prior to sentencing, Lynch moved to withdraw his pleas. The motion was held on May 18, and after hearing testimony the trial court denied the motion. On May 18, 1998, Lynch's attorney again moved to adjourn

sentencing, arguing that he was not prepared to proceed to sentencing and needed to have a private presentence report prepared. The trial court denied the motion. Lynch was sentenced to life in prison without parole for the homicide conviction, and to concurrent nine-year and five-year sentences on the substantial battery and false imprisonment convictions, respectively. Judgment was entered.

¶6 Lynch filed a postconviction motion seeking sentencing modification on the grounds that he received ineffective assistance of trial counsel at the sentencing hearing, that new factors existed to warrant modification of the sentence, and that his sentence should be modified in the interest of justice. The trial court denied the motion without conducting a hearing. Lynch now appeals.

II. DISCUSSION

A. Plea Withdrawal.

¶7 Lynch claims that the trial court should have granted his motion seeking to withdraw his guilty pleas. He claims that the pleas were not entered knowingly, intelligently and voluntarily because: (1) he believed that he would be given a parole date; (2) he was not informed that use of LSD on the day of the homicide might have provided him with an intoxication defense; (3) he believed he was guilty under party to a crime liability just for being at the scene of the crime; and (4) mental health issues, including hyperactivity and conduct disorder with depressive features, interfered with his ability to enter a proper plea. He also claims that these same factors constitute a fair and just reason for withdrawing his plea. We are not persuaded.

¶8 Our review of whether a plea was entered knowingly, voluntarily and intelligently is a question of constitutional fact, which we review *de novo*. *See*

State v. Bollig, 224 Wis. 2d 621, 628, 593 N.W.2d 67 (Ct. App. 1999), *aff'd*, 2000 WI 6. However, a trial court's findings of fact will be accepted unless they are clearly erroneous. *See* ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). We employ a two-part test to determine whether a plea was knowingly, voluntarily and intelligently entered. *See* ***Bollig***, 224 Wis. 2d at 628. First, we must review:

> whether the defendant has made a prima facia showing that his plea was accepted without the trial court's conformance with § 971.08, STATS., and the other mandatory duties imposed by the supreme court; and … whether the defendant properly alleged that he or she did not know or understand the information that should have been provided at the plea hearing.

Id. at 628-29 (citation and footnote omitted). If the defendant so shows, the second part of the test involves the State showing by clear and convincing evidence that, despite the inadequacies, the plea was entered knowingly, voluntarily and intelligently. *See* ***id.*** at 629.

¶9 Here, Lynch testified at the withdrawal hearing that he did not understand the meaning of "party to a crime," that he believed "just being there" meant he was guilty. He also testified that trial counsel never discussed with him the possibility of an intoxication defense based on his use of LSD, that counsel spent only ten to fifteen minutes discussing the plea with him, and that counsel told him he would not be sentenced to life without parole. The trial court found Lynch's testimony to be wholly incredible. This finding is not clearly erroneous. The record clearly demonstrates that the plea colloquy was in compliance with WIS. STAT. § 971.08.[1] The trial court expressly identified the elements of the three

[1] WISCONSIN STAT. § 971.08 provides in pertinent part:

(continued)

charges facing Lynch, including the party to a crime aspect of each charge. Lynch personally asserted that he understood the elements. Further, Lynch signed a plea questionnaire, which he admitted he had reviewed with counsel, and that he understood everything on the form. Plea questionnaires "in and of themselves are competent evidence of a knowing and voluntary plea." ***Bollig***, 224 Wis. 2d at 632. Lynch also represented that he had discussed with his attorney what the State had to prove and that he understood the proof requirements.

¶10 With regard to the LSD allegations, the trial court found there was no evidence whatsoever to suggest that Lynch actually used LSD at the time of the offense. Use of LSD was not raised until the plea withdrawal stage. Further, the plea questionnaire specifically stated that Lynch was waiving any defenses, including intoxication. In reply, Lynch argues that this is insufficient because it referred only to "intoxication," not *drug* intoxication. He contends that this can only logically be interpreted to mean *alcohol* intoxication. We disagree; it encompasses both.

¶11 With respect to the belief that he would not be sentenced to a "no parole" term, the record clearly refutes this. Lynch personally acknowledged that he understood the trial court could sentence him to life without the possibility of parole. The trial court also found that Lynch's statement that trial counsel had only talked to him for ten to fifteen minutes about the plea was incredible. This finding was not clearly erroneous given the record evidence that a plea

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> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

questionnaire was reviewed, and Lynch's admission that his attorney had discussed the State's burden of proof. Finally, Lynch failed to demonstrate how "hyperactivity" or "conduct disorder with depressive features" interfered with his ability to comprehend the plea procedures. Based on the foregoing, we conclude that Lynch failed to satisfy the first part of the two-part plea withdrawal test. That is, he has failed to show that the pleas were not in conformance with the statutory requirements. Accordingly, the pleas were entered knowingly, intelligently and voluntarily.

¶12 We now turn to whether Lynch presented a "fair and just reason" for withdrawing his pleas. The question of whether a defendant may withdraw his plea is left to the sound discretion of the trial court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). However, a trial court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). Although "freely" does not mean "automatically," *see* ***id.***, the exercise of discretion requires the court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal, *see* ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). A fair and just reason "contemplates the mere showing of some adequate reason for the defendant's change of heart." ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). However, "the reason must be something other than the desire to have a trial." ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991).

¶13 In order to sustain a trial court's discretionary decision to deny a plea withdrawal, we must ensure that the court's determination was made upon the

facts of the record and in reliance on the appropriate and applicable law. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998).

¶14 Lynch argues that his "fair and just" reason to withdraw his plea was that it was not entered knowingly, intelligently and voluntarily. We disagree. As noted, there is no credible evidence demonstrating that Lynch did not know or understand what was happening. Moreover, we note that: (1) this was not Lynch's first contact with the criminal justice system; (2) he admitted that he understood what was happening; (3) there is a complete and valid plea questionnaire in the record, and (4) his testimony at the plea hearing directly contradicts his statements made during the plea-withdrawal hearing. The trial court found that Lynch's plea-withdrawal hearing testimony was "pure fabrication" given either because Lynch was not satisfied with the negotiations, or because the guilty plea was an attempt to manipulate the system to secure severed trials for him and Steldt. Our review of the record confirms that the trial court considered the proper facts and pertinent law, and reasonably concluded that Lynch failed to show a fair and just reason to grant his motion to withdraw his pleas. There was no erroneous exercise of discretion.

B. Motion to Adjourn.

¶15 Lynch next argues that the trial court erroneously exercised its discretion when it denied his motion seeking to adjourn sentencing so that counsel would have time to properly prepare for sentencing and so that a private presentence investigative report could be prepared. We reject Lynch's claim.

¶16 In reviewing whether the trial court should have granted an adjournment, we are limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Fink***, 195 Wis. 2d 330, 338, 536 N.W.2d 401

(Ct. App. 1995). In determining whether an adjournment request should be granted, the following factors are relevant: the length of the delay requested, whether another attorney could readily fill in, how many other adjournment requests have been made and granted, whether granting the request would inconvenience the State, the witnesses or the court, and whether the purpose for the delay appears legitimate or dilatory. *See* ***State v. Wollman***, 86 Wis. 2d 459, 470, 273 N.W.2d 225 (1979). The court may also consider any "[o]ther relevant factors." ***Id.***

¶17 Applying the factors in the instant case reveals that the trial court did not erroneously exercise its discretion when it denied the request for adjournment. This was the third time the defense was requesting an adjournment; the reason for the request was to prepare a private presentence report where a complete and comprehensive presentence report had already been completed; the victim's family had appeared for all the prior adjourned hearings; and, the State objected to yet another delay. Further, the record reflects that, although trial counsel represented that he was not prepared to proceed to sentencing, counsel was prepared as he pointed out several corrections to the presentence report, pointed out that Lynch had enrolled in a G.E.D. equivalent program, and made a sentencing recommendation that identified several mitigating aspects to this case.

¶18 Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion when it denied Lynch's motion for another adjournment. In addition, the record confirms that the denial did not prejudice Lynch because, when the subsequently conducted private presentence report was presented to the trial court in support of his postconviction motion seeking sentence modification, the trial court specifically ruled that nothing in the report would have altered its sentence.

C. Evidentiary Hearing, New Factors and Interest of Justice.

¶19 Finally, Lynch contends that the trial court should not have summarily denied his postconviction motion seeking sentence modification based on ineffective assistance of trial counsel, new factors, and the interest of justice. We disagree.

¶20 If a defendant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the defendant must allege, with specificity, both deficient performance and prejudice in the postconviction motion. *See* ***id.*** Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law to be reviewed independently by this court. *See* ***id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *See* ***id.*** at 318.

¶21 Lynch's claim of ineffective assistance of counsel is based on counsel's admission at sentencing that he was not prepared to proceed to sentencing because he wanted to obtain a private presentence report. The private report was submitted with the postconviction motion seeking sentence modification. The trial court reviewed the report and concluded that nothing in the report altered its previous conclusion that the proper sentence on the homicide

count was life in prison without the possibility of parole. In its written order denying the postconviction motion, the trial court explored in detail the private presentence report. The trial court concluded that the new report actually supported the trial court's original sentence. The trial court concluded that failure to prepare the private presentence report prior to sentencing did not prejudice Lynch. Accordingly, the trial court concluded that the record conclusively demonstrated that Lynch did not receive ineffective assistance of trial counsel and there was no need to conduct a hearing. We agree.

¶22 Lynch next contended that new factors required modification of his sentence or, at a minimum, an evidentiary hearing to explore the new factors. He argues that the private presentence report and the "life means life" guidelines, which suggest he should be given a parole eligibility date in sixteen to twenty-six years, constitute new factors. We disagree.

¶23 The trial court has the discretion to modify a sentence if the defendant presents new factors. *See* ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402 (1983). "A new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it." ***State v. Toliver***, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994). In addition, a new factor must have some connection to the sentence; that is, it must operate to frustrate the purpose of the original sentence. *See* ***id.*** at 362. "Whether a new factor exists presents a question of law which this court reviews *de novo*." ***Id.*** "If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification." ***Id.***

¶24 Here, neither proffered new factor satisfies this standard. The private presentence report did not provide any information, the absence of which frustrated the purpose of the original sentence, nor did it alter the trial court's belief that the crimes Lynch committed justified life in prison without the possibility of parole. Similarly, the "life means life" guidelines do not constitute a new factor. These guidelines are not mandatory and a trial court is not required to consider or impose the sentence suggested by the guidelines. Accordingly, we conclude that neither factor presented by Lynch constituted a new factor. There was no need to conduct an evidentiary hearing on this claim.

¶25 Finally, Lynch contends that his sentence should have been modified to include a parole eligibility date "in the interest of justice." He argues that to impose a no parole sentence on him, given the mitigating factors, including his young age, was unduly harsh. We do not agree.

¶26 Sentencing lies within the discretion of the trial court. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the sentencing discretion of the trial court, and sentences are afforded the presumption that the trial court acted reasonably. *See* ***id.*** at 681-82.

¶27 If the record contains evidence that the trial court properly exercised discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a

sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis.2d at 40.

¶28 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). As part of these primary factors, the sentencing court may consider a variety of other factors as set forth in ***Echols***, 175 Wis. 2d at 682-83, which are well recognized and need not be repeated. Suffice it to say, the sentencing court is not required to address each of those factors in addition to the three primary factors. The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). Because the sentencing court is in the best position to determine the relevant factors in each case, we allow the court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing how it is unreasonable or unjustified. *See* ***Echols***, 175 Wis. 2d at 682. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶29 We have reviewed the sentencing transcript. The trial court addressed the proper factors when it imposed sentence. It noted the serious nature of the crime, and the gang context in which the homicide took place. It pointed out the gang's

specific purpose is to be involved with guns and to sell drugs to others in the community. The trial court commented that Lynch was not simply a member of the gang, but rather, a demonstrated leader, that he had a substantial prior criminal record, and that all attempts at rehabilitating him had failed. The trial court also observed that there was a strong need to protect the public and send a message that this type of conduct results in severe consequences. The trial court concurred in the presentence writer's opinion that Lynch is "an extremely dangerous person and that [he does not] grasp the understanding or the point that such violence is reprehensible."

¶30 While it certainly cannot be disputed that imposing a "no possibility of parole" sentence on a nineteen-year-old is harsh, we cannot conclude that the sentence imposed here was unduly harsh. The crimes committed were extremely serious and callous, and involved taking a human life to enforce gang rules with very little remorse. Further, given Lynch's history of failing to take the opportunity to turn his life around, we agree with the trial court that "the interest of justice" does not require modifying the sentence imposed.

By the Court.—Judgment and order affirmed.

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