COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1216-CR **Cir. Ct. No. 2013CF3861**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES R. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Charles R. Smith appeals from a judgment of conviction for one count of first-degree reckless homicide, contrary to WIS. STAT.

§ 940.02(1) (2013-14).[1] Smith also appeals from an order that denied his post-sentencing motion to withdraw his guilty plea. Smith argues that the trial court erred when it found that his postconviction motion, which alleged that Smith's lawyer had "promised" him a specific sentence, was insufficient to warrant an evidentiary hearing. We affirm.

BACKGROUND

¶2 Smith was charged with one count of first-degree intentional homicide in connection with the stabbing death of Javier Bautista. One week before trial, Smith rejected a plea offer from the State, but on the scheduled trial date, Smith accepted a different plea offer.

¶3 At the plea hearing, the State told the trial court that it had filed an amended information that reduced the charge against Smith to one count of first-degree reckless homicide, for which the maximum sentence is sixty years of incarceration, including forty years of initial confinement and twenty years of extended supervision. The State continued:

> The [S]tate's recommendation is that the defendant serves a term of prison length up to the [c]ourt. The [S]tate's also seeking all lawful restitution and a presentence investigation.
>
> I'd note that the terms and conditions of the offer are outlined in a letter dated January 10, 2014, which specifically reserves the victim and their family's right to make any statements to the [c]ourt at sentencing and make their own recommendations as appropriate. Defense is free to argue.

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

¶4 The trial court confirmed with trial counsel that the State had correctly stated the plea agreement and then asked Smith whether he understood. Smith replied: "Yes." The trial court then asked Smith: "And you also understand that the [c]ourt's not bound by any negotiations or plea bargains. Do you understand that?" Again, Smith answered: "Yes."

¶5 The trial court continued the standard plea colloquy with Smith and ultimately found him guilty. It ordered a presentence investigation ("PSI") and directed that the PSI writer not make a sentencing recommendation.

¶6 At sentencing, the State again restated the plea agreement: "The State is recommending prison leaving the length up to the court and … restitution [to which the defense has stipulated]. The defense is free to argue." After the State discussed the offense, the victim's daughter and sister both personally addressed the court and urged it to impose the maximum sentence of forty years of initial confinement and twenty years of extended supervision.

¶7 Trial counsel offered his sentencing recommendations as well:

> [Smith] is asking the court to consider probation. I know the court is required to do that. I told him that because of the seriousness of the offense that that is something the court will consider but that I'm not optimistic that's the way the court would have to go given the court has an obligation to impose a sentence that's consistent with the seriousness of the offense and need for some punishment. So I see a prison case here.
>
> What I'm asking the court to consider is a total sentence of 15 years broken down into five of initial confinement, ten of extended supervision.

Smith elected to exercise his right of allocution. He expressed his remorse, but did not discuss the potential length of his sentence.

¶8 The trial court imposed a sentence of twenty-seven years of initial confinement and ten years of extended supervision. Postconviction counsel was appointed for Smith. Smith subsequently filed a postconviction motion to withdraw his guilty plea based on the alleged ineffective assistance of trial counsel. Specifically, Smith alleged that his plea was not knowingly, voluntarily, and intelligently entered because when he spoke with his trial counsel before entering his plea, Smith "was promised a sentence of ten years consisting of five years [of] incarceration and five years [of] extended supervision." Smith sought an evidentiary hearing on his motion.

¶9 In a written order, the trial court denied both the motion and Smith's request for an evidentiary hearing. It found "that the allegations in the motion are insufficient to warrant a hearing," in part because the motion did "not articulate[] with sufficient specificity what counsel exactly said that led him to believe that counsel was promising a particular sentencing outcome." This appeal follows.

DISCUSSION

¶10 Smith rests his claim for plea withdrawal on allegations that he received ineffective assistance from his trial counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) ("A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence," and that "test is met if the defendant was denied the effective assistance of counsel.") (citation omitted). To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, a defendant must show that trial counsel's actions or omissions "fell below an

objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Strickland***, 466 U.S. at 697.

¶11 Smith's postconviction motion asserted that his plea was flawed for reasons extrinsic to the plea colloquy, thereby invoking the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***Bentley***.[2] At issue on appeal is whether Smith's postconviction motion was sufficient on its face to entitle him to an evidentiary hearing on his ineffective assistance claim. Our Supreme Court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [trial] court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

[2] Smith's motion did not allege that there were deficiencies in the plea hearing that establish a violation of WIS. STAT. § 971.08 or other mandatory duties, which is referred to as a ***Bangert*** claim. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶12 With those standards in mind, we consider Smith's postconviction motion. The motion does not contain affidavits from Smith or anyone else, but it provided an offer of proof concerning Smith's understanding of his sentence. The motion explains that after the revised plea offer was communicated to Smith on the morning of trial, he received permission for his mother and girlfriend to meet with him and trial counsel to discuss the plea. The motion states:

> Trial counsel again explained [the] offer in the presence of the two women. His counsel's explanation contained repeated references to 5 years in prison followed by supervision. Mr. Smith understood that the offer would result in a sentence of 10 years with 5 in prison and 5 on[] supervision. Mr. Smith agreed to accept the offer based upon this understanding. He did not understand that the State would be recommending prison with the amount left up to the court.
>
> Prior to entering the plea, Mr. Smith did sign a plea questionnaire. However, his trial counsel never explained, and [Smith] did not read, the handwritten words "prison – term up to court" in the plea agreement section of the questionnaire.
>
> When he entered his plea, Mr. Smith did not understand the prosecutor was recommending an unspecified term of imprisonment, and that the court was free to disregard any recommendation. Mr. Smith rejected an earlier offer … and would have likewise rejected this offer and he would have proceeded to trial but for his mistaken understanding that his plea would result in a 10 year[] sentence with 5 years in prison and 5 on supervision….
>
> [Smith's girlfriend] was allowed to speak with Mr. Smith in the bullpen prior to Mr. Smith's entry of his plea. While there, she heard Mr. Smith's counsel relate the offer: if Mr. Smith entered a plea, he was guaranteed 10 years, plus five on paper.
>
> [Smith's mother] was also allowed to speak with Mr. Smith in the bullpen…. Based upon what she heard while there, she understood the offer to be 5 to 7 years, with the rest on paper.

¶13 The conclusion of the motion asserts that "trial counsel's explanation of the new offer, which occurred in the bullpen on the morning of trial, left Mr. Smith with the understanding that he would get a sentence with 5 years in prison followed by supervision." The conclusion continues: "While Mr. Smith does not say so, his trial counsel apparently emphasized that *he* (i.e. trial counsel) would advocate for a 5 year prison sentence to such a degree that Mr. Smith believed this to be the outcome guaranteed by the new plea agreement."

¶14 Our review of the postconviction motion leads us to conclude that Smith was not entitled to an evidentiary hearing on his postconviction motion, both because it did "not raise facts sufficient to entitle the movant to relief," as the trial court determined, and because "the record conclusively demonstrates that the defendant is not entitled to relief." *See* ***Burton***, 349 Wis. 2d 1, ¶38 (citations and internal quotation marks omitted). Thus, it was within the trial court's discretion to deny the motion without a hearing. *See* ***id.***

¶15 We agree with the trial court that Smith's motion fails because it did not raise sufficient facts with respect to the advice Smith claims he was given before he pled guilty. While the motion begins with the assertion that Smith "entered his plea on the understanding that he was promised a sentence of ten years, consisting of five years [of] incarceration and five years [of] extended supervision," the motion never asserts that trial counsel actually told Smith that a particular sentence was guaranteed.[3] The motion contends that trial counsel's explanation "contained repeated references to 5 years in prison," but that is

[3] The motion also does not explain why Smith's mother and girlfriend believed Smith would instead serve five-to-seven years or ten years of initial confinement, respectively, if Smith was allegedly promised five years of initial confinement.

understandable, given that trial counsel ultimately recommended that Smith serve five years of initial confinement. In order to prove deficient performance, Smith is required to allege facts showing that trial counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. at 688. The postconviction motion does not adequately allege anything that trial counsel did that would lead a court to conclude that he performed deficiently.

¶16 Further, the record conclusively demonstrates that Smith is not entitled to relief. Regardless of what trial counsel allegedly told Smith in the bullpen, the State clearly stated at the plea hearing that it would be recommending prison in an amount left to the trial court's discretion and that the plea agreement provided that the victim's family members would be allowed to offer their own sentencing recommendations. Both of those plea terms are clearly inconsistent with Smith being guaranteed a particular sentence. The trial court explicitly asked Smith whether he understood the State's recitation of the plea agreement and Smith said yes. The trial court also explicitly asked Smith if he understood that the trial court would not be bound by the plea agreement. Again, Smith said yes. Later, the trial court confirmed with Smith that no one had "made any promises or threats to you to plead." Smith indicated no one had.

¶17 Next, when Smith spoke with the PSI writer, he told her "that he believes that he should receive a 10-year probation term with an imposed and stayed prison sentence." The PSI report does not indicate that Smith ever mentioned being guaranteed five years of initial confinement.

¶18 At sentencing, the State again stated its recommendation: "prison leaving the length up to the court." Smith never interrupted the sentencing hearing or mentioned anything during his allocution about having been allegedly

guaranteed five years of initial confinement and five years of extended supervision, even after trial counsel recommended five years of initial confinement and *ten* years of extended supervision.

¶19 In short, the record indicates that the terms of the plea agreement were stated in open court at the plea hearing and sentencing hearing, that Smith explicitly acknowledged those terms at the plea hearing, and that Smith did not subsequently say anything about a guaranteed five-year term of initial confinement, despite being given opportunities to do so when he met with the PSI writer and at sentencing. The record conclusively demonstrates that Smith is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 319 (affirming trial court's decision to deny postconviction motion without a hearing where trial court "concluded that even if trial counsel had represented to Bentley that his minimum parole eligibility date would be 11 years, 5 months, the record unequivocally overrides that assertion").

¶20 For the foregoing reasons, Smith was not entitled to a hearing on his postconviction motion. It was therefore within the trial court's discretion to deny the motion without a hearing. *See* ***id.*** Smith has not shown that the trial court erroneously exercised its discretion. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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