COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1778 **Cir. Ct. No. 2003CF1962**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRAIG V. CARTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kraig V. Carter, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion without a hearing. Carter makes multiple claims of error; the postconviction court concluded Carter was not entitled to relief on any of them. We affirm the order.

BACKGROUND

¶2 On March 24, 2003, Milwaukee police responded to a shots-fired complaint. When they arrived at the reported residence, they found three victims on the porch. Delores McHenry had been shot four times and was pronounced dead at the scene. K.M. had been shot once, and D.M. had been shot nine times. K.M. and D.M. were transported to the hospital for treatment; both survived. K.M. told police that two men walking by the house stopped in front of it, raised automatic weapons, pointed them towards the victims, and started shooting.

¶3 Carter was identified as a suspect from a line-up, and he gave a statement to police. He admitted he was one of the individuals K.M. saw. Further investigation revealed that two days earlier at a neighboring house, Carter and the other shooter—his cousin, Christopher Elim—were in an altercation where Carter had been struck in the face with a baseball bat. Carter believed D.M. had been part of that altercation and said that when he saw D.M. on the porch, he fired shots to scare him. Carter then got "excited" and fired additional shots at the victims.

¶4 Carter was initially charged with one count of first-degree intentional homicide, while armed, as party to a crime, and two counts of

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

attempted first-degree intentional homicide, while armed, as party to a crime. Later, in exchange for Carter's guilty pleas, the State amended the charges to one count of first-degree reckless homicide, while armed, as party to a crime, and two counts of reckless injury, while armed, as party to a crime. The circuit court sentenced Carter to consecutive sentences totaling thirty-two years' initial confinement and eight years' extended supervision.[2]

¶5 Carter filed a motion for sentence modification, which the circuit court denied. Carter appealed, and we affirmed. *See* ***State v. Carter***, No. 2004AP2814-CR, unpublished slip op. (WI App Nov. 22, 2005). The supreme court denied a petition for review.

¶6 In July 2015, Carter filed the underlying WIS. STAT. § 974.06 postconviction motion. He argued ineffective assistance of postconviction counsel for failing to make four lines of argument: (1) the plea colloquy was inadequate because it failed to establish Carter had the requisite mental state for his offenses; (2) the plea colloquy was inadequate because it failed to establish Carter's understanding of party-to-a-crime liability; (3) Carter pled to non-existent crimes; and (4) trial counsel was ineffective for reading the wrong jury instruction to him.

¶7 The postconviction court addressed the claims on the merits under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), and concluded that Carter had not sufficiently shown he was entitled to relief on some claims or that the record demonstrated conclusively that he was

[2] The Honorable Jean A. DiMotto accepted Carter's plea, imposed sentence, and denied a subsequent motion for sentence modification. When we refer to "the circuit court" in the body of this opinion, it is to proceedings before Judge DiMotto.

not entitled to relief on others. The postconviction court thus denied the motion. Carter appeals.

DISCUSSION

I. Standards of Review

¶8 Absent a sufficient reason, a defendant may not bring a claim in a WIS. STAT. § 974.06 motion if it could have been raised in a prior motion or direct appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Ineffective assistance of postconviction counsel may be a sufficient reason for not raising a claim in an earlier proceedings. *See* ***Rothering***, 205 Wis. 2d at 678. In some cases, then, the result is that a circuit court must address the actual merits of the ineffective-assistance claim in order to determine whether the defendant should be procedurally barred from obtaining review of the issue. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶11, 314 Wis. 2d 112, 758 N.W.2d 806. That is how the postconviction court approached Carter's motion; the postconviction court did not expressly invoke a procedural bar.

¶9 However, to be entitled to a hearing on his postconviction motion, Carter still had to allege sufficient material facts to show he was entitled to relief on his claims. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30. When a motion contains insufficient factual allegations or is conclusory, or when the record conclusively demonstrated the movant is not entitled to relief, a circuit court may deny the motion without a hearing. *See* ***id.*** Whether the motion alleges sufficient facts is a question of law. *See* ***id.***

¶10 Criminal defendants have a constitutional right to counsel. *See* ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. That right includes the right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). For a court to conclude that counsel rendered ineffective assistance, a defendant must show that the attorney's performance was deficient and that the deficiency prejudiced the defense. *See* ***id.*** at 687. An attorney's conduct is deficient when it falls below an objective standard of reasonableness. *See* ***id.*** at 688. Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶11 Claims of ineffective assistance present mixed questions of fact and law. *See* ***Thiel***, 264 Wis. 2d 571, ¶21. We uphold a circuit court's findings of fact unless clearly erroneous, but whether counsel's performance amounts to ineffective assistance is a question of law we review *de novo*. *See* ***id.***

II. Carter's Substantive Issues

A. Mental States

¶12 Carter pled guilty to reckless homicide and reckless injury as party to a crime. "'[C]riminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk[.]" WIS. STAT. § 939.24(1). "Whoever is concerned in the commission of a crime … may be charged with and convicted of the commission of the crime although the person did not directly commit it[.]" WIS. STAT. § 939.05(1). "A person is concerned in the commission of the crime if the person … [i]ntentionally aids and abets the commission of it[.]" WIS. STAT.

§ 939.05(2)(b). A person is also "concerned in the commission of the crime if the person … [d]irectly commits the crime[.]" WIS. STAT. § 939.05(2)(a).

¶13 Carter claims that "the plea colloquy is inadequate to demonstrate [the] 'awareness' element either for 'criminal recklessness' or for the 'state of mind' requirement for aiding and abetting." That is, Carter is claiming that the plea colloquy did not sufficiently establish a factual basis for concluding he was aware of the "unreasonable and substantial risk" of Elim's behavior or that he intentionally assisted in the crimes. *See* WIS. STAT. § 971.08(1)(b) (court accepting guilty plea must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged").

1. Reckless Homicide

¶14 Carter had disputed whether the fatal bullet to McHenry was his, insisting that only Elim was shooting when McHenry was killed. However, the criminal complaint alleged that he and Elim approached the house together and both shot at it. Carter admitted those facts at the plea hearing, conceded liability as a party to a crime, and stipulated to use of the complaint as a factual basis for his pleas.

¶15 The State's theory was that Carter had aided and abetted Elim in this offense. The elements of aiding and abetting are: "(1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of a crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance." ***State v. Rundle***, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993).

¶16 It is not necessary for an aider and abettor to "share the intent required for direct commission of the offense." *See* ***State v. Sharlow***, 110 Wis. 2d 226, 238, 327 N.W.2d 692 (1983). We therefore reject a claim that the plea colloquy had to directly establish that Carter was aware that Elim's behavior created the requisite risk. Rather, the colloquy had to establish a factual basis for Carter's conscious desire or intent to aid Elim. It does.

¶17 Intent can be inferred from an aider and abettor's conduct. *See* ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984). Shooting at the home with Elim, whether or not Carter was shooting at the exact moment McHenry was struck by the fatal bullet, establishes an intent to aid Elim's activities. *See* ***State v. Barksdale***, 160 Wis. 2d 284, 289-90, 466 N.W.2d 198 (Ct. App. 1991).

2. Reckless Injury

¶18 Regarding the reckless injury charges involving K.M. and D.M., Carter admitted shooting them, making him responsible by direct commission of the crime. *See* WIS. STAT. § 939.05(2)(a). Thus, we need not concern ourselves with the aiding and abetting elements for these offenses. Instead, the plea colloquy had to establish a factual basis that Carter was aware that his shooting was conduct that created "an unreasonable and substantial risk of death or great bodily harm." *See* WIS. STAT. § 939.24(1).

¶19 The very act of shooting his gun at three people establishes that risk awareness.[3] *See* ***Barksdale***, 160 Wis. 2d at 290; *see also* ***State v. Groth***, 2002 WI

[3] Indeed, Carter admitted he wanted to scare D.M., and it is difficult to imagine how firing shots would accomplish that goal if indiscriminate shooting at a person is not accompanied by an inherent risk of death or great bodily harm.

App 299, ¶14, 258 Wis. 2d 889, 655 N.W.2d 163, *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1; ***State v. Blair***, 164 Wis. 2d 64, 73-74, 473 N.W.2d 566 (Ct. App. 1991).

B. Party-to-a-crime liability

¶20 Carter also complains that the plea colloquy was insufficient to establish his understanding of the party-to-a-crime elements. We reject this claim for the same reasons as the postconviction court, which indicated in its written decision that:

> Not only was the defendant a direct participant in these crimes, but the court asked him if he understood that with regard to party to a crime liability, he was "ready, willing, and able to help Christopher Elim, and … your being present and participating in that conduct makes you as guilty as Christopher Elim under the law,"[4] to which the defendant responded, "Yes." … In addition, trial counsel informed the court that he had discussed what party to a crime meant with the defendant.… The court finds that the record shows that the defendant was aware of and understood the concept of party to a crime. His barefaced statement that he did not understand party to a crime liability is self serving and conclusory.

In short, the record reveals a proper colloquy in which the circuit court taking Carter's plea confirmed his understanding of the elements of his offenses, including party-to-a-crime liability. Carter does not allege sufficient facts to undermine the record.

[4] This is one way of describing aiding and abetting. *See* WIS JI—CRIMINAL 402.

We additionally note that this particular quote comes from the circuit court's plea colloquy; the postconviction court did not hold a hearing at which it would have addressed Carter.

C. Non-Existent Crimes

¶21 Carter next complains that he was allowed to plead to non-existent crimes, specifically, *attempted* first-degree reckless injury as party to a crime. Assuming without deciding that Carter is correct when he asserts that first-degree reckless injury cannot be charged as an attempt, the only basis for Carter's belief that he was so charged or that he so pled is a notation on the cover page of the plea hearing transcript. However, the charge description on the front of a transcript is placed there by a court reporter at the time the transcript is prepared, which is often well after sentencing in a criminal matter. The reporter's description, as annotated on the transcript, is dispositive of nothing.[5]

¶22 A review of the other documents in this matter reflects that Carter was not charged with, nor allowed to plead to, a non-existent crime. The amended information states Carter's second and third charges are first-degree reckless injury, while armed, as party to a crime, with no attempt modifier. The plea questionnaire form indicates Carter is pleading to first-degree reckless injury, while armed, as party to a crime; the statute numbers for each of those elements is listed but the statute number for the attempt modifier is not. During the plea colloquy, Carter was not asked about "attempt" or his understanding thereof. Finally, the judgment of conviction does not include the attempt modifier on either reckless injury charge. The record thus conclusively shows that Carter was not charged with, asked to plead to, or allowed to plead to attempted first-degree reckless injury as party to a crime, regardless of whether that crime exists.

[5] In this case, it appears that inclusion of the word "attempt" may have occurred because the original charges are also listed on the cover sheet.

D. Incorrect Jury Instruction

¶23 Carter also complains that trial counsel was ineffective "when he read the jury instructions to Carter of Attempted 1st-degree reckless injury[.]"[6] We note that there is no individual jury instruction for attempted first-degree reckless injury, so it is not entirely clear what Carter is claiming counsel read to him. But even if counsel combined the attempt instruction with the first-degree reckless injury instruction, Carter has failed to show any prejudice from the error. This is because, at the plea colloquy, the circuit court reviewed the correct elements of first-degree reckless injury with Carter, and he acknowledged his understanding of those elements. Thus, Carter has not established that, but for trial counsel's reading of the incorrect instruction, he would have rejected the plea to the reduced charges and insisted on a trial on the original intentional homicide and attempted intentional homicide charges.

III. Summary

¶24 The postconviction court rejected Carter's WIS. STAT. § 974.06 motion because the record showed he was not entitled to relief, or because Carter failed to allege sufficient facts to show he was entitled to relief.[7] On appeal, Carter has not persuaded this court that the postconviction court's conclusions were erroneous. Thus, we conclude the postconviction court properly denied the § 974.06 motion without a hearing.

[6] It is not clear whether this issue is raised for the first time on appeal or whether the postconviction court considered it to be part of another argument.

[7] Of course, if Carter was not entitled to relief on his claims, then postconviction counsel was not ineffective for failing to raise them. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

By the Court.—Order affirmed.

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