COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0367-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. BEASLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] James E. Beasley appeals from the judgment of conviction for disorderly conduct, knowing violation of a domestic abuse injunction, resisting an officer, and obstructing an officer, following his guilty

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

pleas, and from the order denying his motion for postconviction relief. Beasley argues that trial counsel was ineffective for failing to contact witnesses, and that the trial court erroneously exercised discretion by denying his postconviction motion without holding a ***Machner***[2] hearing. This court affirms.

I. BACKGROUND

¶2 As summarized in the criminal complaint and guilty plea hearing record, on July 15, 1998, Beasley, in violation of a domestic abuse injunction, was at the home of Martha Nixon, where he was involved in a physical altercation with Ms. Nixon's son, Latare. At the scene, he gave false information to police officers, resisted their efforts to take him into custody and, at the police station, again gave false information and also refused to participate in the booking process.[3] As a result, he was charged with the four offenses to which he ultimately pled guilty.

¶3 On the day of Beasley's guilty pleas and sentencing, seventeen other charges in five other cases against him, all arising from his relationship with Ms. Nixon, were dismissed as a result of Ms. Nixon's failure to appear in court. The court sentenced Beasley to consecutive prison terms totaling nine and one-half years.[4]

¶4 Following his sentencing, Beasley brought a motion for postconviction relief claiming that counsel was ineffective for failing "to properly

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[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] At the plea hearing, defense counsel commented that at the scene and the police station, "there [were] multiple times when the obstructing could be coming into play."

[4] Although the offenses were misdemeanors, Beasley was subject to enhanced penalties as a habitual criminal.

contact and interview the victim/witnesses in this matter as part of his investigation despite numerous requests by the defendant for him to do so." Beasley sought an order allowing him to withdraw his guilty pleas and go to trial or, in the alternative, providing him a new sentencing hearing where the defense would be able "to present witness testimony he feels is necessary for the court's understanding of the incidents."

¶5 In a written decision denying Beasley's postconviction motion, the trial court concluded that "[e]ven assuming counsel's performance was deficient for failing to contact Martha Nixon or Latare Nixon, the defendant has failed to show that he was prejudiced by the absence of their testimony." The trial court was correct.

II. ANALYSIS

¶6 A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). A guilty plea is manifestly unjust if it is entered in a manner that is not knowing, voluntary, and intelligent. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). If counsel fails to provide accurate and adequate information to enable a defendant to enter a knowing, voluntary and intelligent guilty plea, such assistance may be ineffective, constituting a manifest injustice. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-18, 548 N.W.2d 50 (1996).

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v.***

Washington, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232-236, 548 N.W.2d 69 (1996). If the defendant fails to establish that counsel's alleged conduct was prejudicial, this court need not address whether the counsel's alleged conduct was deficient. *See* ***Strickland***, 466 U.S. at 697. To show prejudice, the defendant must establish "a reasonable probability" that, but for counsel's performance, "the result of the proceeding would have been different." *See* ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶8 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether alleged deficient performance prejudiced a defendant is an issue of law, subject to this court's *de novo* review. *See* ***Pitsch***, 124 Wis. 2d at 634.

¶9 If a postconviction motion to withdraw a guilty plea "'alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing.'" *See* ***Bentley***, 201 Wis. 2d at 310 (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)). If, however, the motion "'fails to allege sufficient facts … to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" *See* ***id.*** at 309-310 (quoting ***Nelson***, 54 Wis. 2d at 497-98). Whether a motion alleges sufficient facts to require a hearing is an issue subject to *de novo* review. *See* ***id.*** at 310. This court, however, will reverse a trial court's decision to deny an evidentiary hearing only if the trial court erroneously exercised discretion. *See* ***id.*** at 310-11.

¶10 Beasley maintains that if counsel had contacted Ms. Nixon, her son, and perhaps certain other unidentified witnesses, he would not have pled guilty. He fails, however, to explain how or why, specifically, their presence or testimony would have altered his decision. In his reply brief, Beasley maintains that his postconviction motion "indicated that … [Ms. Nixon's] testimony would have raised several trial issues." But a review of his postconviction motion belies his claim.

¶11 In his motion, Beasley asserted that "Ms. Nixon's testimony was and still is an important facet of this case," and that her testimony "would have shed more light on the incidents at issue in this matter and would have been necessary for the sentencing hearing." But Beasley never specifies what she or any other witness might have said that would have established any issue or even influenced his decision to plead guilty. In fact, his motion refers only to potential testimony on matters that simply were not at issue.

¶12 First, Beasley's motion stated:

> Ms. Martha Nixon, if called upon to testify, at the defendant's trial or sentencing hearing, would have testified that the defendant was under the influence of drugs at the time these incidents occurred. She would also testify that she had in fact invited the defendant over to her home on numerous occassions [sic] after the domestic abuse injunction had been issued. She would testify that she only filed for the injunction in an effort to help the defendant stop using drugs.

Clearly, while perhaps some of that testimony might have provided interesting background, none of it would have established any defense to any of the charges or, contrary to Beasley's assertion, raised any trial issue.

¶13 Second, Beasley's motion maintained:

> Ms. Martha Nixon would further testify that her son, not the defendant, was the first one to provoke the disturbance

> in this matter. She would further testify that Mr. Beasley's admissions about starting to fight with Latare Nixon were not true but that they were merely done to keep Latare Nixon out of jail.

Such testimony would not have established any defense or raised any trial issue. After all, Beasley was charged with disorderly conduct, not battery, arising from his altercation with Latare. And at his plea hearing, Beasley acknowledged his part in provoking the disturbance:

> THE COURT: You would agree that your actions with Latare … were violent and disorderly?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: You would agree that your conduct with him tended to cause or provoke a disturbance?
>
> THE DEFENDANT: No— Oh, yes. Oh, yes, ma'am.
>
> THE COURT: Now, I want to be clear about that with you. Is it true that your fighting with Latare Nixon was violent conduct that tended to cause or provoke a disturbance?
>
> THE DEFENDANT: Yes, ma'am.

Thus, once again, Beasley's motion alleged nothing that would have established a defense or even a trial issue.

¶14 "A defendant who alleges that counsel was ineffective by failing to take certain steps [such as contacting or interviewing a witness] must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999). Beasley's allegations were utterly insufficient. Indeed, the only apparent way in which Ms. Nixon's appearance would have altered the outcome of the proceeding was that seventeen additional charges might not have been dismissed.

¶15 Beasley also argues Ms. Nixon's appearance at sentencing "would likely have resulted in a far lesser period of incarceration" because she could have supplied information that would have countered the court's impression that he was not being "forthright[]." He fails, however, to explain how Ms. Nixon's specific information, as alleged in his motion and quoted above, would have had any impact on sentencing.

¶16 The sentencing court was informed of the information Beasley claims Ms. Nixon would have provided. The court learned, from defense counsel and from Beasley's sister, of his long-term relationship with Ms. Nixon and of the fact that, despite court orders prohibiting their contact, they continued to live together. The court's comment about Beasley's "lack of forthrightness" related to his conduct in, and account of, resisting an officer, obstructing an officer, and disorderly conduct, not to anything on which his motion said Ms. Nixon would testify.

¶17 Thus, once again, Beasley failed to allege facts sufficient to establish any prejudice resulting from counsel's failure to contact Ms. Nixon or have her in court for his sentencing. Accordingly, this court concludes that Beasley's postconviction motion failed to support his claim of ineffective assistance of counsel and, accordingly, that the trial court correctly denied his motion without a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.