COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2693-CR **Cir. Ct. No. 2002CF159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT G. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Smith appeals a judgment, entered upon his no contest plea, convicting him of second-degree intentional homicide. He also appeals the denial of his postconviction motion for plea withdrawal. Smith argues the court erred by denying his motion without an evidentiary hearing. Smith

asserts he did not enter a knowing and intelligent plea because (1) the court failed to adequately explain the elements of the crime; and (2) he was misinformed by a defense investigator that his plea would preclude federal drug crime charges. We reject Smith's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Smith with first-degree intentional homicide, arising from the shooting death of Cody Wade. In exchange for Smith's no contest plea to an amended charge of second-degree intentional homicide, the State agreed to recommend a twenty-three-year sentence, consisting of thirteen years' initial confinement and ten years' extended supervision. Smith was convicted upon his no contest plea and the court imposed a sentence consistent with the State's recommendation. Smith's postconviction motion for plea withdrawal was deemed denied, without a hearing, by operation of WIS. STAT. RULE 809.30(2)(i).[1] This appeal follows.

DISCUSSION

¶3 Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of

[1] WISCONSIN STAT. RULE 809.30(2)(i) provides:

> Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the person's motion for postconviction … relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that we review independently. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, the trial court must hold an evidentiary hearing. ***Id.*** at 310. However, if the motion does not raise facts sufficient to entitle the defendant 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 deny the motion without a hearing. ***Id.***

¶4 In a claim for plea withdrawal based on an inadequate plea colloquy, the defendant must make a prima facie showing that the plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 or other mandatory procedures. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Where the defendant has shown a prima facie violation of § 971.08 or other mandatory duties, and alleges that he or she in fact did not know or understand the information that should have been provided at the plea hearing, the burden will then shift to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance. ***Id.***

¶5 In his postconviction motion, Smith alleged he was entitled to withdraw his no contest plea because the circuit court failed to inform him of the elements of second-degree intentional homicide and he did not understand the elements. More specifically, Smith asserted the court failed to inform him of the difference between first- and second-degree intentional homicide.

¶6 Second-degree intentional homicide has two elements: (1) the causing of death; (2) with the intent to kill. WIS. STAT. § 940.05; ***State v. Watkins***, 2002 WI 101, ¶61, 255 Wis. 2d 265, 647 N.W.2d 244. First-degree intentional homicide has the same two elements, but differs from second-degree in that if a mitigating circumstance is raised by the evidence, the State must disprove the mitigating circumstance beyond a reasonable doubt in order to prove the person is guilty of first-degree intentional homicide. WIS. STAT. § 940.01; ***Watkins***, 255 Wis. 2d 265, ¶62. If a person is tried for first-degree intentional homicide, and the State proves the person caused the death of another with intent to kill, but fails to disprove a mitigating circumstance raised by the evidence, the person is guilty of second-degree intentional homicide. WIS. STAT. § 940.01(2).

¶7 Although Smith was initially charged with first-degree intentional homicide, he ultimately pled to second-degree intentional homicide. At the plea hearing, the following exchange occurred:

> The Court: You understand you are pleading no contest to and relieving the State from proving beyond a reasonable doubt each and every element of this offense. The first element the State would have to prove is that you caused the death of Cody Wade?
>
> Smith: Yes.
>
> The Court: The second element that the State would have to prove is that you intended to cause the death of Cody Wade. Do you understand that?
>
> Smith. Yes, I do.

The record establishes that the court informed Smith of the only two elements of second-degree intentional homicide, and Smith acknowledged his understanding of those elements.

¶8 Smith nevertheless appears to argue that had he known the State would have to disprove a mitigating circumstance in order to convict him of first-degree intentional homicide, he would not have pled to second-degree intentional homicide. As noted above, however, if the State had failed to disprove mitigating circumstances under the first-degree intentional homicide paradigm, Smith would have been guilty of second-degree intentional homicide. It follows, therefore, that the court had no reason to inform Smith about mitigation because by pleading no contest to second-degree intentional homicide, Smith was already reaping the benefit of mitigation. Because the court properly informed Smith of the elements of the crime to which he pled, and Smith confirmed his understanding of those elements, the motion for plea withdrawal on these grounds was properly denied without a hearing.

¶9 Smith's postconviction motion also alleged his plea was not knowing or intelligent because it was based on misinformation. In the affidavit attached to his postconviction motion, Smith averred that a defense investigator told him before he entered his plea that the prosecutor had said that if Smith were going to be charged with a federal drug crime, he would already have been charged. Smith claims he then entered his plea based on a belief he "would not be charged federally." As the State points out, and Smith concedes, neither the postconviction motion nor the affidavit attached to the motion indicate that Smith was charged federally. Therefore, even if Smith could show that he was informed he would not be charged federally, and even if he could show that he entered his plea on the basis of that information, he has failed to allege that the information

was incorrect. Because the motion, on its face, failed to allege facts which, if true, would entitle him to relief, his motion was properly denied without a hearing.[2]

By the Court.—Judgment and order affirmed.

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

[2] Even were we to reach the merits of Smith's claim, we would reject his reliance on ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, as distinguishable from the present facts. There, this court determined a defendant was entitled to plea withdrawal where he was misinformed of the consequences of his plea by both his attorney and the prosecutor, with acquiescence by the circuit court. ***Id.***, ¶8. Here, the claimed misinformation was not relayed by Smith's attorney, the prosecutor or the court. Therefore, we are not convinced that reliance on the information was justified and would consequently conclude Smith failed to provide sufficient grounds for plea withdrawal.