

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP529-CR

Cir. Ct. No. 2007CF1832

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD SCOTT COLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Reginald Scott Cole appeals from a corrected judgment of conviction for felony murder and from a postconviction order summarily denying his postconviction motion for plea withdrawal. Cole has

alleged information extrinsic to the colloquy that, if true, demonstrates the invalidity of his guilty plea; we conclude that he is therefore entitled to an evidentiary hearing to determine whether his plea questionnaire and waiver of rights form (“plea questionnaire”) was inaccurate regarding the status of his mental health and medications, and if those inaccuracies affected the validity of his guilty plea. We therefore reverse the postconviction order and remand the matter for an evidentiary hearing on Cole’s plea withdrawal motion.

¶2 Cole pled guilty to felony murder resulting from an attempted armed robbery, in violation of WIS. STAT. § 940.03 (2007-08).¹ The trial court imposed a twenty-seven-year sentence, comprised of twenty- and seven-year respective periods of initial confinement and extended supervision to run consecutive to any other sentence.

¶3 Over a year later, Cole moved to withdraw his guilty plea, contending that the plea questionnaire inaccurately reported his mental status and medication regimen. Cole alleged specifically that his actual mental condition and the medication he was taking at that time interfered with his ability to understand the elements of the offense and the rights he was waiving by pleading guilty.² The trial court summarily denied the motion, ruling that his allegations were conclusory and that the record conclusively demonstrated that he was not entitled to relief. It is from this summary denial that Cole appeals.

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

² Cole also challenged the adequacy of the plea colloquy. Because we conclude that Cole is entitled to an evidentiary hearing on the information he alleged extrinsic to the colloquy, we do not address the adequacy of the plea colloquy. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues).

¶4 Cole filed a plea withdrawal motion, alleging the ineffective assistance of trial counsel. To demonstrate entitlement to a postconviction evidentiary hearing to challenge the plea because of an extrinsic factor (in this case trial counsel's alleged ineffectiveness) the defendant must meet the following criteria:

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 review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*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; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). 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 grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review the trial court's summary denial of Cole's plea withdrawal motion as a question of law. See *State v. Howell*, 2007 WI 75, ¶78, 301 Wis. 2d 350, 734 N.W.2d 48.

¶5 In his postconviction motion, Cole alleged that at the time he pled guilty, he was being treated for mental illness, including Post-Traumatic Stress Disorder, and that he was taking Trazodone, Risperdal, Benadryl and Ibuprofen. He further alleged that his mental illness and these medications interfered with his abilities to understand the elements of the offense and the rights he was waiving by pleading guilty.

¶6 The standard pre-printed plea questionnaire includes inquiries about the defendant's mental condition and medication regimen. Cole alleged that he told his trial counsel about his treatment for mental illness and the medication he was taking; he has no explanation for why trial counsel did not accurately note them in his plea questionnaire. However, he also does not explain why he personally did not disclose these inaccuracies to the trial court when he reviewed and signed the plea questionnaire. We address the inaccuracies in the plea questionnaire implicating the ineffectiveness of trial counsel according to *Nelson/Bentley* (summarized in *Allen*). See *Allen*, 274 Wis. 2d 568, ¶9.

¶7 Although Cole's plea questionnaire belies his substantive postconviction allegations, he further alleged that his questionnaire was inaccurate because his counsel was ineffective for failing to note the status of his mental health and his medication regimen, both of which Cole had made her aware. Cole's allegations, albeit problematic in that he does not explain why he signed an inaccurate plea questionnaire, are sufficient to meet the *Nelson/Bentley* criteria for an evidentiary hearing to determine whether trial counsel knew of Cole's mental illness, treatment and medication regimen, and if so, why she did not note them on his questionnaire to alert the trial court to explore those concerns before accepting Cole's guilty plea. See *Allen*, 274 Wis. 2d 568, ¶9.

¶8 We therefore reverse the postconviction order summarily denying Cole's plea withdrawal motion and remand the matter to the trial court for an evidentiary hearing to determine whether Cole's trial counsel was ineffective for failing to indicate that: (1) he was mentally ill and receiving treatment; (2) he was on a specific medication regimen at the time he pled guilty; and (3) if the illness and medication inaccurately noted, affected the validity of his guilty plea, entitling him to plea withdrawal.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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

