COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2391-CR **Cir. Ct. No. 2011CM1274**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Edward Hill appeals pro se from the denial of his postconviction motion to withdraw his guilty plea. He asserts two grounds for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

withdrawal: (1) his attorney misinformed him as to the consequences of a read-in charge at a subsequent revocation hearing in a different case and (2) his attorney failed to show him a particular witness statement prior to the plea. Based on those facts, he argues that his plea was the result of ineffective assistance of counsel and that it was not knowingly, intelligently, and voluntarily entered. We agree with the trial court that the record contains no evidence to support Hill's claim that trial counsel misinformed him. Furthermore, Hill forfeited his argument regarding the witness statement because he did not raise it as part of his postconviction motion. We affirm.

BACKGROUND

¶2 On June 28, 2011, Hill was charged with misdemeanor battery and disorderly conduct as a repeater, related to an incident in which his wife was the victim. On August 22, 2011, he pled guilty to the disorderly conduct charge and was sentenced. The battery charge was dismissed and read in.

¶3 The record indicates that at the time of the charges in the present case Hill was on extended supervision related to a prior conviction, and a revocation hearing took place on that case on September 1, 2011. Hill contends in his brief that the read-in charge contributed to the revocation of his extended supervision and the record suggests this may have been the case.[2] After the revocation hearing, Hill filed a motion to withdraw his guilty plea in this case, contending that his trial counsel was ineffective because, prior to his plea, counsel

[2] Neither a transcript of the revocation hearing nor a copy of the ALJ's revocation decision is included in the record. However, testimony by Hill's trial counsel at the postconviction hearing relevant to this appeal suggests the read-in charge may have played some role in the revocation decision.

had erroneously informed him that the read-in charge could not be used against him at his revocation hearing. As requested by Hill, the trial court held a ***Machner***[3] hearing to determine if Hill's counsel ineffectively represented him. Near the end of the hearing, Hill also contended that his plea was not knowingly, voluntarily, and intelligently made because he "didn't know or understand the consequences of taking that plea."[4] At the conclusion of the hearing, the court denied the motion, finding that Hill had failed to produce any evidence to support his claims. Hill appeals.

DISCUSSION

¶4 A defendant seeking to withdraw a guilty plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a manifest injustice." ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177 (citations omitted). Our supreme court has enumerated several situations that may constitute a manifest injustice, two of which are when a plea is the result of ineffective assistance of counsel and when it is not entered knowingly, intelligently, and voluntarily. ***Id.***, ¶27 (citation omitted); ***State v. Lopez***, 2010 WI App 153, ¶7, 330 Wis. 2d 487, 792 N.W.2d 199. Here, Hill raises both of these bases as grounds for withdrawal of his plea.

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

[4] Hill further argued at the hearing that his plea should be withdrawn "on the grounds of newly discovered evidence" related to the statement of a different witness. Hill does not argue this newly discovered evidence issue on appeal.

¶5 The decision to permit or deny withdrawal of a guilty plea is left to the trial court's discretion, "subject to the erroneous exercise of discretion standard on review." ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. In reviewing a discretionary decision, we examine the record to determine if the court "logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999).

¶6 To prevail on an ineffective assistance of counsel claim, a defendant must prove both that counsel's representation was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel present mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not disturb a trial court's findings of fact unless they are clearly erroneous; however, the court's legal conclusions as to whether counsel's performance was deficient and, if so, prejudicial, present questions of law we review de novo. ***Id.*** at 127-28.

¶7 Whether a plea was knowingly, voluntarily, and intelligently entered presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. This court reviews constitutional questions independently of the trial court's determination; however, we will not reverse a trial court's findings of fact unless the findings are clearly erroneous. ***State v. Bangert***, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986).

¶8 Here, Hill does not allege any infirmity with the plea hearing itself or contend that his plea was not taken in conformity with the mandatory

procedural requirements set forth in WIS. STAT. § 971.08 and ***Bangert***. His primary argument on appeal is that his trial counsel was ineffective because counsel misinformed him that the read-in charge could not be used against him at his revocation hearing. Hill's complaint in that regard is two-fold. First, he alleges trial counsel failed to inform him "that a read-in charge is an admission to the charge," a fact he says he subsequently learned at his revocation hearing. Second, Hill complains that his attorney misinformed him by leading him to believe that because the battery charge was dismissed and read in, the facts underlying it would not be considered at his revocation hearing.

¶9 We answer Hill's first allegation by noting that his trial counsel could not have been deficient for failing to inform Hill that a read-in charge constitutes an admission of guilt regarding the charge because the opposite is true. Our supreme court has explained that a read-in charge should not be deemed an admission of guilt by the defendant. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.

¶10 Regarding Hill's second allegation, we point out that after listening to the testimony at the postconviction hearing, the trial court observed that "[a]ll of [Hill's] arguments seem to relate to a revocation hearing" and found that Hill had not presented "one scintilla" of evidence "as it relates to this particular charge." The court concluded that "[t]here's absolutely no evidence whatsoever under any of the bases to allow withdrawal of a plea" and that there was "no basis whatsoever to indicate that [trial counsel] was ineffective as his trial attorney." The trial court is correct.

¶11 Hill's trial counsel was the only witness to testify at the postconviction hearing. Counsel testified that he advised Hill that the battery

count could not be used against Hill *as a conviction* because that count was being dismissed and read in. Counsel further testified that he advised Hill prior to his plea that because the battery charge was being read in "the court would be able to consider [Hill's] involvement in that matter in sentencing [him] on the disorderly conduct, but ultimately [he] would not be convicted of a battery." While Hill alleges on appeal that counsel told him "that there was no way the plea could be used at the revocation hearing," no testimony was provided that counsel made such a statement to Hill prior to his plea.

¶12 Counsel was not deficient. Since the battery charge would be dismissed and read in, Hill would not be convicted of it, as he was not, and it would not be able to be utilized against him at the revocation hearing as a conviction. Further, Hill was put on notice that, despite the fact the battery charge was being dismissed, because the charge was being read in, Hill's "involvement in that matter" could still be considered, at least by the sentencing court. Absent a direct statement by counsel to the contrary, which Hill has not shown, it would be unreasonable for Hill to hear from counsel that his "involvement in that matter" could be considered by the sentencing court but then believe it could not be considered by an administrative law judge considering revocation based, at least in part, on Hill's "involvement" in the same "matter." There was simply no testimony that counsel suggested that Hill's involvement in the disorderly conduct/battery event could not also be considered at a revocation hearing. Further, Hill does not allege that he was unaware that the disorderly conduct

conviction and the facts related to it could be used against him at his revocation hearing.[5] Hill has not shown counsel was ineffective.

¶13 Hill's claim that his plea was not knowing, intelligent, and voluntary, raised as such for the first time during the ***Machner*** hearing, is based on the same facts as his ineffective assistance of counsel claim—that he did not know that the read-in offense could be treated as an admission (which it could not) and that he believed, based on his attorney's advice, that the facts underlying the battery could not be used against him at the revocation hearing. Because there is no evidence in the record to show that Hill was in fact provided erroneous information prior to entering his plea, his claim that his plea was not knowingly, intelligently, and voluntarily entered fails. The trial court did not erroneously exercise its discretion in denying Hill's request to withdraw his plea when he presented no evidence from which it could conclude that the plea was not knowingly, intelligently, and voluntarily made.

¶14 Hill makes one final argument in his brief—that his trial counsel was ineffective for failing to show him a particular witness statement before he pled guilty to the disorderly conduct charge and that his plea was not knowing, intelligent, and voluntary for that same reason. After examining Hill's postconviction motion, amended postconviction motion, and the transcript from the postconviction motion hearing, we could find no such argument made to the

[5] The disorderly conduct charge to which Hill pled guilty arose from the same event as the battery charge. At the plea hearing, Hill acknowledged he understood that by pleading guilty to the disorderly conduct charge he was admitting that he committed that crime and that the State would be able to prove beyond a reasonable doubt that Hill engaged in "violent, abusive, boisterous, profane or unreasonably loud or otherwise disorderly conduct" under circumstances which tended to cause or provoke a disturbance.

trial court.[6] Furthermore, the burden is on Hill to establish by reference to the record that he raised the issue as part of his postconviction motion before the trial court, and he has not done so.[7] *See* ***Nickel v. Ambac***, 2012 WI 22, ¶21, 339 Wis. 2d 48, 65, 810 N.W.2d 450. We do not ordinarily address issues for the first time on appeal, and we make no exception here. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶15 We find no error in the trial court's conclusion that there was "no basis whatsoever" to indicate that Hill should be allowed to withdraw his plea.

By the Court.—Judgment and order affirmed.

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

[6] During questioning of his trial counsel at the postconviction hearing, Hill mentioned that he "never got a copy of the statement" related to the witness. At no point, however, did he allege ineffective assistance of counsel or that his plea was not knowingly, voluntarily, and intelligently entered because he did not receive the statement.

[7] On October 5, 2011, the trial court denied Hill's postconviction motion. On October 7, 2011, Hill filed a Motion for Reconsideration, raising for the first time his concern regarding this witness statement. Without waiting for a response from the trial court, Hill filed a Notice of Intent to Appeal on October 8, 2011. This notice also included no mention of the witness statement at issue.