COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2195 **Cir. Ct. No. 2005CF6421**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELLIOTT V. LANDRUM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Elliot V. Landrum, *pro se*, appeals from an order of the circuit court, which denied his WIS. STAT. § 974.06 motion for postconviction relief without a hearing. Landrum alleged that he received ineffective assistance of trial counsel when his attorney allowed him to enter guilty

pleas without (1) fully litigating a suppression motion and (2) obtaining an express ruling on Landrum's competency. Landrum also contends that the prosecutor abused his discretion in charging Landrum with attempted first-degree intentional homicide, a charge Landrum believes was never supported by the facts. The circuit court rejected the motion, concluding that the guilty pleas forfeited any right to pursue the suppression motion; there was no basis on which the circuit court could have found Landrum incompetent; and the prosecutor did not abuse his charging discretion but, in any event, Landrum pled to a lesser charge and so was not prejudiced by the original charge. We affirm the order.

BACKGROUND

¶2 Landrum was originally charged in November 2005 with two counts of first-degree intentional homicide and one count of attempted first-degree intentional homicide, all while armed with a dangerous weapon, and one count of possession of a firearm by a felon. The charges arose following an argument Landrum was having with one of the homicide victims. During the argument, Landrum exited the room, returned armed with a gun, and shot the first intentional homicide victim. When that victim was on the ground, Landrum stood over him and shot him a few more times. The second homicide victim retreated into a pantry; Landrum approached the pantry and shot into it, killing the second victim. The attempted intentional homicide charge was brought because the third victim believed the bullet that hit him had first passed through one of the other victims.

¶3 Landrum turned himself into police, who interviewed him three times. By the end of the third interview, Landrum had given a statement in which

he admitted his involvement in the shootings.[1] At the arraignment, Landrum—who suffers from schizophrenia, mood disorder, and depression—entered a plea of not guilty by reason of mental disease or defect. The circuit court ordered an evaluation, and the examining psychologist, Dr. Kenneth Smail, ultimately concluded there was no basis for supporting the special plea. Smail's report was filed with the circuit court and the parties, but no formal hearing was held.

¶4 Landrum had moved to suppress the statement he had given to police, claiming that his statement was coerced and involuntary. The circuit court never ruled on the motion, however, because Landrum entered guilty pleas to reduced charges. In exchange for his guilty pleas, the State moved to amend the intentional homicide charges to two counts of first-degree reckless homicide while armed with a dangerous weapon. In addition, the attempted homicide charge was reduced to first-degree reckless injury while armed with a dangerous weapon, and the firearm possession charge was dismissed.

¶5 On August 21, 2006, the trial court sentenced Landrum to thirty-five years' initial confinement and twenty years' extended supervision for each homicide conviction, to be served concurrently. The trial court also sentenced him to five years' initial confinement and five years' extended supervision for the reckless injury conviction, to be served consecutive to the homicide sentences.

[1] Landrum asserted that he was subjected to more than fifty hours of interrogation. This claim is inaccurate. Police did not interview Landrum for the first two hours after he surrendered himself. There were three periods of interrogation, lasting four and one-half, seven, and six hours. Between the first two periods, there was a six-hour interval. Between the second two periods, there was a twenty-two hour interval. The total interrogation time was fewer than eighteen hours in a period of fewer than forty-eight hours.

Landrum received appointed postconviction counsel, who did not pursue postconviction relief or a direct appeal on Landrum's behalf.

¶6 In August 2011, Landrum filed a WIS. STAT. § 974.06 motion, claiming that it was ineffective of trial counsel to allow him to enter pleas without first obtaining a decision on the suppression motion or on his competency. He further argued that the prosecutor had erroneously exercised his charging authority when he charged attempted homicide, claiming the facts of the case supported only a lesser charge. The circuit court rejected the motion without a hearing.

DISCUSSION

¶7 After the time for an appeal or postconviction remedy under WIS. STAT. § 974.02 has expired, "a prisoner in custody under sentence of a court … claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state … may move the court … to vacate, set aside or correct the sentence." WIS. STAT. § 974.06(1). A claim that trial counsel was ineffective is a claim that a defendant's sentence was imposed in violation of the constitution. ***State v. Balliette***, 2011 WI 79, ¶34, 336 Wis. 2d 358, 375, 805 N.W.2d 334, 342.

¶8 On appeal, we review whether Landrum's motion "is sufficient on its face to entitle him to an evidentiary hearing" on his ineffective-assistance claim. *See* ***id.***, 2011 WI 79, ¶18, 336 Wis. 2d at 369, 805 N.W.2d at 339. This is a question of law that we review *de novo*. ***Ibid.*** If the postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, then the circuit court is required to hold an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. If the motion does not allege sufficient facts, if the motion contains only conclusory allegations, or if

the record conclusively demonstrates that the defendant is not entitled to relief, then the decision whether to grant a hearing is committed to the circuit court's discretion. ***Ibid.*** We review a circuit court's discretionary decision only for an erroneous exercise of that discretion. ***Id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶9 Before a court can find ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense.[2] *See* ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 587, 665 N.W.2d 305, 314. Counsel is presumed effective unless the defendant shows otherwise. ***Balliette***, 2011 WI 79, ¶27, 336 Wis. 2d at 373, 805 N.W.2d at 340.

¶10 A lawyer's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d at 587, 665 N.W.2d at 314. Reasonableness is evaluated "'on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***Balliette***, 2011 WI 79, ¶23, 336 Wis. 2d at 371, 805 N.W.2d at 340 (citation omitted). The test for prejudice is "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

[2] Landrum's focus is on ineffective assistance of trial counsel, though he also claimed that postconviction counsel was ineffective for not bringing a motion to challenge trial counsel's performance. However, an attorney is not ineffective for failing to pursue a meritless issue or motion. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 416 n.10 (1996). Thus, a defendant who claims postconviction counsel was ineffective for not challenging trial counsel's performance must show that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375. As we shall see, Landrum has not alleged sufficient facts to suggest that trial counsel actually was ineffective, so any claim against postconviction counsel for not challenging trial counsel's performance also fails.

outcome.'" ***Id.***, 2011 WI 79, ¶24, 336 Wis. 2d at 372, 805 N.W.2d at 340 (citation omitted).

I. The Suppression Motion

¶11 In pretrial posture, Landrum moved to suppress his inculpatory statement to police on the grounds that the statement: (1) was obtained in violation of his right to counsel, claiming that the interrogation continued even after he had asked for an attorney; and (2) was the involuntary "product of coercion and overbearing inquisitorial techniques." The circuit court never held a hearing or ruled on the motion because the case was resolved by Landrum's plea.

¶12 In his WIS. STAT. § 974.06 motion, Landrum reiterates the claims in the suppression motion and asserts that counsel "abdicated her duty" to obtain a ruling on the motion. He further contends, "It can hardly be said that a man in Landrum's state, having been without his medication for several weeks, deprived of food and sleep for the first 24 hours and without the advice of sought after counsel, could have 'knowingly and intelligently' waived his *Miranda* rights."[3]

¶13 In his reply brief, Landrum contends that "there can be no rational strategic reason, in this case, for why counsel" encouraged his guilty plea prior to obtaining a ruling on the suppression motion. In rejecting Landrum's postconviction motion, however, the circuit court noted that, according to the plea hearing transcript, Landrum "freely and intelligently gave up his right to have the suppression motion heard because it was his desire to take advantage of the State's plea offer to obtain reduced charges and less prison exposure." It further appears

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

that the withdrawal of the motion was a term of the plea bargain. At the plea hearing, the circuit court expressly confirmed with Landrum personally his understanding that he would, in fact, be forgoing a ruling on the suppression motion by entering his pleas. Thus, as the circuit court explained in denying the postconviction motion, trial counsel was not ineffective because it was ultimately *Landrum's* decision to forego a ruling on the suppression motion.[4]

¶14 Moreover, for trial counsel to have been deficient in encouraging the plea despite not having obtained a ruling on the suppression motion, Landrum's postconviction motion had to allege sufficient material facts to show that the suppression motion actually would have succeeded.[5] *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39, 47 (Ct. App. 1999). Landrum has not met this burden.[6]

[4] In any event, a valid guilty plea waives all nonjurisdictional defects and defenses, including those of a constitutional magnitude. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 73, 716 N.W.2d 886, 892.

[5] The State points out that even if Landrum sufficiently alleged deficient performance, he did not sufficiently allege prejudice. Landrum's third victim had survived and identified Landrum, with whom he was previously acquainted, as the shooter. Thus, even if Landrum's own incriminating statement had been suppressed, he does not confront the reality of the remaining evidence against him.

[6] Landrum claims police continued interrogating him even though he requested an attorney. However, Landrum does not allege any other relevant facts, including what he said to police in asking for counsel. However, if Landrum's request for counsel was in any way equivocal, police were not required to cease interrogation and clarify his requests, *see* ***State v. Ward***, 2009 WI 60, ¶43, 318 Wis. 2d 301, 333–335, 767 N.W.2d 236, 251–252.

Landrum also claims that his statement was a product "of coercion and overbearing inquisitorial techniques" without alleging what those techniques were. This dearth of factual allegations is a problem because the threshold inquiry for determining voluntariness of a confession is objective evidence of police misconduct. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 533, 470 N.W.2d 322, 326 (Ct. App. 1991).

II. Competency

¶15 Landrum's motion also complains that he was not competent to have entered guilty pleas, and counsel should not have allowed the case to proceed without an express ruling on his competency. He appears to believe that his original NGI plea should have caused counsel to question his competency, and he complains that "counsel, without a ghost of reason abandoned the attempt to ascertain whether or not Landrum was competent to be tried, or plead guilty, and instead encouraged and aided Landrum in pleading guilty."

¶16 "One who lacks mental capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in his own defense may not be subjected to a trial." ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583, 585 (Ct. App. 1988). Competency proceedings are to be initiated whenever there is a reason to doubt the defendant's competency to proceed. *See* WIS. STAT. § 971.14(1r)(a). If a defendant claims incompetency, the State has the burden to show competency by the greater weight of the credible evidence. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 221–222, 558 N.W.2d 626, 630 (1997). A defendant is competent to proceed if he or she "possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding" and he or she "possesses a rational as well as factual understanding of a proceeding against him or her." ***Id.***, 207 Wis. 2d at 222, 558 N.W.2d at 630.

¶17 Landrum alleges no facts that indicate he was not competent to proceed with entering a plea. His assertions that he suffers from schizophrenia and depression, absent more, are insufficient, as neither illness in and of itself

necessarily causes incompetency.[7] Moreover, in his report regarding the viability of the NGI plea, Dr. Smail wrote:

> Unlike the previous time when [Landrum] successfully pled NGRI … there was no sustained agitation by him as he came into contact with the police. *There were no signs observed to raise questions of competency to proceed* and he did proceed rather unremarkably…. He was re-established on medication, as he should have been, but not because of signs of acute agitation or marked disturbance in psychological functioning.

[Emphasis added.]

¶18 Landrum's motion alleges no contrary facts.[8] Thus, we agree with the circuit court's observation that "there is nothing else on which to base a conclusion that the defendant was not competent at the time he entered his guilty pleas." Indeed, at the plea colloquy, the circuit court specifically inquired of Landrum personally whether his comprehension was impaired at that time; Landrum indicated that it was not. Accordingly, Landrum has not alleged sufficient facts to show ineffective assistance of trial counsel for failing to make an issue of Landrum's competency.[9]

[7] Even on appeal, Landrum does not tell us what it is about his mental health issues that prevented him from conferring with counsel, understanding the pleadings or proceedings, or entering a valid plea.

[8] Landrum attempts to present additional facts in his brief, but we are constrained to reviewing the allegations within the four corners of his motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 588, 682 N.W.2d 433, 443.

[9] Landrum also contends that he could not waive an NGI plea absent a determination of his competency. However, Landrum has not shown that an NGI plea was viable. Dr. Smail had concluded that the "major contributing factor to any compromised functioning Mr. Landrum had at the time of the offense of was his state of intoxication consequent to his drug [marijuana and cocaine] and alcohol consumption. There is no evidence to support his special plea."

III. Prosecutorial Discretion

¶19 Landrum also claims that the prosecutor abused his discretion in charging him with attempted first-degree intentional homicide of the third victim, and that trial counsel was ineffective for not objecting. Landrum contends that it "is hard to determine from the record and facts of this case just how the prosecutor could determine that Landrum's shooting of [the third victim] was anything other than an accident, or reckless at best."

¶20 So long as a prosecutor has probable cause to believe that an accused has committed an offense defined by statute, the decision of whether to bring charges, and what charges to bring, is left to the prosecutor's discretion. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 364–365 (1977). It is, however, an erroneous exercise of that discretion when the evidence available is clearly insufficient to support a conviction on the crime charged. *See* ***Thompson v. State***, 61 Wis. 2d 325, 330, 212 N.W.2d 109, 111 (1973).

¶21 The State argues that that attempted homicide charge was supported by "transferred intent" based on the premise that the bullet that struck the victim had first traveled through one of the intentional homicide victims. The circuit court, however, noted that Landrum had no prejudice shown because he entered a guilty plea to a reduced charge, not the one that he challenges. We agree with the circuit court, and note that Landrum has not argued that the first-degree reckless injury charge to which he pled is unsupported by the facts of the case. Further, the guilty plea forfeits any challenge to the charges. *See* ***State v. Oakley***, 2001 WI 103, ¶23, 245 Wis. 2d 447, 476–477, 629 N.W.2d 200, 213. Thus, we need not discuss the merits of the State's "transferred intent" theory.

IV. Summation

¶22 Landrum's motion failed to allege sufficient material facts which, if true, would entitle him to relief. Thus, the decision whether to grant an evidentiary hearing was committed to the circuit court's discretion. We discern no erroneous exercise of that discretion.

By the Court.—Order affirmed.

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