COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP834 **Cir. Ct. No. 1986CF7363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWAYNE ALMOND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dwayne Almond, *pro se*, appeals a circuit court order denying his postconviction motion filed under WIS. STAT. § 974.06

(2011-12).[1] He seeks relief from a judgment of conviction entered in 1992. He alleges that the trial court did not comply with allegedly applicable deadlines for conducting competency proceedings, that his guilty pleas are invalid, and that his trial counsel was ineffective.[2] We reject his claims and affirm the postconviction order.

BACKGROUND

¶2 Almond pled guilty in December 1991 to one count of second-degree murder and one count of armed robbery, both as a party to a crime. *See* WIS. STAT. §§ 943.32, 940.02, 939.05 (1985-86). The pleas resolved a case filed nearly five years earlier. Much of the delay in concluding the matter stemmed from Almond's challenge to his competency to proceed. In late 1987, psychologists diagnosed him with mild mental retardation and depression. The trial court thereafter found him incompetent to proceed with the criminal prosecution and entered an order committing him for treatment. Almond remained in custody pursuant to commitment orders for some time until, in October 1989, the trial court ordered him released on bond. After his release, the State presented evidence that Almond had attained competency, and, in August 1990, the trial court found him competent.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Throughout this opinion, we refer to the circuit court when we discuss the actions or rulings of the judge that conducted the postconviction proceedings underlying this appeal. We refer to the trial court when we discuss the actions or rulings of any of the several judges that presided over this matter through the entry of the judgment of conviction.

¶3 Almond pursued some additional pretrial motions, but eventually he resolved the matter with guilty pleas, and the trial court imposed sentence and entered a judgment of conviction in February 1992. Almond did not bring a direct appeal.

¶4 In 2012, Almond filed a postconviction motion seeking relief under WIS. STAT. § 974.06. He challenged the validity of the 1990 competency proceedings, and he sought to withdraw his guilty pleas based on alleged defects in the record and on his trial counsel's alleged ineffectiveness.

¶5 The circuit court denied Almond's postconviction claims. The circuit court determined that Almond based his challenge to the competency proceedings on a misunderstanding of the applicable statutes. As to Almond's claims for plea withdrawal, the circuit court determined that the record does not include a transcript of the 1991 plea hearing, and the circuit court found that the court reporter's notes of that hearing have been destroyed. *See* SCR 72.01(47) (establishing ten-year retention period for court reporter's notes of proceedings). The circuit court therefore concluded that it could not review Almond's allegations of infirmities in the plea proceeding. The circuit court further rejected Almond's claim of trial counsel's ineffectiveness, and this appeal followed.

DISCUSSION

¶6 After the time for a direct appeal has passed, a prisoner may attack his or her conviction pursuant to WIS. STAT. § 974.06. Claims for postconviction relief under the statute are limited to constitutional and jurisdictional challenges. ***State v. Balliette***, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334.

¶7 Almond's first substantive claim is that the trial court improperly conducted competency proceedings and found him competent to proceed more than eighteen months after he was committed in 1987 for treatment to bring him to competency pursuant to WIS. STAT. § 971.14 (1987-88).[3] He believes that this was unlawful because, in his view, § 971.14 creates an eighteen-month deadline for completing any competency proceedings in a criminal prosecution.

[3] All references in this opinion to WIS. STAT. § 971.14 are to the 1987-88 version. The statute provides, in pertinent part:

> **971.14 Competency proceedings. (1)** PROCEEDINGS. (a) The court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed.
>
> ….
>
> **(5)** COMMITMENT. (a) If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, it shall suspend the proceedings and commit the defendant to the custody of the department for placement in an appropriate institution for a period of time not to exceed 18 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less....
>
> **(6)** DISCHARGE; CIVIL PROCEEDINGS. (a) If the court determines that it is unlikely that the defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him or her.... The court may order the defendant to appear in court at specified intervals for redetermination of his or her competency to proceed.
>
> ....
>
> (d) Counsel who ... obtain information that a defendant discharged under par. (a) may have become competent may move the court to order that the defendant undergo a competency examination.... If the court so orders, a report shall be filed under [§ 971.14] sub. (3) and a hearing held under [§ 971.14] sub. (4). If the court determines that the defendant is competent, the criminal proceeding shall be resumed.…

¶8 Almond brings his claim of a missed statutory deadline in the context of a postconviction motion under WIS. STAT. § 974.06, which is not a vehicle for pursuing a mere procedural challenge. *See* ***Balliette***, 336 Wis. 2d 358, ¶34 n.4. Assuming, however, that Almond's claim is cognizable in this postconviction litigation, we conclude that the circuit court correctly denied relief because Almond has not demonstrated any error.

¶9 WISCONSIN STAT. § 971.14 creates a statutory scheme for proceeding in criminal cases when a reason exists to doubt a defendant's competency. *See* § 971.14(1)(a). The statute requires, *inter alia*, an incompetent defendant's discharge from commitment after the defendant is confined for either eighteen months or a period equal to the maximum sentence for the most serious charge that the defendant faces, whichever is shorter. *See* § 971.14(5)(a). The statute, however, also permits the trial court to conduct additional hearings to assess a defendant's progress after discharge. *See* § 971.14(6)(a) (providing that, after discharge, "[t]he court may order the defendant to appear in court at specified intervals for redetermination of his or her competency"). Further, the statute permits the criminal proceedings to resume if the defendant becomes competent after discharge from a commitment. *See* § 971.14(6)(d) (providing that "[i]f the court determines that the defendant is competent, the criminal proceeding shall be resumed"); *see also* ***State ex rel. Deisinger v. Treffert***, 85 Wis. 2d 257, 270, 270 N.W.2d 402 (1978) (reflecting that an incompetent defendant's discharge from a commitment "does not preclude the [S]tate from bringing the party to trial at some future date if he regains competency"). Accordingly, the trial court had statutory authority to assess Almond's competency to proceed more than eighteen months after he was first committed under § 971.14. Almond's contention to the contrary lacks merit.

¶10 We turn to Almond's claims for plea withdrawal and his contention that he is entitled to an evidentiary hearing to pursue those claims. A defendant who wishes to withdraw a guilty plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations omitted).

¶11 Wisconsin recognizes two methods for evaluating a claim for plea withdrawal. *See* ***State v. Howell***, 2007 WI 75, ¶¶2, 73-74, 301 Wis. 2d 350, 734 N.W.2d 48. One method for assessing such a claim is set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant moving for plea withdrawal pursuant to ***Bangert*** must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) "allege[] that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy." ***Howell***, 301 Wis. 2d 350, ¶27 (brackets added). If the defendant makes the necessary showing, the circuit court must hold an evidentiary hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant's plea was knowingly, intelligently, and voluntarily made. *See* ***id.***, ¶29.

¶12 Almond alleges defects in the plea hearing record and thus appears to rely on ***Bangert*** here, but ***Bangert*** methodology requires a defendant to make "'a pointed showing' of an error in the plea colloquy by reference to the plea colloquy transcript." *See* ***State v. Negrete***, 2012 WI 92, ¶20, 343 Wis. 2d 1, 819 N.W.2d 749 (citation and footnote omitted). When reference to the plea hearing

transcript is impossible because that transcript is unavailable, a defendant's claim for plea withdrawal should not be evaluated under ***Bangert*** but should instead be evaluated under the standards set forth in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***Negrete***, 343 Wis. 2d 1, ¶¶3, 20.

¶13 Under ***Bentley***, a reviewing court determines whether a defendant seeking postconviction relief has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***Negrete***, 343 Wis. 2d 1, ¶17. Whether a postconviction motion alleges facts that, if true, would entitle the defendant to relief is a question of law. ***Id.*** If the record conclusively demonstrates that the defendant is not entitled to relief, or if the defendant's motion does not allege sufficient facts to entitle the defendant to relief, the circuit court has discretion to deny the defendant's motion without holding an evidentiary hearing, and a reviewing court will sustain the decision of the circuit court if it properly exercised its discretion. *See* ***id.***, ¶¶17-18, 28. The defendant retains the burden of proving his or claim for plea withdrawal by clear and convincing evidence. *See* ***id.***, ¶32.

¶14 Because the circuit court found that the plea hearing transcript is unavailable, we agree with the State that ***Negrete*** requires use of the ***Bentley*** standards here. Accordingly, we examine the allegations in Almond's postconviction motion in light of ***Bentley***.

¶15 Almond complains that the record does not show that the trial court complied during the plea proceedings with its obligations to: (1) ascertain his understanding of the nature and elements of the charges, as required by WIS. STAT. § 971.08(1)(a); (2) establish a factual basis for his guilty pleas, as required by § 971.08(1)(b); and (3) determine his understanding of the rights that he waived by pleading guilty, as required by ***Bangert***, 131 Wis. 2d at 270-72. These allegations

are insufficient to demonstrate that the trial court was in any way derelict in its duties. Because the transcript of the plea hearing is unavailable, "there is no evidence in the record that the [trial] court did *not* comply" with its obligations during the plea colloquy. *See* ***Negrete***, 343 Wis. 2d 1, ¶32 (emphasis added). Almond thus fails to satisfy his burden to show any trial court error. *See* ***id.*** Rather, we assume that the missing transcript supports the trial court's decision to accept Almond's guilty pleas. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

¶16 Almond also claims that he did not know and understand the elements of armed robbery as a party to a crime. A manifest injustice occurs when a defendant's guilty plea is not entered knowingly and intelligently. *See* ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). A postconviction motion for plea withdrawal requires more, however, than mere conclusory allegations. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant must allege material facts that, if true, show that he or she is entitled to relief. ***Id.***

¶17 In this case, Almond asserts that "medications for his medical and psychological issues during the entire time of the court proceedings against him ... had an immediate and automatic effect on [his] ability for focusing on the proceedings or comprehending and fully understanding the proceedings and charges against him." Almond does not support these statements with a showing that he was being treated with any inappropriate medications at the time of his guilty pleas or that he was under the influence of any prescribed drugs that improperly affected his thinking at that time. His vague and conclusory assertion that he took medication during the pendency of the prosecution is inadequate to

support his claim that he did not understand the elements of armed robbery when he pled guilty to that offense.

¶18 Almond also implies that his diagnosis of mild mental retardation supports his claim for plea withdrawal, but he is not correct. Mental retardation is not synonymous with incompetency. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 226, 558 N.W.2d 626 (1997). Whether a mentally disabled person is competent to proceed is a factual question for the trial court. *See* ***id.*** at 222-23. Here, the trial court found Almond competent. His diagnosis of mild mental retardation does not itself undermine the trial court's finding.

¶19 Moreover, Almond's claimed failure to understand necessary information is refuted by the available record, namely, the guilty plea questionnaire form filed when Almond pled guilty. The form bears the signatures of both Almond and his trial attorney, thereby confirming that they had reviewed it together and that Almond understood all of the matters it contained. On the form, Almond declared that he understood the rights that he waived by pleading guilty, the charges he faced, the elements of those charges, and how the evidence established his guilt. Almond does not explain why we should question or ignore the written representations on the form that he and his trial counsel signed and filed when he entered his guilty pleas. *Cf.* ***State v. Taylor***, 2013 WI 34, ¶¶38-39, 347 Wis. 2d 30, 829 N.W.2d 482 (observing that to conclude defendant did not understand information on plea questionnaire, court would be required to assume that trial counsel and defendant made misrepresentations on the questionnaire).

¶20 In light of the available record and the absence of material facts to support Almond's allegations, Almond fails to demonstrate that the plea colloquy was defective or that he lacked understanding of the information that should have

been provided during the plea hearing. The circuit court therefore properly denied plea withdrawal on these grounds without a hearing. *See* ***Negrete***, 343 Wis. 2d 1, ¶¶17-18, 28.

¶21 Last, Almond alleged in his postconviction motion that he is entitled to withdraw his guilty pleas because his trial counsel was ineffective by failing to explain to him "the possibility of a hung jury or a mistrial." A manifest injustice may exist if a guilty plea results from ineffective assistance of counsel. *See* ***Bentley***, 201 Wis. 2d at 311.

¶22 We assess claims of trial counsel's alleged ineffectiveness by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A criminal defendant must thus establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Allen***, 274 Wis. 2d 568, ¶26. We determine *de novo* whether the defendant has demonstrated deficiency and prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶23 To demonstrate deficiency, a defendant must show that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. To demonstrate prejudice in a case resolved with a guilty plea, the defendant must allege facts sufficient to show "'that there is a reasonable probability that, but for the counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

¶24 Here, Almond cites no authority that required his trial counsel to advise him about the possibility of a hung jury or a mistrial. "'[I]neffective assistance of counsel cases should be limited to situations where the law or duty is

clear.'" ***State v. Maloney***, 2005 WI 74, ¶29, 281 Wis. 2d 595, 698 N.W.2d 583 (citation omitted). Because Almond does not show that his trial counsel neglected to take steps clearly required by law, he does not demonstrate that his trial counsel's performance was deficient. *See* ***id.*** Moreover, Almond did not allege in his postconviction motion that he would probably not have pled guilty if his trial counsel had explained "the possibility of a hung jury or a mistrial." Therefore, his motion was inadequate to show that he suffered prejudice from any alleged deficiency in his trial counsel's performance. *See* ***Bentley***, 201 Wis. 2d at 312. For all of these reasons, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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