COURT OF APPEALS
DECISION
DATED AND RELEASED

February 18, 1997

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

NOTICE

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

Nos.96-0717-CR
96-0718-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLEVELAND BROWN, JR.,

Defendant-Appellant.

APPEAL from judgments and orders of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge, and PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Cleveland Brown appeals from judgments of conviction for one count of burglary and one count of burglary as a party to a crime. He also appeals from orders denying his motions for postconviction relief. Brown raises essentially two issues for review: (1) whether the trial court erroneously exercised its discretion when it denied his motion to withdraw his

guilty and ***Alford*** pleas[1] premised on a claim that his pleas were not knowingly, voluntarily, and intelligently made; and (2) whether the trial court erroneously exercised its discretion when it decided his claim of ineffective assistance of counsel without an evidentiary hearing.

I. BACKGROUND.

In April 1994, Brown was charged with one count of burglary and pleaded guilty to this charge in July 1994. Then, in October 1994, Brown was charged with another count of burglary as a party to a crime, to which he entered an ***Alford*** plea in November 1994. He was sentenced in both cases on November 10, 1994.[2]

In January 1996, Brown filed motions for postconviction relief, alleging in part that his plea was not knowingly, voluntarily, and intelligently entered because the trial court did not follow the proper procedure for accepting his plea and that he was suffering from mental confusion at the time he entered the ***Alford*** plea on November 10, 1994. The trial court denied the motion without a hearing. Brown then filed a motion for reconsideration, requesting a ***Machner*** hearing to consider whether he received ineffective assistance of trial counsel.[3] The trial court denied the motion without a hearing.

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[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970); *see* ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995) (discussing ***Alford*** pleas).

[2] This case has a complicated procedural history. Brown was prosecuted separately for the two independent robberies. In the first case (Case No. F-941044), he entered a guilty plea before the Hon. Jeffrey A. Kremers on July 20, 1994. The sentencing was held over until September 15, 1994. During the intervening months, Brown was charged with the second robbery (Case No. F-943932), to which he entered an ***Alford*** plea before the Hon. Raymond E. Gieringer on November 10, 1994. Reserve Judge Gieringer then sentenced Brown for each robbery. Independent judgments of conviction were filed by Judge Gieringer in Case No. F-941044, and the Hon. Patricia D. McMahon in Case No. F-943932. Judge McMahon then presided over and entered the orders denying Brown's motion for postconviction relief. Separate notices of appeal were filed with this court, but both cases were consolidated on April 8, 1996.

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

II. ANALYSIS.

Brown's first argument is that he should be able to withdraw his pleas because they were not knowingly, voluntarily, and intelligently entered. We disagree.

A postconviction motion to withdraw a plea after sentencing is within the discretion of the trial court "and will be granted only when necessary to correct a manifest injustice." ***State v. Duychak***, 133 Wis.2d 307, 312, 395 N.W.2d 795, 798 (Ct. App. 1986). A defendant has the burden of proving manifest injustice by clear and convincing evidence. ***State v. Rock***, 92 Wis.2d 554, 559, 285 N.W.2d 739, 743 (1979).

Brown contends that the trial court, in accepting his guilty and ***Alford*** pleas, did not follow the proper procedures because the trial court did not mention that Brown would be giving up his right to a unanimous jury verdict. He does concede that this right was contained in the Plea Questionnaire and Waiver of Rights Form that he signed when he entered the pleas.

Under the Fourteenth Amendment guarantee of due process, a trial court may accept a plea only when it has been made knowingly, voluntarily, and intelligently. *See* ***Brady v. United States***, 397 U.S. 742, 747 (1970). The plea colloquy has arisen to insure that when defendants enter their pleas they are aware of the nature of the crime charged, the constitutional rights they are waiving, and the direct consequences of their pleas. ***State v. Bangert***, 131 Wis.2d 246, 257, 389 N.W.2d 12, 19 (1986); *see also* § 971.08(1)(a), STATS.[4]

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[4] Section 971.08, STATS., provides in relevant part:

> **Pleas of guilty and no contest; withdrawal thereof; (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with the understanding of the nature of the charge and the potential punishment if convicted.

Further, the Wisconsin Supreme Court has established a two-step procedure to evaluate a defendant's postconviction challenge to the constitutional validity of a plea of guilty or no contest:

> The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of Section 971.08(1)(a) ... and alleges that he in fact did not know or understand the information which 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. The state may then utilize any evidence which substantiates that the plea was knowingly and voluntarily made. In essence, the state will be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him.

Id. at 274-75, 389 N.W.2d at 26 (citations omitted).

In his postconviction motions, Brown alleged for the first time that he was "totally illiterate and was not able to read the criminal complaints or the Guilty Plea Questionnaires." He argues that this allegation supports his contention that the pleas were not knowingly, voluntarily, and intelligently entered.

In denying Brown's postconviction motion to withdraw his pleas, the trial court concluded that the record refutes his allegations. The trial court found that during the original plea hearing, Brown signed the Guilty Plea

Questionnaire and Waiver of Rights form, "which indicated he had read it and understood its contents." The trial court also found that during his plea colloquy, the court asked Brown "whether he had read the complaint `where it says what you did,'" and that Brown responded, "Yes, I did, sir." Further, the court found that although Brown alleged in his postconviction motion that he could not have read the complaint on the Guilty Plea Questionnaire, during the colloquy "he responded to [the trial court's] questions affirmatively and definitively, leaving no room for doubt." Brown has not presented anything to this court from which we can conclude that the trial court's factual findings were clearly erroneous. *See* § 805.17(2), STATS. (findings of fact shall not be set aside unless clearly erroneous). In addition, there is nothing in the record to independently substantiate Brown's allegation that he was illiterate. Brown's affidavit contains the only reference to his alleged illiteracy.

Additionally, we conclude that the trial court was correct when it determined that Brown was aware that he was giving up his right to a unanimous jury verdict. During the original colloquy, Brown acknowledged that he had gone over the Guilty Plea Questionnaire and Waiver of Rights form with his attorney and that he understood that he would be giving up those rights—including his right to a unanimous jury verdict. His attorney indicated that he had reviewed the form with Brown as well. Given this clear record, we reject Brown's argument that he had not been properly informed that he was giving up his right to a unanimous jury by pleading to the charges.

Next, Brown contends that during the ***Alford*** plea hearing on November 10, 1994, he was mentally "confused" and therefore could not knowingly and intelligently submit his pleas. The trial court rejected this argument. So do we.

The trial court made the following finding in support of its denial. The court noted that during the plea colloquy:

> [Brown's] answers were responsive, intelligent, and appropriate throughout the hearing. He did not appear confused; he spoke clearly, logically, and in direct response to several issues raised during the hearing.

> Prior to sentence, the defendant spoke at length to the court, indicating that he knew what he [w]as there for and that he knew what he had done was wrong. In his allocution, he mentioned paying restitution "for the people's windows that I busted out," and that he "did it" to help his mother pay for funeral expenses.

The trial court found that "[b]oth statements indicate a clear understanding of the elements of the offense." In sum, the trial court concluded that Brown had not established that a manifest injustice had occurred. We agree and adopt the trial court's findings and reasoning on this issue.

Finally, Brown argues that the trial court erroneously exercised its discretion when it rejected his ineffective assistance of counsel claim without an evidentiary hearing. We disagree. The standard for reviewing this issue was recently stated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). Further, if "`the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id***. at 309-10, 548 N.W.2d at 53 (citation omitted).

For a defendant to succeed in a plea withdrawal motion based on an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), must be satisfied. That is, a defendant "must show that counsel's performance was both deficient and prejudicial." ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54. Further, if a defendant fails to show one of the prongs, the court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

In his postconviction motion, Brown alleged that at the plea hearing on November 10, 1994, he "was disoriented, dazed, and confused." He alleged that his "sister had been murdered several weeks prior to that time, and he believed that she was watching him." He also alleged that he "kept hearing her voice telling him to plead guilty," and that he "had complained to Milwaukee County Jail Health Services staff that he was hallucinating and hearing voices."

Brown alleged that his trial counsel "did nothing to determine the nature and extent of [his] mental condition," that his counsel never "requested [his] mental health records from the jail," and that his counsel "knew he was confused and unclear about what was happening." Brown contended that his counsel's performance was deficient because counsel never raised the issue of competency at the November 10 plea hearing.

The trial court rejected Brown's claim without a hearing, concluding that he had not shown the court "that counsel knew or should have known he had a particular psychological condition on the day of the second plea hearing and sentencing." The trial court concluded that Brown had not satisfactorily shown that his counsel's performance was either deficient or that it prejudiced him. Brown then moved the court to reconsider its motion and to grant him a ***Machner*** hearing. He provided nothing new in his motion for reconsideration to support his request.

We acknowledge that at the time of the hearing, the trial court did not have the benefit of the supreme court's recent ruling in ***Bentley***. Nonetheless, we conclude that the trial court properly rejected his ineffective assistance of counsel claim without a hearing.

Brown's contentions that his counsel was aware of his alleged mental condition are comprised solely of conclusory allegations that are insufficient under ***Bentley*** to require a hearing. ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53. Nothing in his submission alleges how his counsel would have been aware of his alleged mental condition. In fact, Brown merely argues: "Given [his] hallucinations, voices, dizziness and confusion *it must be assumed* that trial counsel was aware of [his] mental disorientation." (Emphasis added.) Clearly, without more support, assumptions are insufficient to require a trial court to hold an evidentiary hearing.

Accordingly, we conclude that the trial court could properly deny Brown's motion without a hearing because Brown's submissions were inadequate to meet the necessary deficient performance and prejudice prongs under ***Strickland***.

By the Court.—Judgments and orders affirmed.

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