COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1547-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE E. FLEMING A/K/A WILLIE L. FLEMING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Willie E. Fleming appeals from a judgment of conviction, a sentencing order and an order denying his postconviction motion. We reject Fleming's arguments: (1) that because of his low mental functioning and mental illness, his guilty plea was involuntary, unknowing and unintelligent; (2) that his counsel was ineffective; (3) that new factors exist which mandate

reconsideration; or (4) that a sentence of ten years' imprisonment was unduly harsh and unconscionable. We therefore affirm.

A complaint dated May 19, 1993, alleged that while intoxicated on drugs and alcohol, Fleming drew a loaded gun, and placed it to the back of James Pulliam's head. Another man present, Robert Ayers, disarmed Fleming. Police were called. Upon arrival, police confiscated Fleming's gun. Fleming was charged with intentionally pointing a firearm at another, contrary to § 941.20(1)(c), STATS.; possession of a firearm by a felon as a repeater in violation of § 941.29(2), STATS.; possession of a controlled substance (cocaine), contrary to § 961.41(1)(a), STATS.; and possession of a controlled substance (THC), contrary to § 961.41(1)(b).[1] Each of the four charges contained a habitual criminality enhancer under § 939.62(1)(a), STATS.

Fleming, through his counsel, entered into plea negotiations, and as a result pleaded guilty to unlawfully and unintentionally pointing a firearm at another individual; possession of a weapon by a felon; and possession of a controlled substance (cocaine). As a result, the State dropped the possession of THC charge and other charges in unrelated cases. After a sentencing hearing, Fleming was sentenced to ten years' imprisonment. Thereafter, Fleming brought a postconviction motion. After a five-day hearing, the trial court rejected Fleming's arguments. Fleming appeals to this court from the conviction, the sentencing and the postconviction motion disposition.

A. *Plea Withdrawal*

[1] Fleming was charged under the old statute. However, the legislature renumbered the chapter in 1995. *See* 1995 Wis. Act 448, § 323.

Fleming argues that his low level mental functioning, coupled with his mental illness, made him incapable of entering an intelligent, knowing and voluntary plea. He also argues that the circuit court erred by denying his postconviction motion to withdraw his plea.

A defendant who seeks to withdraw a guilty or no contest plea 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. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). The motion to withdraw a plea is addressed to the sound discretion of the trial court, and we will only reverse if the trial court fails to properly exercise its discretion. ***State v. Booth***, 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987). Where, as in the postconviction motion hearing here, the circuit court is acting as trier of fact, the weight to grant conflicting testimony is a matter for the circuit court. ***Matter of Estate of Czerniejewski***, 185 Wis.2d 892, 898, 519 N.W.2d 702, 704-05 (Ct. App. 1994). Stated another way, when more than one inference can be drawn from conflicting evidence, a reviewing court must accept the inference drawn by the trier of fact. ***Rotor-Aire, Inc. v. Marth***, 87 Wis.2d 773, 779, 275 N.W.2d 701, 704 (1979).

At the postconviction hearing, the court heard Fleming's personal and expert evidence that he was mentally incapable[2] of a knowing, intelligent and voluntary plea. The State presented expert evidence to the contrary, as it was permitted to do under ***State v. Bangert,*** 131 Wis.2d 246, 275, 389 N.W.2d 12, 26 (1986). Although Fleming downplays the State's evidence and elevates his own, the

[2] On appeal, Fleming argues that his plea was involuntary. However, he makes no argument that he was incompetent to enter the plea.

weight to grant conflicting evidence is a matter for the trier of fact. ***Czerniejewski***, 185 Wis.2d at 898, 519 N.W.2d at 704-05. The record contains two state psychologists' testimony to the effect that Fleming was capable of entering a knowing, intelligent and voluntary plea. Therefore, we must sustain the circuit court's finding that Fleming understood the proceedings, and he was capable of entering a proper guilty plea.

Fleming argues that the court erred because the plea colloquy was perfunctory and should have been more searching. We have carefully reviewed the plea colloquy. The court twice asked Fleming to be sure to speak up if anything happened that he could not understand, and Fleming both times stated he would. The court also asked him numerous times whether he was understanding the proceedings, and Fleming each time responded "yes." As to each count individually, the court read the charge to Fleming, explained the possible penalty, ascertained Fleming's understanding, and asked Fleming how he wanted to plead.

The court also ascertained that Fleming understood he was waiving his constitutional rights, and informed him that the court was not bound by the State's recommendation. The court asked trial counsel's opinion on whether Fleming was acting intelligently, knowingly and voluntarily, and also inquired whether Fleming was satisfied with trial counsel's services. Finally, the trial court ascertained that no promises or threats had been made to Fleming. Thus, the plea colloquy complied with the requirement that the court personally determine the defendant's understanding. ***Bangert,*** 131 Wis.2d at 268, 389 N.W.2d at 24.

Fleming argues, however, that he was under compulsion to plead guilty. He points to his mental state, his previous intoxication, his drug-dependent life style and his need for treatment. We reject this argument. An inner

compulsion to plead guilty does not void a plea. As the court explained in ***State v. McKnight***, 65 Wis.2d 582, 590, 223 N.W.2d 550, 555 (1974):

> The inquiry that the trial court is required to make relates solely to the voluntariness of the plea or waiver, and to their being knowledgeably and intelligently made. The decision as to waiver or plea is for the defendant to make. He is not required to state his reasons, and the court is not required to locate them.

B. *Ineffective Assistance of Counsel*

Fleming argues that he received ineffective assistance of counsel before sentencing because counsel did not aggressively investigate and litigate the case. He also argues that he received ineffective assistance of counsel at sentencing. To prevail on his claim of ineffective assistance of counsel, Fleming must show: (1) his counsel's performance was deficient; and (2) that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. *See also* ***State v. Ambuehl***, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

1. *Effectiveness of Counsel Prior to Sentencing*

Defendant offered several versions of the events underlying the charges, and finally admitted that due to intoxication with a variety of drugs as well as alcohol, he had no real recollection of the events. There was no question, however, that the others present implicated Fleming in holding a loaded gun to another man's head, and that police retrieved the gun.

Given these circumstances, it is not surprising that counsel chose to compromise this case, rather than aggressively pursue investigation, or mount an active and aggressive defense. Counsel effectuated this strategy by arranging a plea agreement. Fleming pleaded guilty to three of the original four charges; unrelated charges against him in other cases were dropped; and the State agreed to recommend three years' imprisonment, out of a possible ten. We agree with the circuit court that far from being ineffective, trial counsel achieved an excellent result. The fact that postconviction counsel may have chosen to try the case differently does not invalidate trial counsel's strategy. "[S]trategic choices ... are virtually unchallengeable." ***Strickland,*** 466 U.S. at 690-91.

2. *Effectiveness of Counsel at Sentencing*

Under the plea agreement, the State agreed to recommend three years' imprisonment. Fleming contends that the State breached this agreement, and that counsel ineffectively failed to object. The record, however, does not support this argument. At sentencing, the prosecutor stated:

> [T]he state is respectfully asking the court to sentence Mr. Fleming to a period of three years in the Wisconsin State Prison System on each of the three charges that are before the Court and to run those sentences concurrent with one another ... for a total of three years.

Fleming argues that trial counsel failed to endorse the plea agreement. At sentencing counsel argued that "warehousing" Fleming would not address his needs for treatment. Instead, counsel asked that Fleming be placed on probation in an intensive treatment program for "as long as it takes." We do not understand an argument for a lesser degree of punishment to be ineffective assistance of counsel. Stated another way, when counsel argued for treatment on

probation rather than three years' imprisonment, we do not believe counsel ineffectively failed to endorse the plea agreement.[3]

Fleming argues that counsel ineffectively failed to counter negative and inaccurate statements in the presentence report. Again, the record does not support this argument. Counsel objected to the PSI's characterization of Fleming as "dishonest," and offered a different explanation for Fleming's apparent inconsistencies. Counsel also attempted to show that the PSI was incomplete and possibly misleading because it failed to consider Fleming's background.

C. *New Factors*

Fleming argues that his cognitive and social background are "new factors" which entitle him to resentencing. Specifically, he contends that: (1) the full extent of his limitations were not brought before the court prior to sentencing; (2) that before sentencing, the court was unaware that he was amenable to treatment; and (3) that alternative explanations to various unfavorable factors were not offered to the court prior to sentencing.

In order to prevail on a motion to modify sentence, defendant must demonstrate by "clear and convincing evidence" that a "new factor" exists unknown to any party at the time of sentencing, and the circuit court must agree that the new factor warrants sentence modification. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611-12 (1989). The new factor must not only be previously unknown,

[3] As discussed below, Fleming argues on appeal that his need for treatment is a "new factor" which justifies a "shorter sentence designed to provide intensive psychological rehabilitation." Given his explicit desire for "intensive ... treatment," we fail to see how trial counsel was ineffective by arguing at sentencing that Fleming should have the intensive treatment he desired.

but must strike at the very purpose for the sentence selected by the trial court. ***State v. Michels*** 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether facts constitute a "new factor" is a question of law, which we review de novo. ***Id.***, 150 Wis.2d at 97, 441 N.W.2d at 279.

As is evident from its remarks on the record, at sentencing the court knew that Fleming had mental and physical problems and had limited intellectual capacity.[4] We therefore agree with the State that none of the matters Fleming has brought to the court's attention post-sentencing meets the "new factor" criterion of being "previously unknown." ***Michels***, 150 Wis.2d at 99, 441 N.W.2d at 280. Rather, it is supplemental information, consistent with the information the court had before it at sentencing. As Fleming concedes, where postconviction hearing testimony is consistent with information already presented at sentencing, no new factor exists. ***State v. Harris***, 174 Wis.2d 367, 378-80, 497 N.W.2d 742, 747 (Ct. App. 1993).

Fleming's argument that he is amenable to treatment is not a "new factor," as it does not strike to the very purpose of the sentence. ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279. At sentencing, the court noted that Fleming had a twenty-five year history of substance abuse, and noted his need for rehabilitative control in a closed setting for the protection of society. Post-sentencing evidence that Fleming might benefit from a lesser degree of control during his treatment does

[4] For example, the court noted that Fleming had a very serious and long-standing drug and alcohol problem, and that he received SSI for drug and alcohol-related disability; that he was learning disabled; had only a third-grade education; could neither read nor write; had physical limitations; suffered auditory hallucinations; had been suicidal in the past; and had flashbacks to a stressful childhood incident where some cousins were killed in a fire.

not vitiate the purpose of protecting society enunciated by the circuit court as a sentencing factor.

We also reject Fleming's argument that at sentencing, the court wrongly relied upon unfavorable conclusions for which alternative explanations can now be offered. The record of the sentencing hearing shows that trial counsel offered alternative explanations for unfavorable conclusions about Fleming contained in the PSI. Counsel argued, for example, that Fleming was neither dishonest nor manipulative, but that these apparent characteristics were attributable to low functioning or social background. The fact that even more alternative explanations could be offered, post-sentencing does not mean that the court was unaware that alternative explanations existed.

D. *Sentencing*

Fleming argues that the ten-year term imposed was unduly harsh or unconscionable.[5] Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court misused that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors which the trial court must consider are the gravity of the offense, the character of the offender, and the need for public protection. ***Id.*** at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

[5] He also argues that "manifest injustice" resulted because his plea was involuntary. We do not consider this contention further because we have previously determined that the plea was proper.

The court may also consider, among other things, the defendant's criminal record; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of culpability; the defendant's demeanor at trial; the defendant's age, educational record and employment record; the defendant's remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; and the length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994).

Specifically, Fleming argues that his rehabilitative needs will go unmet while he is incarcerated. This argument focuses on the consequences Fleming will suffer due to the ten-year term imposed. However, effect on the defendant is only one of a variety of factors a sentencing court may properly consider. Here, the court specifically considered Fleming's long history of undesirable behavior, and concluded that society would benefit by the sentence imposed. The court also noted Fleming's unsuccessful attempts at community-based rehabilitation and determined that a closed environment was necessary. Because these are proper sentencing factors under ***Iglesias***, Fleming has not shown any misuse of discretion in sentencing.

By the Court.—Judgment and orders affirmed.

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