COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2306-CR **Cir. Ct. No. 2008CF1073**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY DEWAYNE LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Anthony Dewayne Lewis entered a guilty plea to first-degree reckless homicide. He seeks to withdraw his plea based on claims that his counsel was ineffective and the plea colloquy defective. We affirm the judgment of conviction and the order denying his motion for postconviction relief.

¶2 Witnesses told police Lewis shot Ahattola Feemster. Feemster died at the hospital. The next day, police officers went to an apartment complex where they believed Lewis was. They had no warrant, as they were advised there was probable cause to arrest him. They saw Lewis through an open door, arrested him, obtained a search warrant, then retrieved a gun observed during the arrest.

¶3 Lewis at first denied any involvement in the shooting. He later claimed self-defense, but the bullet's trajectory and witness accounts contradicted his version of events. He was charged with first-degree intentional homicide, attempted first-degree intentional homicide by use of a dangerous weapon, and possession of a firearm by a felon.

¶4 Lewis moved to suppress his statements and the fruits of the search. According to suppression hearing testimony, Racine Police Department Investigator David Shortess saw Lewis inside one of the apartments when a woman exited and left the door ajar. When Shortess "charged" the door and called out, "Police!" he saw something "kind of roll" out of Lewis's hand and heard it hit the wall. Investigator Alfred Fellion entered and handcuffed Lewis, noticing, as he did so, a revolver a few feet from the apartment door. Police obtained a search warrant after arresting Lewis and seized the gun after obtaining the warrant.

¶5 Lewis testified that he had left the apartment, closed the door, and taken several steps when Shortess "jumped out with a gun" and ordered him to the ground. He also testified that he did not give the officers permission to enter or to search the apartment, which belonged to a friend of someone he knew. The court denied the motion to suppress.

¶6 Lewis pled guilty to an amended charge of first-degree reckless homicide; the other two counts were dismissed and read in. After this court

rejected the no-merit appeal that followed, Lewis filed a postconviction motion seeking to withdraw his guilty plea on grounds of ineffective assistance of counsel and a defective plea colloquy. The court denied the motion after a ***Machner***[1] hearing. Lewis appeals.

¶7 Lewis first contends he should be allowed to withdraw his plea because trial counsel, Attorney Richard Hart, ineffectively failed to seek suppression of evidence and statements on the basis that police lacked probable cause to arrest.

¶8 Decisions on plea withdrawal requests are discretionary and will not be overturned absent an erroneous exercise of discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A postsentencing plea withdrawal motion should be granted only to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The defendant bears the burden of proving by clear and convincing evidence that a manifest injustice exists. ***State v. Lee***, 88 Wis. 2d 239, 248, 276 N.W.2d 268 (1979).

¶9 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. We uphold the circuit

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

court's findings of fact unless clearly erroneous, but "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." ***Id.***

¶10 To be lawful, an arrest must be based on probable cause. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge "would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). "An officer's [probable cause] belief may be partially predicated on hearsay information, and the officer may rely on the collective knowledge of the officer's entire department." ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994).

¶11 Hart testified at the ***Machner*** hearing that he was convinced a probable cause challenge would be meritless. The case file showed that Lewis was known on the street as "Memphis"; several witnesses identified Memphis as the shooter, described his bright orange shirt, and said Memphis was the only one in the bar wearing an orange shirt; the bar's outdoor surveillance video showed the shooter wearing an orange shirt; the car witnesses described as the one Lewis drove to the bar was impounded because it was left on the street; and Lewis placed himself at the scene by later calling police and telling them he left it parked near the bar because he was drunk.

¶12 The circuit court concluded it was not necessary to raise lack of probable cause in the suppression motion because "probable cause, quite frankly, was all over the place." Lewis insists that it nonetheless was incumbent upon defense counsel to raise the issue so as to establish that there was probable cause.

The circuit court termed that argument "dead wrong." We agree. Hart did not perform deficiently by not pursuing a meritless argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶13 Lewis also complains that Hart failed to challenge probable cause for the search. This is puzzling, considering that Lewis concedes he was without standing to object to a search of an apartment that was not his. "[T]o challenge a warrantless search or seizure, one must show a legitimate expectation of privacy in the thing or place searched or seized." ***State v. Earl***, 2009 WI App 99, ¶9, 320 Wis. 2d 639, 770 N.W.2d 755. Fourth Amendment rights are personal and may not be asserted vicariously. ***State v. Malone***, 2004 WI 108, ¶22, 274 Wis. 2d 540, 683 N.W.2d 1. Lewis does not have a legitimate expectation of privacy in a friend-of-a-friend's apartment.

¶14 Lewis next contends that he should be allowed to withdraw his plea because a defective colloquy rendered his plea unknowing and involuntary, invoking the authority of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and that it was infirm because he was "promised" a specific, lesser sentence, invoking the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***Bentley***.

¶15 Whether a plea was knowingly, voluntarily, and intelligently entered is a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. "We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous." ***Id.*** Whether the plea was knowing and intelligent, however, is a question of constitutional fact subject to

independent review. ***Id.*** If the defendant makes a prima facie showing that the plea was accepted without conformance to WIS. STAT. § 971.08 (2011-12)[2] or other mandatory procedures, the State must show by clear and convincing evidence that, despite the defect, the plea was knowing, voluntary, and intelligent. ***Bangert***, 131 Wis. 2d at 274. To meet its burden, the State may use the entire record and "may examine the defendant [and] defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for [the defendant] to enter a voluntary and intelligent plea." ***Id.*** at 274-75.

¶16 Lewis told the court at the plea hearing that he had an eighth-grade education and that he could read, write, and understand English. Three months later, he sent a letter to Hart bearing a handwritten note he penned. Lewis also confirmed no fewer than nine times that he understood the questions put to him, was twice afforded extra time to confer with Hart when he appeared unsure, and assured the court that he wanted to go forward with the hearing.

¶17 At the postconviction motion hearing, however, Lewis testified that when he entered his guilty plea he was unable to read and write or to understand the plea questionnaire. Lewis argues here that had the court probed the extent of his education and general ability to comprehend the proceedings, it would have recognized that he was functionally illiterate. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

¶18 Hart testified that he spent "a whole lot of time" going over the jury instructions and explaining the difference between intentional and reckless

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

homicide, that he read the plea questionnaire to Lewis "not just once, but several times," and that he "explained it again in layman's terms, and we did that with each right[,] with each element." The court found Hart more credible than Lewis.

¶19 We "will not exclude the circuit court's articulated assessments of credibility and demeanor, unless they are clearly erroneous." ***Carter***, 324 Wis. 2d 640, ¶19. They are not. Lewis leaves us to guess why, if he could not read and write, he told the court that he could; what he believes the court should have done beyond what it did; what he did not understand; or how, since counsel read the plea form and verbally explained everything on it, his claimed illiteracy undermined his comprehension.

¶20 Lewis next asserts that the circuit court failed to alert him to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman. Had he been pro se, this claim might have some heft. On these facts, we confess being mystified as to what his complaint is.

¶21 Lewis also contends that he entered his plea without understanding the difference between the elements of the crime initially charged and the crime to which he pled; that the court failed to personally address him to ascertain that a factual basis existed to support his plea, but instead relied on the complaint, which alleged first-degree intentional homicide; and that the court failed to notify him of the direct consequences of his plea, namely, the read-in charges.

¶22 In ***Bangert***, the supreme court offered a nonexhaustive list of methods for circuit courts to determine a defendant's understanding of the plea. ***Bangert***, 131 Wis. 2d at 268. Here, the court asked him during the colloquy, "Do you have any questions of me about any of this at all?" Lewis hesitated, conferred with Hart, then answered, "No questions." The court pressed, "Are you sure?"

Lewis answered, "Yes, sir." Still, the court provided another opportunity to confer with Hart and went on only after Lewis indicated his concerns were allayed.

¶23 As noted, Hart testified that he explained the difference between intentional and reckless homicide. He also attached the jury instructions to Lewis's signed plea form and a copy of the complaint with the original charge. He discussed the elements with Lewis, read the plea questionnaire to him several times, explained it again in lay terms, and was satisfied that Lewis understood. The court's finding that Lewis understood the charge and the elements is not clearly erroneous.

¶24 A factual basis for a guilty plea is established if the circuit court is presented with facts that, if proved, would constitute the offense charged. *See* ***Little v. State***, 85 Wis. 2d 558, 560-61, 271 N.W.2d 105 (1978). A factual basis for first-degree reckless homicide exists when the facts show: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct, which means that the defendant was aware that his or her conduct created an unreasonable and substantial risk of death or great bodily harm to another; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS. STAT. § 940.02(1) and WIS JI—CRIMINAL 1020. The court may consider hearsay evidence, such as police officers' testimony, the preliminary examination record and other records in the case. ***Little***, 85 Wis. 2d at 561.

¶25 The allegations in the complaint, if proved, establish a factual basis for first-degree reckless homicide. It alleged that Lewis fled after knowingly firing his gun in Feemster's direction and that Feemster later died of the gunshot wound. As part of his self-defense theory, Lewis claimed that Feemster long had

antagonized him, even once shooting Lewis in the jaw. Lewis thus could not plausibly maintain that he did not know that intentionally firing a loaded weapon at a person creates an unreasonable risk of death or great bodily harm. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 665-66, 348 N.W.2d 527 (1984); *see also* ***State v. Bernal***, 111 Wis. 2d 280, 283-84, 330 N.W.2d 219 (Ct. App. 1983). Fleeing after shooting at someone shows an utter disregard for human life. *See* ***State v. Davis***, 144 Wis. 2d 852, 864, 425 N.W.2d 411 (1988).

¶26 As for failing to notify Lewis of his plea's direct consequences, our courts have never said that read ins can be categorized as such. While the supreme court chose not to adopt this court's conclusion in ***State v. Lackershire***, 2005 WI App 265, ¶15, 288 Wis. 2d 609, 707 N.W.2d 891, that read ins are collateral consequences, it did so because that determination "appear[ed] to extend existing law." ***State v. Lackershire***, 2007 WI 74, ¶28 n.8, 301 Wis. 2d 418, 734 N.W.2d 23. The supreme court "decline[d] to engage in further analysis regarding the circuit court's obligation to explain the nature of read-in offenses" when that issue was not before it. ***Id.***

¶27 In any event, Lewis was advised of the consequences of having an offense read in. Lewis's signed plea form describes the sentencing, restitution, and future-prosecution effects of a read in. Hart said they went over the plea form several times and that he "absolutely" explained those effects to Lewis.

¶28 Lewis was sentenced to a total of thirty-five years, consecutive to another sentence he was serving for his probation revocation. He contends Hart promised him he would get a maximum of "five, ten years."

¶29 The circuit court found no basis for Lewis's claim that Hart promised Lewis he would get a five-to-ten-year sentence for a homicide. It found

that Hart "would never, never guarantee to a criminal defendant what the sentence is going to be," and that it was explained to Lewis by the court and by Hart that the "lawyers … make a recommendation to the Court, but it's the Court that ultimately makes the sentence." This finding is supported by Hart's testimony that he "[a]bsolutely [did] not" tell either Lewis or any defendant he ever has represented what his or her sentence would be, and by the plea-bargain agreement and the plea-waiver form, both of which told Lewis the maximum potential penalty and that the court was not bound by the plea bargain.

¶30 Even if the colloquy fell somewhat short of ***Bangert***, the remedy is plea withdrawal only if the State cannot show that Lewis's plea was knowingly, voluntarily, and intelligently made. ***Bangert***, 131 Wis. 2d at 274. The court's factual findings are not clearly erroneous. The record satisfies us that the court's and defense counsel's joint efforts resulted in Lewis being provided sufficient information about the nature of the crime and the rights he was waiving and that he expressed an understanding of both. The court did not erroneously exercise its discretion in denying Lewis's motion to withdraw his plea. Lewis did not prove clearly and convincingly that a manifest injustice must be corrected.

By the Court.—Judgment and order affirmed.

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