COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0639-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BENARD TREADWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

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

PER CURIAM. Benard Treadwell appeals from a judgment of conviction entered after he pleaded guilty to an amended charge of first-degree reckless homicide, party to a crime, contrary to §§ 939.05 and 940.02, STATS. Treadwell also appeals from the order denying his postconviction motion for plea withdrawal. Treadwell claims that: (1) he should be allowed to withdraw his plea

because it was not knowingly entered, it was entered as the result of the ineffective assistance of counsel, and it was entered without an understanding of the charges; (2) the trial court erred in denying his request for a ***Machner*** hearing; and (3) he should be granted a new sentencing hearing because he was denied the effective assistance of counsel at the sentencing hearing, he was sentenced on the basis of incorrect information, and a new factor exists warranting sentence modification. We disagree with all of Treadwell's claims and affirm the judgment and order.

I. BACKGROUND.

This case arises from a shooting which occurred on February 11, 1995, at a Milwaukee tavern, in which Corey Pittman was shot and killed by DeMarrus Willis for stepping on a gang member's shoe. Treadwell, Willis and others were at the tavern when Pittman apparently stepped on a gang member's shoe. After Pittman left the tavern and was attempting to enter Damion Powell's car, he was shot and killed by Willis. As Powell drove away from the scene, Treadwell fired a number of shots at his car. Although a number of bullets struck the car, Powell was not hurt.

Following the incident, Treadwell and Willis were arrested. Treadwell was originally charged with first-degree intentional homicide, party to a crime. However, pursuant to a plea negotiation, Treadwell eventually pleaded guilty to an amended charge of first-degree reckless homicide, party to a crime, contrary to § 940.02, STATS.

Before Treadwell pleaded guilty, the bullets found in Powell's car were analyzed and a ballistics report was issued which stated that, although the bullets found in Powell's car could not be positively identified as coming from Treadwell's gun, the bullets were consistent with bullets fired from Treadwell's

gun. Treadwell's counsel, however, apparently told Treadwell that the ballistics report stated that his bullets "matched" the bullets found in Powell's car. Further facts related to the ballistics report will be stated as necessary in the analysis portion of the opinion.

After pleading guilty, Treadwell was sentenced to thirty years in prison. He subsequently filed a postconviction motion for plea withdrawal and sentence modification which was denied. Treadwell now appeals.

II. ANALYSIS.

A. Plea withdrawal.

Treadwell claims that he should be allowed to withdraw his plea on the grounds that: (1) he did not enter the plea knowingly; (2) he was denied the effective assistance of counsel; and (3) he did not understand the nature of the charges due to a ***Bangert*** violation.[1] To withdraw a guilty plea after sentencing, the defendant must show that a manifest injustice would result if withdrawal were not permitted. ***State v. Booth,*** 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A "manifest injustice" occurs where a defendant makes a plea involuntarily or without knowledge of the consequences of the plea—or where the plea is "entered without knowledge of the charge or that the sentence actually imposed could be imposed." ***State v. James***, 176 Wis.2d 230, 237, 500 N.W.2d 345, 348 (Ct. App. 1993). A manifest injustice may also occur when a defendant

[1] Treadwell also makes passing reference to an "arguable absence of a factual basis for the original or the amended charges." This argument is insufficiently developed and, therefore, we will not address it. *See* ***Barakat v. DHSS,*** 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

enters a plea as the result of the ineffective assistance of counsel. *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993). The burden of proving a manifest injustice is on the defendant, by clear and convincing evidence, and the court's decision not to allow the defendant to withdraw his plea will only be reversed for an erroneous exercise of discretion. *See* ***Booth***, 142 Wis.2d at 237, 418 N.W.2d at 22.

Two of Treadwell's claims are based on discrepancies between statements made before he pleaded guilty by his counsel, the prosecutor, and the court regarding a crime lab ballistics report, and the information actually contained in the ballistics report. Treadwell first claims that his plea was not entered knowingly because he was misinformed concerning the ballistics report. Treadwell asserts that, had he known exactly what the ballistics report actually stated concerning the bullets taken from the victim's car, he would not have pleaded guilty. Treadwell also claims that his counsel's failure to provide him with the correct information regarding the ballistics report amounted to ineffective assistance of counsel, in the absence of which he would not have pleaded guilty.

First, we disagree with Treadwell's characterization of the underlying facts. Treadwell asserts that not only his counsel, but also the prosecution and the court, made misrepresentations concerning the evidence against him, before he pleaded guilty. The alleged "misrepresentations" by the prosecutor and the court which Treadwell refers to are as follows. The prosecutor, during the guilty plea hearing, stated: "You know, if he wanted to shoot at the car he could have shot over the car, shot at the wheels, but the shots were going right into the car based on the physical evidence we found and there were twenty-three gun wounds in that car." The court then stated: "You understand that, Mr.

Treadwell?" to which Treadwell replied, "Yes, Ma'am." Later in the guilty plea hearing, the following exchange also occurred:

> THE COURT: Okay. And you heard what the district attorney said about the physical evidence in this case, correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you're aware of that physical evidence also, correct?
>
> THE DEFENDANT: Yes, Ma'am.

Treadwell argues that there was no physical proof that the bullets found in the car came from his gun, and that these statements made by the prosecutor and the court therefore amounted to misrepresentations. We disagree. First, although the physical evidence did not conclusively show that the bullets found in the car came from Treadwell's gun, it is far from correct to say that there was no physical proof of that fact. The ballistics report does state that: "Items AB, AE, AF, AG, and AH [bullets removed from Powell's car] were not positively identified to any firearm submitted." The report, however, also states that "Examination of Items AB, AE, AF, AG, and AH revealed them to be *consistent* with damaged bullets fired through the barrel of a caliber 9MM Luger firearm having six lands and grooves with a right hand twist." (Emphasis added.) Treadwell's defense counsel stipulated at the postconviction motion hearing that the gun which Treadwell admitted firing was the 9MM Luger, having six lands and grooves with a right hand twist, which the crime lab had tested and referred to in its ballistics report. Thus, viewed in its totality, the ballistics report, rather than providing "no proof" that Treadwell's shots struck Powell's car, actually corroborates the other evidence supporting the State's case against Treadwell. As the trial court stated in its decision denying Treadwell's postconviction motion:

"The ballistics report does not say that the bullets were not from the defendant's gun, merely that the expert could not establish with certainty that they were from that gun. Moreover, the report does conclude that the bullets were consistent with such a weapon."

The ballistics report's reference to the bullets was not the only physical evidence which tended to prove that Treadwell's bullets struck Powell's car. Nine cartridge cases found at the scene of the crime were also positively identified in the ballistics report as coming from Treadwell's gun. Therefore, we conclude that the prosecutor did not make any misrepresentation when he stated that "the shots were going right into the car based on the physical evidence we found," and that the court did not make any misrepresentations by referring to the prosecutor's statement. The prosecutor's statement was accurate because the evidence did tend to show that the bullets found in Powell's car came from Treadwell's gun. The fact that the evidence did not conclusively prove that fact does not make the prosecutor's and court's statements "misrepresentations."

The State, however, did offer to stipulate at the postconviction hearing that Treadwell's counsel told him that the bullets in the back of Powell's car "matched" the bullets in his gun. The ballistics report, as noted, states that the bullets found in the car were "consistent" with the bullets from Treadwell's gun. Therefore, although the ballistics report provides some evidence that Treadwell's bullets struck Powell's car, it does not state that Treadwell's bullets "matched" those found in Powell's car. Thus, we conclude that Powell has shown that his trial counsel gave him inaccurate information concerning the ballistics report. We do not agree, however, that Treadwell's plea was not entered knowingly, for purposes of plea withdrawal, as a result of his misunderstanding of the strength of the State's case against him.

Treadwell argues that his plea was entered unknowingly because he did not have a completely accurate understanding of the ballistics report. Treadwell bases his argument on the United States Supreme Court's statement that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *See* ***Brady v. United States***, 397 U.S. 742, 748 (1970). Treadwell essentially argues that the information found in the ballistics report was a "relevant circumstance" which he needed to have a complete understanding of in order to knowingly plead guilty. Treadwell fails to acknowledge, however, that the Supreme Court also stated, in ***Brady***, that:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

Id., 397 U.S. at 757. Besides ***Brady***, Treadwell cites no other authority for the proposition that a defendant must have a complete and perfect understanding of all of the State's evidence against him or her in order to knowingly plead guilty. The authority we have uncovered does not address a defendant's knowledge of the evidence against him or her, but rather deals with the defendant's knowledge of the charges against him or her, or the consequences of the plea. Treadwell's misunderstanding concerning the ballistics report did not relate to his understanding of the charges against him, or to the consequences which could follow from his entering a plea. Instead, Treadwell's misunderstanding merely related to the strength of the State's case against him. We conclude that Treadwell's misunderstanding is of the type which the Supreme Court in ***Brady***

believed should not entitle a defendant to withdrawal of his or her plea; namely, an incorrect assessment of one relevant factor which entered into his decision to plead guilty, or a misapprehension of the quality of the State's case. Therefore, we conclude that Treadwell's misunderstanding did not cause him to enter his plea unknowingly, for purposes of plea withdrawal.

Even so, Treadwell's counsel's misrepresentation of the ballistics report's conclusions to Treadwell may have constituted deficient performance which could entitle Treadwell to plea withdrawal on ineffective assistance of counsel grounds. We conclude, however, that Treadwell has failed to prove prejudice, and, as a consequence, this claim also fails.

In order to prove ineffective assistance of counsel, a defendant must show both deficient performance by trial counsel and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice in connection with a guilty plea, the defendant must show that, but for counsel's errors, there is a reasonable probability that he or she would not have pleaded guilty and would have insisted on going to trial. ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). A defendant must affirmatively prove prejudice and may not rely on speculation. *See* ***State v. Wirts***, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993). On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

We conclude, like the trial court, that Treadwell has failed to show a reasonable probability that, but for counsel's statement that the bullets found in

Powell's car "matched" the bullets from his gun, Treadwell would not have pleaded guilty. As the trial court stated, strong evidence of Treadwell's guilt existed which provided a legitimate and independent reason for Treadwell to plead guilty. First, Treadwell voluntarily confessed to the police, before he was told about the ballistics report, and admitted that he had fired his gun at Powell's vehicle. Treadwell stated that he was making the confession because he was sorry for "help[ing] kill" another person, not because the ballistics test results conclusively linked him to the crime. Additionally, an eyewitness, Calvin Reed, gave a statement and testified at Treadwell's co-defendant's trial that a suspect in the roadway was firing a handgun at the car. The ballistics report, although not proving conclusively that Treadwell's shots met their mark, also provided evidence that the bullets in Powell's car came from Treadwell's gun. Also, as stated earlier, the gun casings found on the ground which were positively identified in the ballistics report as coming from Treadwell's gun were more evidence against Treadwell. Treadwell was also aware, at the time he pleaded guilty, that his co-defendant had been tried and convicted of the two charges which Treadwell had also been charged with. Finally, at the guilty plea hearing, Treadwell again admitted firing a gun directly at Powell's car. Given this evidence, we conclude that Treadwell has failed to show a reasonable probability that he would have not pleaded guilty, and insisted on going to trial, but for his counsel's statements regarding the ballistics report.

Finally, Treadwell asserts that he did not understand the nature of the charges due to a ***Bangert*** violation. In order to prove a ***Bangert*** violation, the defendant must make a *prima facie* case that the trial court failed to follow the proper procedures during the plea colloquy. *See* ***State v. Bangert***, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). Treadwell's ***Bangert*** claim amounts to an

assertion that the trial court's plea colloquy did not adequately insure that he understood the nature of the charge, and specifically, that the colloquy did not insure that he understood the meaning of the terms, "recklessly" and "utter disregard for human life," found in § 940.02(1), STATS. The relevant portion of the trial court's plea colloquy is as follows:

> THE COURT: And your firing at the car was reckless conduct; criminally reckless conduct, correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And under the circumstances it showed an utter disregard for human life, correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And if you fire bullets at people leaving—or at a car leaving, it's likely to cause death or great bodily harm, correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And you talked about the elements the State would have to prove if this case went to trial; you talked about that with your attorney, correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And did he go over something called jury instructions with you or did he just talk about the elements in general?
>
> THE DEFENDANT: We just talked about the elements.

In addition to this portion of a quite extensive colloquy, the trial court also confirmed that Treadwell had gone over the waiver of rights form with his attorney, who was able to answer any questions that Treadwell had about the form; that Treadwell and his attorney went over the form line by line; and that Treadwell signed the form on both sides. A trial court has a number of methods available during a plea colloquy to ensure that a defendant understands the nature of the charges against him or her. *See* ***Bangert***, 131 Wis.2d at 268, 389 N.W.2d at 23-24. One way for a trial court to fulfill its obligations under ***Bangert*** is by

making reference to a signed waiver of rights form. *See* ***State v. Moederndorfer,*** 141 Wis.2d 823, 827-29, 416 N.W.2d 627, 629-30 (Ct. App. 1987). The trial court's colloquy, by referring to the signed waiver of rights form, and by expressly making reference to the elements of the offense, ensured that Treadwell understood the elements of the offense to which he pleaded. Therefore, Treadwell has failed to make a *prima facie* showing that the colloquy was deficient under ***Bangert***.

B. ***Machner*** *hearing denial.*

Treadwell also claims that the trial court erred by denying his request for a ***Machner*** hearing.[2] It is within the discretion of the trial court to deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts to raise a question of fact, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Bentley***, 201 Wis.2d at 309-11, 548 N.W.2d at 53. This court's review of a trial court's decision not to hold a ***Machner*** hearing, based on its finding that the record conclusively demonstrates that the defendant is not entitled to relief, is limited to determining whether the trial court erroneously exercised its discretion. *See* ***id.*** at 318, 548 N.W.2d at 57.

In the instant case, the trial court denied Treadwell's request for a ***Machner*** hearing on the grounds that he had failed to "specif[y] any facts in dispute." This amounts to a finding that the record conclusively demonstrated that Treadwell was not entitled to relief. Significantly, Treadwell cannot say what facts relevant to the ineffectiveness analysis could have been discovered if a

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

Machner hearing would have been granted. The purpose of a ***Machner*** hearing is to allow trial counsel to explain whether his challenged actions were the result of incompetence or deliberate trial strategies. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Here, the State offered to stipulate that trial counsel had misinformed Treadwell concerning the ballistics report, an action that obviously could not have been strategic. The only factor really in dispute concerned whether Treadwell had been prejudiced by his counsel's actions. The trial court found that there was no prejudice, and this court also agrees that there was no prejudice. Therefore, a ***Machner*** hearing would have been useless, and the trial court's determination not to grant a ***Machner*** hearing on the grounds that the record conclusively demonstrates that Treadwell is not entitled to relief was a proper exercise of the trial court's discretion.

C. Sentencing.

Finally, Treadwell claims that the trial court erred when it denied his motion for sentence modification. Treadwell specifically claims that his due process rights were violated at sentencing because he was denied the effective assistance of counsel, and was not sentenced on the basis of true and correct information. Treadwell also asserts that the "lack of physical proof" that his bullets struck Powell's car is a new factor justifying sentence modification.

At sentencing, a defendant has three due process rights: (1) to be present and to be afforded the right of allocution; (2) to be represented by counsel; and (3) to be sentenced on the basis of true and correct information. ***Bruneau v. State***, 77 Wis.2d 166, 174-75, 252 N.W.2d 347, 351 (1977). A defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate

information in the sentencing. ***State v. Johnson***, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990). A defendant has the burden of proving, by clear and convincing evidence, both the inaccuracy and prejudice prongs of the due process test. ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991).

Treadwell argues that the information the trial court was presented with was inaccurate, and that the court relied on the inaccurate information in determining his sentence. First, the trial court arguably was not presented with inaccurate information. The only relevant statement made to the court during sentencing was Treadwell's counsel's remark that: "I was told that the ballistics show that the bullets that came from the gun Mr. Treadwell was using were the bullets that went into the rear portion of the automobile bumper and trunk." Although the ballistics report could not conclusively link Treadwell's bullets to the bullets found in the car, it could reasonably be interpreted as "showing" that the bullets found in the car came from Treadwell's gun. Additionally, the casings found at the scene which were positively identified in the ballistics report as coming from Treadwell's gun provided more physical evidence of that fact. Finally, other non-physical evidence, including the testimony of the eyewitness, and Treadwell's own confessions contributed to the conclusion that Treadwell shot at, and struck, Powell's car. Therefore, any hypothetical inaccuracy related to the ballistics report was *de minimis* at best.

With regard to the prejudice prong, Treadwell argues that the trial court relied on the allegedly inaccurate information at sentencing because the trial court stated, during sentencing, that: "I, too, was struck by the evidence, the physical evidence, that you continued to shoot and the shots met their mark in that car." Although this statement reveals that the trial court considered the physical

evidence, and presumably the ballistics report, the court's sentencing decision was also based on numerous other relevant factors. In making its sentencing decision, the court considered not only the nature and seriousness of the offense, but also Treadwell's character and the needs of the community. *See* ***McCleary v. State***, 49 Wis.2d 263, 274-76, 182 N.W.2d 512, 518-19 (1971). The court considered the impact of the offense on the victim's family, which it found to be "devastating." The court considered Treadwell's age, his educational and employment history, his prior criminal record, and his history of drug and alcohol abuse. The court considered the role that Treadwell played in bringing his co-defendant to trial, and the role that Treadwell played in causing the death of Pittman. Finally, the court considered Treadwell's counsel's recommendation of probation, and Treadwell's expressions of remorse. Therefore, even if the fact that a *de minimis* inaccuracy may have slightly entered into the court's consideration at sentencing was deemed to be constitutional error, such error was harmless because there is no reasonable possibility that it materially affected Treadwell's sentence. *See* ***Littrup***, 164 Wis.2d at 132, 473 N.W.2d at 168 (if the defendant meets his or her burden of showing the accuracy and prejudice prongs of the due process test, harmless error analysis applies).

Treadwell also claims that his due process rights were violated because his counsel was ineffective during the sentencing proceedings. As stated earlier, in order to prove ineffectiveness, a defendant must show both deficient performance and resulting prejudice. ***Strickland***, 466 U.S. at 687. Even if Treadwell's counsel acted deficiently during sentencing, we conclude that Treadwell was not prejudiced. As mentioned, the ballistics report was one factor among many which the trial court considered when determining Treadwell's sentence. Thus, Treadwell has failed to prove that, but for his counsel's failure to

make perfectly clear to the trial court that the ballistics report did not conclusively prove that Treadwell's bullets struck Powell's car, it is reasonably probable that his sentence would have been different. *See* ***State v. Giebel***, 198 Wis.2d 207, 219, 541 N.W.2d 815, 820 (Ct. App. 1995).

Finally, Treadwell claims that the "lack of physical proof" that his bullets struck Powell's car is a new factor justifying sentence modification. A new factor is:

> [A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor "must be an event or development which frustrates the purpose of the original sentence." There must be some connection between the factor and the sentencing—something which strikes 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 a fact or set of facts constitutes a new factor is a question of law which we decide *de novo*. ***Id.*** at 97, 441 N.W.2d at 279.

We conclude that the lack of *conclusive* physical proof that the bullets found in Powell's car came from Treadwell's gun was not a new factor because it was not highly relevant to the imposition of sentence, and because it does not frustrate the purpose of the original sentence. As stated, there was proof, although not conclusive proof, that Treadwell's bullets struck Powell's car. The ballistics report was only one factor among many which the court considered when

determining Treadwell's sentence. Therefore, Treadwell's "new factor" claim fails as well.

III. CONCLUSION.

In conclusion, neither the issues concerning the ballistics report nor any other issue warrants withdrawal of Treadwell's plea or modification of his sentence. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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