COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1024-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY N. TALLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Timothy N. Talley appeals from a judgment convicting him of substantial battery[1] as party to the crime and from a

[1] Section 940.19(2), STATS.

postconviction order refusing to hold a hearing because his postconviction motion consisted of conclusory allegations. We affirm.

Talley's postconviction motion alleged that trial counsel was ineffective because he "effectively usurped, or at least impermissibly influenced, [Talley's] prerogative to decide what plea to enter …." The motion further alleged that Talley presented trial counsel "with potential issues and questions concerning a possible defense of self-defense" and that trial counsel (1) misinformed Talley that there was no self-defense law in Wisconsin; (2) failed to sufficiently investigate the underlying facts and circumstances and the viability of Talley's defenses, including a claim of self-defense; and (3) failed to meaningfully discuss with Talley the available options and alternatives beyond accepting the State's plea offer. Talley alleged that had he received accurate information and effective counseling, he would not have pled guilty. Talley claimed that he was prejudiced by counsel's performance because his opportunity to pursue legal defenses was unfairly and unconstitutionally compromised. The motion sought an evidentiary hearing.

After reviewing the motion and the plea and sentencing transcripts, the trial court declined to hold a hearing because the motion did not allege sufficient facts to support the claims made therein. Rather, the trial court determined that the motion presented only conclusory allegations. Talley appeals.

A trial court has discretion to deny a postconviction plea withdrawal motion without a hearing if the motion does not allege sufficient facts, presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley,*** 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). We will not reverse a trial court's discretionary act if

the record reflects that discretion was in fact exercised and there was a reasonable basis for the trial court's determination. *See* ***State v. C.W.***, 142 Wis.2d 763, 766, 419 N.W.2d 327, 328 (Ct. App. 1987).

Postconviction, a guilty plea may be withdrawn only upon a showing of manifest injustice by clear and convincing evidence. *See* ***Bentley,*** 201 Wis.2d at 311, 548 N.W.2d at 54. The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *See* ***id.*** Ineffective assistance of counsel arises where counsel's performance was both deficient and prejudicial. *See* ***id.*** at 311-12, 548 N.W.2d at 54. "In order to satisfy the prejudice prong of the ***Strickland*** test, the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Id.*** at 312, 548 N.W.2d at 54 (quoted source omitted).

We assume arguendo that counsel advised Talley that self-defense does not exist in Wisconsin. Because § 939.48, STATS., provides for such a defense, trial counsel's performance was deficient. This does not end our inquiry, however. For a defendant to obtain a hearing on a postconviction ineffective assistance of counsel claim, he or she must allege "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley,*** 201 Wis.2d at 312, 548 N.W.2d at 54 (quoted source omitted). In our estimation, this is where Talley's motion falls short.

The motion fails to provide any factual underpinning for Talley's self-defense claim. The motion does not describe the facts supporting self-defense so that the court could analyze whether Talley was prejudiced when counsel told him such a defense does not exist. He also claims that counsel did not investigate

the underlying facts and circumstances and the viability of Talley's defenses. However, the motion does not specifically discuss what such an investigation would have revealed and how the investigation would have altered the outcome in the circuit court. *See* ***State v. Flynn,*** 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). These allegations do not permit a meaningful assessment of Talley's claim that he was prejudiced by counsel's deficient performance. *See* ***Bentley,*** 201 Wis.2d at 318, 548 N.W.2d at 57.

Talley argues that trial counsel's remarks at the sentencing hearing provide a basis for a self-defense defense. Counsel stated that Talley hit the victim after the victim "came after" him and that the victim was the only party holding a beer bottle. These remarks, Talley suggests, provide the factual basis for the prejudice prong of his plea withdrawal motion. We disagree. ***Bentley*** requires that the motion (and any exhibits thereto) set forth the factual basis. Expecting the trial court to rummage through the record to find factual support for a defendant's postconviction motion does not comport with ***Bentley.***

In the absence of sufficient factual allegations of prejudice due to counsel's deficient performance, the trial court did not erroneously exercise its discretion in declining to hold a hearing on Talley's plea withdrawal motion. *See* ***id.*** at 318, 548 N.W.2d at 57.

By the Court.—Judgment and order affirmed.

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