COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP17-CR **Cir. Ct. No. 2010CF892**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN P. OSBURN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: MARK D. GUNDRUM and JENNIFER R. DOROW, Judges. *Affirmed*.

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

¶1 PER CURIAM. Steven P. Osburn appeals from judgments of conviction for one count of second-degree intentional homicide and one count of intentionally pointing a firearm at another, contrary to §§ 940.05(1)(b) and

941.20(1)(c) (2009-10).[1] Osburn also appeals from an order denying his postconviction motion to withdraw his guilty plea, which alleged that he misunderstood the legal significance of dismissing one count of strangulation as part of the plea agreement. We affirm.

BACKGROUND

¶2 Osburn was charged with first-degree intentional homicide in connection with the 2010 shooting death of Zachary S. Gallenberg. According to the criminal complaint, Osburn and Gallenberg were longtime friends who had an argument early one morning after a night of drinking. Osburn shot Gallenberg and later told the police that Gallenberg had hit him and that Osburn "felt threatened."

¶3 After the preliminary hearing, Osburn was also charged with three crimes related to Abby Alfaro, a woman who was present the night of the shooting: (1) strangulation and suffocation; (2) felony intimidation of a victim; and (3) pointing a firearm at another. The strangulation charge related to Alfaro's allegation that Osburn grabbed her throat and choked her earlier in the evening, and the other two counts related to Osburn's yelling and pointing the gun at Alfaro after Gallenberg was shot.

¶4 Several days before the scheduled jury trial, the parties reached a plea agreement. The State agreed to: (1) amend the homicide charge to second-degree intentional homicide; (2) "dismiss outright" the strangulation charge; and

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

(3) "dismiss and read in" the intimidation charge.[2] The State further agreed to recommend a sentence of twenty to twenty-five years of initial confinement and twenty years of extended supervision for the homicide, and a concurrent sentence of nine months in jail for pointing a firearm at another, which is a misdemeanor. In exchange, Osburn agreed to enter guilty pleas to the two charges and was free to argue for an appropriate sentence.

¶5 The trial court accepted Osburn's pleas and found him guilty. It ordered a presentence investigation. The presentence investigation report contained several references to the dismissed strangulation charge. First, the report restated the allegations from the complaint, including Alfaro's statement that while she and Osburn were sitting on the couch, Osburn "all of a sudden startled her by putting his hands around her throat and starting to choke her." Second, the report stated that in interviews with the presentence investigation writer, Osburn "denied ever touching Abby Alfaro that evening in his apartment." Third, the report said that Alfaro told the presentence investigation writer that Osburn had put his hands on her neck and began to choke her, which led Gallenberg to push Osburn away from Alfaro. In his summary and conclusion, the presentence investigation writer added his assessment of Alfaro's statements:

> Steven P. Osburn, Jr. denied his involvement in Count 4 [to which he pled guilty] and the dismissed and read-in count of the underlying case. It is difficult to understand what Abby Alfaro has to gain to fabricate the events of the evening. The defendant also could not answer why he believes she was not truthful to the police.

[2] Our Supreme Court has recognized that the terms "dismissed" and "dismissed outright" are synonymous, and that they have a different meaning than charges that are dismissed and "read in." *See* ***State v. Frey***, 2012 WI 99, ¶¶41-43, 343 Wis. 2d 358, 817 N.W.2d 436.

¶6 At sentencing, the State briefly addressed the dismissed strangulation charge, stating:

> During [the] morning of [the shooting], the Defendant, who admittedly cannot handle his alcohol, is intoxicated. He's angry and upset about his life. The Defendant's loyal friend [Gallenberg] is there hoping to help this defendant drown his sorrows. Abby Alfaro is also there in the Defendant's house.
>
> The Defendant's anger surfaced against Abby. She was on a piece of furniture, and the Defendant came up to her and grabbed her by the neck and held her down. She said it freaked her out. She didn't like people grabbing her neck, but she couldn't say that it stopped her from breathing or cut off the blood supply to her brain, so we don't have that type of crime here, but it stopped —
>
> The hands on her neck stopped when [Gallenberg] came by and pushed the Defendant off of her.

¶7 Trial counsel also addressed the dismissed charge, in the context of making corrections to the presentence investigation report. Trial counsel recognized that Alfaro said that Osburn put his hands on her throat, but counsel explained: "[Osburn] says he did not do it. He wouldn't do it. He understood that she has some phobia about that…. His behavior around women is not aggressive." Osburn did not mention the allegations concerning Alfaro during his allocution.

¶8 When the trial court pronounced sentence, most of its remarks focused on the shooting of Gallenberg. It briefly referenced the fact that Osburn had pointed the gun at Abby and yelled at her, but it did not discuss the alleged strangulation. The trial court sentenced Osburn to twenty-eight years of initial confinement and twenty years of extended supervision for the homicide. It imposed a concurrent nine-month sentence for the misdemeanor.

¶9 Osburn retained new counsel and filed a postconviction motion seeking to withdraw his guilty plea for the homicide.[3] The basis for his motion concerned the strangulation charge that was dismissed as part of the plea agreement. Osburn alleged that he was entitled to plea withdrawal pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), due to a deficiency in the trial court's plea colloquy concerning the dismissed charge, and pursuant to ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), due to the ineffective assistance of his two trial lawyers.[4]

¶10 In an affidavit offered in support of the motion, Osburn asserted that he erroneously believed that once the strangulation charge was dismissed, "the State would not be able to argue to the sentencing court that I had strangled Alfaro" and that the trial court "would not be able to rely on those facts when sentencing me." Osburn said this erroneous belief was based on inaccurate information provided by the two lawyers who represented him. Osburn said his "misinformed belief" was reinforced when the trial court did not inform Osburn that the allegation could still be considered at sentencing, despite having given such an admonition concerning the charge that was dismissed and read in.[5]

[3] Osburn's motion did not explicitly seek to withdraw his guilty plea for the misdemeanor conviction.

[4] Osburn's motion also stated that he "reserves the right to argue that he is entitled to a new sentencing hearing or to withdraw his plea based on the prosecutor's breach of the plea agreement." (Uppercasing and bolding omitted.) It does not appear that Osburn subsequently raised that issue with the trial court, and it was not discussed on appeal.

[5] At the plea hearing, the trial court asked Osburn about his understanding of the charge that was dismissed and read in, stating: "[D]o you understand that while the Court will not sentence you on that charge, the Court may consider it for purposes of determining an appropriate sentence on the charges you are pleading [guilty] to?" Osburn said that he understood.

¶11 Osburn's affidavit further explained that he did not want the strangling allegation mentioned at sentencing because it "made [him] out to be a vicious monster capable of strangling an innocent person in an unprovoked attack." His affidavit stated that he "would not have entered a plea if his attorneys had correctly informed him that dismissing the strangulation count would not keep the underlying facts out of the sentencing hearing," because keeping those details out of the hearing "would remove the linchpin from the State's argument that I was a person of bad character." (Uppercasing and bolding omitted.) Osburn's affidavit also stated: "I would have gone to trial because, if the State was going to argue and the court was going to consider Alfaro's allegation regardless of my plea and the count's dismissal, then there was no benefit to me to entering a plea."

¶12 The trial court—which was not the same trial court that accepted Osburn's plea and sentenced him—denied Osburn's ***Bangert*** claim in a written order, concluding that the trial court was not required to advise Osburn of the legal effect of the dismissed charge.[6] As for Osburn's ***Nelson/Bentley*** claim, which alleged ineffective assistance of counsel, the trial court found that based on the allegations in Osburn's motion and affidavit, he was entitled to a ***Machner*** hearing.[7]

¶13 At the ***Machner*** hearing, both of Osburn's trial lawyers and Osburn testified. One lawyer testified that during plea negotiations, he focused on the homicide charge, because the other charges "paled in comparison to the

[6] The Honorable Mark D. Gundrum accepted Osburn's pleas and sentenced him, and the Honorable Jennifer R. Dorow denied the postconviction motion.

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

first-degree intentional homicide because that was the one that would put him away forever." The lawyer said that Osburn "completely denied doing anything" to Alfaro, and that when the lawyer learned that the strangulation charge was going to "be dismissed and not read in, there really wasn't much more to have to talk about." The lawyer also said that he did not believe that the trial court would consider the strangulation charge at sentencing.

¶14 Osburn's second lawyer said that Osburn had specifically wanted the strangulation charge "dismissed outright as opposed to being read in" because "he didn't want to be involved in anything that he hadn't participated in." The lawyer also testified that he did not believe that the trial court could use that dismissed charge to "increas[e] the penalty" or "aggravate the sentence."

¶15 Osburn testified that his goal in entering the plea agreement was that he would "be able to talk" at sentencing and "get[] rid of that strangulation/suffocation" charge, because "[t]hat one charge … would have made everything else that [Alfaro] said valid, meaning the statement that she had given about what happened that night[, which] was completely contradictory to what I had said." Osburn said he would not have entered his guilty plea if he had known that the trial court could consider "the facts underlying the strangulation count" because that count "paints me as a monster."

¶16 The trial court denied the motion in an oral ruling, concluding that even if it were to find that the trial lawyers performed deficiently in advising Osburn about the dismissed charge, Osburn had not proven prejudice because he received the three things he was hoping for: (1) the homicide charge was reduced, which lowered his exposure; (2) the strangulation charge was dismissed; and (3) "he would be able to tell his side of the story."

¶17 The trial court recognized Osburn's claim that he would not have pled guilty if he had known that the trial court could consider the dismissed strangulation charge at sentencing. The trial court rejected that claim, stating:

> [Osburn] wants this Court to find that because he had a misunderstanding regarding the effect of the dismissed charge … [and misunderstood] that a sentencing judge may consider the facts that underlie a dismissed charge at the time of sentencing, that had he known that, he would not have entered his guilty plea to the charge of second-degree intentional homicide and the pointing a firearm charge.
>
> ….
>
> This Court cannot look solely … at the dismissal of the strangulation count in a vacuum. This Court must look at really what is the totality of the situation facing Mr. Osburn. When I consider that he reduced his exposure significantly … from life without the possibility of extended supervision to a 60-year felony, when you consider that the strangulation count was, in fact, dismissed, and he was able to tell his side of the story, he got what he bargained for by accepting responsibility to the two counts that he entered his pleas to.

¶18 As additional support for its finding that Osburn would have still accepted the plea agreement, the trial court also noted that even after the presentence investigation report referenced Alfaro's allegations concerning the strangulation, Osburn "didn't ask for his plea to be withdrawn." The trial court continued: "He didn't walk into court on the day of sentencing asking for his plea to be withdrawn…. Mr. Osburn knew by the time that he reviewed that presentence [report] with his attorneys that that information was out there." The trial court also said that it believed Osburn was disappointed in his sentence, implying that the length of the sentence was the reason Osburn was seeking to withdraw his plea.

¶19 In addition to finding that Osburn would have entered his guilty pleas even if his trial lawyers had not misinformed him about the effect of the dismissed charge, the trial court also found that the sentencing court "did not rely on that at all in [its] sentencing of Mr. Osburn." This appeal follows.

DISCUSSION

¶20 At issue is whether the trial court erroneously exercised its discretion when it denied Osburn's motion for plea withdrawal. To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. "A manifest injustice occurs when there has been 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786 N.W.2d 64 (citation omitted).

¶21 Osburn's postconviction motion was a dual-purpose motion insofar as it contained claims that he is entitled to plea withdrawal under the rationales set forth in ***Bangert*** and ***Nelson/Bentley***. The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. We begin our analysis with Osburn's ***Bangert*** claim.

I. Osburn's *Bangert* claim.

¶22 In order to insure that a defendant's plea is knowing, voluntary, and intelligent, WIS. STAT. § 971.08 and Wisconsin case law impose duties on the trial court when it conducts a plea colloquy. *See* ***Cross***, 326 Wis. 2d 492, ¶16. "If the

[trial] court fails at one of these duties (also called a '***Bangert*** violation'), the defendant may be entitled to withdraw his plea." ***Cross***, 326 Wis. 2d 492, ¶19; *see also* ***Taylor***, 347 Wis. 2d 30, ¶24 ("One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily.").

¶23 In this case, Osburn filed a ***Bangert*** motion alleging that the trial court erred when it "failed to advise him of the legal effect of dismissing the strangulation count." He asserted that this violated the trial court's duty to notify Osburn of the "direct consequences" of his plea. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998) ("[C]ourts are only required to notify [defendants] of the 'direct consequences' of their pleas," not the "collateral" consequences.) (citation omitted). The State agrees that courts are required "to advise defendants of the direct consequences of their pleas," but it asserts that "the sentencing effects of dismissed charges" are collateral, not direct, consequences of a plea.

¶24 Osburn candidly admits that "[c]urrent Wisconsin case law does not have an answer for whether the effect of dismissing a count is a direct or collateral consequence of a defendant's plea." He cites several Wisconsin Supreme Court cases which, he argues, support his argument that "the legal effect of dismissing a criminal charge *should* be recognized as a direct consequence of a defendant's plea." (Emphasis added.) *See* ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835; ***State v. Lackershire***, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23; ***State v. Byrge***, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; and ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199. Osburn urges us "to hold that dismissal of a criminal charge is a direct consequence of a

defendant's guilty plea, and thus that courts have a duty to advise defendants of the legal effect of dismissal of a criminal charge."

¶25 We are not convinced that our supreme court's prior holdings require trial courts to advise defendants of the legal effect of dismissed charges. On numerous occasions, the Wisconsin Supreme Court has outlined the trial court's plea colloquy duties, and it has never explicitly required the trial court to discuss with the defendant charges that are dismissed and not read in. Moreover, in ***State v. Frey***—the case that reiterated the "longstanding rule" that a trial court "may consider dismissed charges in imposing sentence"—the court went on to approve a plea colloquy that did not include an admonishment from the trial court that the dismissed charges could still be considered at sentencing. *See* ***id.***, 2012 WI 99, ¶¶5, 90-101, 343 Wis. 2d 358, 817 N.W.2d 436. We decline to impose a new plea colloquy duty on trial courts; Osburn's remedy lies with the Wisconsin Supreme Court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶26 For the foregoing reasons, we conclude that Osburn has not established a ***Bangert*** violation, and he was therefore not entitled to plea withdrawal based on the plea colloquy.

II. Osburn's *Nelson/Bentley* claim.

¶27 Osburn's ***Nelson/Bentley*** claim is based on the ineffective assistance of counsel, which can constitute a manifest injustice that justifies plea withdrawal after sentencing. *See* ***Bentley***, 201 Wis. 2d at 311. 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). If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Id.*** at 697.

¶28 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 will uphold the trial court's findings of fact unless they are clearly erroneous, but "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review *de novo*." ***Id.*** (italics added).

¶29 In this case, the trial court concluded that even if Osburn's two trial lawyers performed deficiently, Osburn was not prejudiced. We will likewise focus on the prejudice prong of the ineffective-assistance-of-counsel test.

¶30 "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.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted). In his appellate brief, Osburn asserts that his "testimony, his affidavit, and the testimony of his attorneys has thus proven a reasonable probability that he would have gone to trial if his attorneys had accurately informed him of the legal effect of dismissing the strangulation allegation."

¶31 In response, the State points out that Osburn does not address either the trial court's findings "that his reasons for accepting the plea were the reduction in the charges, the dismissal of the strangulation, and being allowed to tell his side of the story," or the trial court's conclusion "that Osburn's real motivation for withdrawing his pleas was his disappointment in his sentence, not his attorney[s'] advice." The State argues that those findings of fact are not clearly erroneous, and

that Osburn has therefore not shown "that he would have insisted on going to trial but for [his lawyers'] advice."[8]

¶32 In his reply brief, Osburn asserts that "the motivation for Osburn's plea withdrawal is not determinative of whether he is legally entitled to withdraw his plea," which addresses part of the State's argument. However, Osburn still does not explicitly argue that the trial court's findings of fact are clearly erroneous, choosing instead to imply that the findings may be inaccurate. For instance, he states:

> The [trial] court's assertion that Osburn "got the benefit of his bargain" is contingent on him having correctly understood what it meant to dismiss the strangulation count. However, as previously argued, Osburn believed the term "dismissed" included more than it legally could include. In light of that, while it is true to say that Osburn successfully had the strangulation count dismissed, one cannot leap to the conclusion that Osburn received the bargain for which he pled. That logical step can be made only by disregarding the definitional difference between "dismissed" as that term was used by (1) Osburn and his attorneys and (2) the State and the court.
>
> For those reasons, Osburn disagrees with the State's characterization of the facts in the record.

(Record citation omitted.)

¶33 We have carefully reviewed the trial court's findings. The trial court rejected Osburn's claim that he would not have pled guilty but for his belief—

[8] The State also suggests that Osburn is not entitled to plea withdrawal for a second reason: the trial court did not actually consider the strangulation charge at sentencing. Because we conclude that Osburn has failed to demonstrate that he would not have pled guilty but for the alleged deficient performance of his lawyers, we decline to address the parties' debate over whether what occurred at sentencing is relevant to whether Osburn is entitled to withdraw his plea after sentencing. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

which he claimed was based on his lawyers' allegedly deficient advice—that the strangulation charge would not be considered at sentencing. The trial court found compelling the fact that even though the presentence investigation report addressed the strangulation charge, Osburn did not seek to withdraw his pleas *before* sentencing. That fact supports the trial court's other findings of fact and its conclusion that plea withdrawal was not warranted.

¶34 Osburn has not convinced us that the trial court's findings are clearly erroneous. Based on those findings, Osburn has not shown that he would not have pled guilty but for his lawyers' allegedly deficient performance. Therefore, Osburn's ***Nelson/Bentley*** claim fails.

By the Court.—Judgments and order affirmed.

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