COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1545-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK ANTHONY KELLEY,

DEFENDANT-APPELLANT,

LINDA R. HINES,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

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

PER CURIAM. Mark Anthony Kelley appeals from a judgment entered after he pleaded guilty to one count of delivery of a controlled substance

(cocaine), as party to a crime, and one count of resisting or obstructing an officer, contrary to §§ 961.16(2)(b)(1), 961.41(1)(cm)(1), 939.05 and 946.41(1), STATS. He also appeals from an order denying his postconviction motion. He claims that: (1) he received ineffective assistance of trial counsel; (2) the trial court erred in denying his ineffective assistance claim without conducting a ***Machner*** hearing;[1] and (3) the trial court erroneously exercised its sentencing discretion. Because the record refutes Kelley's ineffective assistance claim, because his postconviction motion alleged merely conclusory allegations insufficient to require an evidentiary hearing, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

On October 17, 1996, Kelley sold .18 grams of cocaine to an undercover officer through the window of a home he shared with the co-defendant and their three children. Shortly after the purchase of the cocaine, police officers went to the residence to arrest Kelley. Kelley answered the door and Officer Larry Pierce displayed his badge and stated, "Police, narcotics, I'm here to arrest you." Kelley ran from the officer. The officer chased Kelley and arrested him. The officers observed additional drug-related items in the home, including a 9 mm pistol, sandwich baggies (several having a corner cut), marijuana, cocaine, a police scanner and a digital pager.

Kelley was charged with delivery of a controlled substance (cocaine), as party to a crime, and one count of resisting or obstructing an officer. Kelley pleaded guilty and judgment was entered. The trial court sentenced him to

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

eight years on the drug count and thirty days concurrent on the resisting an officer count. Kelley filed a postconviction motion alleging ineffective assistance of trial counsel and seeking sentence modification. The trial court denied the motion without a hearing. He now appeals.

II. DISCUSSION

A. Ineffective Assistance and Machner Hearing.

Kelley claims the trial court erred when it denied his postconviction motion without conducting an evidentiary hearing. He claims he received ineffective assistance because his trial counsel only met with him once, told Kelley that he would only receive a five-year sentence if he pled guilty, failed to file a motion seeking to suppress Kelley's statements to the police, and advised that it was unnecessary to have a presentence investigation report prepared. The trial court denied Kelley's ineffective assistance claims because the record conclusively established that Kelley was aware that the trial court was free to sentence him to the maximum penalty of nineteen years and Kelley's motion failed to provide sufficient facts to support the remaining allegations. We agree with the trial court.

Our standard of review of the trial court's decision to deny Kelley's motion without a hearing is as follows. If Kelley alleged facts in his motion which, if true, would entitle him to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996) (citing ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633-34 (1972)). If, however, Kelley failed to allege sufficient facts to raise a question of fact, or made only conclusory allegations, or if the record conclusively demonstrates that he is not entitled to relief, the trial court may, in its discretion, deny the motion

without holding a hearing. *See* ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53 (citing ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633-34). Further, "[w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53.

Because Kelley's claim arises in the context of an ineffective assistance claim, we also set forth those standards. In order to establish that he did not receive effective assistance of counsel, Kelley must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Even if Kelley can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

The record conclusively refutes Kelley's claim that trial counsel told him he would only receive a five-year sentence if he pleaded guilty and that trial counsel failed to inform Kelley the trial court was free to impose the maximum possible penalties despite any recommendations from the State. Kelley admitted that he had read the entire Guilty Plea Questionnaire and Waiver of Rights form,

which specifically apprised him that the trial court was not bound to follow any plea agreement or recommendation made by the attorneys and that the trial court was free to sentence him to the maximum possible penalties in the case. The trial court specifically indicated, at the time Kelley entered his guilty plea, what the maximum penalty was on each count, and these figures were set forth with great specificity by trial counsel on the Guilty Plea Questionnaire and Waiver of Rights form, which Kelley signed. Therefore, a ***Machner*** hearing was not required to address this allegation because it was conclusively refuted by the record.

Further, a hearing was not required for Kelley's remaining three ineffective assistance allegations because his motion failed to allege sufficient facts to raise a question of fact and presented only conclusory allegations. *See* ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633-34.

With respect to his claim that counsel was ineffective for meeting with him only once, Kelley's motion states: "The defendant's trial counsel visited him once for a brief time during his representation; there existed no opportunity for the defendant and his attorney to form a relationship and communicate regarding the defendant's interests." This allegation is wholly conclusory. It fails to allege why the attorney's visit was inadequate, whether this was the only contact at all between the two, and why this prejudiced the outcome.

With respect to his claim that trial counsel was ineffective for failing to make a suppression motion, Kelley's postconviction motion alleged:

> The defendant provided an exculpatory statement to the police while under the influence of alcohol, thus impairing his judgment. His confusion affected his appreciation of his rights and the statement was not knowingly and voluntarily given. Counsel failed to challenge the admissibility of the statement and, had a

> challenge been lodged, the defendant may not have waived his right to a jury trial.

This allegation is likewise insufficient to warrant a ***Machner*** hearing because Kelley fails to allege, with the requisite specificity, how an *exculpatory* statement prejudiced his case, and on what grounds trial counsel could have moved to suppress it. It is insufficient for Kelley to merely allege that he would have pled differently. *See* ***Bentley***, 201 Wis.2d at 313-14, 548 N.W.2d at 54. Kelley was required to support his allegation with objective factual assertions. His failure to do so results in a postconviction motion that was factually insufficient to warrant a ***Machner*** hearing.

Finally, Kelley alleged in his postconviction motion that:

> Defense counsel did not order a presentence investigative report on behalf of the defendant or present mitigating factors to the court that could have supported a lesser sentence. Defense counsel specifically told Kelley upon his request for a presentence investigative report that it was not necessary because it was highly probable that he would receive a five year sentence. Counsel failed to advise that Mr. Kelley had a right to the presentence investigative report.

Again, Kelley's postconviction motion does not warrant an evidentiary hearing with respect to this allegation because Kelley failed to set forth any grounds which would reasonably demonstrate that a presentence report would have altered the outcome of the sentencing proceeding. Moreover, the record demonstrates that trial counsel did present mitigating factors to the trial court at the sentencing. Trial counsel informed the court of Kelley's positive character, including his education, work history, family situation and his cooperation with police after his arrest. Trial counsel also argued that Kelley was "not one of these fellows who's out on the street getting arrested every year because he can't subsist in the society on his own," that this case involved a very small quantity of drugs, and "reflects a

rather unsophisticated attempt at meeting with his habit as opposed to an advanced commercial activity." Finally, trial counsel argued that Kelley's drug addiction was the genesis for his drug dealing and the facts reflect that he was selling only small quantities to enable himself to satisfy his habit. Therefore, because the allegations were either insufficient or conclusively refuted by the record, the trial court did not err in denying Kelley's motion without a hearing.[2]

B. Sentencing.

Kelley also claims that the trial court's sentence constituted an erroneous exercise of discretion. We disagree.

We review a challenge to the trial court's sentence under the erroneous exercise of discretion standard. *See* ***State v. Wuensch***, 69 Wis.2d 467, 480, 230 N.W.2d 665, 672-73 (1975). In imposing sentence, the trial court must consider three primary factors: the gravity of the offense, the character of the offender and the need to protect the public. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984).

Our review of the sentencing transcript demonstrates that the trial court did not erroneously exercise its discretion in imposing sentence. The trial court considered the three primary factors. It addressed the gravity of the offense, noting that Kelley was a drug dealer as evidenced by all the drug-related items discovered in Kelley's home. The trial court expressed concern relative to the

[2] On appeal, Kelley proffers an elaborate argument regarding the importance of a decision to request a presentence investigative report and the invalidity of his guilty pleas. These claims, however, were not presented to the trial court, and are therefore waived. Thus, they will not be considered by this court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (a defendant forfeits his or her right to this court's review of a claim by failing to raise it in the trial court).

community protection factor, noting "the impact drug dealing has on this community" and the fact that his three children were living with him in the "drug house." Finally, the trial court considered Kelley's character, noting his education, work history, and remorse.

Kelley argues that the sentence was excessive given the minimal quantity of drugs involved, the fact that this was his first drug offense, and acknowledgment by the co-defendant that Kelley had only been dealing drugs for one week. We do not agree. A sentence is harsh and excessive when it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975) (citations omitted). The sentence imposed here is not shocking to public sentiment. Kelley faced a possible maximum sentence of nineteen years. The trial court imposed only an eight-year sentence. Moreover, Kelley had previously been put on probation for a robbery offense, which included an order that he be provided with drug treatment. One and a half years later, Kelley was arrested for drug dealing. Kelley was given a chance to recover from his drug habit after the robbery conviction. Instead, he chose to deal drugs and to do so out of a home in which he was raising three children. Under these circumstances, the eight-year sentence was not excessive or unduly harsh.[3]

By the Court.—Judgment and order affirmed.

[3] Kelley also argues that if the trial court had the benefit of a presentence report, it would have imposed a lesser sentence. This assertion, however, is purely speculative. Given our analysis of the above facts, which would still exist even if a presentence report would have been prepared, we are unwilling to allow the speculative assertion to impact on our determination.

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