COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP623-CR **Cir. Ct. No. 2012CT283**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS E. HANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Douglas Hanson appeals a judgment of conviction and an order denying postconviction relief. Hanson seeks to withdraw

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

his guilty plea to operating a motor vehicle while under the influence of an intoxicant (OWI), his second offense. On appeal, Hanson argues that his plea was not knowing, intelligent, and voluntary because his mental illness, paranoid schizophrenia, rendered him incapable of understanding the consequences of his plea, and that he was denied the effective assistance of counsel due to his counsel's failure to file a motion to suppress evidence after his alleged unconstitutional arrest and transport from the scene of an accident Hanson was involved in to the police station, one mile away. For the reasons that follow, we affirm.

BACKGROUND

¶2 Hanson was charged with OWI and operating with a prohibited alcohol concentration, both as second offenses. The issues on appeal surround the events occurring prior to Hanson's arrest and the circumstances at Hanson's plea hearing. The evidence offered at the postconviction hearing consisted of testimony from Officer Justin Popovich, Hanson's trial attorney Donald Weeden, and Hanson's siblings. The circuit court made findings of fact based on their testimony.

Events Surrounding Hanson's Arrest

¶3 The following facts are taken from the testimony of City of Janesville Police Officer Justin Popovich. Officer Popovich was dispatched to investigate a report of an automobile accident. The person reporting the incident claimed that a vehicle had struck a utility pole and a male had left the scene. Popovich arrived at the scene of the accident at approximately 1:24 a.m.

¶4 Upon arrival, Popovich began to look for the male matching the description provided. Popovich located the vehicle and identified the name of the vehicle's owner through a license plate search. After a brief search of the surrounding area, Popovich located a man that fit the description of the male who was seen leaving the scene of the accident near River's Edge Bowl parking lot, four or five blocks from the accident scene. Popovich testified that he saw the man run behind the bowling alley.

¶5 According to Popovich, the bowling alley parking lot was not well lit. Popovich announced himself as a police officer and approached the unidentified male. Popovich asked him whether he had been involved in an accident. Popovich testified that the male responded that he did not recall being in an accident, but that he had been driving. Popovich secured the male's drivers license, which identified the male as Douglas Hanson, which also matched the name of the registered owner of the vehicle involved in the accident.

¶6 At this time, Popovich testified that he had noted an odor of intoxicants and observed that Hanson had slightly slurred speech. Popovich asked Hanson to perform field sobriety tests and informed Hanson that the tests would be conducted at a different location. Popovich did not state the reason for the location change in his report. However, Popovich testified that he conducted the tests at a different location because of the parking lot's conditions. According to Popovich, he did not feel that the parking lot would give Hanson a fair chance at the sobriety tests because the parking lot was uneven and not well lit. Popovich subsequently transported Hanson to the Janesville Police Department garage to conduct the field sobriety tests. Popovich agreed that Hanson was legally detained; however, Popovich said that Hanson was not under arrest. The garage was located about a mile from where Popovich found Hanson.

¶7 Based on Popovich's testimony, the circuit court concluded that "the officer acted appropriately and with reasonable suspicion" in transporting Hanson to the Janesville Police Department and conducting the field sobriety tests and stated that "if that's the basis for finding [Hanson's trial counsel] to be ineffective I find that he was not ineffective." The court concluded that "[t]here was no prejudice to the defendant."

Events Surrounding Hanson's Plea

¶8 During pretrial, defense counsel filed a motion to suppress the physical evidence taken from Hanson on the ground of an illegal arrest. However, the motion was never heard because Hanson accepted the State's plea offer.

¶9 At the plea hearing, the circuit court conducted a standard plea colloquy. Hanson answered affirmatively when asked if his attorney had accurately stated how he wished his case to be resolved, if he had enough time to talk to his attorney about his case, and if his attorney had answered all the questions he had regarding his case, and that he was satisfied with his attorney's representation. Hanson provided the court with a plea questionnaire and waiver of rights form and stated that he had read the documents before he signed them and that he understood all the statements in the documents. Hanson stated he did not have any questions about those documents.

¶10 The circuit court asked Hanson's defense counsel, Weeden, if he reviewed the plea questionnaire with Hanson, and whether he thought Hanson understood, to which Weeden responded affirmatively. The court asked Hanson, "do you understand the constitutional rights you give up when you enter a plea today" which Hanson responded, "Yes." Hanson answered affirmatively to the remainder of the court's questions surrounding his plea, and stated he did not have

any questions. The court asked Hanson if anybody forced him or threatened him to enter a plea, which Hanson answered, "No." The court further asked, "You are doing that freely and voluntarily," which Hanson answered, "Yes." The court asked Hanson if he had taken any drugs, alcohol or medication, and Hanson answered, "No." The court asked if Hanson believed he was thinking clearly, and Hanson answered, "Yes." The court also asked Hanson if he had "ever been in a mental hospital or mental institution," and Hanson answered, "Yes." When asked how long ago, Hanson responded, "30 days." Hanson answered, "No," when asked if he was taking any medication as a result of being in a mental hospital or institution. The court did not inquire about, and Hanson did not offer, information regarding the diagnosis that led to Hanson's hospitalization.

¶11 Hanson entered a plea of guilty. Based on Hanson's answers to the court's colloquy and Hanson's admission that he understood everything that the court and his attorney discussed with him and his constitutional rights set forth in the plea questionnaire, the court found his plea was freely, knowingly, and intelligently made. The court immediately proceeded to sentencing. Hanson's attorney explained to the court that Hanson was diagnosed with having paranoid schizophrenia, and mentioned how the circumstances surrounding the field sobriety tests were "very confusing and confounding" to Hanson. The court then sentenced Hanson.

¶12 Following sentencing, Hanson filed a postconviction motion seeking to withdraw his plea on the ground that he could not appreciate the consequences of entering a guilty plea because of his mental illness. Hanson's defense counsel testified at the postconviction motion hearing. He testified that he had presented a number of documents to Hanson associated with the plea, including a State Bar plea questionnaire form, an appellate rights form, and copies of two motions filed

the previous week. Weeden discussed these documents with Hanson and went through them, in particular the plea form, line by line. Weeden testified that after Hanson plead guilty, Hanson went to Weeden's office and that Hanson appeared distraught and appeared to have made a "180-degree change." Hanson told Weeden that he thought Weeden had tricked him into entering the plea. Weeden discussed the appeal process and Hanson's options for a plea withdrawal.

¶13 Also at the postconviction hearing, Hanson's sister, Sherri Stumpf, offered the following testimony. Sherri testified that Hanson lives with her. Hanson was diagnosed with paranoid schizophrenia, which makes it difficult for Hanson to understand simple things such as the proper amount of postage to put on his mail, as well as anything that he is given to work on or make comments about. For example, Sherri had to read Hanson an email and break down its contents in order for Hanson to understand what the content meant. Sherri also said that Hanson would experience episodes where he believed that people were out to get him and that everything was a conspiracy. Sherri testified that she had thought about committing her brother to a mental institution in the spring of 2013 because of his mental illness.

¶14 Gary Hanson, Hanson's brother, testified at the postconviction motion hearing and said that Hanson called him after he entered his plea and that Hanson believed he was being tricked and mislead.

¶15 Based on the testimony and documentary evidence presented at the hearing, the circuit court concluded that Hanson's plea was knowingly, voluntarily, and intelligently made. The court found that Hanson failed to present sufficient credible evidence that he did not understand the consequences of pleading guilty to the charge of OWI, second offense. For instance, the court

observed that no expert medical testimony was presented and no specific evidence existed relating to Hanson's thought process on the day he entered the plea. More generally, the court stated that the record of the plea hearing did not contain anything that supports Hanson's claim that his plea was not voluntary, knowing, or intelligent. Hanson appeals.

I. Hanson's Plea

¶16 A defendant who wishes to withdraw a guilty plea after sentencing must establish that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. Hanson contends his plea was not made knowingly and intelligently because his mental illness caused him to act against his will at the time he entered the plea. That is so, Hanson argues, because he was unable to understand the consequences of entering his plea. In contrast, the State maintains that Hanson's plea was knowingly, intelligently, and voluntarily and in conformity with WIS. STAT. § 971.08. This court concludes that the record before us supports the circuit court's conclusion that Hanson's plea was knowing, intelligent, and voluntary.

¶17 On appellate review, the issue of whether a plea was knowingly voluntary, and intelligently entered is a question of constitutional fact. *See* ***State v. Hoppe***, 2009 WI 41, ¶59, 317 Wis. 2d 161, 765 N.W.2d 794. In determining whether plea withdrawal is warranted, "[w]e accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was

knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

¶18 Hanson concedes that the court's plea colloquy was in conformity with WIS. STAT. § 971.08. However, Hanson asserts that "[w]hen extrinsic evidence is considered and the colloquy is contextualized ... the colloquy does not represent a confirmation that … Hanson intended to enter the plea." Hanson's argument invokes the ***Nelson/Bentley*** line of cases.

> A defendant raising a ***Nelson/Bentley*** challenge faces stricter pleading requirements than on a ***Bangert*** claim. Moreover, the burden remains with the defendant to prove by clear and convincing evidence that he or she did not know or understand the information necessary to make the plea knowing and voluntary, resulting in a manifest injustice.

State v. Hoppe, 2008 WI App 89, ¶29, 312 Wis. 2d 765, 754 N.W.2d 203 (citations omitted).

¶19 Hanson argues the circuit court's finding that no specific evidence was presented regarding Hanson's thought processes on the morning of the plea was clearly erroneous. Hanson asserts that his counsel presented sufficient and credible evidence that showed Hanson was immediately and utterly confused by what had occurred in the courtroom during the plea hearing, such as Hanson's sister Sherri's testimony that he struggles to process seemingly uncomplicated information. Hanson argues that he presented clear and convincing evidence that he was not acting rationally at the time he entered his plea, pointing to when he accused his attorney of tricking him immediately after the plea hearing. Hanson also points to testimony regarding his general difficulty understanding and processing information as specific evidence that Hanson was unable to process the terms and ramifications of entering his plea.

¶20 We conclude that the record before us supports the circuit court's findings of fact and conclusion that Hanson's plea was knowing, voluntary and intelligent. Hanson has failed to show by clear and convincing evidence that he did not know or understand the information necessary to make the plea knowing, voluntary and intelligent. *See* ***id.***, ¶29. The testimony presented at the postconviction hearing was insufficient to establish that Hanson's mental condition resulted in him not knowing or understanding the consequences of entering his plea. It is undisputed that, prior to Hanson entering a plea, Hanson's attorney went over the required documents with Hanson, line by line, and that Hanson stated that he understood those documents. At the plea hearing, Hanson was given an opportunity to ask questions, and the court even asked about his mental condition and whether he was taking any medication. The circuit court's finding that the record and the testimony provided does not contain evidence that supports Hanson's claim that his plea was not knowing, voluntary or intelligent is not clearly erroneous.

¶21 Further, part of the circuit court's findings are premised on the lack of expert medical evidence regarding Hanson's mental illness and how that mental illness affected Hanson's ability to understand the rights that he was giving up and the consequences of entering a guilty plea. On appeal, Hanson argues that expert medical evidence was unnecessary because he is not claiming to be legally incompetent, and that the inquiry regarding whether his plea comports with due process does not require expert medical testimony. We need not answer this question of whether medical expert testimony was necessary because we conclude that the testimony that was presented was insufficient to establish that Hanson's mental illness caused him to enter a plea or that he did not know or understand the information necessary to make the plea knowing and voluntary.

¶22 It is true that Hanson's sister testified about Hanson's mental illness and how his mental illness allegedly affects his ability to process uncomplicated information in general. But, as the court correctly observed, Hanson's sister is not qualified to give an expert opinion on whether Hanson's mental illness affected his ability to understand the rights that he was waiving by entering a guilty plea and the consequences of doing so on the day he entered his plea. Hanson does not present an argument that his sister was qualified to give an expert opinion. Rather, his only challenge to this part of the court's ruling is that he is not claiming that he was incompetent, and so expert medical opinion evidence was unnecessary.

¶23 Based on our review of the record, we agree with the court that, aside from Sherri's general testimony regarding Hanson's difficulties with managing the ordinary affairs of life because of his mental illness, there is nothing specific in the record regarding Hanson's relative ability to understand what transpired during the plea hearing or prior to entering his guilty plea. To the extent the court's decision to deny Hanson's postconviction motion rested on credibility determinations, it is the circuit court that makes the credibility determinations when a defendant seeks to withdraw a guilty plea. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291-92, 592 N.W.2d 220 (1999).

¶24 In sum, we conclude that Hanson has not carried his burden of showing by clear and convincing evidence that his plea was not knowing, intelligent, and voluntary. We therefore conclude that the circuit court did not err in denying Hanson's postconviction motion on this topic.

II. Ineffective Assistance of Counsel Claim

¶25 Hanson contends that he did not receive the effective assistance of counsel based on his counsel's alleged failure to file a timely motion to suppress

evidence. According to Hanson, Hanson's transport from the bowling alley parking lot to the police garage constituted a seizure and an arrest without probable cause, and therefore, any evidence obtained by Officer Popovich during and after the transport should have been suppressed. Hanson contends that had his counsel moved to suppress the evidence on the basis that his transport was illegal, memories of key witnesses would have been fresher and therefore more accurate had a suppression hearing been held early in the proceedings. Hanson points to inconsistencies in the criminal complaint and in the police report, and argues that the investigating officer's testimony at the postconviction motion held two years after the incident added details not present in either document. Additionally, Hanson points out that Officer Popovich could not recall details of the night at issue when he provided testimony at the postconviction hearing. Hanson argues that these inconsistencies, ambiguities, and omissions call into question the reliability of the State's version of events as a whole, and "undermines confidence in the outcome," establishing prejudice to Hanson. We disagree.

¶26 To establish that defense counsel rendered 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. Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). This court upholds the circuit court's findings of fact unless clearly erroneous. ***Id.*** Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo. ***Id.***

¶27 We do not agree that confidence in the proceedings have been undermined by Hanson's trial counsel's failure to bring a suppression motion at an earlier time. The prejudice standard requires that a defendant show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Johnson***, 153, Wis. 2d 121, 129, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 694). In application of this principal, appellate courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30. We do not find that a reasonable probability exists here based on the totality of the evidence.

¶28 Hanson specifically argues that had the suppression motion been addressed earlier, the officer's memory of the incident would have been clearer and more reliable and the alleged inconsistencies in the criminal complaint and the officer's testimony would have been resolved. To the extent that Officer Popovich was unable to recall certain events on the night in question, we are not convinced based on the record before us that Officer Popovich's testimony would not have led to the same findings of fact or conclusions of law. The criminal complaint and the officer's testimony reveal that Officer Popovich came across Hanson and identified him as the owner of a vehicle that had struck a pole. The officer testified that he smelled intoxicants and observed slightly slurred speech, which is consistent with his police report. At the hearing, Officer Popovich testified that the parking lot was unlit and uneven, and it was to Hanson's advantage to take the field sobriety tests on a flat surface and that is why he transported Hanson to the police garage to conduct the tests. Regardless of when the officer would have

provided this testimony, either at an earlier suppression hearing or at the postconviction hearing, the testimony is consistent with the officer's police report.

¶29 We reject Hanson's argument that his counsel provided ineffective assistance by failing to file a motion to suppress early in the proceedings for an additional reason. Hanson does not explain with any clarity and specificity the evidence that would have been presented at such a hearing by Officer Popovich and other key witnesses he identifies, and how that evidence would have led to the court granting Hanson's motion. Without more, Hanson cannot meet his burden of showing that counsel's presumed deficient performance prejudiced Hanson.

¶30 Hanson fails to establish that he was prejudiced by his counsel's failure to file a timely suppression motion and that the circuit court's findings of fact on the transport were clearly erroneous. The circuit court concluded, and we agree, that the evidence shows that Officer Popovich "acted appropriately and with reasonable suspicion" in transporting Hanson to the Janesville Police Department and conducting the field sobriety tests at the police garage. Because Hanson fails to establish prejudice, we need not address the performance prong. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) ("[I]f defendant has failed to show prejudice, omit the inquiry into whether counsel's performance was deficient.").

CONCLUSION

¶31 In sum, we conclude that Hanson's plea was knowing, intelligent, and voluntary and not in violation of his due process rights. Additionally, Hanson's claim of ineffective assistance of counsel fails because he has failed to show prejudice. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.