COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3440-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRENTON MCADOO,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Trenton McAdoo, *pro se*, appeals from the judgment of conviction for four counts of second-degree sexual assault and one count of burglary, following his no contest pleas, and from the order denying his postconviction motion. McAdoo argues that the trial court erred in concluding that he had failed to present a fair and just reason for withdrawal of his pleas, and

in refusing to hold a hearing on his claims of ineffective assistance of counsel. We affirm.

McAdoo pled no contest to five crimes stemming from his brutal assault of a fifty-seven-year-old woman. The allegations in the criminal complaint and the victim's testimony at the preliminary hearing, both of which served as the factual basis for the trial court's findings, established that at approximately 5:30 a.m. on August 7, 1996, McAdoo entered the victim's apartment, under the pretext of looking for another resident of the building and requesting a glass of water. Over the next two to three hours, McAdoo bashed the victim's head against the wall, punched her repeatedly in the mouth and face, wrapped a cord around her neck, covered her face with a blanket, gagged her with a piece of hosiery, tied her to a chair, tied her to a bed, sexually assaulted her numerous times, and took her money and bus tickets.

The State charged McAdoo with five counts of second-degree sexual assault, burglary, and false imprisonment. Ultimately, however, pursuant to a plea agreement, one of the sexual assault charges and the false imprisonment charge were dismissed, and McAdoo pled no contest to the remaining charges. Approximately one month later, before sentencing, McAdoo moved to withdraw his pleas.[1]

McAdoo's motion presented a single basis for his request: "[D]efendant says he was unduly pressured by his family to plead no contest and

[1] McAdoo's "Motion to Withdraw Plea" bears the clerk's filing date of January 6, 1998. From the judgment roll and trial court transcripts, however, it is clear that the filing date should have read, "January 6, 1997." It is undisputed that McAdoo entered his pleas on December 9, 1996, and that his postconviction motion was heard, before sentencing, on January 13, 1997.

waive his right to a trial. His waiver of his trial rights was therefore not a free and voluntary one." Before sentencing him, the trial court considered McAdoo's motion and heard his testimony:

> THE COURT: Your attorney indicated you wanted to withdraw your … no contest plea; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Can you tell me why?
>
> THE DEFENDANT: Because it really wasn't my decision to make. I was kind of pressured into it. I wanted to go to trial but upon, you know, I got to visit with my family and they was sort of like pressured–too much pressure.
>
> THE COURT: Why was your family telling you to enter a plea of no contest?
>
> THE DEFENDANT: I guess they was scared for me or something. I don't know.
>
> ….
>
> [PROSECUTOR]: … You say that your reason for … moving to withdraw the guilty [sic] plea is because your family made you enter that plea, the no contest plea?
>
> THE DEFENDANT: Um-hum.
>
> [PROSECUTOR]: Yes?
>
> THE DEFENDANT: Yes.
>
> [PROSECUTOR]: Did they threaten you with physical harm to get you to enter that plea?
>
> THE DEFENDANT: No. They told me … that if I took it to jury trial, that I would possibly get the maximum and if I took the deal or whatever, that I probably wouldn't get the maximum.
>
> [PROSECUTOR]: And you believed that at the time, right?
>
> THE DEFENDANT: Yes.
>
> [PROSECUTOR]: And that's why you entered the plea?
>
> THE DEFENDANT: Not really. It was because of the pressure why I entered the plea.

> [PROSECUTOR]: And so now that advice that they gave you, you don't believe that anymore; is that right?
>
> THE DEFENDANT: No.
>
> [PROSECUTOR]: And that would be, your reason is because they – they strongly wanted you to enter those pleas and that's the reason they gave you but now after thinking about it, you've decided that you'd rather have a trial; is that correct?
>
> THE DEFENDANT: Yes.

Denying McAdoo's motion, the trial court concluded that "even applying the liberal interpretation as required by the [Wisconsin] Supreme Court" requiring nothing more than "a fair and just reason" for plea withdrawal prior to sentencing, McAdoo had presented no basis justifying plea withdrawal. The trial court also concluded that, even if McAdoo's "naked assertion" constituted "a fair and just reason," the State would be prejudiced by plea withdrawal given the trauma to the victim, who "feels the case has been over with" and, on the day of sentencing, "couldn't even show up at court to look the defendant in the eyes to say she's been victimized … it's very possible she may not … psychologically be able to show up in court as a witness and testify."

The supreme court recently reiterated the standards governing appellate review of a trial court's denial of a plea withdrawal motion prior to sentencing, and the standards governing the trial court's determination of such a motion:

> This Court will sustain a circuit court's ruling denying a motion to withdraw a plea unless the circuit court erroneously exercised its discretion. "A discretionary determination, to be sustained, must demonstrably be made and based upon facts appearing in the record and in reliance on the appropriate and applicable law."
>
> A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been

> substantially prejudiced by reliance on the defendant's plea. "But 'freely' doesn't mean automatically." A fair and just reason is "some adequate reason for defendant's change of heart … other than the desire to have a trial." The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence.

State v. Garcia, 192 Wis.2d 845, 861-62, 532 N.W.2d 111, 117 (1995) (citations and footnote omitted; ellipsis in ***Garcia***). Here, the record reflects the trial court's careful consideration of both McAdoo's no contest pleas and his testimony in support of plea withdrawal, and the trial court's application of the proper legal standard. We conclude that the trial court did not erroneously exercise discretion in determining that McAdoo failed to present a fair and just reason for plea withdrawal.[2]

Denying McAdoo's motion, the trial court accurately recalled that the "plea colloquy was done extensively over a long period of time after defendant went through the facts with his attorney and his family and his family was giving him advice." In fact, the record reflects that the case was set for trial on the morning of December 9, 1996, but that McAdoo entered his plea that afternoon, after taking the intervening hours to further confer with his attorney and family members. Then, at the point McAdoo was entering his plea, defense counsel carefully elaborated his familiarity with McAdoo's "mental problems," alcohol and drug abuse, and medication history, and emphatically declared that he was "absolutely convinced" of McAdoo's ability to enter informed and voluntary pleas. The trial court carefully questioned McAdoo, asking, among other things, "Has anyone made any threats or promises besides what the District Attorney said

[2] Because we conclude that the trial court properly exercised discretion in determining that McAdoo failed to present a fair and just reason for plea withdrawal, we need not decide whether the trial court also correctly concluded that the State would have been prejudiced by plea withdrawal. *See* ***State v. Garcia***, 192 Wis.2d 845, 861 n.7, 532 N.W.2d 111, 117 n.7 (1995).

on the record [regarding the plea agreement] to make you give up your constitutional rights and plead no contest?" McAdoo answered, "No."

Against this background, McAdoo offered nothing more than the assertion that his family "kind of pressured" him into entering his no contest pleas and, as he conceded in response to the prosecutor's question, he subsequently "decided that [he'd] rather have a trial." McAdoo provides no authority to support the proposition that advice—in this case apparently persuasive *and accurate*[3] advice from family members who are seeking to reduce a defendant's sentencing exposure—somehow undermines the voluntariness of a plea. *See* ***State v. Herro***, 53 Wis.2d 211, 215, 191 N.W.2d 889, 891 (1971) (denying motion to withdraw plea after sentencing, court correctly concluded that "difference in possible penalties" pursuant to plea agreement does not render plea involuntary).[4]

McAdoo next argues that the trial court erred by not holding a hearing on his claims that trial counsel was ineffective. We disagree.

---

[3] Indeed, at sentencing, the trial court commented:

> If this case would have gone to trial and the State would have tried all the counts and he would have been convicted, I would have had no problem sentencing him to the additional 32 years in [sic] exposure[,] consecutive.
>
> I think his family's advice to plead guilty [sic] was correct. Otherwise it would have been a longer sentence.

[4] McAdoo also contends that his pleas were involuntary because the record provides no factual basis supporting them. McAdoo, however, failed to raise this issue in the trial court and, therefore, has waived the issue. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Additionally, however, we note that, at the plea hearing, defense counsel commented that the reason for the no contest plea was that McAdoo "does not have a clear and distinct recollection of what occurred but would not contest the facts as contained in the complaint … relative to the five counts that we're talking about." Accordingly, with the agreement of the parties, the complaint and preliminary hearing were used as the factual basis for the pleas. We have reviewed them; they provide an adequate factual basis for each of the five counts.

When a defendant files a postconviction motion making allegations that, if true, would require relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion makes such allegations presents a question of law, which we review *de novo*. *See* ***id.***

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 309-10, 548 N.W.2d at 53 (quoting ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972)). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.*** at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232-36, 548 N.W.2d 69, 74-76 (1996). To show prejudice, the defendant must demonstrate "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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245

(1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

McAdoo contends that counsel was ineffective for failing to supplement his motion to withdraw his pleas with affidavits or additional support, for failing to have DNA testing performed by an out-of-state laboratory, for failing to investigate an intoxication defense, and for failing to interview alibi witnesses. On each alleged failure of counsel, however, McAdoo offered the trial court nothing other than what the trial court correctly termed "wholly conclusory" allegations.

McAdoo did not explain what more counsel could have presented regarding his family's pressure to plead. He presented nothing to establish that DNA testing by an out-of-state laboratory would have produced meaningful or exculpatory results, in contrast to what, in the record, his attorney vaguely referred to as "inconclusive" test results. He submitted nothing to suggest the viability of an intoxication defense, in contrast to the clear plea-hearing record of counsel's knowledge of his drug abuse and medication, counsel's conclusion that he had no such defense, and his (McAdoo's) waiver of his defenses.[5] And McAdoo provided nothing to counter counsel's representation to the trial court that he had investigated potential alibis and had concluded that they would not provide "a viable defense."

[5] Additionally, McAdoo offers no reply to the State's assertion that, because second-degree sexual assault by intercourse does not include an element of "intent," McAdoo could have no voluntary intoxication defense to the sexual assault charges. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Accordingly, we conclude that McAdoo failed to offer anything to establish any deficiency in counsel's performance or any prejudice that could have resulted from any alleged deficiency and, further, that McAdoo failed to provide sufficient allegations of ineffective assistance of counsel to merit an evidentiary hearing.

By the Court.—Judgment and order affirmed.

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