COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2240-CR **Cir. Ct. No. 2009CF5832**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THONGSAVAHN RODTHONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Thongsavahn Rodthong, *pro se*, appeals the judgment of conviction for two counts of robbery (use of force), as a party to the crimes, with the use of a dangerous weapon, contrary to WIS. STAT.

§§ 943.32(1)(a), 939.05, and 939.63(1)(b) (2009-10).[1] He also appeals the orders denying his postconviction motions for plea withdrawal and for the appointment of counsel. We affirm.

BACKGROUND

¶2 In December 2009, the State charged Rodthong with armed robbery (use of force), burglary, and attempted first-degree intentional homicide, all as a party to the crimes. The charges stemmed from the armed robbery of a restaurant in Wauwatosa, the burglary of the restaurant owners' home, and the shooting of a police officer.

¶3 Pursuant to plea negotiations, the State filed an amended information charging Rodthong with two counts of robbery (use of force), as a party to the crimes, with the use of a dangerous weapon. Rodthong entered guilty pleas to those charges. The circuit court accepted Rodthong's pleas and sentenced him to two consecutive terms of twelve years of initial confinement and five years of extended supervision. The court also held Rodthong jointly and severally liable with his co-actors for $370 in restitution.

¶4 The State Public Defender's Office (SPD) appointed Rodthong successor counsel for postconviction purposes. After that appointment, however, Rodthong hired a different attorney, Peter Heflin, to represent him.

¶5 Rodthong, through Heflin, then filed a postconviction motion to withdraw his guilty pleas. Rodthong argued that his trial attorney pressured him to

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

enter guilty pleas. The court held a hearing on the motion, at which both Rodthong and his trial attorney testified. Following the hearing, the court denied the motion in a written order.[2]

¶6 Heflin subsequently moved to withdraw as Rodthong's attorney, stating that Rodthong told him he wanted to appeal the postconviction order, but he did not want Heflin to continue to represent him. Heflin requested that the circuit court "instruct the State Public Defender's Office to appoint" Rodthong successor counsel. The court sought a response from the SPD. The SPD indicated that when Rodthong discharged his SPD attorney to hire Heflin, he was told that he would not get another appointed attorney in this case. The SPD stated that it would "not re-appoint counsel for Mr. Rodthong in this appeal"

¶7 The court then issued an order informing Rodthong of the risks of proceeding *pro se* and instructing him to respond as to how he wished to proceed, knowing that if Heflin was permitted to withdraw, he would not be represented by another appointed attorney. Rodthong responded, requesting that the SPD reconsider its decision, asserting that there had been no evaluation of his "unexpected indigence"; Heflin's potential conflict of interest; and the postconviction transcripts. The court ordered the SPD to file a "supplemental report" to address Rodthong's response. The SPD analyzed Rodthong's claims in its response and maintained that it would not re-appoint counsel for Rodthong. The circuit court denied Rodthong's request.

[2] The Honorable Ellen R. Brostrom presided over the hearing on Rodthong's first postconviction motion to withdraw his guilty pleas and issued the order that followed. In his appellate brief, Rodthong notes that he is not challenging this ruling.

¶8 Three months later, Rodthong, now appearing *pro se*, moved the circuit court for the appointment of counsel. He argued that the circuit court should have invoked its inherent authority to appoint an attorney for him at the county's expense. The court denied the motion, finding that Rodthong had previously discharged two lawyers after being informed of the consequences of those decisions. The court also found that there were no exceptional circumstances requiring it to appoint a lawyer in Rodthong's case. The circuit court denied the motion for reconsideration that followed.

¶9 Rodthong then filed a second postconviction motion to withdraw his guilty pleas. He argued that he should be allowed to withdraw his guilty pleas because they were not knowingly, intelligently, and voluntarily entered and because they were entered upon the erroneous advice of counsel. In a detailed decision setting forth its analysis, the circuit court denied the motion.

DISCUSSION

A. Plea Withdrawal

¶10 Rodthong asserted that his guilty pleas were not knowingly, intelligently, and voluntarily entered. Specifically, he claimed he did not understand that by pleading guilty, the read-in charges would likely increase his sentence up to the maximum authorized by law and that he faced the additional possibility of restitution. Additionally, Rodthong argued that his trial attorney was ineffective because she told him that the read-in charges would not be used against him if he agreed to plead guilty and that restitution would not be relevant.

¶11 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.

¶12 On appellate review, the issue of whether a plea was knowingly, intelligently, and voluntarily 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.

¶13 Rodthong's postconviction motion was a dual-purpose motion insofar as it contained claims that he is entitled to plea withdrawal under the rationale set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), 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). 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* ***Hoppe***, 317 Wis. 2d 161, ¶3.

¶14 Rodthong's postconviction motion implicated ***Bangert*** when he claimed he did not understand that by pleading guilty, the read-in charges would likely increase his sentence up to the maximum authorized by law. This argument fails at the outset because there were no read-in charges in this case. As set forth in the circuit court's decision, "an amended information was filed revamping and

replacing the charges alleged in the complaint with two totally different charges with lesser maximum penalties." (Emphasis in decision.)

¶15 Moreover, at the plea hearing, Rodthong affirmed his understanding that the circuit court would consider the circumstances of the crimes at sentencing, as it was allowed to do:

> THE COURT: Do you understand even though that is not part of the amended information that the State is going to bring in the facts of the burglary; do you understand that, Mr. Rodthong?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And, I'm prohibited from charging, and the State's prohibited from charging that, and I also assume the attempt[ed] first-degree homicide?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: So, do you understand the State is not charging you with either the burglary or the attempted first-degree intentional homicide, but I'll be hearing facts about those incidents as well at sentencing; do you understand?
>
> THE DEFENDANT: Yes, ma'am.

See ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 ("This court has stated that the [circuit] court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing.").

¶16 In denying Rodthong's postconviction motion, the circuit court explained:

> The law does not require the court to inform a defendant at a plea hearing what impact factual data from other uncharged incidents may have on the sentence it ultimately fashions. The bottom line is that there was not a read-in in this case. None of the charges were *dismissed and read in*

> for purposes of sentencing; the charges were simply *replaced* by other charges….
>
> … The court finds that the defendant has not set forth a viable claim for relief on the "read-in" issue he submits in his motion.

(Emphasis in decision.) We agree and adopt this reasoning.[3] *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto."). There were no read-in charges, and Rodthong was aware that the court would consider the circumstances of the crimes—namely the facts of the burglary and the attempted first-degree homicide—at sentencing. There was no requirement for the circuit court to advise Rodthong as to how this information ultimately would impact Rodthong's sentence.

¶17 Rodthong's claim that his guilty pleas were not knowingly, intelligently, and voluntarily entered because he did not understand that by pleading guilty he faced the additional possibility of restitution also fails. There is no requirement that a circuit court inform a defendant at the plea hearing that he may be subject to restitution. *See* ***State v. Dugan***, 193 Wis. 2d 610, 624, 534 N.W.2d 897 (Ct. App. 1995) ("[W]e conclude that restitution ordered pursuant to § 973.20, Stats., is not 'potential punishment' under § 971.08, Stats.

[3] To support his argument that there were read-in charges, Rodthong references a remark by the prosecutor at the beginning of the plea hearing: "At the time of sentencing I am going to argue about the defendant's involvement in the burglary and it's supposed to be considered as sort of a read-in." We are not convinced that when considered in its proper context, the prosecutor's remark is of consequence.

Therefore, the [circuit] court did not err when it failed to advise [the defendant] in the plea colloquy that the court could order restitution.").

¶18 In an alternative argument on this point, Rodthong submits that even if restitution is not "potential punishment" under WIS. STAT. § 971.08(1)(a), it is a direct consequence of his guilty pleas such that the circuit court was required to notify him and ascertain his understanding. Contrary to Rodthong's assertion, restitution is not a direct consequence of his pleas—it is a collateral one of which he has no due process right to be informed. *See* ***State v. Parker***, 2001 WI App 111, ¶9, 244 Wis. 2d 145, 629 N.W.2d 77 ("[C]ollateral consequences include … restitution."); *see also* ***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). Therefore, the circuit court did not err when it failed to inform Rodthong at the plea hearing of the potential for restitution.

¶19 Next, we address Rodthong's claims based on the ineffective assistance of counsel, which can constitute a manifest injustice justifying 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. The issues of deficiency and prejudice present questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶20 Rodthong argued that his trial attorney was ineffective because she told him that the read-in charges would not be used against him if he agreed to plead guilty. Again, there were no read-in charges in this case. Against this backdrop, we cannot conclude that Rodthong's trial attorney was deficient for giving him erroneous advice about read-in charges that did not exist. *See* ***Strickland***, 466 U.S. at 687 (The defendant bears the burden of proving both that counsel's performance was deficient and, if so, that such performance prejudiced his defense.). And, given that the record reflects Rodthong was well aware the circumstances of the crimes would be considered by the circuit court at sentencing, he also falls short of demonstrating prejudice. *See* ***State v. Jackson***, 229 Wis. 2d 328, 343, 600 N.W.2d 39 (Ct. App. 1999) (In the context of a plea, a defendant must demonstrate prejudice by showing that, but for the trial attorney's errors, the defendant would not have pled guilty and would have instead insisted on a trial.).

¶21 Rodthong further argues that his trial attorney was ineffective because she told him that restitution would not be relevant. We agree with the State's assessment of this argument:

> It strains credibility to suggest that a defendant in Rodthong's position—facing an attempted first-degree homicide charge in the shooting of a police officer, as well as two counts of armed robbery—would reject a plea offer to two counts of robbery with the use of force and the use of a dangerous weapon if had known he could be subject to a joint and several restitution order in the amount of $370.

We note that even if Rodthong's trial attorney did misinform him regarding restitution, he personally had the opportunity to contest the amount at sentencing and did not do so. When the circuit court told him that he could request a hearing on the issue of restitution, he declined and stated on the record that he was

agreeing to the amount. Rodthong has not established either deficient performance or prejudice as it relates to his trial attorney's advice on the issue of restitution. *See* ***Strickland***, 466 U.S. at 687.

B. Right to Counsel

¶22 As detailed above, after Rodthong was convicted, the SPD appointed an attorney to represent him on appeal. When Rodthong discharged the SPD attorney to hire Attorney Heflin, he was told that he would not get another appointed attorney in this case. Rodthong pursued a postconviction motion with Heflin. After the circuit court denied the motion, Rodthong discharged Heflin and sought an attorney at public expense. Both the SPD and the circuit court declined to appoint an attorney to represent Rodthong.

¶23 Rodthong submits that the circuit court's denials were based on an improper standard of law. He contends that even if there was a waiver of an attorney appointed by the SPD, the circuit court should have nevertheless exercised its inherent power to appoint counsel. *See* ***State v. Kennedy***, 2008 WI App 186, ¶10, 315 Wis. 2d 507, 762 N.W.2d 412. Rodthong seeks "to reclaim the right to counsel" for his first appeal of right.

¶24 If the SPD declines to appoint an attorney, "the [circuit] court may, in its discretion, invoke its inherent authority and appoint counsel at county expense when the necessities of the case and the demands of public justice and sound policy require appointing counsel ... to protect the defendant's constitutional right to counsel." ***Id.*** (citation and three sets of internal quotation marks omitted, ellipsis in ***Kennedy***). "An appellate court will sustain a discretionary act if the [circuit] court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable

judge could reach." ***State Public Defender v. Circuit Court for Marinette Cnty.***, 172 Wis. 2d 343, 346, 493 N.W.2d 232 (Ct. App. 1992).

¶25 In its decision and order denying Rodthong's motion for the appointment of an attorney, the circuit court noted that Rodthong had discharged two lawyers and was apprised of the consequences of doing so in each situation. *See* ***State v. Jones***, 2010 WI 72, ¶4, 326 Wis. 2d 380, 797 N.W.2d 378 ("We reject … [the] argument that indigent defendants with appointed counsel have a right, under the constitutions of Wisconsin and the United States, to reject appointed counsel in favor of substitute counsel."). The circuit court further found that there were no rare or unusual circumstances that warranted the appointment of an attorney. We conclude that the circuit court properly exercised its discretion in arriving at this conclusion.

By the Court.—Judgment and orders affirmed.

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