COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3730-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGG S. PATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Gregg Pate appeals his three convictions for first-degree intentional homicide by use of a dangerous weapon, having pled guilty to the charges. Around 8 a.m. on October 11, 1996, Pate shot his ex-girlfriend, her new boyfriend, and her one-year-old boy, all in the head execution-style, with a .38 caliber revolver. The trial court sentenced Pate to three concurrent life sentences

with no possibility for parole. Pate's counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Pate received a copy of the report and has filed three responses. We granted him permission to file the second response. He filed the third one, however, without any advance permission and after we had refused to extend again the deadline for responses. Nonetheless, we have considered the response in evaluating counsel's no merit report, including the request in that response that we stay appellate proceedings until the Wisconsin Supreme Court issues a decision in another case.

Counsel's no merit report raises four possible arguments: (1) trial counsel was ineffective; (2) the trial court should have held a hearing on Pate's initial plea of not guilty by reason of insanity; (3) the plea procedures were inadequate; and (4) the sentence was excessive. Upon review of the record, we are satisfied that the no merit report properly analyzes these issues and that they have no arguable merit. We will not discuss them further, except to the extent Pate raises them in his responses. In three responses, Pate raises three basic arguments: (1) trial counsel failed to raise a voluntary intoxication defense; (2) medical experts improperly filed their reports on Pate's competency outside the statutory deadlines of § 971.14(2)(c), STATS.; and (3) trial counsel failed to raise the § 971.14(2)(c) issue in the trial court. Pate also briefly raises other claims we will describe in the opinion. We conclude that Pate's contentions also have no arguable merit. Accordingly, we adopt the no merit report, affirm the convictions, and discharge Pate's appellate counsel of his obligation to further represent Pate in this appeal.

We first discern no merit to a voluntary intoxication defense. Pate needed to show that his trial counsel's performance on this issue was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). For a successful defense, Pate needed a high degree of intoxication that completely

overcame his power to form an intent to kill. *See* ***State v. Strege***, 116 Wis.2d 477, 486, 343 N.W.2d 100, 105 (1984). Proof of this often depends on circumstantial evidence; if defendants have vivid and detailed memories of their crimes, this weighs strongly against a voluntary intoxication defense. *See* ***State v. Nash***, 123 Wis.2d 154, 166, 366 N.W.2d 146, 154 (Ct. App. 1985). Courts must also scrutinize a defendant's claimed severe intoxication against a level of functioning inconsistent with such severity. *See* ***State v. Holt***, 128 Wis.2d 110, 130, 382 N.W.2d 679, 689 (Ct. App. 1985). In addition, a defendant's own description of his actions may many times disprove acute intoxication. *See* ***id***. at 127, 382 N.W.2d at 688. We must therefore examine Pate's own description of the murders for signs of acute intoxication. In that regard, Pate's detailed description of the murders suggests, at most, nonacute intoxication that fell short of greatly impeding his intent to kill and of supporting a claim of ineffective trial counsel.

At 4 a.m., after sleepless, all-night alcohol use, Pate loaded his .38 and went across town to his ex-girlfriend's home. He wanted to intimidate his ex-girlfriend and her new boyfriend into ending their relationship. Pate put a note on her boyfriend's truck warning him to stay away from his ex-girlfriend "or else." Pate then returned to his apartment. At 8 a.m., he again went across town to his ex-girlfriend's home. He knocked on the door and walked in unannounced. He saw his ex-girlfriend and her new boyfriend seated on a couch, reading the note he had left on the boyfriend's truck. The ex-girlfriend confronted him and threatened to call the police. Pate "snapped," reached for his .38, and opened fire. He shot the boyfriend in the face, sending him to the floor. Pate saw the ex-girlfriend run for the phone; he shot her from the back in the head. At the same time, the dying boyfriend was floundering about on the floor, trying to grab Pate's leg; Pate fired another round in his head. Pate now turned on the baby seated in a high chair, its eyes fixed on its

mother dying on the floor. Pate shot it in the head, convinced it had no life worth living without its mother. Pate told police that he could never have shot the one-year-old had it turned toward him. It stayed faced away, however, and ennerved Pate to pull the trigger.

Pate's acts and thought processes belie any possible voluntary intoxication defense. They are incompatible with the kind of acute intoxication needed to advance that defense. Pate's acts and thinking at each stage revealed an ill-advised, but otherwise unimpaired, intent to kill. Pate shot the boyfriend in a jealous rage when the ex-girlfriend confronted him. He shot the ex-girlfriend when she made a move toward the phone to call police. He shot the boyfriend again when the boyfriend made a dying, convulsive lurch at his leg. He shot the baby in a self-delusional act of mercy. Each of these acts flowed from aberrant but demonstrably conscious thoughts that show an intent to kill free of the mentally incapacitating intoxication needed to nullify criminal intent. Later events help confirm this. After the killings, Pate drove around looking for a place to shoot himself, fully mindful of his wrongs. He could not find the strength, he admitted, and instead for a time made his escape. All this evidence was demonstrably incompatible with mind-paralyzing intoxication. Under the circumstances, we have no reason to believe that a voluntary intoxication defense would have any chance of success at a trial. In short, Pate has shown no ***Strickland*** prejudice. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

We also discern no merit to Pate's claim of untimely competency evaluations. The trial court ordered two such evaluations on January 21 and 28, 1997, respectively, but Pate's evaluators did not file their reports until February 14 and 19, 1997, outside the fifteen-day deadlines. *See* § 971.14(2)(c), STATS. The statute gave the trial court the power to extend the fifteen-day deadlines for fifteen more, and it may have tacitly granted an extension; the delay was slight compared to

the gravity of the competency issue, and the parties never objected to it. We are satisfied that all involved acquiesced to the delay in the hope that the reports would be favorable to their side. Moreover, appellate courts must disregard breaches of procedural deadlines that did no harm to an accused's substantial rights. *See* ***State v. Weber***, 174 Wis.2d 98, 109, 496 N.W.2d 762, 767 (Ct. App. 1993). We see no substantial harm to Pate from the slight delay, whether judged under the ***Weber*** or ***Strickland*** prejudice standards. In addition, although we have accepted Pate's late third response raising his § 971.14(2)(c) argument, we deny his request there that we stay appellate proceedings pending the Wisconsin Supreme Court's decision in ***State ex rel. Hager v. Marten***, no. 97-3841-W. The two cases are not comparable. ***Hager*** involves a five-month delay under § 971.14(2)(c), and Pate's delay was a matter of days. We therefore see no need to defer resolution of Pate's case until ***Hager*** is issued.

We briefly reject some other arguments Pate raises in cursory fashion. Pate claims problems with venue, raises defects in his police interrogation and cites other delays in his psychological examinations that he believes made the evaluations stale and unreliable as to his mental state at the time of the murders. Pate also asserts a temporary insanity defense. Pate's guilty plea waived these issues, and we will not rule on them. *See* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). In addition, we discern no evidence that a temporary insanity defense would have success at trial, and Pate may therefore not cite trial counsel's failure to pursue that defense as ineffective trial counsel. *See* ***Lockhart***, 474 U.S. at 59. Pate further claims that he never expected or understood he could get a life sentence without parole. This claim has no merit. Pate signed a waiver-of-rights form in which he acknowledged that a life term without parole was possible. In addition, the trial court explained the same to Pate at the plea hearing, and Pate told the court that he

understood. Last, Pate claims that the high-profile nature of the case convinced him he would not get a fair trial and thereby forced him to plead guilty. These kinds of pressures are no basis for withdrawing a plea. Fear of guilty verdicts is a natural part of the plea-making process, and defendants cannot cite that later as a basis to reopen the case. *Cf*. ***State v. Weidner***, 47 Wis.2d 321, 328, 177 N.W.2d 69, 73 (1970).

Finally, Pate seems to argue that the trial court should have given him a chance at parole in the future. The trial court made a discretionary decision. *See* ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402,-405-06 (1983). Pate's sentence depended on his character traits, the gravity of the offense, the public's need for protection, and the interests of deterrence. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, the trial court made a wide-ranging set of sentencing findings. It acknowledged the many from the community who had expressed views on Pate's behalf and had pleaded for mercy. It also spoke, however, to the execution-style nature of the killings. Pate had taken three innocent lives, and this alone showed the danger he posed. Pate was highly culpable, and the trial court concluded that what Pate offered in mitigation carried little weight by comparison. In essence, the trial court concluded that a chance at parole would unjustifiably depreciate the seriousness of Pate's crimes and furnish inadequate punishment. We are satisfied that the trial court's sentence was commensurate with Pate's culpability, the severity of his crimes, the public's need for protection, and the need to deter Pate and others from such crimes. In sum, we see no erroneous exercise of the trial court's sentencing discretion. Accordingly, we discharge Pate's appellate counsel of his obligation to represent Pate further in this appeal.

By the Court.—Judgment affirmed.