COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1153-CR **Cir. Ct. No. 2011CF1752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENYATTA SOBEASR CLINCY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Kenyatta Clincy pled no contest to misdemeanor theft and first-degree reckless injury. He appeals his judgments of conviction and orders denying pre-sentencing and postconviction motions for plea withdrawal. Clincy contends that he presented a fair and just reason warranting pre-sentencing

plea withdrawal, that he is entitled to plea withdrawal because there is a lack of a factual basis for his plea to first-degree reckless injury, and that he is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. We reject each argument and affirm.

Background

¶2 Clincy was charged in connection with a home invasion. At the time of his plea hearing, he faced charges of burglary as a repeater and first-degree reckless injury as a habitual criminal and with use of a dangerous weapon. Clincy entered no contest pleas to misdemeanor theft and first-degree reckless injury.

¶3 The victim was attacked in her home while her husband was at work. The husband returned home to find it "ransacked" with signs of a violent struggle. He found his wife on the kitchen floor, lying stomach down in a pool of blood, unconscious and barely breathing. Circumstantial evidence led police to a residence about 15 blocks away and, in it, an attic room used by Clincy. After viewing the room with the permission of Clincy's girlfriend, police returned with a search warrant and seized several items connecting Clincy to both the room and the home invasion. These items included several objects that the husband had listed as missing from his home and a coat with the victim's blood on it. In addition to items covered by the search warrant, police seized other items that we surmise might have appeared to police, based on the appearance of the items and information from Clincy's girlfriend, to be items taken in other home invasions.

¶4 This case has a complicated procedural history. Clincy has been represented by multiple attorneys and there were several appearances and hearings. We need not detail them. It is sufficient to say that, prior to sentencing, Clincy moved to withdraw his pleas on several grounds, and all were denied.

Post-sentencing, Clincy again moved to withdraw his pleas, making a different mix of arguments. The circuit court ordered briefing, reviewed the briefs, and then denied the motion without an evidentiary hearing.

Discussion

I. Pre-Sentencing Plea Withdrawal

¶5 Clincy contends that he presented to the circuit court, pre-sentencing, a sufficient reason to entitle him to plea withdrawal. As Clincy notes, ***State v. Cain***, 2012 WI 68, 342 Wis. 2d 1, 816 N.W.2d 177, sets forth the applicable standard:

> Withdrawal of a plea may occur either before sentencing, or after sentencing. When a defendant moves to withdraw a plea before sentencing, "a circuit court should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" However, this rule should not be confused "'with the rule for post-sentence withdrawal where the defendant must show the withdrawal is necessary to correct a manifest injustice.'"

Id., ¶24 (quoted sources omitted). Clincy also correctly cites ***State v. Rhodes***, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599 (WI App 2007), for the proposition that a "fair and just reason" means an adequate reason other than a defendant simply changing his or her mind.

¶6 Clincy argues that his fair and just reason was that he relied on his trial counsel's advice when entering his pleas, only to learn later that his counsel failed to investigate whether the primary evidence against him was subject to a viable suppression motion. Clincy asserts that he repeatedly asked his counsel, prior to his plea hearing, about the possibility of a suppression motion and was

repeatedly told that there was no viable suppression motion. Clincy asserts that he relied on this assurance when entering his pleas.[1] Clincy contends that, when he learned that his counsel did not have a basis for telling him there was no ground on which to move to suppress evidence, he lost confidence in counsel, and this is an "adequate reason" other than Clincy simply changing his mind. It follows, according to Clincy, that the circuit court erred when it denied his pre-sentencing plea withdrawal motion.[2]

¶7 We agree that Clincy has pointed to something other than him merely changing his mind. However, not every other reason is an "adequate reason." The mere possibility, regardless how remote, that an adequate inquiry into the suppression issue would have produced a viable challenge is simply too speculative to be an "adequate reason." At least under the circumstances here, the mere possibility that Clincy's trial counsel may have given him bad advice is not an adequate reason.

¶8 Clincy may hope that we have in the back of our minds his later argument that there was a viable suppression motion that could have been filed. But Clincy's argument does not hinge on whether such an inquiry would have

[1] The State argues that the circuit court found Clincy's assertions on this topic not credible. We acknowledge that the circuit court found Clincy not credible in some respects, but we agree with Clincy that the circuit court did not address the allegations we discuss in the text. As Clincy points out, it is undisputed that Clincy's trial counsel could not have sufficiently investigated possible suppression issues because she did not obtain the search warrant until after Clincy entered his pleas.

[2] In his appellate brief-in-chief, Clincy raises the same issue in the context of ineffective assistance of counsel. Although Clincy tells us that the circuit court erred by rejecting his pre-sentencing plea withdrawal argument, Clincy also expresses concern that we might conclude that his trial counsel failed to preserve the argument for appeal, thus raising the possibility that the issue would need to be addressed in the context of ineffective assistance. We need not address ineffective assistance of counsel for this issue because we do not consider the issue forfeited.

been fruitful or even somewhat likely to have been fruitful. Rather, Clincy's proposition is that, any time a defendant is able to persuade a circuit court that trial counsel's advice relating to the entry of a plea rests on an inadequate inquiry, a defendant is entitled to pre-sentencing plea withdrawal. That approach sets the bar too low.

¶9 Notably, Clincy is not precluded from pursuing the topic of bad advice. We address it later in this opinion. Indeed, if Clincy could have demonstrated, pre-sentencing, that he relied on bad advice to enter an unknowing plea, he would have been entitled to plea withdrawal. Here, we merely conclude that the circuit court did not misuse its discretion when it denied pre-sentencing plea withdrawal based solely on Clincy's concern that he might have received bad advice.

II. Plea Withdrawal Based On Lack Of Factual Basis

¶10 A defendant is entitled to withdraw a plea if the record fails to establish a factual basis for the plea. ***State v. Harvey***, 2006 WI App 26, ¶10, 289 Wis. 2d 222, 710 N.W.2d 482. Clincy argues that this "factual basis" requirement was not met with respect to his no contest plea to first-degree reckless injury.

¶11 The applicable standards, as they pertain to the circumstances here, were aptly summarized in ***State v. Sutton***, 2006 WI App 118, 294 Wis. 2d 330, 718 N.W.2d 146:

> When we review a circuit court's determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the court's findings were clearly erroneous. We approach this issue recognizing that where, as here, the plea is pursuant to a negotiated agreement between the State and the defendant, "the court need not go to the same length to determine whether the facts would

> sustain the charge as it would where there is no negotiated plea."
>
> Generally, the factual basis for a guilty plea may be established by reference to the allegations set forth in the criminal complaint.... Other facts may be gleaned from the plea hearing record, the sentencing hearing record, as well as defense counsel's statements concerning the factual basis presented by the State.
>
> ....
>
> ... "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." "The essence of what a defendant waives when he or she enters a guilty or no contest plea" is the opportunity to defend against the inculpatory inferences and advocate those that are exculpatory.

Id., ¶¶16-17, 22 (citations and quoted sources omitted).

¶12 To repeat, Clincy argues that the "factual basis" requirement was not met with respect to his no contest plea to first-degree reckless injury. More specifically, Clincy contends that the facts alleged are insufficient to show that Clincy created an "unreasonable and substantial risk of death or great bodily harm," *see* WIS. STAT. § 939.24(1) (2009-10), or to show that Clincy caused harm to the victim "under circumstances which show utter disregard for human life," *see* WIS. STAT. § 940.23(1) (2009-10). Clincy agrees that the facts are sufficient to show that he caused the alleged injuries to the victim.[3] Nonetheless, we

[3] In his appellate brief-in-chief, Clincy states: "The complaint and his attorney's statement that he 'lost it' at least implied that he caused the described injuries to [the victim] ...." Clincy goes on to say that this causation evidence might be enough to supply a factual basis for a lesser crime. However, for reasons we set forth in the text, Clincy contends that it is not enough to supply a factual basis for first-degree reckless injury.

understand Clincy to be making two arguments. First, he contends that the facts fail to show *sufficiently serious injuries* to support an inference that he created an "unreasonable and substantial risk of death or great bodily harm." Second, he argues that the facts fail to support an inference that he acted with utter disregard for human life because there are no facts alleging what Clincy *did* to cause the injuries.

¶13 A review of the allegations in the criminal complaint, the plea hearing including defense counsel's statements during that hearing, and the sentencing hearing shows that these arguments are easily rejected.[4]

¶14 The victim was attacked while her husband was at work. The husband returned home to find the home "ransacked." Many items throughout the home were missing, including multiple larger items, such as a television and a microwave oven, and smaller items, such as jewelry and small electronics. In the living room, the husband found tables knocked over, broken glass, and numerous items thrown to the floor. In the dining room, panels from a drop ceiling had been pulled down and scattered. Wires, including telephone wiring and burglar alarm wiring, were "torn out of the ceiling."

[4] Clincy complains that the State improperly relies on allegations in the search warrant application. According to the State, the application states that the victim was listed in very critical condition at the hospital and that she had multiple skull fractures, broken ribs, and a one-inch puncture wound above her left eyelid. The State also asserts that the application alleges that medical personnel reported that the victim was vaginally penetrated by a broomstick, as evidenced by the severe injuries to that area and bloodstains that extended about one foot up the handle of the broomstick. Clincy presents reasons why, under the particular facts of this case, the allegations in the search warrant application should not be considered. We do not resolve the dispute and, thus, do not rely on the allegations in the search warrant application.

¶15 In the kitchen, the husband found signs of a violent struggle and his wife. A chair was turned over and numerous kitchen items were on the floor. The back door appeared to have been kicked in. The door's latch was "knocked loose" and there was "damage to the wooden frame of the door." There was a footprint on the door "consistent with the door being kicked in."

¶16 The victim was lying on the kitchen floor, stomach down, in a "pool of her own blood." She was "unconscious" and "barely breathing." She was naked except for her bra. There was a "massive amount of blood" and numerous blood stains on the floor. There was "blood all over [her] legs and rectum." A broom handle with blood on the end of the handle was located near her legs.

¶17 Responding fire department personnel found the victim "unresponsive." They transported her to a hospital, where she was treated for a "puncture wound above her left eyelid, a puncture wound to her left outer thigh, multiple rib fractures on her left side and vaginal bleeding due to trauma." She was deemed to be "currently in critical condition."

¶18 At his plea hearing, Clincy informed the court through his counsel that he believed the events happened because he was under the influence of a drug and alcohol and, in his own words, he "lost it." Clincy's counsel informed the court that, on the day in question, Clincy had consumed alcohol and cocaine.

¶19 Clincy's argument that the facts that were alleged fail to show sufficiently serious injuries to support an inference that he created an "unreasonable and substantial risk of death or great bodily harm" is nonsense. He argues that we do not know how deep the puncture wound above the victim's eye was or the specific severity of other injuries or why such injuries would leave the victim in critical condition. However, the insurmountable problem for Clincy is

that the allegations show that the victim was "unconscious," "unresponsive," "barely breathing," and in "critical condition." A reasonable inculpatory inference is that Clincy so violently attacked the victim that his actions not only created an unreasonable risk of death or great bodily harm, but indeed left her near death.

¶20 Clincy's second argument fares no better. He contends that the facts fail to support an inference that he acted with utter disregard for human life because there are no facts alleging what he *did* to cause the injuries. However, taken together, all of the circumstances easily support the inference that Clincy acted with utter disregard for the victim's life. Clincy focuses on the visible injuries and the lack of specificity as to the seriousness of these injuries. But that divorces the injuries from context. The larger context is that the victim was found mostly naked in a ransacked house that had been violently broken into. There was evidence of a struggle and substantial amounts of blood in the location where the victim was found lying unconscious. It is true that there is no direct allegation about the condition the victim was in when Clincy left her. But the fact that she was unconscious and face-down on the kitchen floor, in the same place where visible blood and a broom handle suggest she was attacked, supports the reasonable inference that she was incapacitated by the attack—that is, that Clincy left her as her husband later found her.

¶21 As the case law we quote above makes clear, we consider not only the particular facts alleged, but also reasonable inculpatory inferences from those facts. Applying that approach, we conclude that there is a factual basis for Clincy's plea to first-degree reckless injury.

¶22 In a brief argument, Clincy seems to suggest that we should also analyze his factual basis argument as an ineffective assistance of counsel claim.

Clincy suggests that, at the pre-sentencing plea withdrawal hearing, his trial counsel failed to pursue, or inadequately pursued, the lack-of-factual-basis issue and that, if counsel had properly pursued this issue at that time, the circuit court would have been limited to facts alleged in the criminal complaint which, Clincy contends, did not supply a factual basis. The argument is undeveloped. Clincy does not identify the difference between the facts available then and the additional facts available post-sentencing. We reject the argument on that basis. We also reject the argument because, so far as we can tell, the timing makes no difference. Almost all of the facts we recite above come from sources available at the time of Clincy's pre-sentencing plea withdrawal hearing. The only significant assertions recited above that do not come from the criminal complaint, the preliminary hearing, or the plea hearing relate to the volume of blood observed on the kitchen floor. In that respect, the additional information that came out at the sentencing hearing consists of statements that vary in degree. That is, there was a more graphic description of the amount of blood. Even if we ignore these statements from the sentencing hearing, the result is the same.

III. Ineffective Assistance Of Counsel: Failure To Advise Clincy Of A Meritorious Suppression Motion

¶23 Clincy contends that he is entitled to an evidentiary hearing on his claim that he would not have entered his pleas, but would have instead pursued suppression of evidence, if his trial counsel had not rendered ineffective assistance by failing to advise Clincy that there was a meritorious suppression argument. This ineffective assistance of counsel claim hinges on the proposition that there was in fact a meritorious challenge to incriminating evidence that his trial counsel

failed to identify. Because we reject this proposition, we reject Clincy's ineffective assistance claim.[5]

¶24 Clincy points to case law holding that the execution of a valid search warrant may be grounds to suppress *all* evidence obtained if the search was conducted in "flagrant disregard" of the limitations in the warrant. As Clincy correctly explains, the normal remedy when officers exceed the scope of a search warrant is the suppression of items not covered by the scope of the warrant. However, when police conducting the search act in "flagrant disregard" of the limitations in the warrant, the remedy is suppression of all evidence seized. *See* ***State v. Pender***, 2008 WI App 47, ¶9, 308 Wis. 2d 428, 748 N.W.2d 471.[6]

¶25 Clincy argues that his trial counsel performed deficiently by failing to advise him that the "flagrant disregard" suppression rule could be used to seek suppression of damaging evidence against him, such as a coat with the victim's blood on it found in Clincy's room. According to Clincy, the search warrant authorized the seizure of just 13 listed items and categories of items. He argues

[5] The State asserts that there is no reviewable ineffective assistance issue. According to the State, we may not review Clincy's claim that he was denied a chance to prove ineffective assistance because a prerequisite to the review of such claims is a ***Machner*** hearing, and there was no such hearing here. Clincy characterizes this argument as "truly odd." We agree. The State asserts that the erroneous denial of a ***Machner*** hearing is unreviewable because a ***Machner*** hearing is a prerequisite to review, which is, of course, incorrect. *See, e.g.*, ***State v. Harris***, 2012 WI App 79, ¶¶12-24, 343 Wis. 2d 479, 819 N.W.2d 350 (deciding that the circuit court erroneously denied the defendant a ***Machner*** hearing and remanding with directions to hold such a hearing).

[6] The standards applicable to ineffective assistance of counsel claims under ***Strickland v. Washington***, 466 U.S. 668 (1984), and to the pleading requirements to obtain a hearing on an ineffective assistance of counsel claim under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), are not disputed here. We need not discuss them because, as we explain in the text, the starting point for Clincy's argument that he is entitled to an evidentiary hearing is the proposition that a "flagrant disregard" motion would have had merit. Our rejection of that underlying proposition is dispositive.

that the police acted in "flagrant disregard" of the warrant by seizing 85 "items." Clincy contends that 45 of the 85 "items" seized bear "no discernible relationship or resemblance to the items described in the warrant."[7] Clincy lists as examples of unrelated items the following: five curling irons, a purified water bottle, a sconce-style lamp, automobile repair books, a gravy boat, electrical cords, a bag of dominos, and a bottle of shaving lotion. Clincy asserts: "There is no rhyme or reason to what [the police officers] took." He contends: "The only reasonable inference is that the officers essentially emptied [Clincy's] room of every portable thing."

¶26 Clincy's suppression argument is the same one rejected by the United States Supreme Court in ***Waller v. Georgia***, 467 U.S. 39 (1984). Like the defendant in ***Waller***, Clincy relies on Fourth Amendment jurisprudence, including the "flagrant disregard" standard. *See* ***id.*** at 43 n.3. Like the defendant in ***Waller***, Clincy does not "assert that the officers exceeded the scope of the warrant in the *places* searched." ***Id.*** (emphasis added). Like the defendant in ***Waller***, Clincy asserts "only that the police unlawfully seized and took away items unconnected to the prosecution." ***Id.*** Under these circumstances, the "unconnected" items should be suppressed. However, as the ***Waller*** Court held, "there is certainly no requirement that lawfully seized evidence be suppressed as well." ***Id.***

¶27 The clarity of the ***Waller*** Court's pronouncement is beyond reasonable dispute. As the Eighth Circuit Court of Appeals has stated:

[7] By Clincy's reckoning, the 40 items that appear to have been properly seized include 13 that were properly seized because they were "somewhat similar in character" to items expressly covered by the warrant. We follow Clincy's lead in this respect.

> The Supreme Court [in ***Waller***] ... expressly dictated that the flagrant disregard standard applies only where the government exceeds the scope of the authorized search in terms of the places searched, and not to cases in which the government indulges in excessive seizures.

United States v. Decker, 956 F.2d 773, 779 (8th Cir. 1992). In a similar vein, the Sixth Circuit Court of Appeals relied on ***Waller***'s flagrant disregard discussion to state: "Because [the defendant] couches his argument as a challenge to the extent of the officers' seizure, rather than the scope of their search, we find that his 'general search' argument lacks merit." ***United States v. Garcia***, 496 F.3d 495, 507 (6th Cir. 2007).

¶28 Therefore, under ***Waller***, Clincy's suppression argument lacks merit.

¶29 Moreover, even if we considered the alleged excessive seizures, it is not reasonable to suppose that a motion to suppress *all* of the evidence would have been successful. Clincy points to no Wisconsin case in which a court has applied the "flagrant disregard" test to suppress evidence. The California Supreme Court has observed: "[C]ourts rarely have actually concluded that police conduct was so extreme as to warrant total suppression" under the "flagrant disregard" standard. ***People v. Bradford***, 939 P.2d 259, 300 (Cal. 1997) (no "flagrant disregard" when officers seized a number of items falling outside the scope of the warrant, including a vehicle, medicines, toiletries, magazines, and documents, *see* ***id.*** at 299, 301); *see also* ***United States v. Lambert***, 887 F.2d 1568, 1572 (11th Cir. 1989) (no flagrant disregard when government seized a number of items, including documents, not authorized for seizure under the warrant).

¶30 Here, it is clear that the police officers executing the search warrant did not examine any place not authorized by the warrant. The officers were authorized to look, in Clincy's room, for many items taken from the victim's

residence, including relatively small jewelry items. Thus, the intensity of the search of Clincy's room was well within the bounds of the warrant. As to the items seized, the motion illogically treats all items as equivalent. For example, under the motion's simple stick-counting approach, the proper seizure of a microwave oven is offset by the improper seizure of a "rusted pair of pliers." When we put aside minor items, such as the pliers,[8] there appear to be about 20 arguably significant items seized that are not covered by the warrant.[9] Viewed in the context of the large number of properly seized items, we conclude that there is no meritorious argument that this seizure overreach constituted "flagrant disregard."[10]

Conclusion

¶31 For the reasons above, we affirm the circuit court.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

[8] Other examples of minor items include a plastic crate, 29 Dominos in a plastic bag, electrical cords, a roll of white plastic garbage bags, and hand towels.

[9] Items 3-6, 9, 18, 19, 30, 32, 33, 45-50, 57, 61, 64, 65, 72, and 73, as listed in the attachment prepared by Clincy's postconviction counsel, document 36, pages 42 to 45 in the record.

[10] Clincy's brief-in-chief anticipates that the State may contend, as it did before the circuit court, that additional seizures were justified because Clincy's girlfriend, who let Clincy use his room, told officers that many items in Clincy's room had recently arrived there. We do not rely on that reasoning.