COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1694 **Cir. Ct. No. 2004CF6461**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW CHARLES STECHAUNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Matthew Charles Stechauner, *pro se*, appeals an order denying his motion for postconviction relief. Stechauner argues that he should be allowed to withdraw his guilty plea based on newly discovered

evidence. He also argues that he received ineffective assistance of counsel. We affirm.

¶2 Stechauner was convicted of second-degree reckless homicide and armed robbery, with use of force, both as a party to a crime. He filed a postconviction motion, arguing that his statements to the police should have been suppressed because he made them while in custody without being given ***Miranda***[1] warnings. He also argued that the police engaged in coercive conduct, rendering his statements involuntary. The circuit court denied the motion. On appeal, we affirmed. Two years after his direct appeal, Stechauner filed a second postconviction motion raising multiple issues, including an argument that his statements should have been suppressed because he was unlawfully arrested. The circuit court denied the motion and we affirmed on appeal. Stechauner then filed the current postconviction motion. The circuit court denied it without a hearing.

¶3 Stechauner first argues that he should be allowed to withdraw his guilty plea because there is newly discovered evidence, an expert's photogrammetric analysis of the beating scene, captured on video, that shows that the perpetrator was taller than Stechauner by three and a half inches.

¶4 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

> Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred…. For

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

Id.

¶5 Stechauner's claim that he should be allowed to withdraw his plea based on the photogrammetric analysis is unavailing because he has not shown that there is a reasonable probability that a different result would be reached in a trial. Stechauner confessed that he and a companion nicked-named Smokey attacked the victim, who they saw walking down the street, because they were upset about a prior dispute. They each had a baseball bat and they proceeded to beat him to death. Stechauner described the beating to police as "crazy out of hand." Because Stechauner confessed to beating the victim to death, the opinion of one expert witness that video evidence of the attack purportedly shows that the assailant was taller than Stechauner by three and a half inches is not persuasive enough to make it reasonably probable that Stechauner would be acquitted in a trial.[2] Therefore, Stechauner is not entitled to plea withdrawal based on this evidence.

[2] Stechauner may not challenge the admissibility of his confession because he previously raised arguments in this regard, which we rejected. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent … proceeding no matter how artfully the defendant may rephrase the issue.").

¶6 Stechauner next argues that he received ineffective assistance of counsel. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶7 Stechauner's first claim of ineffective assistance is premised on an argument that his trial lawyers did not proffer his mother as a potential alibi witness during any of the court proceedings. Stechauner contends his mother, Starella Frye, would have testified that Stechauner was with her, Stechauner's sister Tonya Frye, Tonya's children and others at the Ramada Inn during the time the beating occurred.

¶8 Stechauner's claim is unavailing for several reasons. First, Stechauner's trial lawyer did, in fact, give notice that Stechauner had an alibi, naming Stechauner's sister Tonya, her children and others on the notice of alibi, which would presumably be based on the same circumstances, a family gathering at the Ramada Inn. Although Stechauner's lawyer did not specifically name Starella Frye in the notice, Stechauner has not explained why Starella Frye's alibi testimony would have been more helpful to him than the testimony of other family members.

¶9 More importantly, Stechauner waived his alibi defense when he pled guilty to the charges. It is well established that a plea of guilty, knowingly and understandingly made, waives nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). During the plea colloquy, the circuit court pointed out to Stechauner that he had raised an alibi defense, and informed him that he would be waiving that defense by pleading guilty. Stechauner informed the court that he understood. Because Stechauner waived his right to raise the alibi defense when he pled guilty, he cannot now argue that he was prejudiced by his lawyer's failure to raise the waived argument.

¶10 Stechauner next argues that his trial lawyer was ineffective because he did not obtain video, fingerprint and other crime scene evidence. We have already addressed the video evidence, and have concluded that there is no reasonable probability that Stechauner would be acquitted at a trial that included the video evidence.[3] Stechauner therefore cannot show prejudice. As for the fingerprint and other crime scene evidence, which Stechauner characterizes as exculpatory, Stechauner has not adequately developed this argument. He has not adequately explained what evidence he believes his lawyer should have obtained and has not adequately explained why his attorney's actions or omissions with regard to this evidence constitute deficient performance. Moreover, Stechauner has not explained how he can show prejudice in light of his confession that he savagely beat the victim. We reject this argument.

[3] Stechauner also argues that the police and the prosecutor should have turned this evidence, which he characterizes as exculpatory, over to him. The factual basis for and the legal reasoning underlying this argument are not adequately developed. There is nothing that suggests that this purported "fingerprint and other crime scene evidence" was exculpatory.

¶11 Finally, Stechauner argues that he received ineffective assistance of postconviction counsel because his lawyer failed to raise the ineffective assistance of trial counsel arguments discussed above. Because we have rejected Stechauner's argument that he received ineffective assistance of trial counsel, we also reject his argument that his postconviction counsel was ineffective. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (failing to raise an argument that does not have merit does not constitute ineffective assistance of counsel).

By the Court.—Order affirmed.

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