COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2825-CR **Cir. Ct. No. 2012CF1482**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONDON A. TRIPLETT,

DEFENDANT-APPELLANT.

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

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. London A. Triplett appeals a judgment of conviction entered following a guilty plea to human trafficking, a felon in possession of a firearm, and pandering. He also appeals a circuit court order denying his postconviction motion for plea withdrawal. Triplett seeks to withdraw

his guilty pleas to three felonies for which he was convicted based on his pleas. He asserts that he is entitled to withdraw his pleas on the grounds that the plea colloquy was defective, the court failed to ensure that a sufficient factual basis existed for the human trafficking conviction, and he did not receive effective assistance of counsel. The court denied Triplett's motion without an evidentiary hearing.

¶2 Triplett argues that the circuit court erroneously denied his postconviction motion without holding an evidentiary hearing and seeks a court order allowing him to withdraw his guilty pleas.[1] For the reasons that follow, we conclude that the court properly denied Triplett's postconviction motion without an evidentiary hearing. We affirm.

BACKGROUND

¶3 The following pertinent facts are taken from the record and are undisputed. Triplett was charged with twenty felonies. Pursuant to a plea agreement, Triplett agreed to plead to three felonies, including human trafficking, and the State agreed to dismiss and read-in the remaining seventeen charges.

¶4 Pertinent to this case, at the plea hearing, defense counsel concurred with the prosecutor's recitation of the plea agreement. However, counsel stated to the circuit court that the read-in charges were "not admitted read-ins" and that "[t]here's a difference" between admitted and non-admitted read-ins. The plea inquiry continued with no further references to the read-in charges from counsel,

[1] Triplett requests an evidentiary hearing on his lack-of-factual-basis claim. As we will explain below, the proper remedy for this claim under the circumstances here would be plea withdrawal, not an evidentiary hearing.

the prosecutor or the court. Triplett subsequently entered guilty pleas to the three agreed-upon counts, including human trafficking. The court sentenced Triplett to eleven years' initial confinement and nine years of extended supervision.

¶5 Triplett filed a postconviction motion to withdraw his pleas, requesting an evidentiary hearing and an order vacating his three convictions. He claimed that he did not enter a knowing, intelligent, and voluntary plea on the grounds that: (1) the plea colloquy was defective under WIS. STAT. § 971.08 (2013-14)[2] because: (a) the court did not advise him that the court could consider the read-ins for sentencing purposes, and (b) the court failed to correct defense counsel's misunderstanding that, contrary to counsel's belief, Wisconsin law permits the court to consider the read-ins at sentencing; (2) the court failed to ensure that a factual basis existed to support Triplett's plea to human trafficking; and (3) Triplett received ineffective assistance of counsel. The court denied Triplett's motion without an evidentiary hearing. Triplett appeals.

DISCUSSION

¶6 The central issue we address in this case is whether the circuit court properly denied Triplett's postconviction motion to withdraw his guilty plea without an evidentiary hearing. We conclude that it did.

Standard of Review and Applicable Legal Principles

¶7 To be entitled to withdraw a guilty plea after sentencing, the defendant must show that the refusal to permit withdrawal would result in a

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A plea which is not made knowingly, voluntarily or intelligently is a manifest injustice. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

¶8 The manifest injustice test is satisfied if a defendant demonstrates he or she received ineffective assistance of counsel in relation to the plea. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A claim of ineffective assistance of counsel requires the defendant to demonstrate both deficient performance and prejudice. ***Id.*** at 312. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶9 Triplett argues that an evidentiary hearing was required, and if not required, the circuit court erroneously exercised its discretion in not conducting a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 ("[T]he circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient."). "[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." ***State v. Howell***, 2007 WI 75, ¶77 n.51, 301 Wis. 2d 350, 734 N.W.2d 48.

¶10 Thus, two standards of review potentially apply. First, we determine as a matter of law "whether a defendant's motion to withdraw a guilty plea 'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, ¶78 (footnote omitted). Under the second standard, when a circuit court has discretion to grant or deny a hearing because the defendant's motion fails to allege sufficient facts, presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates that the defendant is not entitled to relief, we review whether the circuit court erroneously exercised its discretion. *See* ***id.***, ¶79.

¶11 We address Triplett's arguments in an order that differs from how they are presented in Triplett's primary brief. We begin with his allegations that defense counsel was ineffective because that discussion provides context for the rest of the opinion. We then address Triplett's defective plea colloquy argument, and finally his argument that the circuit court failed to ensure a factual basis exists to support the charge of human trafficking.

I. Ineffective Assistance of Counsel

¶12 Triplett alleges in his postconviction motion,

> that he was denied his [constitutional] right to effective assistance of counsel … when his attorney[:] a) told him that the read-in charges could not [be] considered by the judge at sentencing because he was not admitting to the read-in offenses; b) told him that the trial court would "see through" the charges and sentence him accordingly; and c) talked him out of withdrawing his plea shortly after it was entered.

Based on our review of the postconviction motion, including an affidavit from postconviction counsel that was included with the motion, we conclude that the

motion fails to allege sufficient facts to entitle Triplett to an evidentiary hearing on this issue.

¶13 A claim of ineffective assistance of counsel requires proof that counsel's performance was *both* deficient and that the deficiencies prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant has not proved one prong, we need not address the other. ***Id.*** at 697.

¶14 We look first to the allegation that defense counsel told Triplett that the circuit court could not consider the read-ins at sentencing. Assuming Triplett has sufficiently alleged deficient performance, the motion does not allege that Triplett was prejudiced. More specifically, the motion does not sufficiently allege how this misinformation affected Triplett's decision to enter the guilty plea.

¶15 The portion of Triplett's motion that matters on this topic is the allegation that Triplett told his postconviction counsel Marcella De Peters that "had he known the read-in counts could be considered by the judge at sentencing he would have decided to go to trial." This assertion is insufficient because it is purely conclusory.

¶16 The supreme court in ***Bentley*** ruled that a similar conclusory allegation was insufficient to warrant an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 312-13. The supreme court reasoned: "A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." ***Id.*** at 313 (citation omitted). The ***Bentley*** court referred to ***Hill v. Lockhart***, 474 U.S. 52 (1985), where the Supreme Court stated that a sufficiently pled allegation might further allege "special circumstances that might support the conclusion that [the defendant] placed

particular emphasis on his parole eligibility in deciding whether or not to plead guilty." ***Bentley***, 201 Wis. 2d at 314 (quoting ***Hill***, 474 U.S. at 60).[3]

¶17 Applying the same reasoning found in ***Bentley*** and ***Hill*** to Triplett's allegation, we conclude that this allegation is insufficient because it is not supported by "objective factual assertions." ***Bentley***, 201 Wis. 2d at 313. Notably, Triplett's agreement to enter pleas significantly reduced his potential prison sentence. And, even without the read-ins, it would have been apparent to the circuit court that Triplett was engaged in the business of "pimping" women. Triplett does not assert any facts that support his conclusory allegation that he would have foregone the substantial benefits of the plea agreement and have gone to trial had counsel correctly informed Triplett about the read-ins.

¶18 Triplett's second claim of ineffective assistance of counsel is that defense counsel misinformed him "that the trial court would 'see through' the charges and sentence him accordingly." De Peters averred as much in her affidavit submitted with the postconviction motion. It is not readily apparent what Triplett means by "see through" the charges and the affidavit is equally unenlightening. What is clear is that this allegation is conclusory and vague, and fails to state sufficient facts to demonstrate that counsel was deficient and that counsel's deficient performance was prejudicial.

[3] The ***Bentley*** court also cited with approval other federal cases that stand for the same or similar proposition. *See e.g.*, ***Key v. United States***, 806 F.2d 133, 139 (7th Cir.1986) (a defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim); ***Santos v. Kolb***, 880 F.2d 941, 943 (7th Cir.1989), *cert. denied*, 493 U.S. 1059 (1990) ("[a] specific explanation of why the defendant alleges he would have gone to trial is required"); ***United States v. Winston***, 34 F.3d 574, 578–79 (7th Cir.1994) (defendant failed to explain why he would not have pled guilty).

¶19 Triplett's final claim of ineffective assistance of counsel is that counsel persuaded Triplett not to pursue presentence plea withdrawal "shortly after it was entered." Triplett alleges in the motion that defense counsel persuaded Triplett not to seek presentence plea withdrawal because: (1) the court could not consider the read-ins at sentencing; (2) the judge would "see through" the allegations; (3) Triplett risked upsetting the judge if he attempted to withdraw his plea; and (4) that what appears to be a negotiated three-year sentence recommendation "was reasonable because he would get that for having a gun in the house regardless."

¶20 As to the first two reasons, we have already explained why they lack merit. As to the third reason, the risk of upsetting the judge, Triplett does not allege, much less support, the proposition that this was bad advice. Similarly as to the fourth reason, proceeding with a recommendation for a sentence for three counts that could be imposed solely for the least serious count, Triplett does not support the proposition that it was bad advice.

¶21 There is, however, a more fundamental problem with this last ineffective assistance claim based on any of the four reasons. Triplett does not show that a presentence plea withdrawal motion would have been successful. So far as we can tell, based on the allegations in Triplett's motion, the circuit court could reasonably have denied such a motion.

¶22 For the above reasons, we conclude that Triplett has failed to demonstrate that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

II. Allegations of a Defective Plea Colloquy

¶23 Triplett argues that the circuit court's plea colloquy was defective because the court failed to advise Triplett that the court could consider read-ins at sentencing. Triplett argues that WIS. STAT. § 971.08, ***Bangert***[4] and its progeny require circuit courts to advise a defendant that it may consider read-in offenses at sentencing. Triplett seeks an evidentiary hearing under ***Bangert***.

¶24 A court must hold an evidentiary ***Bangert*** hearing *only* if the motion for a ***Bangert*** hearing establishes a prima facie violation of WIS. STAT. § 971.08 or other court-mandated duties, and alleges that the defendant did not know or understand the information that the court should have provided at the plea colloquy. ***State v. Burton***, 2013 WI 61, ¶¶78-79, 349 Wis. 2d 1, 832 N.W.2d 611.

¶25 Triplett's defective plea colloquy argument is easily rejected. Triplett's argument that the court is obligated under WIS. STAT. § 971.08 and ***Bangert*** to advise him that the court may consider read-ins at sentencing has no legal support. Triplett does not point to any legal authority that supports his contention. Section 971.08 does not contain any language that imposes such an obligation on a circuit court, and none of the cases following ***Bangert*** have ruled that a court is compelled to advise a defendant regarding the effects of read-ins.

¶26 Triplett relies primarily on ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835, and ***Garski v. State***, 75 Wis. 2d 62, 77, 248 N.W.2d 425 (1977), for the proposition that a circuit court "should" advise a defendant during a plea colloquy that the court may consider the read-in offenses

[4] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

for sentencing purposes.[5] *See* ***Straszkowski***, 310 Wis. 2d 259, ¶97 ("A circuit court *should* advise a defendant that it may consider read-in charges when imposing sentence …."). Upon further examination, Triplett's arguments cannot succeed. Neither case requires that courts advise defendants about read-ins.

¶27 The issue in ***Straszkowski*** was whether a defendant was required to admit guilt before the court may consider read-in offenses at sentencing. ***Id.***, ¶¶4, 5. It is within this context that the supreme court counseled that "[i]t is a *better practice* for prosecuting and defense counsel and circuit courts to omit any reference to a defendant admitting a read-in crime, except when the defendant does admit guilt, and simply to recognize that a defendant's agreement to read in a charge affects sentencing …." ***Id.***, ¶93 (emphasis added). The supreme court summed up its discussion on this topic by stating the following: "[N]o admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed.… A circuit court *should* advise a defendant that it may consider read-in charges when imposing sentence …." ***Id.***, ¶97 (emphasis added). ***Garski*** essentially stands for the same proposition—a circuit court "s*hould*" advise a defendant of the effects of read-ins on sentencing. ***Garski***, 75 Wis. 2d at 77.

¶28 Properly read, ***Straszkowski*** and ***Garski*** simply explain that the better practice is to explain the effects of read-ins to defendants. Triplett fails to demonstrate that there is a requirement that courts do so.

[5] On the topic of read-ins, Triplett also argues that the circuit court has a duty to inform a defendant of the direct consequences of his plea and that read-ins are a direct consequence of a defendant's plea. We do not consider this argument because it is not fully developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶29 Triplett also alleges that he is entitled to a ***Bangert*** hearing because the circuit court did not correct defense counsel's misunderstanding about read-ins. We reject this argument as being patently meritless. Triplett does not and could not point to any plea colloquy obligation on the part of the circuit court to assure the proper understanding of defense counsel. And, to the extent defense counsel's misunderstanding might have affected Triplett's understanding, we have already addressed the topic.

¶30 In sum, Triplett has not shown that the circuit court erred in any way during the plea colloquy and thus his argument that he is entitled to a hearing under ***Bangert*** must be denied.

III. Factual Basis to Support the Plea to Human Trafficking

¶31 As we understand it, Triplett alleges that the circuit court failed to fulfill its duty under WIS. STAT. § 971.08(1)(b) to ensure that a sufficient factual basis existed to support the elements of the charge of human trafficking, as charged in the criminal complaint. We are not persuaded.

¶32 WISCONSIN STAT. § 971.08(1)(b) establishes a requirement that a circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged," known as the "factual basis" requirement. ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (quoted source omitted). Stated differently, a circuit court has the duty to determine "[t]hat the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." ***Id.***, ¶17 (quoted source omitted). A manifest injustice occurs if a court fails to establish that a sufficient factual basis exists to the charge to which a defendant enters a plea of guilty. *See* ***id.***

¶33 Count four of the amended information in this case charges Triplett with "human trafficking, domestic abuse"

> by controlling an individual, [the victim's] access to an addictive substance, heroin, and/or by threatening to cause or causing bodily harm to any individual, and/or by using any scheme or pattern to cause an individual, [the victim] to believe any individual would suffer bodily harm, financial harm, restraint or other harm, did recruit, entice, harbor, transport, provide and/or obtain [the victim], an individual, to engage in commercial sex acts, without [the victim's] consent.

¶34 Triplett does not contest that a factual basis exists for the first two elements of human trafficking: (1) Triplett knowingly engaged in trafficking, and (2) for the purpose of a commercial sex act. *See* WIS JI—CRIMINAL 1276. Triplett focuses his challenge on two alternative ways of satisfying the third element: "The defendant engaged in trafficking by" either (1) "fraud or deception" or, alternatively, (2) "controlling any individual's access to an addictive controlled substance." *See* WIS JI—CRIMINAL 1276; WIS. STAT. § 940,302(2)(g), (i).

¶35 Triplett's factual basis argument is difficult to follow. To simplify Triplett's arguments we focus our discussion on each alternative basis separately, beginning with the controlling-access alternative.

A. Controlling-Access Alternative

¶36 As the basis for his argument, Triplett points to defense counsel's statement *at sentencing* regarding element three regarding how Triplett engaged in human trafficking: "I think I mentioned that we fall within the fraud/deception prong and maybe partially into the controlling access to substance." Triplett argues that "[t]he court does not inquire whether 'some' or 'maybe partial' control of [the victim's] heroin supply satisfied the [third] element in [the jury

instructions]." He points out that "[n]owhere in the jury instruction is there an option to modify [the third element] with the word some or partially." As best we understand, Triplett is asserting that maintaining "some" or "partial" control of the heroin supplied to the victim does not satisfy the third element's controlling-access alternative.

¶37 In what appears to be a related but separate argument, Triplett asserts that "[a] review of the criminal complaint does not support the conclusion that the state alleged that Mr. Triplett only had some or partial control over the victim's supply of heroin."

¶38 Triplett's arguments lack supporting developed argument and we reject them on that basis. Moreover, even if we were to attempt to address the arguments as best we could, it seems apparent that controlling a victim's access to heroin by supplying "part" or "some" of the heroin can easily fit within the meaning of "control." That is, one can easily understand that Triplett does not need to be his victim's sole supplier to leverage the heroin that Triplett does supply to prompt the victim to engage in a commercial sex act.

B. Fraud/Deception Alternative

¶39 Triplett argues that the criminal complaint is entirely void of any claim that Triplett engaged in human trafficking by engaging in fraud or deception. Even if this is true, it does not help Triplett. The third element's fraud/deception alternative is simply one of numerous alternatives. Here, as we concluded, Triplett fails to demonstrate that there is a problem with the controlling-access alternative. Thus, it is unnecessary to address Triplett's fraud/deception argument.

CONCLUSION

¶40 In sum, we conclude that the circuit court properly exercised its discretion in denying Triplett's postconviction motion without an evidentiary hearing.

By the Court.—Judgment and order affirmed.

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