COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2344-CR **Cir. Ct. No. 2012CF75**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY L. WAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lafayette County: THOMAS J. VALE, Judge. *Affirmed*.

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

¶1 KLOPPENBURG, P.J. Jeremy Wand contends that the circuit court wrongly denied his post-sentencing plea withdrawal motion without an evidentiary hearing.

¶2 Pursuant to a plea agreement, Wand pled guilty to crimes related to a fire at his brother's residence that resulted in the death of his three nephews, serious injuries to his sister-in-law, and the death of his sister-in-law's fetus. The fire occurred on September 7, 2012. Wand made four statements to law enforcement in the days immediately after the fire, and on September 11, 2012, the State filed the criminal complaint charging Wand with crimes related to the fire. Wand entered his pleas in June 2013, and was sentenced in August 2013.

¶3 After sentencing, Wand filed a motion alleging that plea withdrawal was necessary to correct a "manifest injustice" resulting from the ineffective assistance of his trial attorneys. Wand alleged that his trial attorneys coerced him to plead guilty, that his trial attorneys failed to retain a fire investigation expert to dispute the origin of the fire, and that his trial attorneys failed to retain a police interrogation expert to support a pretrial motion to suppress statements that Wand made to law enforcement shortly after the fire. The circuit court denied the post-sentencing plea withdrawal motion without an evidentiary hearing.

¶4 Wand appeals, seeking remand for an evidentiary hearing. We conclude that Wand is not entitled to an evidentiary hearing because his motion seeking a hearing fails to allege sufficient facts that, if true, would entitle him to the relief he seeks. Accordingly, we affirm.

DISCUSSION

¶5 Wand argues on appeal that he is entitled to an evidentiary hearing because, in his motion, he makes sufficient factual allegations that, if true, would support the conclusion that his trial attorneys coerced him to plead guilty. He also argues that he sufficiently alleges that his trial attorneys were ineffective for failing to retain a fire investigation expert to dispute the origin of the fire, and that

his trial attorneys were ineffective for failing to retain a police interrogation expert to support a pretrial motion to suppress statements that Wand made to law enforcement shortly after the fire. We conclude that Wand's motion does not allege sufficient facts that, if true, would support the relief he seeks.

¶6 We begin by stating the applicable legal standards and we then apply those standards to each of Wand's allegations in turn.

I. Applicable Legal Standards

¶7 To satisfy due process, a guilty plea must be entered knowingly, voluntarily, and intelligently. ***State v. Rhodes***, 2008 WI App 32, ¶6, 307 Wis. 2d 350, 746 N.W.2d 599 (2007). A defendant who contends that his or her plea is infirm and seeks to withdraw the plea because of "some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion," invokes the procedure set out in ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972) and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. To be entitled to an evidentiary hearing on a plea withdrawal motion, the defendant must allege sufficient facts that, if true, would entitle the defendant to relief. ***Howell***, 301 Wis. 2d 350, ¶¶75-76. Mere "conclusory allegations" are insufficient. ***Id.***, ¶¶75, 79.

¶8 To allege sufficient facts that, if true, would entitle a defendant to relief, the defendant must "allege the five 'w's' and one 'h'; that is who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. To determine whether a defendant alleges sufficient facts, we review only the allegations contained in the four corners of the motion, and not any additional allegations contained in the defendant's briefs. ***Id.***, ¶27.

¶9 Whether a plea withdrawal motion on its face alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law that we review de novo. ***Bentley***, 201 Wis. 2d at 310; ***Howell***, 301 Wis. 2d 350, ¶78.

¶10 With these standards in mind, we address each of Wand's allegations supporting his plea withdrawal motion in turn.

II. Coercion by Trial Counsel to Enter Pleas

¶11 Wand first argues that he was entitled to an evidentiary hearing based on sufficient allegations that he was coerced by his trial attorneys to enter guilty pleas. Based on our review of his post-sentencing plea withdrawal motion, we disagree.

¶12 Before we proceed with our analysis, we comment on three aspects of Wand's argument that add unnecessary layers of complexity to this first issue.

¶13 First, Wand unnecessarily duplicates this first issue when he makes two separate arguments premised on coercion, namely: (1) his trial attorneys coerced him to enter the pleas; and (2) their coercion gave rise to a conflict of interest that prevented his trial attorneys from "zealously advocat[ing] for" Wand in terms of moving to withdraw his plea before sentencing based on coercion. Both arguments are premised on Wand's initial allegation of coercion, and Wand alleges no other facts in support of his conflict of interest argument. Thus, we fail to understand what Wand's conflict of interest argument adds to the mix.

¶14 Second, Wand unnecessarily presents his arguments about the coercion allegation within the framework of ineffective assistance of counsel. While coercion by counsel may constitute ineffective assistance of counsel, once a defendant proves a plea was involuntary because it was coerced by counsel, he or

she is entitled to plea withdrawal, regardless of whether ineffective assistance was present. *See* ***State v. Basley***, 2006 WI App 253, ¶9, 298 Wis. 2d 232, 726 N.W.2d 671 (a plea that is "tendered under the duress of ... coercive conduct" renders the defendant's plea involuntary); ***Smith v. State***, 60 Wis. 2d 373, 380, 210 N.W.2d 678 (1973) ("What is coerced lacks the voluntariness essential to the validity of a plea."); ***Rhodes***, 307 Wis. 2d 350, ¶14 ("Being coerced into pleading guilty is the direct antithesis to entering a voluntary plea.").

¶15 Third, Wand invites us to divide the plea withdrawal analysis into the pre- and post-sentencing periods, but this would not matter if coercion were sufficiently alleged. Wand seemingly hopes to benefit from the more liberal pre-sentencing plea withdrawal standard of "a fair and just reason," *see* ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24; ***Nelson***, 54 Wis. 2d at 496, as opposed to the more strict "manifest injustice" standard that applies to post-sentencing plea withdrawal motions. *See* ***Bentley***, 201 Wis. 2d at 311. However, coercion suffices to invalidate a plea, regardless of whether the pre- or post-sentencing plea withdrawal standard is applied. *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989) (coercion on the part of counsel is a factor for consideration of a fair and just reason for plea withdrawal); ***State v. Reppin***, 35 Wis. 2d 377, 385-86, 151 N.W.2d 9 (1967) (one of the four reasons for finding a manifest injustice that would support the vacation of a guilty plea is that the plea is not voluntary).

¶16 Putting to the side these red herring issues, we now focus on whether Wand alleges sufficient non-conclusory facts that would support a finding of coercion.

¶17 In his brief-in-chief on appeal, Wand makes extensive factual allegations and argument to support the proposition that he pled guilty because his trial attorneys coerced him to do so. However, as noted above, in order to determine whether Wand alleges sufficient facts to warrant a hearing on that basis, we must look within the four corners of his postconviction motion. *See* ***Allen***, 274 Wis. 2d 568, ¶27. In that motion, Wand makes the following factual allegations relevant to coercion.

- Wand told the PSI writer that he pled guilty only upon the insistence of his attorneys.

- At the July 19, 2013 hearing, Wand told the circuit court he felt most pressured by attorney Michel, who kept talking about it over and over, so Wand just did what Michel thought best. Wand also told the court that attorney Medina "kind of sided" with Michel.

- Although Medina told the circuit court that Medina had previously discussed with Wand entering a plea and he had explained to Wand the options and the plea questionnaire, Medina did not describe any specific discussion in which a decision to plead guilty was made.

- Wand testified at the August 22, 2013 hearing that he was pressured by his attorneys to plead guilty on June 12, 2013.

- Wand will testify that Medina persistently talked about pleading guilty at every meeting with Wand, and that both Medina's and Michel's pressuring him to plead guilty caused him to do so.

- Wand will testify that he felt hopeless when the motion to suppress his statements to law enforcement was withdrawn on the day he entered his pleas.

- Wand will testify that Medina never believed Wand's claim of innocence, and "[n]o defense was ever discussed."

- Wand will testify that, on June 12, "Medina showed up with the guilty plea questionnaire filled out in advance and told Wand that [Medina] knew what was best and to trust him."

¶18 These statements allege coercion but fail to assert coercive conduct by trial counsel. Strikingly absent are any details about what either Michel or Medina said to Wand, when they did so, and with what threats or other means, to coerce Wand to plead guilty (the "five 'w's' and one 'h'" required to be provided under ***Allen***). *Cf.* ***Basley***, 298 Wis. 2d 232, ¶10 (allegations that counsel made specific statements at specific times and locations were factual assertions and not conclusory allegations of coercion). It is not, by itself, coercive conduct for a defense attorney to challenge with a client the client's version of events, or to tell the client that the attorney knows best and that the client should trust the attorney. Nor is it, by itself, coercive conduct for a defense attorney to determine as a matter of professional judgment that no viable defense is available, and that efforts should instead be directed toward obtaining the best plea agreement possible.

¶19 At most, the statements itemized above support the conclusion that Wand's trial attorneys strongly advised him to enter a plea. But "forceful advice" based on counsel's professional belief that conviction is highly likely is not coercion. ***Rhodes***, 307 Wis. 2d 350, ¶11; *see also* ***Salters v. State***, 52 Wis. 2d 708, 712, 191 N.W.2d 19 (1971) ("The distinction between a motivation which induces

and a force which compels the human mind to act must always be kept in focus." (quoted source omitted)).

¶20 Moreover, certain of the broader statements itemized above are not consistent with other more specific statements in Wand's post-sentencing motion. For example, the statement that "[n]o defense was ever discussed" is refuted by the motion's review of two pretrial motions that Wand's trial attorneys filed, each reflecting the consideration of different potential defenses. First, Wand's trial attorneys filed a motion to suppress his statements to law enforcement as not voluntary. That this motion was withdrawn before it was argued does not detract from the indication that a defense based on suppression was considered. Second, Wand's trial attorney filed a pre-sentencing plea withdrawal motion based on certain newly discovered evidence that, his trial attorneys argued, could be used to impeach testimony by Wand's sister-in-law. In support of this motion, Wand's trial attorneys argued to the circuit court that "in view of new evidence and circumstances ... [Wand] wishes to pursue a trial." Thus, a defense based on "new evidence and circumstances" was also considered.

¶21 In sum, we conclude that Wand's motion fails to allege sufficient non-conclusory facts that, if true, would entitle him to relief as to his claim based on coercion.

III. Ineffective Assistance of Trial Counsel

¶22 In support of his post-sentencing plea withdrawal motion, Wand alleges that his trial attorneys were ineffective in two respects: (1) failing to retain a fire investigation expert to dispute the origin of the fire; and (2) failing to retain a police interrogation expert to support a motion to suppress Wand's statements to

law enforcement. We first briefly review the applicable standards and then address each allegation in turn.

¶23 The manifest injustice test for withdrawing a guilty plea after sentencing is met if the defendant was denied the effective assistance of counsel. ***Bentley***, 201 Wis. 2d at 311. Where a plea withdrawal motion is based on an allegation of ineffective assistance of counsel, the defendant must allege sufficient facts from which a court could conclude that his or her attorney's performance was deficient and that the deficient performance was prejudicial. ***Allen***, 274 Wis. 2d 568, ¶26. If a defendant's argument falls short with respect to either deficient performance or prejudice, we need not address the other prong. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.").

A. Failing to retain a fire investigation expert to dispute the origin of the fire

¶24 Wand attached to his post-sentencing plea withdrawal motion a report by a fire investigation expert who concluded that the origin and cause of the fire were undetermined, and who criticized as premature, incorrect, and insufficiently substantiated the State's expert's conclusion that the fire resulted from an intentional human act. Wand argues that his trial attorneys were ineffective for failing to obtain his current expert's report before Wand entered his pleas, in order to cast doubt on the State's theory of the fire's origin.

¶25 There are at least two problems with Wand's argument. First, Wand does not back up the general assertion in his motion that he would not have pled guilty if his trial counsel had obtained the fire investigation expert's report concluding that the fire's origin and cause were undetermined. Wand does not

explain why he would have insisted on going to trial. A conclusory assertion that he would not have entered his pleas is not sufficient to entitle him to an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 313 ("A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.").

¶26 Second, the motion fails to allege that the new expert provided more helpful information from a defense perspective. The record discloses that his trial attorneys had in fact retained a fire investigation expert before trial. That expert, like the State's expert, inspected the property after the fire; Wand's postconviction expert did not. However, the defense pretrial expert's report is not in the record and Wand concedes on appeal, as his postconviction counsel told the circuit court, that his pretrial expert's findings and opinions "remain unknown." In his brief on appeal, Wand speculates that his trial attorneys may have disregarded a favorable report so as to avoid going to trial; alternatively, he seems to suggest that his trial attorneys should have obtained a second opinion if the report were unfavorable. But Wand points to no part of his post-sentencing plea withdrawal motion or the record that supports that speculation or suggestion. It was Wand's obligation to determine in which respect, if any, his trial attorneys were ineffective before he made his motion. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 ("A defendant must base a challenge to counsel's representation on more than speculation."); ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334 ("The evidentiary hearing is not a fishing expedition to discover ineffective assistance ....").

¶27 Wand's motion does not acknowledge that his trial attorneys had retained a fire investigation expert before trial, does not present that expert's findings and opinions, does not allege that the pretrial expert's report was tainted

or otherwise deficient, and does not explain why his trial attorneys were deficient either to hire that particular expert or to not seek a second expert. *See* ***Leighton***, 237 Wis. 2d 709, ¶43 (not ineffective assistance for trial attorney to fail to secure second crime scene examination where defendant failed to show that State Crime Laboratory examination was tainted).

¶28 In sum, the record shows that Wand's trial attorneys *did* retain a fire investigation expert before trial, and Wand fails to allege in his motion sufficient facts to entitle him to an evidentiary hearing on his allegation that his trial attorneys were ineffective for *not* retaining a (different or additional) fire investigation expert.

B. Failing to retain a police interrogation expert to support a motion to suppress statements to law enforcement

¶29 Wand alleges that his trial attorneys rendered ineffective assistance by failing "to make use of" a police interrogation expert to support a motion to suppress Wand's statements to law enforcement as "unreliable" because of the interrogation techniques used by law enforcement. It is a violation of due process to admit at trial a defendant's involuntary statements. ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. The due process test of involuntariness requires a balancing of the personal characteristics of the defendant against the pressures and tactics used in the interrogation. ***Id.***, ¶¶38-39.

¶30 Wand attached to his post-sentencing plea withdrawal motion a summary of the testimony by a psychology professor with expertise on issues related to police interrogations and confessions, who concluded that he "cannot offer a professional opinion as to the truthfulness of the statements made by Jeremy Wand in response to investigators' questions," but "that a large number of

risk factors [for a false confession] are present in Mr. Wand's case," and that "[t]hese risk factors, taken together, make it difficult to know if Jeremy's self-incriminating statements were truthful, partly truthful, or the untruthful product of" what the expert called a "coercive" or "intense" interrogation. Wand argues that his trial attorneys were ineffective for failing to retain this expert to support a suppression motion by explaining how the tactics used here, in Wand's words, "contributed to the unreliability of Wand's confession."[1]

¶31 One problem with Wand's argument is that the expert did not conclude that the risk factors present here rendered Wand's statements involuntary. Rather, the expert concluded that the presence of risk factors makes it "difficult to know" whether Wand's statements were "truthful." However, the issue is not whether Wand's statements were truthful, but whether they were involuntary, and the expert does not provide an opinion as to that issue. Accordingly, Wand fails to allege in his motion sufficient facts to entitle him to an evidentiary hearing on his allegation that his trial attorneys were ineffective for failing to retain this particular expert to show that his statements to law enforcement were involuntary.

[1] We address Wand's involuntary confession allegation as he has argued it, in the context of ineffective assistance of counsel. Neither the transcripts nor the tapes of Wand's interviews by law enforcement are part of the record on appeal, and we do not address the merits, if any, of a direct allegation of an involuntary confession.

CONCLUSION

¶32 For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.