COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP637-CR **Cir. Ct. No. 2013CF4564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERAMIE JOSEPH MASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Jeramie Joseph Mason appeals from an amended judgment of conviction for one count of possession of heroin with intent to deliver (more than fifty grams) and one count of keeping a drug trafficking place, both as

a second and subsequent offense, contrary to WIS. STAT. §§ 961.41(1m)(d)4., 961.42(1), and 961.48(1)(b) (2013-14).[1] Mason also appeals from an order partially denying his motion for postconviction relief. Mason argues that he should be allowed to withdraw his guilty pleas because his trial counsel provided ineffective assistance by "advising Mason that the trial court would have to accept Mason's story regarding the drugs being for personal use." (Bolding and some capitalization omitted.) Mason argues in the alternative that his sentence should be modified because he believes the trial court relied on an improper factor—Mason's race—at sentencing. We affirm.

BACKGROUND

¶2 According to the criminal complaint, officers and community corrections agents conducted an unscheduled visit to the home of Mason, who was on extended supervision for possession with intent to deliver cocaine. After being admitted to the residence, they saw a digital scale on the dining room table that contained suspected drug residue. A subsequent search of the home led to the discovery of just over eighty-one grams of heroin, "loose sandwich bags with the corners removed," a sleep aid commonly added to heroin, and $850 in cash. Mason was originally charged with possession with intent to deliver three or fewer

[1] Although the amended information charged both crimes as party to a crime, *see* WIS. STAT. § 939.50, the trial court at the plea hearing struck the party-to-a-crime designation for both counts from the amended information, with the agreement of the parties. Nonetheless, there is a scrivener's error in the amended judgment of conviction indicating that Mason was found guilty of the first count, possession with intent to deliver, as a party to a crime. We direct the circuit court to correct this scrivener's error in the amended judgment of conviction upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

grams of heroin, but the charge was later amended to more than fifty grams of heroin. Mason was also charged with keeping a drug house.

¶3 Mason ultimately entered a plea agreement with the State pursuant to which he pled guilty as charged in the amended information and the State agreed to recommend a global sentence of eight to ten years of initial confinement and eight to ten years of extended supervision, to be served consecutively to any other sentence. The trial court conducted a plea colloquy with Mason during which it asked Mason about the factual basis for his pleas.[2] Mason answered affirmatively when the trial court asked him whether the "criminal complaint [is] correct." The trial court asked Mason what he was "intending on doing with that heroin," and he replied: "I got a bad drug problem, Your Honor."

¶4 Mason's answer led the trial court to question whether there was a factual basis for the plea. The trial court said that if Mason has "a big, bad heroin problem and you're going to use all of the heroin yourself … that's not possession with intent to deliver." Trial counsel then pointed out that Mason's statement to law enforcement indicated that he "shared [the heroin] with another person." The trial court again asked Mason about his intentions:

> THE COURT: You had eighty-one grams of heroin in your drawer that you were just sharing with this [other man]?
>
> THE DEFENDANT: Yes. He's a friend of mine.
>
> THE COURT: A friend of yours. Where did you get eighty-one grams of heroin, sir?
>
> THE DEFENDANT: From a guy that was getting out of the drug dealing business…. It was a good deal, and we basically took it. We got a bad heroin problem…. At the

[2] The Honorable Clare L. Fiorenza accepted Mason's guilty pleas and sentenced him.

> time, I thought it was a blessing, but it was a fool move. I was stupid.
>
> I know a quantity like that is usually not for someone's person, [sic] but usually I don't have that much.

(Bolding omitted.)

¶5 After this exchange, the trial court questioned Mason about the source of the $5000 he claims he spent on the heroin. The trial court also discussed the elements of the crimes, including the fact that to be guilty of keeping a drug house, Mason must have been keeping heroin "for the purpose of warehousing or storage for ultimate manufacture or delivery." *See* WIS JI—CRIMINAL 6037B (2010). The trial court stated: "You're saying you just didn't possess these drugs. You were using them. You were possessing them with the intent to deliver to your friend." Mason agreed with that statement, and he said he would "share" the drugs with his friend "when need be," at no cost to his friend.

¶6 The trial court ultimately accepted Mason's guilty pleas and found him guilty. A PSI report was generated. In that report, the writer questioned the credibility of Mason's version of the offense, which included his assertions that "he was able to purchase $15,000 worth of drugs for $5,000" and that "he purchased the heroin for his own personal usage" and to share with his friend.

¶7 At sentencing, the State discussed twenty-nine-year-old Mason's extensive criminal record and asserted that eighty-one grams of heroin "is not consistent with personal use." In support of that assertion, the State presented the testimony of the officer who interviewed Mason and who regularly conducts narcotics investigations. The officer said he had "never had a case with that amount of heroin attributable to someone who has an addiction or a simple possession case."

¶8 In addition, the officer testified that Mason, who is African-American, "does not fit the demographics of a heroin user" because in the officer's experience, African-Americans do not generally become "involved in the addiction of heroin" until they are "beyond forty years of age." On cross-examination, trial counsel followed up on the officer's testimony, asking: "You're not suggesting to this [c]ourt that there hasn't been a situation in which an African-American under the age of forty [was] … addicted to heroin, are you?" The officer responded: "I'm not saying that that's not a possibility, I'm saying I haven't experienced that throughout my career."

¶9 When trial counsel offered her sentencing recommendation, she commented on the officer's testimony, stating:

> I know the officer's experienced, but there are things he testified to that are of concern. I understand the demographics of people addicted to heroin tend to be Caucasian, but I have plenty of clients who have been addicted to heroin at high levels that are under the age of forty who are African[-]American, so I find that statement is somewhat inconsistent with my twenty-two years as a defense lawyer.

Trial counsel also suggested that it was conceivable Mason was using a lot of heroin, as he claimed. Trial counsel said:

> I often hear the argument that large amounts of drugs are only indicative of sale … but the reality of the situation is I have plenty of clients that are using a lot more drugs on a regular basis tha[n] are ever suspected by law enforcement, apparently.
>
> So the [c]ourt will determine its own conclusions about how much Mr. Mason was using or wasn't using. But if he is sharing with [his friend] and he's using several grams at least every other day and he is saying that this amount was for about a month and a half … it's at least conceivable or within the realm of what he's saying.

¶10 Mason exercised his right of allocution. He told the trial court that he had "turned to drugs and alcohol" to overcome trauma from the past and said he wants to change so that he is no longer "a person who's taking a chance on killing himself and his friends every day with drugs and alcohol, because we could have easily died at any time." Mason told the trial court that he "accept[s] full responsibility for everything."

¶11 In response, the trial court asked Mason about four conversations he had with the mother of his child when he was in jail, all of which were recorded. In those conversations, Mason is heard telling the woman to say that the drugs were hers, that she is a "heavy" heroin user, and that she hid the drugs from Mason. Mason told the woman: "[Y]ou buy your quantities by the month, you know what I'm saying, then they won't get you on the drug dealing aspect, it will be possession, which carries probation." In response to the trial court's inquiry about those recorded conversations, Mason said: "At that time I was withdrawing [from heroin] and I wasn't thinking clearly."

¶12 In its sentencing remarks, the trial court explicitly rejected Mason's claim that he purchased the heroin solely for his personal use and his friend's use:

> [P]ursuant to the defendant's statements, he was using three to four grams of heroin a day. And pursuant to the defendant's statements in the PSI, I take it most of the heroin he had was for personal use, though [he] said that he gave some to [his friend].
>
> I do find that incredible in that I have never seen a person … using that amount of heroin in my courtroom, or at least no one has said they use that amount of heroin. I … find it incredible that that amount was not possessed with an intent to deliver to someone other than [his friend].

Notably, the trial court did not reference the officer's testimony concerning the race of heroin users, and it did not find that Mason was not a heroin user.

¶13 The trial court sentenced Mason to nine years of initial confinement and nine years of extended supervision for possession with intent to deliver. It imposed a concurrent sentence of eighteen months of initial confinement and two years of extended supervision for the charge of keeping a drug house, but it ordered that both sentences be served consecutive to any other sentence.

¶14 After new counsel was appointed, Mason filed a postconviction motion seeking plea withdrawal or sentence modification. He sought a ***Machner***[3] hearing in support of his allegation that his trial counsel provided ineffective assistance at his plea hearing and when she failed to move to suppress unrecorded statements Mason made to law enforcement. In the alternative, he sought to modify his sentence in two ways: (1) he asked that only one mandatory DNA surcharge be imposed; and (2) he sought a reduced sentence based on information indicating that the drugs belonged to the mother of his child, rather than to him. The State filed a response opposing the motion, except it agreed that only one DNA surcharge should be imposed. Mason filed a written reply.

¶15 In a written decision, the trial court granted Mason's request to vacate one DNA surcharge.[4] It denied all other aspects of the motion for reasons discussed below to the extent they are relevant on appeal.[5] This appeal follows.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] The Honorable Daniel L. Konkol considered Mason's postconviction motion.

[5] This court will not discuss the trial court's rulings on issues not pursued on appeal. For instance, Mason no longer argues that trial counsel should have filed a motion to suppress his statement or that there is new evidence suggesting he was unaware of the drugs in his home.

DISCUSSION

¶16 Mason presents two primary arguments on appeal. First, he argues that he should be allowed to withdraw his guilty pleas because his trial counsel provided ineffective assistance by "advising Mason that the trial court would have to accept Mason's story regarding the drugs being for personal use." (Bolding and some capitalization omitted.) Second, Mason argues in the alternative that his sentence should be modified because the trial court relied on an improper factor at sentencing: Mason's race. We consider each issue in turn.

I. Allegations of ineffective assistance of counsel.

¶17 Mason's postconviction motion sought plea withdrawal on grounds that his trial counsel provided constitutionally deficient representation. To establish that an attorney's representation was constitutionally deficient, a defendant must prove: (1) "counsel's performance was deficient"; and (2) "the deficient performance resulted in prejudice to the defense." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. When considering the first prong, "a court looks to whether the attorney's performance was reasonably effective considering all the circumstances." ***Id.***, ¶22. When considering the second prong, a court must consider "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶24 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

¶18 Mason's motion sought a ***Machner*** hearing to develop his allegations of ineffective assistance of counsel. A defendant is not automatically entitled to a hearing on his postconviction motion. *See* ***State v. Howell***, 2007 WI

75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. "[A] defendant must 'allege [ ] facts which, if true, would entitle the defendant to relief.'" ***Id.*** (citation omitted; second set of brackets in original). Our supreme court has explained:

> "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court may in the exercise of its legal discretion deny the motion without a hearing."

State v. Bentley, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). "If the defendant's motion and the record fail to meet these requirements, a [postconviction] court in its discretion may grant or deny an evidentiary hearing." ***Howell***, 301 Wis. 2d 350, ¶75.

¶19 On appeal, we determine independently whether a motion "'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 (citation and footnote omitted). When a "motion fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," then this court considers whether the postconviction court erroneously exercised its discretion when it decided to grant or deny a hearing. ***Id.***, ¶79.

¶20 In his postconviction motion, Mason sought plea withdrawal based on allegations that his trial counsel gave him bad advice that induced him to plead guilty. His motion alleged that trial counsel told Mason "the [c]ourt would have to accept his version—that the drugs were for personal use" and that "[t]his advice was wrong." Mason further asserted that trial counsel's assurance "that the [c]ourt

would sentence him as a user was the only reason he accepted the plea deal." Therefore, he argued, he was prejudiced by his trial counsel's advice because "he accepted a plea he would not have otherwise accepted."

¶21 The trial court rejected Mason's argument, stating that Mason's "assertion that [trial counsel] made some sort of promise to induce … him to enter his pleas is highly speculative and belied by his statement during the plea colloquy that he was not promised anything in exchange for his pleas." The trial court also noted that at the plea hearing, when the question was raised whether there was a factual basis to support Mason's plea, Mason "told the court that he shared the heroin with [another man], and the court relied on that admission as a factual basis for his guilty plea to the charge of possession with intent to deliver heroin." The trial court continued: "While [Mason] alleges that he relied on counsel's advice that there was a difference between sharing drugs and dealing drugs, and that he would be sentenced as a user, he fails to explain why that assurance was so critical to his decision to enter his pleas."

¶22 Having reviewed Mason's postconviction motion, we conclude that it presented only conclusory allegations and that it was therefore within the trial court's discretion to deny the motion without a hearing. *See* ***Howell***, 301 Wis. 2d 350, ¶79. Even if we accept as true Mason's allegation that his trial counsel told him the trial court would *have* to accept his version of events, Mason has not adequately explained why he told the trial court at the plea hearing that he had not been promised anything and also admitted that he shared the drugs with his friend. Moreover, Mason did not raise concerns or attempt to withdraw his plea after the PSI report stated that "his version of events, namely, that he purchased the heroin for [his] own personal usage is not credible" or after the State presented testimony at sentencing suggesting that such a large amount of drugs would not be for

personal use. Mason's motion fails to explain why he would remain silent in the face of those arguments if he believed the trial court was *required* to accept Mason's assertion that the drugs were for personal use.[6] Moreover, when Mason chose to exercise his right of allocution at sentencing, he did not say anything suggesting he believed the trial court was required to sentence him as a drug user.

¶23 In summary, Mason's motion fails to adequately allege how he was prejudiced by trial counsel's alleged statement that the trial court would be required to sentence Mason as a drug user, and the record does not support Mason's bald assertion that he believed the trial court was required to sentence him as a drug user. It was within the trial court's discretion to deny Mason's motion without a hearing, *see* ***id.***, and we conclude it did not erroneously exercise its discretion when it did so.

¶24 We briefly address one other argument Mason makes in his appellate brief. He asserts that trial counsel's statement at the sentencing hearing suggesting Mason and his friend intended to personally consume all of the heroin was an "irrational argument that 81 grams of heroin was for personal use" and this argument "harmed Mason at sentencing." He also made this assertion in his postconviction motion, within the section of his brief asserting that he was entitled to plea withdrawal. It is not clear whether Mason is suggesting he is entitled to relief based solely on trial counsel's performance at sentencing.

[6] We note that Mason offered numerous corrections to the PSI report through his trial counsel. None of the corrections touched on the PSI writer's opinion that Mason's suggestion that the drugs were for personal use was incredible.

¶25 The State points out that trial counsel's alleged deficiency "would not have affected the validity of Mason's plea because the argument was made at sentencing." The State asserts that trial counsel's performance at sentencing is not properly before this court because "Mason never moved for resentencing or modification of his sentence on the ground that his attorney made an irrational argument at the sentencing hearing." We agree with the State's argument, which Mason does not refute in his reply brief. Mason did not seek resentencing or sentence modification based on his trial counsel's sentencing argument, so we will not consider whether trial counsel's sentencing argument was deficient.[7]

II. Request for sentence modification based on the officer's testimony.

¶26 As explained above, a police officer who testified at sentencing said that in the officer's experience, African-Americans do not generally become "involved in the addiction of heroin" until they are beyond forty years of age. On appeal, Mason quotes the officer's statement and then presents a three-paragraph argument on the issue:

> This is clearly a racial based argument as to why Mason could not have been addicted to heroin, and it ignores that Mason was suffering from withdrawal symptoms while in jail. [Trial counsel] voice[d] concerns about the race based testimony but did not object. The [trial court] later made statements showing that it had relied on [the officer's] testimony.
>
> A trial court erroneously exercises discretion if it bases its decision on "clearly irrelevant or improper factors." ***State v. Young***, 2009 WI App 22, ¶23, 316 Wis. 2d 114, 762 N.W.2d 736.

[7] We have considered trial counsel's statements at sentencing to the extent Mason was raising them as evidence that trial counsel told him before he pled guilty that the trial court would be required to sentence him as a drug user, rather than someone who distributed drugs to others.

> A defendant's race is clearly an[] improper factor when determining whether it is possible that the defendant is addicted to heroin. The court should not have relied upon the officer's statement that young African-Americans do not become addicted to heroin. A defendant's race is not a factor which should be considered in determining a sentence. Mason respectfully requests re-sentencing, without the trial court relying upon improper factors.

(Record citations and one period omitted; bolding added.)

¶27 Mason's argument fails for two reasons. First, although Mason's postconviction motion mentioned the officer's testimony in the course of asserting that a motion to suppress should have been filed, his postconviction motion did not seek resentencing on grounds that the trial court relied on an improper sentencing factor.[8] Thus, Mason is raising an issue for the first time on appeal. This court generally does not consider issues raised for the first time on appeal. ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495.

¶28 Second, even if we interpret Mason's argument as a challenge to the trial court's exercise of sentencing discretion and choose to consider the merits of that argument, it fails because Mason has not adequately developed the argument or demonstrated how the record supports his bald assertions. Mason simply asserts that the trial court "made statements showing that it had relied" on the officer's testimony and cites to a particular page in the sentencing transcript. The

[8] As explained earlier, Mason sought sentence modification on grounds that he should pay only one DNA surcharge and that new evidence showed he was not aware of the drugs in his home. He was successful on the first ground and has not pursued the second ground on appeal. Mason's postconviction motion briefly complained about the officer's testimony about race, but only in the context of arguing that trial counsel should have moved to suppress Mason's statements to the officer, which is another argument he has not pursued on appeal. Mason never argued in his postconviction motion that the trial court relied on improper factors at sentencing. The closest he came to alleging trial court error was to include two sentences in his trial court reply brief asserting that the officer's testimony about race should not have been admitted.

portion of the transcript he references is where the trial court explains that it is accepting the officer's testimony that eighty grams of heroin is too much for personal use. The trial court said nothing about the officer's testimony about race and it did not discuss Mason's race. Moreover, the trial court did not find that Mason was not a heroin user. Indeed, the trial court said it said "hope[s Mason] takes advantage of drug treatment when he gets out in the community." Thus, it is clear that the trial court did not accept the officer's opinion that it was unlikely Mason was a heroin user because he did not fit the officer's opinion of the demographics of those who generally use that drug. Mason has not demonstrated that the trial court relied on improper factors at sentencing and, therefore, his challenge to his sentence fails.

By the Court.—Judgment and order affirmed.

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