COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP638-CR **Cir. Ct. No. 2015CF648**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELSEA SANTANA SMITH,

DEFENDANT-APPELLANT.

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

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Kelsea Santana Smith appeals from a judgment of conviction for one count of first-degree reckless homicide, as a party to a crime

contrary to WIS. STAT. §§ 940.02(1), 939.05 (2015-16)[1]. Smith also appeals from an order denying his postconviction motion for a ***Machner***[2] hearing, a withdrawal of his plea or, alternatively, a sentence modification.

¶2 Smith argues that he should be allowed to withdraw his guilty plea because his trial counsel provided ineffective assistance in multiple ways. Smith additionally asserts that his plea was not knowingly and voluntarily made because the State's offer of resolution was not placed on the record during Smith's plea, because the plea was accepted out of fear, and because his attorney made sentencing promises and pressured him into accepting the plea bargain. As an alternative to plea withdrawal, Smith argues that his sentence should be modified because of a new factor relevant to the imposition of his sentence. We affirm.

BACKGROUND

¶3 On Sunday, May 18, 2014, the Milwaukee Police Department responded to a reported shooting incident at 1500 South 22nd Street in the City and County of Milwaukee. Upon arrival they discovered Eduardo Vital-Cazares, who had suffered a gunshot wound to the head. He ultimately died as the result of his injuries.

¶4 Pursuant to a confidential source, Smith, along with Calvin Clayton, was identified as being responsible for the shooting of Vital-Cazares. The complaint alleged that Smith and Clayton were part of a larger group that had

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

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

attempted to rob Vital-Cazares at his residence, and during this attempted robbery Vital-Cazares was shot and killed.

¶5 Smith was subsequently charged with one count of first-degree reckless homicide, use of a dangerous weapon, contrary to WIS. STAT. § 940.02(1), 939.50(3)(b) and 939.63(1)(b). Clayton was charged with one count of felony murder contrary to WIS. STAT. § 940.03. Thereafter, the State made a plea offer to Smith wherein it offered to remove the dangerous weapon enhancer and not advocate for a specific sentence if Smith plead guilty to the charge of first-degree reckless homicide, as a party to a crime. Smith agreed to the plea.

¶6 The court conducted a plea colloquy with Smith and his attorney, reviewing the charges and penalties that could be imposed, the fact that the court is not bound by plea negotiations, and the plea questionnaire/waiver of rights form, which Smith confirmed that he understood. The trial court also reviewed with Smith what rights he was giving up by entering a plea, and confirmed with Smith that nobody had made any promises or threats to get him to enter his plea to the amended information. Smith's trial counsel confirmed that he was satisfied that his client was entering his plea intelligently, voluntarily, and knowingly.

¶7 Thereafter, Smith entered a guilty plea to the charge of first-degree reckless homicide as a party to a crime. The court found him guilty, indicating that it would use the criminal complaint as a factual basis for his plea and waive any testimony if there were no objections. Smith voiced no objection, while his attorney specifically indicated that he had "no objection" to the court proceeding in that fashion.

¶8 The sentencing hearing was held on July 8, 2015. At that time, the court questioned the parties about the presentence investigative report (PSI). The

State then placed the plea negotiations and its recommendation on the record, all of which were consistent with the State's offer of resolution.

¶9 The State's sentencing remarks specifically asserted that Smith was the individual who shot and killed the victim. The State further argued that the firearm that was recovered was the one used to kill the victim, and that this firearm had Smith's DNA profile on the hammer of the gun, as confirmed through testing at the State Crime Lab. The State contended that Smith, aided by Clayton and others, tried to commit an armed robbery, but ultimately Smith shot the victim, causing his death.

¶10 Upon the conclusion of the State's remarks, and after hearing from the victim's girlfriend and his sister-in-law, the court then heard from Smith and his counsel. His attorney noted that, based on their discussions and after reviewing the factors the court had to take into consideration, the nature of this offense required a prison sentence. The court confirmed that Smith understood, and his attorney noted he was not "asking for anything less than that." Smith's attorney recommended a sentence of forty years, consisting of fifteen years of initial confinement and twenty-five years of extended supervision. Smith's counsel acknowledged that "the facts as stated by the [S]tate are, for the most part, correct," it being the State's position, as outlined in the criminal complaint, that Smith was the shooter. This assertion was not refuted by Smith in either the PSI or during the course of his sentencing allocution, Smith choosing rather to express his remorse, and making no mention of his involvement in this offense.

¶11 In its sentencing remarks, the trial court discussed the factors and information it was considering in imposing a sentence, finding Smith's conduct to be outrageous, heinous, and horrid. The court noted that Vital-Cazares was just

minding his own business, working to make and improve his life and the lives of others that he loved. Ultimately, the court sentenced Smith to forty-five years in the state prison system, consisting of thirty-five years of initial confinement and ten years of extended supervision, concurrent to any other sentence that he was then serving.

¶12 On January 6, 2016, Smith filed a postconviction motion seeking a ***Machner*** hearing in support of his request to withdraw his plea, or, in the alternative, Smith sought sentence modification based on new factors. On March 7, 2016, the trial court denied Smith's postconviction motion without a hearing. This appeal follows.

DISCUSSION

¶13 On appeal, Smith primarily seeks to have his plea withdrawn for a number of reasons, including ineffective assistance of counsel, and because he alleges that his plea was involuntary.

¶14 If a defendant wishes to withdraw his plea after sentencing, he must demonstrate, by clear and convincing evidence, that withdrawal is necessary to prevent a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. This higher standard of proof is warranted because:

> ... once the guilty plea is entered the presumption of innocence is no longer applicable, and when the record on its face shows that the defendant was afforded constitutional safeguards, the defendant should bear the heavier burden of showing that his plea should be vacated. Once the defendant waives his constitutional rights and enters a guilty plea, the [S]tate's interest in finality of convictions requires a high standard of proof to disturb that plea.

State v. Krieger, 163 Wis. 2d 241, 249-50, 471 N.W.2d 599 (Ct. App. 1991) (citation omitted). We review the trial court's decision on a postconviction motion for plea withdrawal under the erroneous exercise of discretion standard. ***Id.*** at 250.

¶15 The courts have previously recognized various examples of manifest injustice that, if proven, provide a defendant with proper grounds to withdraw a guilty plea. Several situations from the non-exhaustive list of examples are argued by Smith, including the ineffective assistance of counsel, and that his plea was involuntary. *See* ***Taylor***, 347 Wis. 2d. 30, ¶49. We address each in relation to Smith's claims.

I. Ineffective Assistance of Counsel

¶16 We begin with Smith's claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." ***Id.*** at 691. To demonstrate prejudice, "[t]he 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.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See* ***Strickland***, 466 U.S. at 697.

¶17 A defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony at a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to a hearing upon filing a postconviction motion. A trial court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶18 Whether the allegations necessitate a hearing presents another question of law for our independent review. ***Id.*** If the defendant is not entitled to a hearing—either because the defendant does not make sufficient allegations that, if true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively shows that the defendant is not entitled to relief—the trial court then has the discretion to deny a postconviction motion without a hearing. ***Id.*** We review a trial court's discretionary decisions with deference. ***Id.***

¶19 In this appeal, Smith contends that his attorney was ineffective for allowing him to be sentenced on the basis of the complaint and, specifically, for failing to argue at sentencing that Clayton was the actual shooter, as well as his failure to zealously defend Smith and obtain a further amendment to his charge. Additionally, Smith asserts that the State, by amending the charge to include the party-to-a-crime liability, suspected that Clayton was the shooter. Smith further contends that these facts alone "should have been enough to amend the charges against Smith down to felony murder, the same as Clayton's charge." Additionally, Smith asserts that his trial counsel was ineffective for pressuring him into accepting the plea bargain.

¶20 These arguments, however, are not supported by the record. During the course of his plea colloquy, Smith's counsel specifically indicated that he had "no objection" to the court using the criminal complaint as a factual basis for his plea, to which Smith voiced no objection. Additionally, the State continuously maintained that Smith possessed and discharged the firearm that resulted in the death of the victim. Further, the trial court informed Smith that he was giving up the right to challenge the sufficiency of the criminal complaint and raise any motions or defenses that he may have, to which Smith indicated that he understood. The trial court then asked Smith whether anyone had made any promises to him or threatened him to get him to enter his plea, and Smith confirmed that no one had made any promises or threatened him in exchange for his plea to this charge. The trial court also explained to Smith the maximum penalties and informed him that "the [C]ourt's not bound by any negotiations or plea bargains," and again Smith indicated that he understood.

¶21 Moreover, the record contains a signed plea questionnaire and waiver of rights form, as well as a fully executed addendum to the plea questionnaire and waiver of rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). The plea questionnaire also reflects the maximum penalty that could be imposed and the fact that the trial court is not bound by any agreement and recommendation.

¶22 Additionally, the court specifically discussed with Smith the fact that that his behavior caused the death of the victim and that his act was a substantial factor in producing that death. The court went on to indicate that he caused the death by criminally reckless conduct, all of which Smith understood and acknowledged, while neither he nor his attorney voiced any objection. Ultimately, the trial court confirmed with Smith that there was not anything that he did not

understand by pleading to this offense, and at that point he entered a plea of guilty to the amended charge.

¶23 Based on Smith's agreement and understanding of the factual basis and terms of the plea at the time it was entered, the trial court denied Smith's postconviction motion without a hearing. We agree. We find that Smith's allegations are unsubstantiated, speculative, and conclusory. Smith cites no authority in support of these assertions, and we decline to develop his arguments for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, Smith has failed to establish that his counsel was deficient in his performance or that he was prejudiced by the same, and therefore the court was within its discretion to deny these claims without a hearing. *See* ***State v. Phillips***, 2009 WI App 179, ¶2, 322 Wis. 2d 576, 778 N.W.2d 157. In sum, Smith's postconviction motion failed to establish a non-speculative claim of ineffective assistance of counsel; accordingly the postconviction court properly denied his motion without granting a ***Machner*** hearing, and rejected Smith's manifest injustice argument as it relates to ineffective assistance.

II. A Knowing and Voluntary Plea

¶24 Smith also makes several assertions relating to the issue of whether he knowingly and voluntarily entered his plea. First, he contends that because the terms of the plea agreement were not placed on the record at the time that he entered his plea, it is invalid because he was not aware of the consequences that he faced. Additionally, Smith alleges that his attorney guaranteed that he would receive a sentence of fifteen to twenty years, and that this guarantee was the only reason that Smith plead guilty.

¶25 Further, Smith claims that he was fearful of Clayton, and did not know what Clayton would do if he did not enter a plea to the charge. Additionally, Smith contends that his attorney pressured him into accepting the plea negotiations because he informed Smith that he could not make motions or switch judges and that the "plea deal that he received was the best that he would get." Based on these assertions, Smith is alleging both a defect in the plea colloquy, as well as the existence of extrinsic factors to the plea colloquy which render it infirm.

¶26 As to the State's failure to place the plea negotiations on the record at the time of the plea, Smith cites to the case of ***State v. Hampton***, 2004 WI 107, ¶73, 274 Wis. 2d 379, 683 N.W.2d 14, in support of his position. His reliance is misplaced.

¶27 Smith's reliance on ***Hampton*** stems from that court's statement that "where the court is aware of a plea agreement, the court must advise the defendant personally that the court is not bound by the terms of that agreement and ascertain that the defendant understands this information." ***Id.*** Smith interprets that statement as requiring that the trial court place plea negotiations on the record.

¶28 However, that conclusion is not the holding in ***Hampton***; in fact, that conclusion is contrary to the decision in ***State v. Lee***, 88 Wis. 2d 239, 251, 276 N.W.2d 268 (1979), wherein the court declined to impose such a requirement. Rather, the trial court is required, before accepting a plea, to conduct a colloquy with the defendant to ascertain that the defendant understands the elements of the crime to which he is pleading guilty, the constitutional rights he is waiving by entering his plea, and the maximum potential penalty that can be imposed. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12

(1986). The trial court's colloquy with the defendant helps to ensure that the defendant is knowingly, intelligently, and voluntarily waiving the rights he is giving up by entering a plea. *See* ***State v. Brown***, 2006 WI 100, ¶23, 293 Wis. 2d 594, 716 N.W.2d 906.

¶29 At the plea hearing, the trial court followed those requirements. It explained to Smith the elements of the crime, and confirmed that he had reviewed the jury instructions with his lawyer. The trial court also explained to Smith the maximum penalties and informed him that "the [c]ourt's not bound by any negotiations or plea bargains," provisions that are also set forth in the plea questionnaire and waiver of rights form executed by Smith, and which he indicated he understood.

¶30 The trial court then reviewed the constitutional rights that Smith was waiving by entering his guilty plea and ascertained that Smith understood them, as specifically set forth on the record and by the court's general reference to Smith's plea questionnaire and waiver-of-rights form. The trial court further confirmed with Smith's counsel that he was satisfied that his client was intelligently, voluntarily, and knowingly waiving those constitutional rights.

¶31 The trial court further discussed with Smith that he was giving up the right to challenge the sufficiency of the criminal complaint and raise any motions or defenses that he might have, to which he said that he understood. The trial court then asked Smith whether anyone had made promises to him or threatened him to get him to enter his plea, and Smith confirmed that no one had made promises or threatened him in exchange for his plea.

¶32 Finally, the court asked Smith if "there was anything you do not understand by pleading to the offense" to which Smith indicated that there was

not. This entire exchange demonstrates that the trial court colloquy with Smith was sufficient to ensure that Smith understood the rights he was giving up by entering the plea, thereby confirming that his plea was entered knowingly, intelligently, and voluntarily. *See* ***Brown***, 293 Wis. 2d 594, ¶23.

¶33 Smith's other claims relating to his assertion that his plea was involuntary—that his attorney guaranteed that Smith would receive only fifteen to twenty years if he plead; that he pressured him into accepting the plea offer; and that he was afraid of Clayton and his associates—are raised by way of a ***Nelson/Bentley*** motion[3].

¶34 "[A] defendant invokes ***Nelson/Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. For a defendant to be entitled to an evidentiary hearing under a ***Nelson/Bentley*** motion, he or she must "'allege[] facts which, if true, would entitle the defendant to relief.'" ***Howell***, 301 Wis. 2d 350, ¶75 (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972); (brackets in ***Howell***). However, if the defendant "'fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,'" then the trial court may, in its discretion, deny the motion without a hearing. ***Id.*** (citation omitted).

¶35 Smith's ***Bangert*** motion substantially overlaps with his ***Nelson/Bentley*** motion because they raise the same issue of constitutional fact,

[3] A ***Nelson/Bentley*** motion invokes a line of cases including ***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).

that being whether Smith entered his plea knowingly, intelligently, and voluntarily. This court ultimately determines the sufficiency of the plea colloquy and the need, if any, for an evidentiary hearing, both of which present questions of law that we review independently of the trial court, while at the same accepting the trial court's findings of fact unless they are clearly erroneous. ***Howell***, 301 Wis. 2d 350, ¶¶78-79.

¶36 It is incumbent upon Smith to provide sufficient material facts in support of his position to ultimately entitle him to his requested relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. However, Smith makes only general conclusory allegations, and offers nothing in support of any of these assertions.

¶37 For example, Smith never asserts that he did not understand plea negotiations; in fact, during the course of his plea colloquy with the court, he affirmatively indicated that he understood that the court was not bound by any negotiations or plea bargains, the court "could impose a sentence up to 60 years," and that nobody had made any promises or threats to get him to enter his plea to the amended information.

¶38 Pursuant to the court's questioning, Smith further affirmed that he understood what he was doing by entering his plea to the offense, and his counsel also confirmed that he was satisfied that his client was entering his plea intelligently, voluntarily, and knowingly, and that by doing so, he waived certain constitutional rights, all of which stands in opposition to these assertions. Additionally, Smith has also failed to demonstrate that there was a manifest injustice with regard to the entry of his plea, and therefore, the trial court was well within its discretion to deny his postconviction motion to withdraw his plea without a hearing.

III. Sentence Modification

¶39 As an alternative to plea withdrawal, Smith's postconviction motion and this appeal both seek sentence modification based upon new factors. Sentence modification may be granted "upon a showing of a new factor." ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A "new factor" is defined as:

> [A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor analysis is designed to "correct specific problems" of a sentence. ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81.

¶40 Modification of a sentence based on a new factor is a two-step inquiry. "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Whether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828 (internal citations omitted).

¶41 If a court determines that a new factor is present, then it must determine whether that factor justifies modification of the sentence, which involves the court's exercise of judicial discretion. ***Id.***, ¶37. Therefore, a "defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***Id.***, ¶38. If, however, "a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis.'" ***Id.*** (citation omitted).

¶42 Smith's "new factor" is his contention that he "was not the person with the gun at the time of the attempted robbery," but rather that Clayton was the shooter, and that is what precipitated the State's amendment of the charge to add the party to a crime modifier. This assertion, however, does not constitute a new factor. Clayton's involvement in these events was known since the State's issuance of the original charges in this matter, and further, Smith's assertions were known by the court at the time of the imposition of Smith's original sentence. It was not overlooked by any of the parties. Therefore, Smith's assertions with regard to Clayton do not constitute a "new factor."

¶43 Overall, we conclude that the trial court did not erroneously exercise its discretion when it denied Smith's claims of ineffective assistance without a hearing, that his plea was knowingly and voluntarily made, and that he is not entitled to a modification of his sentence. We further conclude that Smith has failed to establish a basis for the withdrawal of his plea due to a manifest injustice. We therefore affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).