COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1173 **Cir. Ct. No. 2010CF344**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT E. BOYD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Vincent E. Boyd appeals pro se from an order denying his postconviction motion to withdraw his no contest pleas. For the reasons that follow, we affirm.

¶2 In June 2010, the State charged Boyd with two counts of first-degree sexual assault of a child as a persistent repeater. The charges stemmed from allegations that he twice had sexual contact with a seven-year-old girl. Boyd was previously convicted of second-degree sexual assault of a child in 2001.

¶3 The case was delayed multiple times due to Boyd's issues with appointed counsel. Boyd's first attorney was permitted to withdraw for an unspecified conflict. Boyd's second attorney was also permitted to withdraw for a conflict. Boyd's third attorney moved to withdraw after Boyd submitted several pro se filings and asked to be allowed to "act as co-counsel."

¶4 At a hearing on the motion of the third attorney to withdraw, the prosecutor indicated that the State had obtained recordings of telephone calls made by Boyd from jail in which he talked about keeping his appointed attorneys on the case for as long as possible and then firing them at the last minute. The prosecutor argued that Boyd was trying to delay the proceedings and manipulate the system. The circuit court agreed that Boyd was "playing the game." Nevertheless, it granted the motion to withdraw, and a fourth attorney was appointed for Boyd. The court warned Boyd that it would be his last appointment.

¶5 Boyd's fourth attorney was John Wallace. At a conference on the day before trial, Wallace requested a continuance on the ground that he and Boyd had been arguing over defense strategy. The circuit court denied the request, determining it to be a delay tactic by Boyd. Wallace then informed the court that Boyd did not want Wallace to represent him further. The court found Boyd

competent to represent himself and agreed to allow Boyd to proceed pro se with Wallace as "standby counsel."

¶6 During subsequent discussions, the prosecutor expressed concern that Boyd, while acting pro se, might seek to counter the State's other acts evidence by conducting a "trial within a trial." She observed:

> [A]t least one of the other acts' victims, the one from the Langlade County case, the one [Boyd] was convicted of, I know in some of his motions he is questioning that conviction and wants to have a trial within a trial. He's already pled and been sentenced. There's a Judgement of Conviction there. He can't dispute the fact that that's there, and technically, because the charge is first-degree sexual assault of a child, the fact he has been convicted of it by law is allowed to come in, so I just want him to be aware of that as well. He's not going to be able to collaterally attack that conviction at this trial.

¶7 The circuit court agreed with the prosecutor's statement. However, Boyd interjected, and the following exchange took place regarding his ability to explain why he had pled to the prior sexual assault of a child charge:

> [BOYD]: I have the right to defend myself against it. I would—I would like some latitude in questioning the victim and I would talk to—
>
> THE COURT: You will get no latitude.
>
> MR. WALLACE: He's wishes [sic]—he's requesting some latitude in questioning—
>
> THE COURT: You will get no latitude. You don't—just because you're representing yourself doesn't mean you get to violate the rules of evidence. I mean you get to—you're right, you have a right to defend yourself within the law. That doesn't mean just because you're representing yourself you—means you get to ask questions that aren't relevant, that are prejudicial, that are hearsay. You don't get to violate the rules of evidence just because you're representing yourself.

> [BOYD]: No, I understand that. I just think I should be able to tell the jury—
>
> THE COURT: If you don't—if you don't know what the rules are, maybe you should reconsider whether or not you want to represent yourself.
>
> [BOYD]: I'm not allowed to explain to the jury why I pled guilty to the case?
>
> THE COURT: You are not. You don't get to explain anything unless you testify.
>
> [BOYD]: If I testify, am I allowed to tell the jury why I pled guilty to that charge?
>
> THE COURT: No. It's not relevant.

¶8 The next day, Boyd pled no contest to both counts of first-degree sexual assault of a child without the persistent repeater enhancer. The circuit court accepted the pleas as knowingly, voluntarily, and intelligently entered.

¶9 Prior to sentencing, Boyd filed a pro se motion to withdraw his no contest pleas. He alleged that Wallace had pressured him to enter the pleas. He further alleged that the circuit court had improperly pressured him by ruling that he would get "no latitude" when cross-examining witnesses at trial. The circuit court subsequently removed Wallace as counsel and appointed another attorney.

¶10 Boyd's fifth attorney was Gary Schmidt. Schmidt filed a supplement to Boyd's motion to withdraw his no contest pleas. He argued that Boyd "was unduly pressured by the sudden change in circumstances the morning before his scheduled jury trial and made a hasty entry of his plea of no contest." He also argued that Wallace had pressured Boyd to enter the pleas. Following a hearing on the matter, the circuit court denied the motion.

¶11 Schmidt then filed a second motion to withdraw Boyd's no contest pleas. He asserted that Boyd was entitled to withdraw his pleas because he had

entered them without the benefit of the mandated colloquy under ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), which helps ensure the validity of the waiver of the right to counsel. Schmidt also moved for a continuance "[t]o request a transcript of the plea hearing to obtain an accurate record of the questions and statements made at that hearing." The circuit court denied the motion and proceeded to sentencing. Afterwards, Boyd appealed.

¶12 Tricia Bushnell was appointed to represent Boyd in postconviction proceedings. Like Schmidt, Bushnell asserted that Boyd was entitled to withdraw his no contest pleas because he had entered them without the benefit of the ***Klessig*** colloquy. This court determined that the remedy for the failure to conduct the ***Klessig*** colloquy was to remand for a hearing to determine whether Boyd had validly waived his right to counsel. *See* ***State v. Boyd***, No. 2013AP684-CR, unpublished op. and order (WI App Nov. 6, 2013).

¶13 On remand, the circuit court held a hearing and found that Boyd had validly waived his right to counsel. Accordingly, it concluded that Boyd was not entitled to withdraw his no contest pleas. Boyd appealed, and this court affirmed. *See* ***State v. Boyd***, No. 2014AP837-CR, unpublished slip op. (WI App Feb. 26, 2015).

¶14 In March 2016, Boyd filed a WIS. STAT. § 974.06 (2015-16)[1] postconviction motion to withdraw his no contest pleas based upon ineffective assistance of both trial and postconviction counsel. The circuit court denied the motion without a hearing. This appeal follows.

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

¶15 On appeal, Boyd contends that the circuit court erred in denying his postconviction motion without a hearing. He renews the claims made in the motion and asks this court to either grant a hearing or vacate his convictions and permit him to withdraw his no contest pleas.

¶16 To be entitled to a hearing on a postconviction motion, a defendant must allege "sufficient material facts 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. This is a legal question, which we review de novo. ***Id.*** If the motion alleges sufficient facts, a hearing is required. ***Id.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. ***Id.*** We review discretionary decisions under the erroneous exercise of discretion standard. ***Id.***

¶17 In his postconviction motion, Boyd accused his trial counsel (Schmidt) of ineffective assistance for (1) failing to pursue an allegedly meritorious ground for plea withdrawal (i.e., that Boyd was improperly pressured by the circuit court's ruling that he would get "no latitude" when cross-examining witnesses at trial); and (2) failing to obtain transcripts relevant to whether he was entitled to withdraw his no contest pleas. Boyd also accused his postconviction counsel (Bushnell) of ineffective assistance for failing to challenge his trial counsel's effectiveness on these issues. A claim of ineffective assistance requires a showing of both deficient performance and prejudice. ***Id.***, ¶26.

¶18 Here, we are not persuaded that trial counsel was ineffective for failing to pursue plea withdrawal on the basis of the circuit court's "no latitude" ruling. Contrary to Boyd's assertion, the court was not infringing upon his

constitutional right to cross-examine witnesses at trial. Rather, the record demonstrates that the court was simply impressing upon Boyd the need to follow the rules of evidence while representing himself. This meant that Boyd would get "no latitude" in asking questions that were irrelevant, prejudicial, or otherwise in violation of the rules. Thus, Boyd would not be allowed to conduct a "trial within a trial" and collaterally attack his prior conviction for sexual assault of a child. The court's ruling was proper and does not provide a basis for plea withdrawal.

¶19 Likewise, we are not persuaded that trial counsel was ineffective for failing to obtain transcripts relevant to whether Boyd was entitled to withdraw his no contest pleas. As noted, counsel did move for a continuance to request the transcript of the plea hearing before Boyd's sentencing. The circuit court denied the motion. Even if counsel should have requested this or other transcripts earlier, Boyd has not shown that he was prejudiced by the failure to do so. That is, Boyd has not alleged sufficient facts to support a claim that, but for the absence of transcripts, there is a reasonable probability that he would have been permitted to withdraw his pleas. His allegations in this regard are conclusory and therefore insufficient to warrant a hearing.

¶20 Given our determination that Boyd's challenges to trial counsel's performance lack merit, we conclude that postconviction counsel was not ineffective for failing to raise them. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal issue is not deficient performance if the issue would have been rejected). In any event, Boyd's claims are not "clearly stronger" than the one that counsel actually brought. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (to prevail in a claim that postconviction counsel was ineffective

for failing to pursue an issue, the ignored issue must be clearly stronger than the one counsel actually pursued).

¶21 For these reasons, we conclude that the circuit court properly denied Boyd's postconviction motion to withdraw his no contest pleas without a hearing.[2]

By the Court.—Order affirmed.

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

[2] To the extent we have not addressed an argument raised by Boyd on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").