COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1677-CR **Cir. Ct. No. 2013CF1822**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN DEWAYNE ELLIOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kevin Elliott appeals a judgment, entered upon his guilty pleas, convicting him of first-degree reckless injury with use of a dangerous weapon and two counts of armed robbery. Elliott also appeals the order denying his motion for postconviction relief. Elliott argues the circuit court erred by denying his postconviction motion for plea withdrawal without a hearing. We reject Elliott's arguments and affirm the judgment and order.

BACKGROUND

¶2 An amended Information charged Elliott with one count of first-degree reckless injury by use of a dangerous weapon; two counts of armed robbery; two counts of party to the crime of armed robbery; one count of attempted armed robbery; and one count of possession of a firearm by a felon. In exchange for his guilty pleas to first-degree reckless injury by use of a dangerous weapon and two counts of armed robbery, the State agreed to dismiss and read in the remaining four charges and to recommend a prison sentence without specifying a particular length. The defense remained free to argue at sentencing.

¶3 In April 2014, just over a month after the plea hearing, Elliott's attorney, Robert D'Arruda, was suspended by our supreme court for reasons that appear unrelated to the present case. *See* ***OLR v. D'Arruda***, 2015 WI 62, ¶18, 362 Wis. 2d 760, 864 N.W.2d 873. A new attorney, Danielle Shelton, took over representation and appeared with Elliott at his June 2014 sentencing hearing. Out of a maximum possible 110-year sentence, the circuit court imposed consecutive and concurrent sentences totaling twenty-four years, consisting of sixteen years' initial confinement followed by eight years' extended supervision. Elliott's postconviction motion for plea withdrawal was denied without a hearing. This appeal follows.

DISCUSSION

¶4 Elliott sought to withdraw his guilty pleas based upon a claim of ineffective assistance of both of his trial attorneys. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). In a postconviction motion for plea withdrawal, the defendant carries the heavy burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The manifest injustice standard requires the defendant to show "a serious flaw in the fundamental integrity of the plea." ***Id.***

¶5 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Elliott must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶6 An ineffective assistance claim presents a mixed question of fact and law. ***Id.*** at 698. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Id.*** at 690. To prove prejudice, Elliott must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law we review independently. ***Id.***

¶7 The circuit court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). The postconviction motion should present its allegations in a "who, what, where, when, why, and how" format, with sufficient particularity to allow the circuit court to meaningfully assess the claim. ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. When reviewing a circuit court's discretionary act, we use the deferential erroneous exercise of discretion standard. ***Bentley***, 201 Wis. 2d at 311. A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. ***In re Marriage of Krebs v. Krebs***, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989).

¶8 With respect to attorney D'Arruda's representation, Elliott's postconviction motion alleged:

> D'Arruda told the defendant that he would not get more than 10 years of initial confinement and they would start with a recommendation of 3 years in prison. Based on D'Arruda's representations the defendant never expected to receive more than 10 years in prison. The defendant understood D'Arruda's representations to be a promise and pled guilty because of the promise.

Elliott claimed that counsel misled him and his family when counsel "knew that he could not make such a promise," and Elliott relied on counsel's promise in entering his guilty pleas.

¶9 The circuit court found Elliott's motion failed to allege sufficient facts to demonstrate that D'Arruda actually promised Elliott a specific sentencing outcome. However, we need not address the court's exercise of discretion in this regard because, as the circuit court noted, Elliott's motion did not expressly allege that he would have insisted on going to trial but for counsel's alleged promise and, even if such a claim could be implied, he alleged no facts to support it. The court recounted that there were three eyewitnesses in this case, all of whom identified the defendant as the perpetrator from photo arrays presented to them by police. Given the strength of the State's case, Elliott's motion failed to establish why he would have gone forward with a trial rather than receive the benefit of a favorable plea deal that resulted in four of seven offenses being dismissed and read in, thereby reducing his total sentence exposure by half. Because the postconviction motion failed to sufficiently allege a manifest injustice with respect to D'Arruda's representation, the circuit court properly denied the motion without an evidentiary hearing.

¶10 Turning to Elliott's challenge to the effectiveness of attorney Shelton, the postconviction motion claimed that when discussing the upcoming sentencing, Elliott recounted attorney D'Arruda's representation that Elliott would not get more than ten years of initial confinement. Elliott claimed that when Shelton responded that predecessor counsel's view of the case was not realistic, Elliott told Shelton the only reason he entered guilty pleas was because of counsel's promise. Elliott thus asserted that Shelton was ineffective by failing to advise him of the possibility for presentencing plea withdrawal under the less

stringent "fair and just reason" standard. *See* ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995) (defendant seeking presentence plea withdrawal bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal).

¶11 Elliott's postconviction motion again failed to plead sufficient facts warranting a hearing as Elliott failed to explain why, but for Shelton's alleged failure to discuss the possibility of presentence plea withdrawal, he would have insisted on seeking plea withdrawal and going to trial. Elliott's postconviction motion did not allege a viable defense to any of the seven charges he would have faced had he gone to trial. A simple change of heart does not provide a fair and just reason for plea withdrawal. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). Given the strength of the State's case and the benefit Elliott received under what was a favorable plea agreement, we are not persuaded by Elliott's bald assertion that he would have sought plea withdrawal had Shelton suggested it. Elliott's motion was properly denied without a hearing because he failed to plead sufficient material facts to establish that Shelton rendered ineffective assistance.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).