COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1025 **Cir. Ct. No. 2006CF3473**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN A. BANKS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ryan Banks appeals an order denying his postconviction motion to withdraw his guilty plea or, in the alternative, for sentence modification. He also appeals an order denying his motion for reconsideration of that order. Banks contends that he is entitled to plea withdrawal because of ineffective assistance of trial counsel. According to Banks, his trial counsel was deficient by failing to move for suppression of Banks' confession to being the person who shot and killed the victim, and counsel deficiently told Banks that Banks had no defense. Banks asserts that these instances of deficient performance prompted Banks to plead guilty and forgo his right to a trial. More specifically, Banks effectively asserts that (1) he would not have pled guilty because, if his trial counsel had moved to suppress Banks' admissions, the motion would have been granted and the prosecution against Banks would have been dropped and (2) he would not have pled guilty if he had not been pressured to do so by his trial counsel. We conclude that the circuit court properly denied Banks' postconviction motion and his motion for reconsideration, and we affirm both orders.

Background

¶2 As detailed in the criminal complaint, it was alleged that in 2006 Banks, then age 14, brought a loaded revolver to a location where he expected to meet with the victim, a 15-year-old male. At that location, Banks shot the victim three times in the back and the victim died.

¶3 According to a 13-year-old witness, before the shooting Banks had spent part of the afternoon with the witness and three other minors. This witness saw the shooting and initially told police that the shooting occurred after Banks left to go home and that she did not have any idea who the shooter was. The next

day, however, the witness and her mother appeared at a police station and the witness identified Banks as the shooter. The witness said that she had been afraid to identify Banks. Banks was questioned by police and admitted shooting the victim, although his account differed in some important respects from that of the 13-year-old witness.

¶4 On July 7, 2006, Banks was charged with first-degree intentional homicide with the use of a dangerous weapon, a Class A felony. He faced life imprisonment. Pursuant to a plea agreement, Banks entered a plea to first-degree reckless homicide, a Class B felony carrying a possible 60-year sentence, comprised of 40 years of initial confinement and 20 years of extended supervision, with the State agreeing not to make a sentencing recommendation.

¶5 On March 21, 2007, when Banks was 15 years old, the circuit court imposed 20 years of initial confinement and 10 years of extended supervision.

¶6 In 2016, Banks filed a WIS. STAT. § 974.06 motion asking the circuit court to vacate his conviction because of ineffective assistance of his trial counsel.[1] His motion, in the alternative, requested sentence modification. The circuit court denied the motion without an evidentiary hearing.[2]

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

[2] Banks filed both a WIS. STAT. § 974.06 motion and, after that motion was denied, a reconsideration motion, which the circuit court also denied. For ease of discussion, we speak as if there was a single motion containing all of the allegations in both motions.

We also note here that Banks' motions alleged bias and some sort of conspiracy on the part of the police, the prosecutor, his defense counsel, and the circuit court. These allegations are supported by nothing more than speculation on the part of Banks. And, Banks provides no developed supporting legal argument. We discuss the bias and conspiracy allegations no further.

Discussion

¶7 Banks argues that he is entitled to plea withdrawal. He does not allege a plea colloquy defect under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). If Banks had tried to show a plea colloquy defect under ***Bangert***, and had succeeded, the burden of proof would have shifted to the State to show why plea withdrawal was not required. *See* ***id.*** at 274-75. Banks, however, does not rely on ***Bangert***, and the burden here is not on the State.

¶8 Rather, Banks asserts that he is entitled to plea withdrawal because of ineffective assistance of trial counsel. Whether the pro se Banks understands it or not, this means that he is seeking plea withdrawal under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). Under ***Nelson***/***Bentley***, Banks has the burden of proof, which includes the threshold requirement that he allege sufficient facts in his plea withdrawal motion to warrant an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 311-15.

¶9 To establish his claim of ineffective assistance, Banks must show that his counsel's performance was deficient and that the deficient performance prejudiced Banks' defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 With respect to deficient performance, Banks must point to specific acts or omissions by his counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. "Deficient performance is judged by an objective test, not a subjective one." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461. The focus is not on trial counsel's subjective

thinking, but rather on whether counsel's conduct was objectively reasonable. *See* ***id.***

¶11 Proof of prejudice, in this plea withdrawal context, requires that Banks demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Banks' plea withdrawal motion must contain non-conclusory allegations that "'allow the reviewing court to meaningfully assess [Banks'] claim.'" *See* ***State v. Allen***, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting ***Bentley***, 201 Wis. 2d at 314). The supreme court in ***Allen*** explained that a motion sufficient to meet the ***Nelson***/***Bentley*** standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Allen***, 274 Wis. 2d 568, ¶23. If a defendant such as Banks "fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, ... the trial court may ... deny the motion without a hearing." ***Nelson***, 54 Wis. 2d at 497-98.

¶12 Applying the standards above, we conclude that the circuit court here properly denied Banks' WIS. STAT. § 974.06 motion without an evidentiary hearing. As we explain below, key aspects of Banks' motion are conclusory. He has failed to allege facts demonstrating deficient performance or showing a reasonable probability that he would have forgone the benefits of his plea agreement and, instead, taken his chances at a trial.

¶13 In his WIS. STAT. § 974.06 motion, Banks alleged the following:

- Banks' confession was prompted by coercive police activity, including threatening Banks and denying his requests for an attorney.

- Banks' trial counsel performed deficiently by failing to file a suppression motion after telling Banks that counsel would look into Banks' allegations regarding the police interrogation.

- The witness's mother told the witness to change her story to name Banks as the shooter.

- Banks would not have pled guilty because, if his attorney had pursued suppression, the prosecution against Banks would have been dropped and, so the theory goes, Banks would not have faced the choice of entering a plea or going to trial.

- Banks' trial counsel misled Banks by telling him that he had no defense, and counsel coerced Banks by saying that, if Banks did not accept the plea agreement, Banks would be convicted of first-degree intentional homicide and "die in Waupun."

¶14 Banks' allegations in his motion are insufficient in several respects.

¶15 First, Banks' motion says nothing about what Banks' attorney would say, if he were asked, about why he took various steps and failed to take others. And, as we discuss below, given the facts of this case this prevents "meaningful[] assess[ment]" of Banks' ineffective assistance claim. *See* ***Bentley***, 201 Wis. 2d at 314.

¶16 Second, even assuming that Banks told his trial counsel about the alleged police misconduct, Banks' allegations do not defeat an obvious strategic reason for recommending that Banks accept a plea agreement, rather than pursue suppression. Counsel could reasonably have assumed that at a suppression hearing it would be Banks' word against the word of the police officers. And, counsel would have been aware that there was a problem with Banks' assertion that Banks only told the police what they wanted to hear. As we now describe, Banks' admissions deviated in significant ways from both the physical evidence

and what the 13-year-old witness told the police, undermining the proposition that Banks merely repeated allegations that were already known to the police which the police fed to Banks.

¶17 The witness asserted that Banks told her, before the victim arrived on the scene, that Banks' brother, Trevon, told Banks to shoot and kill the victim because of a dispute. The witness told police that Banks later approached the victim, saying words to the effect of "I got a package for you," and fired three or four shots. The medical examiner reported that there were gunshot wounds to the back of the victim's left shoulder, the victim's lower back, and the victim's "back left waist." But Banks told police that he only wanted to scare and rob the victim. Banks' account suggests that he fired into the victim's front side to fend the victim off. Banks told police that, when the victim refused to cooperate and took steps toward Banks, Banks fired his gun. Thus, in key respects Banks' admissions did not match what the police understood from the witness had happened, and trial counsel would have understood that this undercut Banks' credibility.

¶18 We turn to Banks' argument that it is obvious that his statement to the police could have been suppressed because his attorney and the prosecutor agreed that his statement would not be part of the factual basis for the plea. We do not agree. There is an obvious and different explanation for the agreement to inform the circuit court to disregard Banks' admissions for purposes of a factual basis. Regardless whether there was a basis to move to suppress Banks' statements, his account of the shooting does not match the location of the entry wounds and, in key respects, does not match the witness's account. Thus, Banks' account was both unnecessary and, indeed, inconsistent with the apparent prosecution theory of the case.

¶19 Banks' motion makes allegations suggesting that the witness to the shooting was unreliable, including the bald allegation that the witness's mother told the witness to identify Banks as the shooter. The apparent purpose of these allegations is to bolster the idea that, without his confession, the State would have dropped the charges against Banks. But Banks does not suggest any reason why either the mother or the witness would falsely accuse Banks. Banks' motion merely states: "[The witness's] mother, having seen Banks on the porch earlier that evening, told her daughter to change her story and [identify Banks as the shooter]." Further, as we describe in the next paragraph, the mother and the witness gave credible explanations as to why the witness had not identified Banks when the witness initially spoke with police and why the mother had prompted her daughter to come forward the next day.

¶20 As noted in the background section above, when the witness initially spoke with investigating officers, she said that the shooting occurred after Banks left to go home and that she did not have any idea who the shooter was. The next day, the witness and her mother appeared at a district police station. The mother told police that she became suspicious of her daughter's previous account when the mother spoke with the mother of two other children who were present with the witness before and during the shooting. Both of these other children had told their mother that the shooter was Banks.[3] The witness's mother then confronted the witness and the witness's sister, who had also been present, and both girls admitted that the shooter was Banks. The witness said that she had been afraid to

[3] The other children and the witness referred to Banks as "Little Ryan." There is no dispute that "Little Ryan" is Ryan Banks.

identify Banks. The witness then gave an account similar to the one she had given the day before, but this time telling police:

- that, before the shooting, she saw a handgun in Banks' duffel bag;
- that Banks told her to leave the gun alone;
- that Banks later had the gun in his pants pocket and displayed that it was in his pocket by holding his pants tight and she could see the form of the gun in his pants pocket;
- that Banks' brother had picked Banks up and Banks was gone for a time;
- that, when Banks returned, he talked about shooting and killing a boy named Tony (nickname "Real") who would be arriving in a white minivan;
- that Banks said that his brother Trevon told Banks to shoot Tony because "Tony had been previously fighting with and shooting at Trevon's girlfriend's brother"; and
- that, after a white minivan with the victim did arrive, Banks fired three or four shots at the victim and then Banks ran away.

¶21 The information from the witness and her mother is significant in two ways. First, it shows that there was good reason for Banks' trial counsel to think that the witness and her mother would be compelling witnesses for the State. Second, it provides good reason to believe there were multiple other witnesses who could identify Banks as the shooter. Banks' motion entirely ignores these obvious inferences.

¶22 And, to repeat, Banks' motion says nothing about what his trial counsel might say if called to explain counsel's actions and advice. In particular, Banks seems to suggest that he was prejudiced when his counsel told Banks in

strong words that Banks had "no defense." But in his motion Banks does not allege any facts that, if true, would undercut that assessment. Based on the record before the circuit court at the time Banks entered his plea, there is no indication that Banks had a viable defense, even if his statements had been suppressed.

¶23 At this juncture, it is important to remember that Banks received a significant benefit by entering his plea. Banks faced a life sentence. He ended up with a sentence capped at 40 years of initial confinement, as well as the benefit of a commitment from the State to make no argument for any particular sentence. And, his actual sentence turned out to be half that number, 20 years of initial confinement. Even if the factual allegations in Banks' motion regarding the behavior of the police and the behavior of his attorney are true, the allegations do not demonstrate either deficient performance or prejudice.

¶24 In sum, we conclude that Banks has failed to allege facts demonstrating deficient performance or showing a reasonable probability that he would have forgone the benefits of his plea agreement and, instead, taken his chances at a trial. Perhaps more aptly, Banks' motion does not allege facts which, if true, allow for a meaningful assessment of Banks' allegation of ineffective assistance of trial counsel.

¶25 Before concluding, we address three topics.

¶26 First, as we have seen, Banks' motion, in the alternative, requested sentence modification. This request was properly denied for multiple reasons. But, it is sufficient to say here that the request was properly denied because it rested entirely on the proposition that Banks was entitled to sentence modification based on "the same grounds and issues" as otherwise set forth in Banks' motion.

Thus, the alternative request for relief adds nothing to what we have already addressed and rejected.

¶27 Second, Banks' WIS. STAT. § 976.04 motion in the circuit court did not request an evidentiary hearing on his ineffective assistance allegation. Banks asserted that an evidentiary hearing was unnecessary under ***United States v. Cronic***, 466 U.S. 648 (1984). Banks points to language in ***Cronic*** that states: "[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance ...." ***Id.*** at 662. Rather than seeking an evidentiary hearing, Banks' motion requested plea withdrawal and dismissal of the prosecution with prejudice.

¶28 Banks' reliance on ***Cronic*** is misplaced. The quote above appears in the ***Cronic*** Court's discussion of three limited circumstances in which an impairment of the right to counsel is so egregious that it constitutes structural error, thereby eliminating the need for an inquiry into counsel's actual performance. *See* ***id.*** at 658-59 (the "complete denial of counsel," when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and where counsel is called upon to render assistance under circumstances where there is a small likelihood that even competent counsel could provide effective assistance). None of the three ***Cronic*** categories are implicated in this case.

¶29 Here, the general rule holding that a postconviction ***Machner*** hearing is needed for a defendant to get relief applies. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (evidentiary hearing is needed to inquire into counsel's performance and reasons for that performance); *see also* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) ("a hearing [is] required in every case" as a prerequisite to granting relief). Thus, the

circuit court could have denied Banks' motion based on the motion's failure to request an evidentiary hearing, and we could have affirmed the circuit court using this reasoning, even though not employed by the circuit court.

¶30 In Banks' appellate brief, he asserts that, if the circuit court had "doubts or questions," the court "should have ordered an evidentiary hearing or a MACHNER proceeding." We observe that, generally speaking, a circuit court is not required to hold a ***Machner*** hearing when a defendant both fails to request a hearing and affirmatively argues that no such hearing was needed.

¶31 Third, we briefly discuss the State's guilty plea waiver rule argument.

¶32 The State argues that Banks, by entering his guilty plea, forfeited his argument that he is entitled to plea withdrawal based on the proposition that his trial counsel deficiently failed to move to suppress Banks' statements to the police. The State acknowledges that ineffective assistance claims are an exception to the guilty plea waiver rule. *See* ***State v. Milanes***, 2006 WI App 259, ¶13, 297 Wis. 2d 684, 727 N.W.2d 94 ("One exception to [the guilty plea waiver] rule is the claim of ineffective assistance of counsel under the Sixth Amendment.").

¶33 But the State argues that this exception should not apply here because the exception "should apply only to claims that directly implicate the knowing, voluntary, and intelligent nature of the plea." The State notes that, in ***McMann v. Richardson***, 397 U.S. 759, 770 (1970), the United States Supreme Court wrote: "[A] defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." According to the State, "[a] claim that counsel was ineffective for not moving to suppress evidence

is an allegation of a constitutional violation that *precedes* the defendant's entry of a guilty plea" and, therefore, it "should ... be subject to the guilty-plea-waiver rule like any other constitutional violation that does not implicate the plea's validity" (emphasis added).

¶34 The obvious problem with the State's argument is that Banks' ineffective assistance claim *is* directed at his plea. As we have explained, Banks tied ineffective assistance to his plea two ways. First, he contends that his trial counsel incorrectly pressured him to enter a plea, telling Banks there was no defense. Second, Banks claims that, but for the failure to move for suppression, the charges would have been dropped and he would not have entered a plea. Indeed, Banks alleged in his motion that his plea was "unknowing, unintelligent and markedly involuntary" because of his counsel's failings. Thus, Banks, in the words of ***Hill***, alleged that, "but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *See* ***Hill***, 474 U.S. at 59.

¶35 Banks' ineffective assistance claim does not fail because it was forfeited by his plea; it fails because in his motion Banks did not allege sufficient facts under ***Nelson***/***Bentley*** and ***Hill***.

Conclusion

¶36 For the reasons stated above, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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