COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2398-CR **Cir. Ct. No. 2002CF2857**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES G. MONTGOMERY,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Charles G. Montgomery appeals from a judgment of conviction, entered on his guilty plea, for second-degree reckless homicide by use of a dangerous weapon, contrary to WIS. STAT. §§ 940.06(1) and 939.63 (2001-

02).[1] He also appeals from an order denying his motion for postconviction relief. Montgomery argues that he is entitled to withdraw his guilty plea because: (1) his trial counsel provided ineffective assistance by failing to provide Montgomery with all necessary information and failing to fully investigate the case; and (2) Montgomery's plea was not knowingly, voluntarily and intelligently entered. In the alternative, he argues that he is entitled to resentencing because the trial court erroneously exercised its discretion in sentencing Montgomery to thirteen years of initial confinement and five years of extended supervision. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 Montgomery was charged with second-degree reckless homicide in connection with the death of Jessie Neely, the husband of Montgomery's sister, Sheila Neely. According to the criminal complaint that ultimately provided the factual basis for the guilty plea, Sheila and Jessie had domestic disputes that led to Sheila obtaining a restraining order against Jessie. On May 26, 2002, at 12:30 a.m., Jessie came to Sheila's house and tried to enter. Sheila sought help from Montgomery, who was sleeping in Sheila's basement. Montgomery emerged from the basement with a gun in his hand and went outside with the gun.

¶3 According to Montgomery's statement to the police, he yelled for Jessie and started walking toward an alley. Montgomery said that Jessie jumped out from behind the house and that Jessie pushed him. Montgomery said he began falling backward and the gun discharged; he did not know how many times.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Montgomery said Jessie then started running toward the alley. Montgomery dropped the gun and left the scene.

¶4 Later, the police found Jessie dead in the alley. The medical examiner determined that Jessie had been shot in the upper back and that he had died from loss of blood.

¶5 Montgomery was charged with second-degree reckless homicide. He pled guilty and was sentenced to thirteen years of initial confinement and five years of extended supervision.

¶6 Montgomery filed a motion for postconviction relief seeking to withdraw his guilty plea on grounds that: (1) his trial counsel provided ineffective assistance by failing to provide Montgomery with all necessary information and failing to fully investigate the case; and (2) Montgomery's plea was not knowingly, voluntarily and intelligently entered. In the alternative, he argued that he was entitled to resentencing because the trial court erroneously exercised its discretion in sentencing Montgomery to thirteen years of initial confinement and five years of extended supervision. The trial court denied the motion without a hearing. This appeal followed.

DISCUSSION

I. Ineffective assistance of counsel

¶7 Montgomery's first argument is based on ineffective assistance of counsel. To establish ineffective assistance, Montgomery must show that defense counsel's performance was not within the range of competence demanded by attorneys in criminal cases and that the deficient performance prejudiced Montgomery's case. *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.

¶8 On appeal, the issue of ineffective assistance of counsel presents mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Findings of fact are upheld unless clearly erroneous, *see* WIS. STAT. § 805.17(2), and whether counsel's deficient performance was prejudicial is a question of law to be reviewed *de novo*, ***Pitsch***, 124 Wis. 2d at 634.

¶9 An evidentiary hearing is not required in every case. Rather, the trial court shall conduct a fact-finding hearing on an ineffective assistance of counsel claim only when the petitioner alleges sufficient material facts that, if true, entitle him or her to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In order to satisfy this standard, it is suggested that motions "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 309-10.

¶10 Montgomery argues that he was provided ineffective assistance because his trial counsel "failed to fully investigate the matter." His brief explains:

> Mr. Montgomery maintains that there were numerous inconsistencies in the statements given to police by the individuals who were at the residence the night of the shooting. He did not discover the inconsistencies until after he entered his plea because he was not provided with all the discovery materials until after he entered the plea. There were inconsistencies in times given for the time of events

> by Ms. Neely. There were also reports of shots being fired after Mr. Montgomery left the house, after he allegedly shot Mr. Neely. Mr. Montgomery maintains that [trial counsel] should have investigated these matters more fully prior to having Mr. Montgomery enter a plea to the charge. Mr. Montgomery was prejudiced by not having the pertinent information he needed to fully weigh his options in determining whether to enter a plea. Mr. Montgomery maintains that his attorney should have provided him with the discovery materials early in his representation and should have reviewed it with him. Because this was not done, Mr. Montgomery was prejudiced due to not having all the information and being forced into a plea.

¶11 We conclude that the trial court properly denied Montgomery's ineffective assistance of counsel claim without a hearing. First, Montgomery does not identify the specific information that was lacking, and he does not explain with specificity how having that information sooner would have affected his decision to plead guilty.

¶12 Second, the record belies Montgomery's assertions that he lacked information about his case. At the beginning of the sentencing hearing, trial counsel raised with the trial court the issue of Montgomery's dissatisfaction with trial counsel's representation. The trial court engaged Montgomery in a colloquy to determine the source of Montgomery's concerns. Montgomery complained that he had not been given information relevant to his case prior to pleading guilty. Trial counsel told the trial court that prior to entering his plea, Montgomery was provided with everything counsel received from the State.[2] The trial court

[2] Montgomery's appellate counsel has filed a "Motion to Supplement Defendant Appellant's Brief" in which Montgomery alleges that newly discovered evidence supports his claim that he did not receive discovery information before his guilty plea. The motion is actually a request to add newly discovered evidence to the record before us. Newly discovered evidence must first be proffered to the trial court before this court is in a position to review the trial court's determination as to whether it is newly discovered evidence, and if so, its factual and legal significance. *See* ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). The motion is (continued)

observed that at the plea hearing, Montgomery had assured the trial court that he wanted to plead guilty. The trial court found that there was nothing in the record that supported Montgomery's assertion that he had not been provided with police reports and witness statements. The trial court then asked Montgomery whether there was any reason not to proceed with sentencing. He said no, and indicated that the sentencing should continue with trial counsel continuing to represent him.

¶13 The trial court's findings of fact with respect to trial counsel's representations about information provided to Montgomery are not clearly erroneous, based on the record before us. Furthermore, Montgomery has offered no specific assertions about the discovery he says was not timely provided that entitle him to a hearing. We reject his ineffective assistance of counsel claim.

II. Whether the plea was knowingly, voluntarily and intelligently entered

¶14 Montgomery seeks to withdraw his plea after sentencing. In order to do so, he carries the burden of establishing by clear and convincing evidence that he should be permitted to withdraw his plea 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 a defendant to show "'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (citation omitted). Plea withdrawal is necessary to correct a manifest injustice if the plea was not knowingly, voluntarily and intelligently entered. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891.

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denied, without prejudice to Montgomery's right to raise the question of newly discovered evidence, and its impact, by proper motion with the trial court.

¶15 A defendant challenging a plea hearing's adequacy must make two threshold allegations. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). First, the defendant must show a prima facie violation of WIS. STAT. § 971.08 or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274. Second, the defendant must allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815 (Ct. App. 1995). Whether a defendant establishes a prima facie case is a question of law that we review independently. ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). The trial court's findings of fact, however, will be upheld unless they are clearly erroneous. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997).

¶16 Montgomery argues that his plea was not knowingly, voluntarily and intelligently entered because he was emotionally distraught. He notes that at one point during the plea, he cried and wretched into a wastebasket. His brief continues: "Medical records from prison also show that Mr. Montgomery was emotionally disturbed. The record is clear that Mr. Montgomery was not emotionally sound to proceed with his plea and his plea could not have been voluntary."

¶17 While Montgomery asserted at the trial court and on appeal that he is emotionally disturbed, he has produced no evidence to support his claim. There are no medical records supporting this bald assertion. There are no affidavits discussing his mental state. This is insufficient evidence to support the motion for plea withdrawal.

¶18 Moreover, to the extent Montgomery is relying on what occurred at the plea hearing, his claim is likewise rejected. In its order, the trial court stated:

> At the plea hearing, the defendant, although overcome with emotion, stated that he understood what he was charged with and that the maximum sentence he faced upon conviction was twenty years in prison. He stated that he read the complaint and that, except for some factual information that he felt was omitted, everything in the complaint was accurate and true. The defendant further indicated that he understood everything on the Guilty Plea Questionnaire and Waiver of Rights form, that he understood all of the constitutional rights he was waiving, and that by pleading guilty, he was giving up all of those rights. When asked if he was being pressured to enter a guilty plea by anyone, he stated that the detectives told him he may as well plead guilty or else they would charge him with first degree intentional homicide; however, he afterwards acknowledged that it was only after he came to terms with himself that he entered a guilty plea, and not because of any pressure on the part of police detectives. He further stated that he was entering a guilty plea of his own free will, that it was his sole decision, that he was giving up his right to have a trial, and that he was pleading guilty because he was, in fact, guilty. There is no question in the court's mind that the defendant was positively coherent when he entered his guilty plea. He exhibited no confusion, answered the court's questions appropriately, and clearly articulated his responses. Based on the plea transcript, the court finds that the defendant knowingly, intelligently and voluntarily entered a guilty plea … and that plea withdrawal is not warranted.

The trial court's findings are not clearly erroneous. The transcript fully supports the trial court's findings, which the trial court made after having personally observed Montgomery.

¶19 In addition, the fact that Montgomery never attempted to withdraw his plea prior to sentencing further contradicts his assertion that he was coerced into pleading guilty. There is no basis to support his argument. He asserts that he was "coerced into taking the plea by his attorney" and that he believes his attorney "never gave him a chance from the beginning of this case and never spoke with him about the possibilities of taking this matter to trial." He claims his plea was not the product of free and unrestrained will.

¶20 As explained earlier, Montgomery's brief offers only bald assertions about trial counsel's performance and his claim that he was coerced. The record belies his assertions. Montgomery explicitly told the trial court at the plea hearing that he was pleading guilty of his own free will and that he wanted to proceed with sentencing with his trial counsel as his attorney. We reject Montgomery's claims.

III. Whether the trial court erroneously exercised its sentencing discretion

¶21 Montgomery challenges his sentence. He argues that the trial court erroneously exercised its sentencing discretion when it sentenced him to thirteen years of initial confinement and five years of extended supervision. Montgomery claims that he was cooperative throughout the process, and asserts that he should be given credit for not "drag[ging] the entire process out" for the victim's family. He also notes that he was very remorseful, and that he told the trial court he had not intended to hurt or kill Jessie. He states: "The events as laid out for the Court were completely accidental."

¶22 This court will uphold a sentence unless the trial court erroneously exercised its discretion. *See* ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). Public policy strongly disfavors appellate court interference with the sentencing discretion of the trial court. ***State v. Teynor***, 141 Wis. 2d 187, 219, 414 N.W.2d 76 (Ct. App. 1987). In imposing sentence, there are three primary factors that a trial court should consider: the gravity of the offense, the defendant's character and the need to protect the public. ***State v. Borrell***, 167 Wis. 2d 749, 773, 482 N.W.2d 883 (1992). The weight given to each of the sentencing factors is within the trial court's discretion. ***J.E.B.***, 161 Wis. 2d at 662. We presume the trial court acted reasonably, and the defendant must show that the

trial court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** at 661.

¶23 Montgomery appears to challenge his sentence on grounds that the trial court did not give due weight to Montgomery's cooperation and remorse. The record shows, however, that the trial court considered the appropriate factors, including Montgomery's cooperation and remorse. The trial court stated that it gave Montgomery "credit for having pled guilty" and that it believed Montgomery had "genuine remorse" for his actions. The trial court also considered Montgomery's criminal history, and the fact that he was a felon who was forbidden to possess a gun at the time he committed this crime. The trial court observed that Montgomery had not been successful on probation in the past, and opined that Montgomery's decision to go outside with a gun, rather than call the police or take other action, had led to Jessie's death.

¶24 Having examined the sentencing transcript, we are convinced that the trial court acted reasonably, relying on proper bases for the sentence imposed. We discern no erroneous exercise of discretion. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.