COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1464-CR **Cir. Ct. No. 2004CF1113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY LAMONT JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and DENNIS P. MORONEY, Judges.[1] *Affirmed.*

[1] The Honorable Elsa C. Lamelas presided over the pretrial proceedings, entered the judgment of conviction, and heard the first of Jones's two postconviction motions. The Honorable Dennis P. Moroney presided over Jones's second postconviction motion.

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

¶1 PER CURIAM. Anthony Lamont Jones appeals from a judgment of conviction and from an order denying his second postconviction motion to withdraw his guilty pleas. Jones contends that his pleas were not entered knowingly, voluntarily, and intelligently, and therefore they constitute a manifest injustice. We disagree and affirm.

Background

¶2 The facts underlying Jones's appeal involve both a state and a federal prosecution and two postconviction hearings. We review the background in some detail.

¶3 On February 27, 2004, Jones drove his vehicle alongside another car driven by Robert Holt. After Jones and Holt exchanged words, Jones fired several gun shots, one of which hit Holt in the chest and killed him. One passenger in Holt's vehicle, Lashaud Walker, was injured while a second passenger, Jerome Williams, escaped unharmed. Jones was charged with the three offenses to which he eventually pled guilty: one count of first-degree reckless homicide while armed, and two counts of first-degree recklessly endangering safety while armed. *See* WIS. STAT. §§ 940.02(1), 939.63, 941.30(1) (2003-04).[2]

¶4 Jones gave a custodial statement to police following his arrest. He explained that in December 2003, Holt shot Jones. Jones claimed that, based on the prior shooting, the suspicious movement in Holt's vehicle, and Jones's

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

knowledge that Williams had recently been arrested for gun possession, Jones believed that he was in danger when he encountered Holt on the road. Jones claimed that he shot at Holt's car to prevent Holt and Williams from shooting first.

¶5 At the time of the incident, Jones was free on bond following a guilty plea in federal court to a drug offense.[3] Attorney Robert Kaiser was appointed to represent Jones in the federal matter. In advance of the federal sentencing on May 5, 2004, Attorney Kaiser prepared a sentencing memorandum. The memorandum was intended, in part, to rebut the position of the federal probation office that Jones should be denied a sentencing guidelines reduction for acceptance of responsibility in light of the new state charges. Attorney Kaiser argued that Jones's actions constituted self-defense. Ultimately, Jones received a sixteen-year sentence in the federal matter.

¶6 Attorney Cynthia Wynn was appointed to represent Jones in the state prosecution. Attorney Wynn set the matter for trial, but, following plea negotiations, Jones pled guilty. The circuit court engaged Jones in a thorough plea colloquy that elicited Jones's admissions that he had enough time to discuss the case with counsel, that he was satisfied with counsel's representation, and that he understood the rights and the defenses that he forfeited by entering a plea.

¶7 On November 23, 2004, Jones appeared in circuit court for sentencing on the state offenses. Attorney Wynn offered Jones's concerns about his safety in mitigation of the sentence. The State, relying on the location of bullet

[3] The precise federal charge is not stated in the record, but evidently involved conspiracy to distribute cocaine.

casings and the number of shots fired, described the incident as a "pur[suit] shooting" that was "inconsistent with self-defense."

¶8 In conformity with the plea agreement, the State recommended an aggregate term of thirty to forty years of initial confinement, concurrent with the federal sentence. Attorney Wynn asked the court to impose a ten-to-twelve-year consecutive sentence. The circuit court followed the State's recommendation, imposing aggregate concurrent sentences totaling thirty years of initial confinement followed by ten years of extended supervision.

¶9 In November 2005, with the assistance of appointed appellate counsel, Jones moved to withdraw his pleas on the ground that Attorney Wynn provided ineffective assistance of counsel. As relevant here, Jones alleged that Attorney Wynn failed to advise him that he had a viable claim of self-defense.[4]

¶10 At the hearing on Jones's claims, Jones testified that Attorney Wynn never discussed self-defense with him and that he first became aware of a possible self-defense claim after his state sentencing. Further, Jones testified that if Attorney Wynn or anyone else had made him aware of a self-defense claim, he would not have pled guilty.

¶11 Attorney Wynn, by contrast, testified that she "thoroughly" discussed self-defense with Jones "in great detail" over the course of five to ten pre-plea meetings with Jones. Attorney Wynn testified that she eventually presented Jones with a plea agreement and explained that if Jones did not enter

[4] Jones's November 2005 postconviction motion raised additional claims of trial counsel's ineffectiveness that are not relevant to the issues in this appeal.

pleas, the State intended to amend the information and try Jones for first-degree intentional homicide. According to Attorney Wynn, Jones chose to accept a plea agreement to avoid the possibility of a life sentence without parole. At the conclusion of the hearing, the circuit court found Attorney Wynn credible and concluded that she was not ineffective in any respect.

¶12 On January 30, 2007, represented by a new attorney, Jones submitted a second postconviction motion for plea withdrawal.[5] At the hearing, Jones stressed that he was not claiming that Attorney Wynn was ineffective and that he was not bringing his claim under the test for ineffective assistance of counsel set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Rather, the basis for the new motion was Jones's belief that Attorney Wynn was unprepared for trial, regardless of whether she was adequately prepared in fact.

¶13 Attorney Kaiser testified on Jones's behalf and described six meetings with Jones after the shootings to prepare for the federal sentencing. Jones and Attorney Kaiser "talk[ed] a lot about … the self-defense claim" as a component of the federal sentencing proceedings. Attorney Kaiser described additional meetings with Jones to prepare an appeal of the federal sentence.

¶14 Attorney Kaiser testified that Jones indicated an intention to try the state matters and assert self-defense. However, Jones expressed concern that Attorney Wynn had not spent much time with him and he feared that she was not preparing his case. Attorney Kaiser advised Jones about the possibility of

[5] In light of a conflict between Jones and his first postconviction attorney, the State Public Defender appointed new appellate counsel for Jones, and this court extended the deadline for Jones to seek postconviction relief.

requesting a new attorney in the state proceedings. After Jones entered his pleas, but prior to sentencing, Attorney Kaiser advised Jones to "immediately" move for plea withdrawal if his pleas were motivated by concerns that Attorney Wynn was not prepared for trial. Attorney Kaiser also described a telephone conversation with Jones on the day after the state sentencing proceeding in which Jones indicated that "he was not happy" with the sentence.

¶15 Jones testified that he felt abandoned by Attorney Wynn because she communicated inadequately about the trial, the potential witnesses, and her strategy. However, Jones admitted knowing that his defense to the state charges was self-defense, he acknowledged reviewing evidence relevant to a self-defense claim with both Attorneys Wynn and Kaiser, and he admitted knowing the kind of evidence that would be presented at his state trial. Additionally, Jones did not dispute that Attorney Wynn filed a pretrial motion to admit evidence of the victim's prior violent acts. *See* ***McMorris v. State***, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973) (defendant may support a claim of self-defense by proving specific instances of the victim's violence). Rather, he testified that Attorney Wynn never sent him a copy of the ***McMorris*** motion or discussed it with him.

¶16 Jones testified that he lied to the court during the plea colloquy. He explained that he "had no other choice but to take the plea" because he believed that Attorney Wynn was unprepared for trial. He admitted knowing that he could request another attorney, but he chose not to do so for fear that the new lawyer would be worse.

¶17 Jones admitted discussing with Attorney Kaiser the possibility of plea withdrawal prior to sentencing, but he elected not to pursue that motion. He admitted that he subsequently got "whacked" at sentencing.

¶18 The circuit court denied Jones's motion, concluding that Jones's efforts to withdraw his pleas reflected nothing more than disappointment with his punishment. *See* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). This appeal followed.

Discussion

¶19 To withdraw a plea after sentencing, a defendant "must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Milanes***, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94. A defendant may seek plea withdrawal by showing: (1) the plea colloquy is defective; and/or (2) factors outside of the plea colloquy fatally undermine the plea. *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. Here, Jones concedes that the plea colloquy fully conformed to the dictates of WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). He necessarily relies on facts outside of the plea proceedings to show that his pleas constitute a manifest injustice.

¶20 Jones asserts that he had a reasonable belief that his attorney was unprepared for trial; therefore, he was compelled to resolve the charges by pleading guilty. He concludes that his pleas were not entered knowingly, voluntarily, and intelligently as a result. A plea that is not knowingly, voluntarily, or intelligently entered violates due process and is a manifest injustice. *See* ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994).

¶21 The issue of whether a plea is knowingly, voluntarily, and intelligently entered presents a question of constitutional fact. ***State v. Lackershire***, 2007 WI 74, ¶24, 301 Wis. 2d 418, 734 N.W.2d 23. We accept a circuit court's findings of historical and evidentiary fact unless they are clearly

erroneous, but we determine *de novo* whether those facts demonstrate that the plea was entered knowingly, voluntarily, and intelligently. *See* ***id.***

¶22 A plea colloquy in compliance with ***Bangert*** is "clothed with a presumption of its validity." ***State v. Basley***, 2006 WI App 253, ¶17, 298 Wis. 2d 232, 726 N.W.2d 671. A defendant seeking to avoid the effect of a facially valid plea colloquy on the grounds that the plea was involuntary must show that any alleged coercion was legal coercion rather than self-imposed. *See* ***Craker v. State***, 66 Wis. 2d 222, 228-29, 223 N.W.2d 872 (1974).

¶23 Here, the circuit court rejected Jones's testimony that the pleas were coerced. Rather, the court found that Jones's decision to plead guilty stemmed from an assessment of the "totality of the evidence." Referring to Jones's analogy that his decision to plead guilty was made at metaphorical gunpoint, the court found that Jones's choice was not at all similar to having "a gun to your head." By implication, the circuit court did not find Jones's testimony credible. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (on appeal, we assume findings of fact were made implicitly in favor of the decision). Because that credibility determination is not clearly erroneous, we accept it. ***Milanes***, 297 Wis. 2d 684, ¶16 n.3.

¶24 During his first postconviction motion, Jones testified that if Attorney Wynn or anyone else had told him that he had a possible claim of self-defense, he would not have entered guilty pleas. In his second postconviction motion, Jones admitted knowing that his trial strategy would be self-defense, but he entered guilty pleas because Attorney Wynn failed to convince him that she had prepared the self-defense claim for trial. In the face of Jones's wholly contradictory explanations for his decisions, the circuit court could properly reject

Jones's testimony regarding the more recently crafted rationale for entering his pleas.

¶25 Further, Jones's evidence of the pretrial events, even if credited, does not amount to legal coercion. The decision to plead guilty is legally coerced only when the defendant "'is not given a fair or reasonable alternative.'" ***Lackershire***, 301 Wis. 2d 418, ¶63 (citation omitted).

¶26 In this case, Jones discussed with Attorney Kaiser the possibility of replacing Attorney Wynn and the right to ask for that relief. Jones nonetheless elected not to ask the court to appoint new counsel, gambling that he had the best available. Jones was not denied a choice or forced to go forward in the face of an objection. *Cf.* ***id.***, ¶¶62-64 (pregnant defendant claiming fear that stress of trial would affect her pregnancy not legally coerced to plead guilty when she did not ask to postpone the trial). Consequently, Jones's plea was not legally coerced. *See* ***id.***

¶27 Not only did Jones consider and reject the option to request a new attorney before entering his plea, Jones also failed to move for plea withdrawal between his plea and his sentencing. The circuit court found that Jones discussed plea withdrawal with Attorney Kaiser, but did not pursue the motion. The court reasonably concluded that Jones was aware of an alternative course of action, but instead "took his chance" on the punishment. This choice does not demonstrate a manifest injustice. "[D]isappointment in the eventual punishment imposed is no ground for withdrawal of a guilty plea." ***Booth***, 142 Wis. 2d at 237.

¶28 Jones asserts that, because the court imposed the forty-year concurrent sentence recommended by the State, "there can be no inference of disappointment." Jones is wrong. The record contains ample facts from which the

circuit court could infer Jones's disappointment with the sentence imposed, including Jones's own statements that he was "whacked" at sentencing and "was not happy" with the outcome.[6] The circuit court could reasonably reject Jones's explanation for his actions and infer from the record that Jones was dissatisfied with the sentence and motivated by his disappointment to move for plea withdrawal.[7] Accordingly, we are bound by those determinations. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶29 Moreover, Jones's claim does not provide a basis for relief, even had the court accepted Jones's contentions as true. At bottom, Jones's claim is that Attorney Wynn was constitutionally effective, but insufficiently comforting. We agree with the State, however, that an attorney's conduct is judged by an objective standard. Counsel's performance must fall "'within the range of competence demanded of attorneys in criminal cases.'" ***Milanes***, 297 Wis. 2d 684, ¶17 (citation omitted). When the attorney satisfies that obligation in counseling a plea, the defendant may not withdraw that plea because the attorney could have done more or counseled differently. *Cf.* ***id.*** (plea of guilty based on reasonably competent advice is a knowing, voluntary, and intelligent plea not open to attack on ground that counsel may have misjudged the admissibility of defendant's confession).

[6] Additionally, Jones's first postconviction motion included a request for sentence modification.

[7] The circuit court adopted the State's sentencing recommendation, not Jones's.

¶30 Here, Jones concedes Attorney Wynn's competence.[8] Accordingly, his complaints that Attorney Wynn failed to advise him regarding the implications of the pretrial ***McMorris*** motion, the status of her trial preparation, or any other matters, cannot support plea withdrawal. "A failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea." ***United States v. Broce***, 488 U.S. 563, 574 (1989). Our supreme court has previously followed the rationale of ***Broce*** in determining the effect of a plea and has concluded that ***Broce*** represents sound guilty plea practice. *See* ***State v. Kelty***, 2006 WI 101, ¶¶2, 40-45, 294 Wis. 2d 62, 716 N.W.2d 886 (discussing ***Broce*** in relation to a multiplicity challenge). We apply it here.[9]

¶31 Absent a constitutional violation, the decision to permit plea withdrawal lies within the circuit court's sound discretion. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Jones failed to demonstrate that his pleas were entered involuntarily, and he did not sustain the

[8] On appeal, as before the circuit court, Jones unequivocally disavows any reliance on ineffective assistance of counsel as a basis for relief.

[9] Several courts have explicitly rejected efforts to secure plea withdrawal where defendants allegedly felt insecure about competent counsel's abilities and level of trial preparation. *See, e.g.*, ***United States v. Torres***, 129 F.3d 710, 716-17 (2d Cir. 1997) (fear that counsel was unprepared for trial insufficient to permit plea withdrawal where claim is not supported by colloquy and there is no evidence that counsel was in fact unprepared); ***United States v. McCarty***, 99 F.3d 383, 385 (11th Cir. 1996) (defendant represented "ably and professionally" by counsel not entitled to withdraw plea based on claim that he was intimidated by his lawyer who failed to investigate or prepare for trial). Jones has not cited a case that reaches a contrary conclusion.

heavy burden of demonstrating a manifest injustice. The court did not erroneously exercise its discretion by refusing to permit Jones to withdraw his pleas.

By the Court.—Judgment and order affirmed.

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