COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2511-CR **Cir. Ct. No. 99 CF 4107**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUJUAN T. NASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Dujuan T. Nash appeals from a judgment entered after he pled guilty to one count of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1), and to one count of mutilating a corpse, contrary to

WIS. STAT. § 940.11(1) (1999-2000).[1] Nash also appeals from an order denying his postconviction motion to withdraw his plea. Nash claims that he should be allowed to withdraw his plea on the grounds that: (1) his plea was not knowingly and voluntarily entered; and (2) he was denied the effective assistance of counsel. We affirm.

I.

¶2 Dujuan T. Nash was charged with killing and mutilating the dead body of Quinnavin Johnson. After an initial police investigation, Nash became the primary suspect. Nash was taken to the police station for questioning. The police informed Nash of his ***Miranda*** rights, and Nash told the police that he remembered stabbing Johnson in the neck, directly under the chin.[2] Nash told the police that he cut the clothing off of Johnson, dragged Johnson's body to the bathroom, and, after Johnson was dead, cut off Johnson's arms and legs with a steak knife. He then put the body parts into trash bags and put the trash bags into two large suitcases. Nash told the police that he disposed of the body parts at five different dumpsters. Police officers went to each of the five dumpsters but did not find anything because the dumpsters had been emptied.

¶3 Nash's attorney filed a motion to suppress all of Nash's statements to the police, claiming that the police officers violated Nash's ***Miranda*** rights and that the police officers used "pressure and coercion" to obtain Nash's statement. The motion was never litigated. Nash pled guilty to both charges and the trial

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

court sentenced Nash to forty years in prison on count one and ten years in prison on count two, to run consecutive to count one.

¶4 Nash filed a postconviction motion to withdraw his pleas. Nash claimed that he did not knowingly and voluntarily enter his pleas because he did not understand the difference between criminal intent and criminal recklessness, and because he did not understand his sentence. Nash also claimed that his trial counsel was ineffective because: counsel failed to litigate the motion to suppress his statements to the police; counsel failed to explain the meaning of intent; and counsel misinformed Nash of his parole eligibility dates.

¶5 The trial court held a ***Machner*** hearing.[3] Nash testified that his trial counsel never discussed the elements of the charges with him. Nash also testified that his attorney told him that he (Nash) would get out of prison in twelve and one-half years. Nash further claimed that he told his trial attorney that he wanted to litigate the motion to suppress his statements to the police, but that his trial attorney "just ran around the question."

¶6 Nash's trial attorney also testified at the ***Machner*** hearing. Nash's attorney testified that he went through the elements of the crimes when he reviewed the complaint and the information with Nash. Nash's attorney also told the trial court that he did not tell Nash that he would be out of prison in twelve and one-half years; rather, he told Nash that Nash would be eligible for parole in twelve and one-half years. Finally, Nash's attorney testified that Nash never insisted on litigating the motion to suppress and that he (Nash's attorney) did not

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

pursue the motion because, after reviewing the police reports, he did not feel that it would have been successful.

¶7 The trial court denied Nash's motion. The court concluded that Nash's statements to the police were voluntary because the police did not make any threats against Nash when they questioned him: "In this case here, the Court will find that ***Miranda*** rights were given at all times and that the statements that were given were voluntary. There has been not one scintilla of evidence that I have received here today that would indicate to the contrary." The court also found that Nash's plea was knowing and voluntary because the trial court informed Nash of the maximum possible sentence at the plea hearing. The court further determined that Nash's attorney did not misrepresent the conditions of Nash's parole to Nash and that if Nash believed he was going to get out of prison in twelve and one-half years, it was only because Nash "perceived what [he] wanted to hear and how [he] wanted to hear it."

II.

¶8 Nash's allegations involve overlapping claims of ineffective assistance of counsel and involuntariness of his plea. Nash alleges that his plea was not knowingly and voluntarily entered because his trial counsel did not adequately explain the element of intent. Nash also claims that his plea was involuntary because his trial counsel misrepresented to Nash that he would be out of prison in twelve and one-half years. We disagree.

¶9 Whether to permit withdrawal of a plea is a discretionary decision for the court and we will not disturb the court's findings absent an erroneous exercise of discretion. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698, 708 (1998). In a motion to withdraw a guilty plea after

sentencing, the defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***Birts v. State***, 68 Wis. 2d 389, 392–393, 228 N.W.2d 351, 353 (1975). A manifest injustice occurs when the defendant was denied the effective assistance of counsel. ***Id.***, 68 Wis. 2d at 393, 228 N.W.2d at 353.

¶10 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice in the context of a plea withdrawal, the defendant must show 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. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996).

¶11 Our standard for reviewing this claim involves a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). At a postconviction hearing on the claim, the trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses. ***Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980). Thus, we will not reverse a trial court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law. ***Johnson***, 153 Wis. 2d at 128, 449 N.W.2d at 848. We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶12 A manifest injustice also occurs when the defendant does not knowingly, voluntarily, and intelligently enter his or her plea. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). A defendant challenging the adequacy of a plea hearing must make two threshold allegations. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986). First, the defendant must make a showing of a *prima facie* violation of WIS. STAT. § 971.08(1)(a) or other mandatory procedures. ***Id.*** Second, the defendant must allege that he or she did not know or understand the information which should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815, 817–818 (Ct. App. 1995). Whether a defendant has presented a *prima facie* case that a plea was entered knowingly, voluntarily, and intelligently is a question of "constitutional fact" that we will review without deference to the trial court. ***Bangert***, 131 Wis. 2d at 283, 389 N.W.2d at 30. The trial court's findings of historical facts will not be upset unless they are clearly erroneous. ***Id.***, 131 Wis. 2d at 283–284, 389 N.W.2d at 30.

¶13 To assure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08(1)(a) to ascertain whether a defendant understands the nature of the charges to which he or she is pleading, the potential punishment for those charges, and the constitutional rights being relinquished. ***Bangert***, 131 Wis. 2d at 260–262, 389 N.W.2d at 20–21. This function can be served by a detailed colloquy between the judge and the defendant or by referring to some portion of the record or communication between the defendant and his lawyer which exhibits the defendant's knowledge of the nature of the charges and the rights he relinquishes. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24. The court may also make references to a signed

waiver-of-rights form. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

¶14 First, Nash claims that his plea was involuntary because "he did not understand the fact that if he were to take the case to trial, and if the state amended the charge to alleged first[-]degree intentional homicide, that the state would then have had to prove beyond a reasonable doubt that Nash intended to kill Johnson." Nash also appears to claim that his trial counsel was ineffective because counsel failed to explain the element of intent to Nash before he pled guilty. We disagree.

¶15 The ***Machner*** hearing evidence supports the trial court's conclusion that Nash's attorney was not ineffective. At the hearing, Nash's attorney testified that he reviewed the elements of first-degree reckless homicide with Nash and that Nash did not have any questions. Nash's attorney also testified that he discussed the difference between recklessness and intent with Nash. This was sufficient. Section 971.08(1)(a) only requires that the defendant understand the elements of the charge or charges to which he or she is pleading. *See* ***State v. McKee***, 212 Wis. 2d 488, 494–495, 569 N.W.2d 93, 96 (Ct. App. 1997) (The trial court is not required "to go beyond the procedures outlined in ***Bangert*** for accepting a plea."). Here, Nash was charged with first-degree *reckless* homicide, not first-degree *intentional* homicide. Thus, Nash's attorney appropriately reviewed the law with Nash when he went through the elements of first-degree reckless homicide.[4] Accordingly, Nash fails to show that his trial counsel's performance was deficient.

[4] Although the trial court did not make an explicit finding of fact on this issue, it implicitly found that Nash's counsel appropriately reviewed the elements of the charges. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311–312, 470 N.W.2d 873, 878-879 (continued)

¶16 Moreover, the record clearly shows that Nash's plea was knowingly, voluntarily, and intelligently entered. At the plea hearing, the trial court explained the elements of both charges to Nash before Nash pled guilty and Nash responded that he understood:

> THE COURT: Do you also understand that the State must prove up its case on each of these counts beyond a reasonable doubt. They do so by proving up various elements of each offense. Has counsel gone over with you and explained to you the elements the State would have to prove up beyond a reasonable doubt on each count now before this court?
>
> [NASH]: Yes.
>
> THE COURT: Let's go over them one more time. As to Count 1, the State would have to prove that you did on July 30, 1999, at or near 5204 North Lovers Lane Road, Apartment No. 1, the City and County of Milwaukee, State of Wisconsin, that you did recklessly cause the death of another human being, namely a Quinnavin, Q-U-I-N-N-A-V-I-N, Johnson, under circumstances which show utter disregard for human life, contrary to Wisconsin Statute Section 940.02(1) of our statutes.
>
> Do you understand the elements the State would have to prove up beyond a reasonable doubt as to Count 1?
>
> [NASH]: Yes.
>
> THE COURT: And in Count 2 the State would have to prove up the following. That you did on July 30, 1999, at or near 5204 North Lovers Lane Road, Apartment No. 1, the City and County of Milwaukee, State of Wisconsin, that you did dismember a corpse with the intent to conceal a crime, contrary to Wisconsin Statute Section 940.11(1) of our statutes.

(1991) (a trial court's finding of fact may be implicit from its ruling). The trial court heard Nash testify that his trial counsel did not review the elements of the crimes with him; it heard Nash's attorney testify that he did review the elements of the crimes with Nash; and it concluded that "counsel acted appropriately."

> Do you understand the elements that the State would have to prove up beyond a reasonable doubt as to Count 2?
>
> [NASH]: Yes.

Nash also signed a guilty-plea questionnaire and a waiver-of-rights form. At the plea hearing Nash told the court that he reviewed the form with his attorney and that he understood "each paragraph." Nash's attorney also informed the court that he went over the guilty-plea questionnaire and waiver-of-rights form with Nash and indicated that he (Nash's attorney) was "fully satisfied" that Nash understood the elements of each crime. *See* ***Moederndofer***, 141 Wis. 2d at 827, 416 N.W.2d at 629 (the trial court may refer to "some portion of the record or some communication between defense counsel and defendant" to ascertain whether the plea is knowingly, voluntarily, and intelligently entered). Thus, Nash fails to show a *prima facie* violation of § 971.08(1)(a). Accordingly, Nash cannot show that his plea was involuntary because he did not understand the elements of the charges.

¶17 Second, Nash claims that his plea was involuntary because his trial counsel's statements led Nash to believe that he would be released from prison after twelve and one-half years. Nash claims that his trial attorney never told him that he could face a longer sentence because not everyone is paroled when they first become eligible. We disagree.

¶18 At the ***Machner*** hearing, Nash's attorney testified that he never told Nash that Nash would be released from prison after twelve and one-half years. Nash's attorney testified that he told Nash that the maximum sentence for his offenses was fifty years and that if Nash received the maximum, Nash would be eligible for parole in twelve and one-half years. The only evidence to the contrary is Nash's self-serving testimony that his trial counsel told him that he would be out

of prison in twelve and one-half years. The determination of witness credibility is left to the trial court. ***Dejmal***, 95 Wis. 2d at 151–152, 289 N.W.2d at 818. Here, the court found Nash's attorney more credible. Nash has not shown that this finding is clearly erroneous. Accordingly, Nash again fails to prove deficiency.

¶19 Moreover, the trial court clearly explained Nash's sentence to him at the plea hearing:

> THE COURT: Do you understand that in Count 1 you are being charged with first-degree reckless homicide. There upon conviction the maximum penalty is a fine of not more than 40 years in the Wisconsin State Prison.
>
> Do you understand the maximum penalty that could be given to you upon conviction of the first-degree reckless homicide count in Count 1 of the information?
>
> [NASH]: Yes.
>
> THE COURT: In Count 2 you are being charged with mutilating a corpse. There upon conviction the maximum penalty is a fine of not more than $10,000 or imprisonment for not more than 10 years or both. Do you understand the maximum penalties that could be given to you upon conviction of the offense in Count 2, mutilating a corpse?
>
> [NASH]: Yes.

Thus, Nash again fails to show a *prima facie* violation of § 971.08(1)(a). The trial court took great pains to determine that Nash understood the potential punishment if convicted, and we again note that Nash reviewed and signed a guilty-plea questionnaire and a waiver-of-rights form that contained the maximum penalties for the crimes charged. Accordingly, Nash fails to show that his plea should be withdrawn because it was not entered knowingly, voluntarily, and intelligently.

¶20 Finally, Nash alleges that his trial counsel was ineffective because counsel failed to litigate the motion to suppress his statements to the police. Nash

claims that the trial court erred when it determined that the motion to suppress would have been unsuccessful and that his statements were inadmissible because they were involuntary. We disagree.

¶21 "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured [through] coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235–236, 401 N.W.2d 759, 765 (1987). Whether a confession is voluntary under the totality of the circumstances requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressure. ***State v. Pheil***, 152 Wis. 2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989). "However, we do not reach this balancing unless there is some improper or coercive conduct by the police." ***Id.***

¶22 We will uphold the trial court's finding of evidentiary or historical facts unless those findings are against the great weight and clear preponderance of the evidence. ***Clappes***, 136 Wis. 2d at 235, 401 N.W.2d at 765. We independently review the trial court's conclusion by applying constitutional principles to facts found by the trial court. ***Id.***

¶23 Here, the trial court found that Nash's statements were voluntary. The trial court found that Nash was properly advised of his ***Miranda*** rights and that no threats were made to him: "I think generally it's a fair statement that there were no threats." Nash concedes that "[i]t is probably not possible to demonstrate that these findings of fact, as far as they go, are clearly erroneous."

¶24 Nash claims that the trial court erred, however, because it failed to consider the totality of the circumstances surrounding Nash's statements, including that: (1) Nash was questioned for many hours without making any

inculpatory statements; (2) Nash was under the influence of alcohol and marijuana when he made the incriminating statements; and (3) Nash was not taking the medication that he needed to treat his mental illness. This claim fails for several reasons.

¶25 First, at the ***Machner*** hearing, a police officer testified that Nash was coherent and showed no visible signs of intoxication or mental illness during questioning. Nash does not refute this testimony. Second, Nash does not present any evidence that his alleged intoxication or his mental health interfered with his ability to give a voluntary statement. *See* ***State v. Smith***, 125 Wis. 2d 111, 120, 370 N.W.2d 827, 832 (Ct. App. 1985), *rev'd on other grounds by* ***State v. Smith***, 131 Wis. 2d 220, 224, 388 N.W.2d 601, 603 (1986) (A mental illness does not render a statement involuntary unless the "ability to act and respond freely was affected by [the defendant's] mental condition."); ***Clappes***, 136 Wis. 2d at 241–242, 401 N.W.2d at 768 (intoxication does not affect the admissibility of a confession where there is no proof that the defendant was irrational, or unable to understand questions or responses, otherwise incapable of giving a voluntary response, or reluctant to answer questions). Finally, Nash does not present any evidence of police coercion. Without any evidence of police coercion, our involuntariness analysis ends. ***Pheil***, 152 Wis. 2d at 535, 449 N.W.2d at 863.

¶26 Thus, Nash has not presented any evidence that his statements were involuntary. Accordingly, Nash fails to show how he was prejudiced by his counsel's failure to litigate the motion and the trial court properly denied Nash's motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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