COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2786 **Cir. Ct. No. 2004CF6413**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN L. RAUSCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jonathan L. Rausch appeals *pro se* from a circuit court order that denied his postconviction motion filed pursuant to WIS. STAT.

§ 974.06 (2007-08).[1] He asserts that reason existed to doubt his competency to proceed at the time of his guilty pleas, and that he did not plead guilty knowingly, intelligently, and voluntarily. We reject his contentions and affirm the postconviction order.

BACKGROUND

¶2 Rausch pled guilty in 2005 to three counts of armed robbery as a party to a crime. At the outset of the plea proceeding, Rausch told the circuit court that he was taking Prozac and Trazodone to treat depression and another mental disorder that he could not recall. In response to the court's inquiry, Rausch stated that the medications did not cause him any confusion about the proceedings. Additionally, Rausch's trial counsel told the court that he and Rausch had discussed the effect of Rausch's medications, and trial counsel was "very satisfied" that the medications allowed Rausch "a clearer understanding of what is going on than was first present when [trial counsel] first interviewed [Rausch] shortly after his arrest." After conducting a detailed colloquy with Rausch and further questioning his trial counsel, the circuit court accepted Rausch's guilty pleas. At the subsequent sentencing hearing, the circuit court imposed three concurrent twenty-eight-year sentences, each bifurcated as fourteen years of initial confinement and fourteen years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Several years later, Rausch filed a *pro se* motion alleging numerous claims for postconviction relief pursuant to WIS. STAT. § 974.06.[2] The circuit court denied the claims without a hearing, and this appeal followed.

DISCUSSION

¶4 On appeal, Rausch presents claims related to his competency to proceed and to the validity of his guilty pleas.[3] Both of Rausch's bases for relief involve an allegation that Rausch received ineffective assistance from his trial counsel. We assess such claims using the familiar two-prong test set out in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under ***Strickland***, a defendant must show both a deficiency in counsel's performance and prejudice resulting from the deficiency. ***Id.*** To establish deficient performance, the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

[2] For reasons that do not appear in the record, Rausch did not pursue a direct appeal in this matter. We note that Rausch obtained appellate counsel and that we granted appellate counsel's motion for an extension of the deadlines to pursue a direct appeal under WIS. STAT. RULE 809.30. The extended time limits passed without Rausch filing a notice of appeal or postconviction motion, and Rausch's right to a direct appeal lapsed. *See* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 195, ¶35, 296 Wis. 2d 580, 724 N.W.2d 692 (right to direct appeal expired when defendant did not exercise appellate rights within time limits established by this court).

[3] Rausch raised a variety of claims for relief in his postconviction motion that he does not renew on appeal. These included claims that his trial counsel performed ineffectively by: (1) failing to review discovery material; (2) failing to file "standard and requested motions"; (3) failing to keep him informed; and (4) failing to preserve his direct appeal rights. Rausch also claimed that his postconviction and appellate counsel performed ineffectively by failing to file postconviction motions and that the circuit court erroneously exercised its sentencing discretion. We deem these claims abandoned, and we do not address them. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).

result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to make an adequate showing as to one prong, the reviewing court need not address the other. ***Id.*** at 697.

A. Competency

¶5 Rausch first asserts that reason existed to doubt his competency to proceed at the time of the guilty plea hearing. He argues that his trial counsel performed ineffectively by failing to raise the issue and that the circuit court erred by failing to question his competency *sua sponte*. We disagree.

¶6 Competency to proceed is "a judicial inquiry, not a medical determination .... Although a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to [proceed]." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (citations omitted). A person is competent to proceed if the person possesses both "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and ... a rational as well as factual understanding of a proceeding against him or her." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997).

¶7 When trial counsel doubts the defendant's competency to proceed, counsel must raise the issue with the circuit court and failure to do so constitutes deficient performance. ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). Additionally, the circuit court has a duty to initiate competency proceedings pursuant to WIS. STAT. § 971.14(1), whenever there is reason to doubt a defendant's competency. ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). "A reason to doubt competency can arise from the defendant's demeanor in the courtroom, colloquies with the court, or by a motion

from either party." ***Byrge***, 237 Wis. 2d 197, ¶29. Whether there is reason to doubt the defendant's competency is a question committed to the circuit court's discretion. ***Garfoot***, 207 Wis. 2d at 223-24.

¶8 Rausch relies on his trial counsel's statement that he displayed a "clearer understanding" at the time of the plea hearing than he displayed earlier in the proceedings as a reason to doubt his competency. Rausch argues that he "exhibited mental disorders shortly after his arrest that appeared to be successfully treated with Prozac and Trazodone, [and that] was enough evidence for the court to stay the plea hearing and order Mr. Rausch [to] undergo a competency examination." Rausch's conclusion does not follow from his premise. His successful treatment does not suggest that he lacked competency to proceed. "[A] competency inquiry focuses on a defendant's ability at the time of the *present* proceeding." ***State v. Farrell***, 226 Wis. 2d 447, 454, 595 N.W.2d 64 (Ct. App. 1999). Moreover, "[a] defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency." WIS. STAT. § 971.13(2).

¶9 Rausch points out that he claimed to carry two diagnoses but could recall the name of only one at the time of the plea hearing. Memory lapses, however, are normal and do not demonstrate lack of competency. *See* ***State v. McIntosh***, 137 Wis. 2d 339, 348, 404 N.W.2d 557 (Ct. App. 1987).

¶10 The record reflects that Rausch responded appropriately to the circuit court's questions throughout the plea colloquy. Nothing suggests that Rausch was disoriented or impaired during the hearing, and he fails to identify any point at which he exhibited any confusion about what was happening in court. Rausch also fails to identify any evidence of his incompetency at the time of the

plea hearing that trial counsel had available but did not bring to the attention of the circuit court. *Cf.* ***Johnson***, 133 Wis. 2d at 223-24 (withholding available evidence of defendant's incompetency from circuit court may constitute ineffective assistance of trial counsel). Thus, Rausch has not demonstrated either that his trial counsel performed deficiently by failing to raise the issue of competency or that the circuit court erroneously exercised its discretion when it did not order a competency examination *sua sponte* at the time of the plea hearing.

B. Knowing, intelligent, and voluntary nature of guilty pleas

¶11 A defendant who wishes to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883. Rausch claims that his guilty pleas were not entered knowingly, intelligently, and voluntarily. "The constitution requires that a plea must be voluntarily, knowingly and intelligently entered and a manifest injustice occurs when it is not." ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998).

¶12 According to Rausch, his guilty plea was infirm because the circuit court conducted a defective plea colloquy and because his trial counsel performed ineffectively. We examine each contention separately.

¶13 A claim for plea withdrawal bottomed on an alleged defect in the plea colloquy is governed by ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Howell***, 2007 WI 75, ¶¶26-27, 301 Wis. 2d 350, 734 N.W.2d 48. In this case, Rausch alleges that the circuit court did not explain either the concept of party-to-a-crime liability or the potential punishment he faced. *See* ***Bangert***, 131 Wis. 2d at 262 (circuit court has statutory obligation pursuant to

WIS. STAT. § 971.08 to establish on the record that the defendant understands the nature of the crime charged and the range of punishments it carries).

¶14 A defendant moving for plea withdrawal pursuant to ***Bangert*** must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) "allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes the necessary showing, the circuit court must hold an evidentiary hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant's plea was knowingly, intelligently, and voluntarily made. ***Id.***, ¶40.

¶15 A ***Bangert*** claim, however, cannot be pursued in the context of a postconviction motion filed under WIS. STAT. § 974.06. Motions filed under § 974.06 are limited to issues of constitutional or jurisdictional dimensions. ***State v. Carter***, 131 Wis. 2d 69, 81, 389 N.W.2d 1 (1986). An allegation that the circuit court failed to follow the procedures of WIS. STAT. § 971.08 or other court-mandated duties is not an allegation of a constitutional violation. *See* ***Carter***, 131 Wis. 2d at 82-83. Therefore, Rausch cannot maintain a ***Bangert*** claim for plea withdrawal in this proceeding.

¶16 We turn to the claim that Rausch's guilty pleas are invalid because Rausch received ineffective assistance from his trial counsel. In support of this contention, Rausch alleges that his pleas were not entered knowingly, intelligently, and voluntarily because his trial counsel failed to ensure that he understood the elements of the offense or the maximum penalties. This is a basic constitutional

challenge to the validity of the pleas. Such a claim can be pursued under WIS. STAT. § 974.06. *See* ***Carter***, 131 Wis. 2d at 81-83.

¶17 A claim that a plea is infirm for reasons outside of the record, such as the ineffective assistance of counsel, invokes the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***Howell***, 301 Wis. 2d 350, ¶¶2, 74. A ***Nelson/Bentley*** motion for plea withdrawal, "must meet a higher standard for pleading than a ***Bangert*** motion." ***Howell***, 301 Wis. 2d 350, ¶75. The motion "must allege sufficient, nonconclusory facts ... that, if true, would entitle [the defendant] to relief." ***Id.***, ¶76. When the motion fails to include sufficient facts to warrant relief, the circuit court may deny the motion without a hearing if the record as a whole conclusively demonstrates that no relief is warranted. ***Id.***, ¶77.

¶18 Our review of a ***Nelson/Bentley*** motion is *de novo*. *See* ***Howell***, 301 Wis. 2d 350, ¶78. We determine as a matter of law "whether a defendant's motion to withdraw a guilty plea 'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, (footnote and citation omitted).

¶19 Rausch alleges insufficient facts to warrant relief. He contends that his trial counsel "failed to take the necessary steps" to ensure that he understood the charge and the penalties. This is an entirely conclusory assertion that does not explain what steps counsel should have taken or how the omission of those steps disadvantaged Rausch. He further alleges that his trial counsel's billing records overstate the number of hours that counsel spent in consultation with Rausch. This allegation simply does not demonstrate any deficiency in counsel's explanation of the elements of the offense or counsel's description of the statutory

penalties. Thus, Rausch did not allege sufficient nonconclusory facts that would entitle him to relief. *See* ***id.***, ¶76.

¶20 Further, the record as a whole demonstrates that Rausch is not entitled to relief because it shows that Rausch understood the elements of the offense and the maximum penalties that he faced when he entered his pleas. *See* ***id.***, ¶78. The record contains a guilty plea questionnaire and waiver of rights form signed by both Rausch and his trial counsel. The form reflects Rausch's understanding that he faced three counts of armed robbery as a party to the crimes. The elements of armed robbery and the maximum penalties for the offense are handwritten on the form. The form reflects that Rausch reviewed the elements and the penalties with his counsel and that he understood them.

¶21 During the plea colloquy, Rausch told the circuit court that he had reviewed the plea questionnaire with his trial counsel. The circuit court discussed the elements of armed robbery and asked Rausch if he understood what the State would have to prove in order to convict him of each armed robbery as a party to the crime. Rausch replied that he understood. The circuit court probed further, asking Rausch if he understood the term "party to a crime," and whether his trial counsel had explained that concept. Rausch replied: "yes, your honor." Additionally, the circuit court asked Rausch's trial counsel if he had explained to Rausch the meaning of the term "party to a crime," and trial counsel replied affirmatively.

¶22 The circuit court explained the maximum penalties to Rausch: "those armed robberies, as a party to a crime, are what we call Class C felonies. They carry with them fines of up to $100,000, imprisonment for up to forty years,

or both on each of those three charges." The circuit court asked Rausch if he understood the maximum penalties for the charges, and Rausch replied that he did.

¶23 The record conclusively refutes Rausch's claims that he did not understand the elements of the offense or the maximum penalties. The record establishes that Rausch reviewed with his trial counsel the elements of the offense and the maximum penalties and that he understood the information when he pled guilty. Therefore, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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