COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010
A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2416-CR **Cir. Ct. No. 2008CF3333**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY RAY ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 KESSLER, J. Timothy Ray Anderson appeals from a judgment of conviction for taking and driving a vehicle without the owner's consent, contrary

to WIS. STAT. § 943.23(2) (2005-06),[1] and from an order denying his motion for postconviction relief. Anderson argues that the trial court erred when it denied his postconviction motion without an evidentiary hearing. We conclude that Anderson was not entitled to a hearing on his postconviction motion and that the trial court did not erroneously exercise its discretion in denying him one. We affirm the judgment and the order.

BACKGROUND

¶2 Anderson was charged with taking and driving a vehicle without the owner's consent, a Class H felony, *see* ***id.***, as well as armed robbery with threat of force, a Class C felony, contrary to WIS. STAT. § 943.32(2) (2005-06). According to the criminal complaint, Anderson approached a woman at a gas station, pushed her and then said, "This is a stick-up, bitch!" The woman told police that after Anderson took what the woman believed was a gun from his left pants leg, the woman exited her car and ran to her sister's car, which was nearby. The woman said Anderson drove away in her car.

¶3 Anderson admitted to police that he took the car and drove it without the woman's consent. However, he said that he actually knew the victim, that they had an argument and that he drove off in her car. He denied threatening her.

¶4 The State and Anderson reached a plea agreement. The plea questionnaire/waiver of rights form stated that the agreement was as follows: "Dismiss (outright) Armed Robbery charge—both sides free to argue for

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

appropriate sentence." Anderson did not admit to the facts in the criminal complaint, but rather offered his own version of events (both in writing and orally at the plea hearing) to provide a factual basis for his plea on the lesser charge. Anderson told the trial court: "We was out drinking because I know the victim. We been to Atlanta together and grew up in the same neighborhood and we got into a little confrontation and she gave me the keys and I drove off ... because I was upset." Anderson told the trial court that although the victim gave Anderson the car keys, she told him to give them back. Rather than doing that, Anderson took the car and drove off. The trial court accepted Anderson's guilty plea and found him guilty.

¶5 At sentencing, the State argued for imposition of the maximum sentence: three years of initial confinement and three years of extended supervision, consecutive to any other sentence.[2] The State argued that Anderson either had a weapon or made the victim think he had a weapon when he took her car. The State said that the maximum sentence was appropriate because of Anderson's lengthy criminal history, including fourteen convictions for robbery, not including dismissed or read-in charges. The State characterized Anderson as "one of the most prolific robbers in Milwaukee County history," noting that Anderson continued to commit robberies even after losing a leg in one of his robberies.

¶6 Anderson's trial counsel acknowledged Anderson's criminal history, but asserted that Anderson had sought drug and alcohol treatment since the crime

[2] Anderson was on parole at the time he committed this crime; his parole was subsequently revoked.

was committed. Trial counsel also emphasized Anderson's version of the crime, arguing:

> there is a tremendous difference in terms of the severity of the offense when somebody ... basically pulls you out of your car at gunpoint, drives off, it's a stranger, you['ve] never seen him before, as opposed to you have been drinking with some people, you get in an argument, you get mad and drive off with the car.

Trial counsel suggested that an appropriate disposition would be to impose and stay the maximum period of incarceration and extended supervision and place Anderson on probation.

¶7 The trial court discussed the parties' arguments concerning what occurred when the car was taken. It stated: "Each side has a different version as to how the events took place, but let me point out, the armed robbery was dismissed and it was not read in for any type of sentencing purposes, so I'm not considering that there was an armed robbery." The trial court sentenced Anderson to three years of initial confinement and three years of extended supervision. The trial court cited numerous reasons for imposing the maximum sentence, including Anderson's lengthy record, the fact that Anderson committed this crime within six months of being released from prison, and the trial court's assessment that Anderson presented "an extremely high risk to reoffend" from which the public needed protection.

¶8 Anderson filed a motion for postconviction relief, seeking to withdraw his plea on "grounds that his plea was not entered knowingly, voluntarily, and intelligently because he misunderstood the plea agreement, in particular the legal ramifications at sentencing of dismissed charges." In the alternative, Anderson alleged that he should be allowed to withdraw his guilty plea

based on ineffective assistance of counsel. He claimed his trial counsel provided ineffective assistance because counsel "misunderstood the legal ramifications of dismissed charges at sentencing, specifically bargained for the [armed robbery] charge to be dismissed and not 'read-in' because of that misunderstanding, and incorrectly advised Anderson of the legal consequences of the plea agreement." Anderson sought an evidentiary hearing on both claims.

¶9 The trial court denied Anderson's motion without a hearing, in a written decision. With respect to Anderson's first argument, the trial court found that the effect of the dismissed armed robbery charge at sentencing (i.e., the fact that it could be referenced) was a collateral consequence that Anderson misunderstood. Recognizing that some Wisconsin cases have permitted plea withdrawal where a defendant misunderstood a collateral consequence, the trial court concluded that the facts in this case did not support that remedy. The trial court noted that neither the State nor the trial court had made affirmative statements that contributed to Anderson's misunderstanding, and that Anderson had signed a factual basis form that advised him "that the State was not precluded from asserting other facts beyond what the defendant was offering as a factual basis for his guilty plea to the operating a vehicle without owner's consent charge."[3] (Emphasis omitted.)

¶10 With respect to Anderson's allegations that his trial counsel provided ineffective assistance, the trial court found that Anderson had not been prejudiced by the erroneous advice trial counsel allegedly gave, because the trial court did not

[3] The form stated: "This 'Factual Basis' is offered to allow the Court to accept a Guilty or No Contest plea. **Defendant understands that the court is not in any way limited to those facts listed above at sentencing; the State and any victim(s) may assert other facts.**"

consider the disputed facts concerning the taking of the vehicle when it imposed the maximum sentence, as the trial court stated on the record at sentencing.

¶11 For those reasons, the trial court denied Anderson's postconviction motion to withdraw his guilty pleas. This appeal follows.

LEGAL STANDARDS

¶12 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997), *modified on other grounds*, ***State v. Kivioja***, 225 Wis. 2d 271, 293-96, 592 N.W.2d 220 (1999); *see also* ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794 ("[A] defendant is entitled to withdraw his [or her] guilty plea if the [trial] court's refusal to allow withdrawal of the plea would result in a manifest injustice."). "The withdrawal of a plea under the manifest injustice standard rests in the [trial] court's discretion." ***McCallum***, 208 Wis. 2d at 473. On appeal, we will reverse the trial court only if it failed to properly exercise its discretion, such as if it bases its exercise of discretion on an erroneous application of the law to the facts. ***Id.***

¶13 "A defendant may demonstrate a manifest injustice by showing that [the] guilty plea was not made knowingly, intelligently, and voluntarily," ***Hoppe***, 317 Wis. 2d 161, ¶60, or that the defendant was denied the effective assistance of counsel, ***State v. Wesley***, 2009 WI App 118, ¶22, 321 Wis. 2d 151, 772 N.W.2d 232. When a defendant alleges that he or she should be allowed to withdraw his or her plea because the plea was not made knowingly, intelligently, and voluntarily, this court is presented with a question of constitutional fact. ***Hoppe***, 317 Wis. 2d 161, ¶61. "We accept the [trial] court's findings of historical and

evidentiary fact unless they are clearly erroneous … [but w]e independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.*** (footnote omitted).

¶14 When a defendant alleges ineffective assistance as a basis to withdraw a plea, the defendant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *See* ***Wesley***, 321 Wis. 2d 151, ¶23. Applying the ineffective assistance standard in the plea withdrawal context, a defendant may establish a manifest injustice by showing that counsel's conduct or advice was objectively unreasonable and that, but for counsel's error, the defendant would not have entered the plea. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

DISCUSSION

¶15 Anderson argues that the trial court erroneously denied his postconviction motion without a hearing. Where, as here, the defendant alleges that plea withdrawal is necessary to avoid manifest injustice but does not assert a ***Bangert*** violation, the ***Nelson/Bentley*** standard is used to determine whether a hearing is required.[4] *See* ***State v. Allen***, 2004 WI 106, ¶¶12-13, 274 Wis. 2d 568, 682 N.W.2d 433 (describing the procedure for determining whether a postconviction hearing is required outside of the ***Bangert*** context). The

[4] "***Bangert*** and ***Nelson/Bentley*** motions ... are applicable to different factual circumstances. A defendant invokes ***Bangert*** when the plea colloquy is defective; a defendant invokes ***Nelson/Bentley*** when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48 (footnote omitted); *see also* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

postconviction motion must allege "who, what, where, when, why, and how." ***Id.***, ¶23. If "the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief," the trial court must hold an evidentiary hearing. ***Id.***, ¶9. Whether the motion raises such facts "is a question of law that we review de novo." ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Id.*** On appeal, we review the trial court's exercise of discretion using "the deferential erroneous exercise of discretion standard." ***Id.***

¶16 In this case, we agree with the trial court that Anderson was not entitled to an evidentiary hearing, but on different grounds than those cited by the trial court. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 ("On appeal, we may affirm on different grounds than those relied on by the trial court," and when we do so, "we need not discuss our disagreement with the trial court's chosen grounds of reliance.").

A. Misunderstanding of the plea agreement.

¶17 We begin with the first ground for relief alleged in Anderson's motion: "that his plea was not entered knowingly, voluntarily, and intelligently because he misunderstood the plea agreement, in particular the legal ramifications

at sentencing of dismissed charges."[5] Our supreme court has recognized that "in some situations, a mistaken understanding of the law can result in manifest injustice." ***State v. Denk***, 2008 WI 130, ¶73, 315 Wis. 2d 5, 758 N.W.2d 775 (citing ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, and ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983)). For instance, the court in ***Brown*** held that "a manifest injustice occurred when the defendant's plea resulted in the precise legal consequence he entered the plea to avoid." ***Denk***, 315 Wis. 2d 5, ¶73. Specifically, Brown believed that the charges to which he entered no-contest pleas did not require him to register as a sex offender or subject him to WIS. STAT. ch. 980 commitment. *See* ***Brown***, 276 Wis. 2d 559, ¶2.

¶18 In ***Denk***, the defendant entered into a plea agreement with the State, pursuant to which Denk was "to plead guilty or no contest to felony possession of methamphetamine" and "[i]n exchange, the State dismissed the felony methamphetamine paraphernalia charge and the misdemeanor charges for possession of marijuana and marijuana-related paraphernalia." ***Id.***, 315 Wis. 2d 5, ¶21. After sentencing, he sought to withdraw his plea on grounds that it was not entered knowingly or voluntarily because "he, his attorney, the prosecutor, and the judge were all under the misapprehension that he could have been convicted of felony possession of paraphernalia, the charge that was dismissed." ***Id.***, ¶65.

[5] Anderson asserts that "[t]he misunderstanding of 'dismissed outright' shared by [him] and his trial counsel is contrary to established case law" because in ***State v. Leitner***, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, the court recognized that "[a] sentencing court may consider uncharged and unproven offenses ... [and] prosecutors may not keep relevant information from a sentencing court." *See* ***id.***, ¶45 (footnotes omitted). For purposes of this decision, we will accept Anderson's assertion that his understanding of the meaning of "dismissed outright" was contrary to existing law. *But see* ***State v. Wesley***, 2009 WI App 118, ¶20, 321 Wis. 2d 151, 772 N.W.2d 232 (expressing opinion that term "dismissed outright" is ambiguous).

¶19 The Wisconsin Supreme Court rejected Denk's argument. It declined to decide whether Denk could have been convicted of felony possession of paraphernalia, an issue that Wisconsin's appellate courts had not yet decided, after concluding that the case could be decided by analyzing "whether Denk received the benefit of the bargain." *See* ***id.***, ¶70.

¶20 ***Denk*** began by distinguishing both ***Brown*** and ***Riekkoff***—where plea withdrawal was allowed—because in both cases the dispute involved the charge to which the defendant actually pled and whether "the consequence for which the defendant had bargained when he entered the plea to the charge was a legal impossibility." *See* ***Denk***, 315 Wis. 2d 5, ¶75. ***Denk*** continued:

> In contrast, Denk did not plead to the charge in question, rather, his argument relates to his understanding of the charge that was dismissed. Here, the bargain was that in exchange for a plea to a felony possession of methamphetamine charge, the State would dismiss the felony drug paraphernalia charge and two other misdemeanor charges. And that is exactly what happened. By entering into a plea agreement, Denk substantially minimized his exposure. The maximum sentence for the three dismissed charges was six years incarceration for the felony, and six months and thirty days respectively for the two misdemeanors.
>
> The terms of the plea agreement further provided that the State would limit its request at sentencing to jail time rather than prison time for the charge to which he entered a plea. And it did. The maximum sentence of incarceration for felonious possession of methamphetamine was three years and six months.
>
> Unlike the cases upon which Denk relies, this was not a plea based on an illusory promise, but rather it was a plea where the promise was realized. At sentencing, Denk received the benefits of his bargain. He avoided exposure to a substantial period of incarceration. As agreed, the State dismissed the three charges and argued for a withheld sentence, three years probation, and six months in jail. The judge sentenced consistent with the State's argument, except Denk received only five months in jail as a

> condition of probation. Thus, we determine that Denk failed to meet his burden of showing a manifest injustice, entitling him to a plea withdrawal.

Id., ¶¶76-78 (footnote omitted).

¶21 Applying the same reasoning here, we conclude that Anderson has "failed to meet his burden of showing a manifest injustice, entitling him to a plea withdrawal." *See* ***id.***, ¶78. For purposes of this decision, we accept as true Anderson's assertion that both he and his attorney believed that having the armed robbery dismissed outright meant that those allegations would not be considered at sentencing.[6] Ultimately, even though the allegations concerning what Anderson said and did when he took the car were discussed at sentencing, the trial court explicitly stated that it would not consider those facts in fashioning a sentence. As noted, the trial court said: "Each side has a different version as to how the events took place, but let me point out, the armed robbery was dismissed and it was not read in for any type of sentencing purposes, so I'm not considering that there was an armed robbery." Anderson has not challenged either the trial court's sentencing statement that it *would not* consider those facts, or the same trial court's statement in its postconviction order that it *did not* consider those facts in sentencing Anderson. Thus, we accept those statements as true.[7] Anderson

[6] Anderson's attorney never objected at sentencing when the State argued the facts related to the alleged armed robbery and, in fact, trial counsel argued Anderson's side of the story. However, the postconviction motion asserted that trial counsel told postconviction counsel that he believed that when a charge is "dismissed outright," then it "cannot be argued or considered at sentencing." As noted, for purposes of this opinion we will assume the accuracy of the postconviction motion's assertion.

[7] While Anderson did receive the maximum sentence, the trial court made clear that the maximum sentence was necessary based on Anderson's extensive criminal record and the fact that he committed the instant crime while on parole. Anderson has not challenged the trial court's exercise of sentencing discretion.

received the benefits of the plea bargain: the armed robbery charge was dismissed, which reduced his total exposure from forty-six years to six years, which "substantially minimized his exposure." *See* ***id.***, ¶76. Further, at sentencing, the allegations related to the dismissed charge were not factored into his sentence on the lesser charge. Having received the benefits of the bargain, Anderson has not shown a manifest injustice that would entitle him to plea withdrawal.[8] *See* ***id.***, ¶78.

¶22 Because the record conclusively demonstrates that Anderson is not entitled to relief, the trial court had the discretion to grant or deny an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Anderson has not challenged the trial court's exercise of discretion denying his request for a hearing, electing instead to focus on his argument that a hearing was required. We decline to disturb the trial court's exercise of discretion.

B. Ineffective assistance of counsel.

¶23 As noted, to successfully withdraw his plea based on ineffective assistance of counsel, Anderson must show that his trial counsel's advice was objectively unreasonable and that, but for trial counsel's error, Anderson would

[8] Because we decide this case based on the application of ***State v. Denk***, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775, we do not consider the parties' debate over whether a charge that is "dismissed outright" is a collateral or direct consequence of a plea. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground."). However, we note that at one point in Anderson's appellate brief, he states, "Courts are required to notify defendants of the direct consequences of their pleas." To the extent Anderson is attempting to argue that his plea colloquy was insufficient under ***Bangert***, we reject his argument because it was not raised in his postconviction motion and is not adequately briefed on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (inadequately briefed issues will not be addressed).

not have entered the plea. *See* ***Bentley***, 201 Wis. 2d at 311-12. A reviewing court need not consider both the deficient performance and prejudice prongs of the ineffective assistance of counsel test. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). Here, the prejudice prong is dispositive. We conclude that Anderson was not entitled to a hearing on his postconviction motion because he "'present[ed] only conclusory allegations'" with respect to his claim that but for his trial counsel's erroneous advice, he would have not have entered a guilty plea. *See* ***Bentley***, 201 Wis. 2d at 309-10 (citation omitted).

¶24 In his postconviction motion, Anderson alleged as follows:

> [T]rial counsel ... explained to Mr. Anderson that if he pled guilty to count 2, then the armed robbery charge would be dismissed outright.
>
> Further, [trial counsel] explained to Mr. Anderson that if a charge is "dismissed outright," then the charge or the allegations of the dismissed charge cannot be mentioned by the [S]tate at sentencing.
>
> The outright dismissal of the armed robbery charge, and the meaning of an outright dismissal as Mr. Anderson understood it due to [trial counsel's] explanation, was critical to Mr. Anderson's decision to accept the plea agreement and plead guilty.
>
> *Had Mr. Anderson known that, despite the outright dismissal, the [S]tate could nonetheless argue the armed robbery allegations, then Mr. Anderson would have not entered the guilty plea.*

(Emphasis added; bulleting omitted.) We agree with the State that Anderson has failed "to explain why the possibility that the facts [underlying] the dismissed armed robbery charge would be used at sentencing was so critical to his decision

to plead that he would not have pled—and would have gone to trial—if he had known."

¶25 Anderson has offered only the bald assertion that he would have gone to trial if he had known the facts concerning the alleged armed robbery would be considered at sentencing. He offers no explanation why he would risk going to trial on two counts, including one that carried a maximum penalty of "a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both," *see* WIS. STAT. § 939.50(3)(c) (2005-06), rather than face a maximum penalty of "a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both," *see* § 939.50(3)(h), where the trial court might consider the facts related to the dismissed charge at sentencing. Anderson's assertion that he would have gone to trial is especially puzzling because he had already admitted to police that he drove the woman's car without her consent, so he could not have realistically hoped for acquittal on that count. Thus, Anderson, a man with an extensive criminal history, would have subjected himself to conviction for a Class H felony, and possible conviction for a Class C felony, simply to avoid having a dismissed charge mentioned at sentencing for the lesser crime. Anderson's postconviction motion makes no attempt to explain his reasoning.

¶26 We conclude that Anderson has presented only "self-serving" and "'conclusory allegations'" with respect to his claim that he would not have entered his guilty plea but for his trial counsel's erroneous advice. *See* ***State v. Jackson***, 229 Wis. 2d 328, 343, 600 N.W.2d 39 (Ct. App. 1999) ("Mere self-serving conclusions will not suffice."); ***Bentley***, 201 Wis. 2d at 309-10 (citation omitted). Because the record conclusively demonstrates that Anderson is not entitled to relief, the trial court had the discretion to grant or deny an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Anderson has not challenged the trial court's

exercise of discretion denying Anderson's request for a hearing. We see no basis to reverse the trial court's exercise of discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.