COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0091 **Cir. Ct. No. 91CF913671**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN TURNER,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Glenn Turner appeals from a judgment of conviction for first-degree intentional homicide while armed, contrary to WIS. STAT.

§§ 940.01(1) and 939.63 (1991-92),[1] and from an order denying his motion for postconviction relief. We affirm the judgment and order.

BACKGROUND

¶2 In October 1991, Turner was charged with first-degree intentional homicide while armed in connection with the October 18, 1991, death of LaCarlas Edgerton. On the scheduled trial date, Turner pled guilty and was convicted.

¶3 Because the sentence for a Class A felony was mandatory life imprisonment, the only decision before the trial court at sentencing was whether it should set a parole eligibility date. The State asked the trial court to set a parole eligibility date of 2042. Turner recommended that the trial court not set a parole eligibility date. The trial court sentenced Turner to life imprisonment, with a parole eligibility date of 2017.

¶4 Although postconviction counsel was appointed for Turner, no appeal was ever filed. On May 12, 2003, this court reinstated Turner's appeal rights and ordered that counsel be provided to assist him. Turner filed a motion for postconviction relief, alleging that he should be allowed to withdraw his guilty plea because his trial counsel provided ineffective assistance and because his plea was not knowingly, voluntarily and intelligently entered. He also challenged his sentence on grounds that the trial court erroneously exercised its discretion at sentencing. The trial court rejected his challenges and denied the motion without a hearing. This appeal followed. We affirm.

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

DISCUSSION

I. Alleged ineffective assistance of trial counsel

¶5 Turner argues that the trial court erroneously denied, without a hearing, his motion to withdraw his guilty plea based on ineffective assistance of trial counsel. Generally, "[a] guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). After sentencing, the defendant is required to show "that a manifest injustice would result if the withdrawal were not permitted." ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). That showing must be by clear and convincing evidence, and the burden of proof is on the defendant. ***Id.*** at 237. Ineffective assistance of counsel constitutes manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993).

¶6 This court follows a two-part test for ineffective assistance of counsel claims. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that the attorney's performance was deficient and that the deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687; ***Johnson***, 153 Wis. 2d at 127. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. "The defendant must also establish prejudice, defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12 (citing ***Strickland***, 466 U.S. at

694). A movant must prevail on both parts of the test to be afforded relief. ***Johnson***, 153 Wis. 2d at 127.

¶7 Trial courts are not required to hold an evidentiary hearing in all cases where a defendant alleges ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts which would entitle the defendant to relief, the [trial] court has no discretion and must hold an evidentiary hearing." ***Id.*** at 310. Recently, the Wisconsin Supreme Court clarified the test for determining whether a postconviction motion is sufficient to warrant a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

Id. (footnote omitted).

¶8 In cases where a defendant alleges ineffective assistance of counsel and the defendant's conviction is based on a guilty plea, "the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted). Applying these tests, this court agrees with the trial court's conclusion that no evidentiary hearing was required and that Turner is not entitled to withdraw his guilty plea based on ineffective assistance of trial counsel.

¶9 In his postconviction motion, Turner argued that his trial counsel provided ineffective assistance because counsel failed to explain the premeditation element of the crime and did not have all necessary discovery materials, such as ballistics results. However, Turner provided no affidavit explaining how this information would have affected his choice to plead guilty. The motion itself fails to even affirmatively assert that Turner would have proceeded to trial but for trial counsel's alleged errors. The motion states, "Had trial counsel advised Mr. Turner more fully or moved to obtain all evidence from the [S]tate, Mr. Turner may have proceeded differently." Nowhere does the motion explain how Turner's decision to plead guilty would have been affected by ballistics results or additional information on the premeditation element of first-degree intentional homicide. We conclude that Turner has failed to allege sufficient facts showing "'that there is a reasonable probability that, but for the counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" *See* ***id.*** The trial court correctly denied, without a hearing, the ineffective assistance component of Turner's motion.

II. Motion for plea withdrawal

¶10 In his postconviction motion, Turner argued that he is entitled to withdraw his guilty plea because the trial court did not fully explore his understanding of the charge against him. He also asserted: "While the Court did engage Mr. Turner in a colloquy regarding his plea, Mr. Turner never entered a plea of guilt, nor did the court examine Mr. Turner as to what he understood the elements of the crime [to be]."

¶11 After sentencing, a defendant is entitled to plea withdrawal if the defendant shows by clear and convincing evidence that his or her plea was not

voluntarily or intelligently made. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995) (plea that is not voluntarily or intelligently entered is a manifest injustice). 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 (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 *de novo*. ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987).

¶12 Like the trial court, we conclude that Turner's claim fails because he has failed to show a prima facie violation of WIS. STAT. § 971.08. To assure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being relinquished. ***Bangert***, 131 Wis. 2d at 260-262. The trial court can fulfill these requirements by: (1) engaging in a detailed colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charges and the rights he or she relinquishes; or (3) making references to a signed plea questionnaire and waiver-of-rights form. ***Id.***, 131 Wis. 2d at 267-68; ***Moederndorfer***, 141 Wis. 2d at 827.

¶13 Here, the transcript shows that the trial court discussed the guilty plea questionnaire and waiver-of-rights form with the defendant. The following is only part of the detailed colloquy undertaken by the trial court:

> THE COURT: Did you and [trial counsel] go through this Guilty Plea Questionnaire and Waiver of Rights form together this afternoon?
>
> THE DEFENDANT: We did.
>
> THE COURT: Did he explain to you all of your rights, including your constitutional rights?
>
> THE DEFENDANT: At that moment, we went through that questionnaire, I do understand my rights and my constitutional rights.
>
> THE COURT: Okay. And that's contained in this form also, right?
>
> THE DEFENDANT: Right.
>
> THE COURT: And [trial counsel] went through that with you; he read it and he also read it to you; is that right? Is that what you did?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did he answer any questions that you had concerning what your rights are or the nature of these proceedings?
>
> THE DEFENDANT: Yes, he did.
>
> THE COURT: Is this your signature both on the front and back of this form?
>
> THE DEFENDANT: It is my signature.
>
> THE COURT: Does that signify that [trial counsel] answered all of your questions and do you understand what you're doing here this afternoon?
>
> THE DEFENDANT: Yes.

We are satisfied, based on the transcript, that the trial court fulfilled the requirements of § 971.08. Turner has failed to show a prima facie violation of § 971.08.

¶14 Finally, we turn to Turner's bare assertion, contained in a single sentence in both his postconviction motion and opening appellate brief, that he "never entered a plea of guilt." For the first time in his reply brief, Turner explained what he means, stating: "While the court carried on a colloquy with the defendant … it never allowed Mr. Turner to officially enter a plea to the charge." We assume Turner is referring to the fact that instead of actually saying "guilty," Turner instead answered "yes" when asked whether he was pleading guilty. Turner fails to provide any authority or explanation for his assertion that this renders his plea ineffective. We normally decline to address inadequately briefed issues and decline to do so here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

III. Sentencing

¶15 Turner seeks resentencing. This court will uphold a sentence unless the trial court erroneously exercised its discretion. ***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, 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 court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** at 661. It is the responsibility of the sentencing court "to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980).

¶16 It is unclear on what basis Turner is challenging his sentence. His brief merely states several of the facts of his life that mitigate his crime. Here, the trial court had limited discretion to exercise: the only decision before it was whether to set a parole eligibility date. Turner asked that no date be set; the State asked for a date in the year 2042. The trial court set parole eligibility for the year 2017. We have carefully examined the sentencing transcript and are convinced that the trial court considered the appropriate factors and gave a reasoned explanation for the parole eligibility date it selected. We discern no error. We affirm the trial court's order denying relief on this ground.

By the Court.—Judgment and order affirmed.

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