COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP176-CR **Cir. Ct. No. 2010CF125**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM CLARENCE PAULSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. William Paulson appeals a judgment, entered upon his no contest pleas, convicting him of operating a vehicle without the owner's consent and burglary. Paulson also appeals the order denying his postconviction motion for plea withdrawal. Paulson argues he is entitled to withdraw his pleas

based on the ineffective assistance of his trial counsel. We reject Paulson's arguments and affirm the judgment and order.

BACKGROUND

¶2 An Information charged Paulson with operating a motor vehicle without the owner's consent, burglary, misdemeanor theft and two counts of theft of movable property (special facts—firearms). In exchange for his no contest pleas to operating a motor vehicle without the owner's consent and burglary, the remaining charges from this and another case were dismissed and read in, and the State agreed to recommend a total of three years' initial confinement and three years' extended supervision. The court imposed consecutive sentences resulting in a maximum total term of eighteen and one-half years, consisting of ten and one-half years' initial confinement followed by eight years' extended supervision. Paulson's postconviction motion for plea withdrawal was denied after a hearing. This appeal follows.

DISCUSSION

¶3 Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A plea withdrawal motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Paulson has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶4 To establish ineffective assistance of counsel, Paulson must prove both "(1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697. To prove prejudice, Paulson must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pleaded] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶5 Paulson argues counsel was ineffective by providing misinformation about Paulson's right to testify. Specifically, Paulson asserts that counsel told him she could not ethically allow him to testify because she thought he would do so untruthfully based on the conflicting stories he told her. Citing ***State v. McDowell***, 2004 WI 70, ¶34, 272 Wis. 2d 488, 681 N.W.2d 500, Paulson points out that if counsel "knows" a client is not going to testify truthfully, counsel should proceed with narrative form. Here, Paulson asserts counsel did not have actual knowledge he would testify falsely and even if she had, counsel failed to inform him of his right to testify in narrative form.

¶6 Even assuming counsel was deficient, Paulson has failed to prove there was a reasonable probability that, but for counsel's misinformation, he would have gone to trial. Although Paulson contends he would have insisted on going to trial had counsel properly advised him, his motion gives only conclusory and generalized reasons why he would have opted for trial. A postconviction motion for relief requires more than conclusory allegations. ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 Paulson was convicted of stealing several items from a garage in Marinette County and taking a car that was parked in the driveway. In his brief to this court, Paulson indicates he had a good defense to the burglary charge but, again, does not explain the defense beyond intimating it was related to the intent element of the offense. Based on defense counsel's comments at the sentencing hearing, it appears Paulson would have testified he did not enter the garage with an intent to steal but, rather, to keep warm. Paulson insists that the strength of what would have been his case at trial is not a significant factor when his plea was induced by misinformation about his ability to testify. In ***Hill***, however, the Court explained:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. *See, e.g.*, ***Evans v. Meyer***, 742 F.2d 371, 375 (7th Cir. 1984) ("It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received.").

Hill, 474 U.S. at 59.

¶8 When stopped by Michigan law enforcement several days after taking the car, Paulson indicated he bought the vehicle six months earlier, but

could not remember from whom. In the same interview, Paulson indicated he had not purchased the vehicle but, rather, received it from the family of a person who owed him money. When later interviewed by Wisconsin law enforcement, Paulson claimed he bartered for the vehicle from a man he did not know. Additionally, when stopped in Michigan, the car had a stolen dealer license plate on it which Paulson claimed he obtained from a man he met walking down the street.

¶9 Paulson's DNA was found on a pair of glasses left in the garage and, when the car's owner retrieved the vehicle, a pair of bolt cutters from his garage was in it. Further, Paulson had twenty-two prior convictions. Because of the evidence against him, the conflicting and incredible stories he told law enforcement, and his twenty-two prior convictions, we are not persuaded that there is a reasonable possibility that, but for counsel's advice, Paulson would have opted for trial. *See* ***State v. Stuart***, 2005 WI 47, ¶46, 279 Wis. 2d 659, 695 N.W.2d 259 (assumption that the longer the criminal record, the less credible the individual).

¶10 In any event, Paulson's insistence that he wanted a trial is undercut by his own postconviction testimony that he took the plea bargain to obtain its benefits. As noted above, the State agreed to dismiss several charges and recommend concurrent sentences of three years' initial confinement and three years' extended supervision. When questioned why he did not go to trial, Paulson testified counsel "had me convinced that … this plea bargain was—I was going to get it." While Paulson insisted that he really did not want to enter into the plea agreement, he also stated he took it because he "thought [he] was going to get the plea bargain deal." When asked why he did not tell the court at the plea hearing that he was unsatisfied with his counsel's representation, Paulson responded: "I was convinced I was going to get my plea bargain deal." Paulson added his belief

that if he reported feeling threatened to enter into the plea agreement, "the plea bargain wasn't going to work."

¶11 Ultimately, the circuit court found that Paulson had "decided that the plea agreement being offered was more beneficial to him" than going to trial. Thus, the court implicitly found Paulson's testimony about wanting to take the plea agreement more believable than his claims he wanted to go to trial. *See* ***State v. Echols***, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the [circuit] court."). Paulson has failed to establish that he was prejudiced by counsel's misinformation regarding the right to testify.

¶12 Paulson also claims counsel was ineffective by misinforming him about the maximum initial confinement he faced had he gone to trial. Counsel properly informed Paulson that he faced a maximum thirty-three-year sentence, but incorrectly advised him that twenty-four years and nine months of it would be initial confinement. Instead, Paulson claims he faced either eighteen years and two months or nineteen years of initial confinement, and had he known this, he would have gone to trial.[1]

¶13 At the postconviction hearing, Paulson testified that counsel's inaccurate calculation made him scared not to take the plea agreement and, in his brief, Paulson asserts that he entered his pleas believing he was avoiding a higher risk of prison time than he actually was. Paulson, however, has not shown why

[1] Paulson arrives at two different numbers based on whether the sentences he faced on misdemeanor counts would have been bifurcated. The State asserts that the nineteen-year figure is correct.

the amount of initial confinement he faced was of particular importance to him, nor has he adequately explained why counsel's error affected his decision to forego trial. Because Paulson's allegations of prejudice are conclusory and unexplained, he has failed to establish that his attorney's performance constituted a manifest injustice necessitating plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).