COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1061 **Cir. Ct. No. 2002CF5110**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. PATTERSON,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Robert Patterson, pro se, appeals an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief. Patterson

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argues that he is entitled to resentencing or other relief because he was denied the effective assistance of trial counsel. He also claims the circuit court erred by denying his motion without a hearing. We reject these arguments, and affirm the order.

BACKGROUND

¶2 In 2002, the State charged Patterson and a codefendant, Kionta Crockett, with two counts of party to the crime of first-degree intentional homicide for the shooting deaths of David Crowley and Kristopher Beason. According to the complaint, Crockett told police that he, Patterson, Beason, and Crowley drove in a van to an alley. Crowley was driving, Beason was in the front passenger seat, Crockett was in the middle seat, and Patterson was in the rear seat. Crockett saw Beason lean his seat back after speaking to Crowley. According to Crockett, Beason pointed a gun at him, and Crockett yelled, "What the fuck?" Crockett then pulled out his own gun and started shooting. Crockett said he fired at Crowley and Beason until his gun was empty. Crockett told police that he did not remember whether Patterson had a gun, but both he and Patterson exited the van and ran in separate directions.

¶3 Patterson told police that the four men had been driving around smoking marijuana when the van pulled into an alley. As the van came to a stop, Beason turned toward him and Crockett, and Crockett said, "What the fuck's going on?" Patterson heard gunshots and saw muzzle flashes coming from the middle of the van. Patterson then pulled out his own revolver and started shooting toward the front of the van. Patterson said he did not see Crowley or Beason with a gun, but started firing when he saw the shots being fired in the vehicle. Patterson indicated he fired at least two shots before exiting the van, tossing the

gun, and returning home. Crowley was shot five times in the head, right cheek, and arm. Beason received five shots to the head at close range. Ballistics results indicated that Beason's bullet wounds were from the gun Patterson admitted having.

¶4 In exchange for Patterson's guilty plea to an amended charge of party to the crime of second-degree intentional homicide for killing Beason, the State agreed to dismiss the remaining charge and recommend "in the area of 20 years" of initial confinement. In discussing the amended charge with the court, the State conceded that it would be unable to disprove beyond a reasonable doubt a factor that mitigates first-degree intentional homicide to second-degree intentional homicide based on imperfect self-defense.[2] Specifically, the State could not disprove that Patterson believed he was in imminent danger of death or great bodily harm.

¶5 Patterson was convicted upon his guilty plea, and the court imposed a 45-year sentence, consisting of 27 years of initial confinement and 18 years of extended supervision. Patterson did not pursue a direct appeal. In 2011, he filed the underlying WIS. STAT. § 974.06 motion for postconviction relief. The court ordered briefs, and ultimately denied the motion without a hearing, adopting the State's brief as its decision in the matter. This appeal follows.

[2] Under WIS. STAT. §§ 940.01(2)(b) and 940.05(1), first-degree intentional homicide is mitigated to second-degree intentional homicide if the defendant believed he or another was in imminent danger of death or great bodily harm and believed the force used was necessary to defend the endangered person, but at least one of those beliefs was unreasonable. The title of § 940.01(2) refers to this mitigating factor as "[u]nnecessary defensive force," though it is also known as "imperfect" self-defense. *See* ***State v. Head***, 2002 WI 99, ¶¶61-63, 255 Wis. 2d 194, 648 N.W.2d 413.

DISCUSSION

¶6 Patterson argues that he is entitled to relief based on the ineffective assistance of his trial counsel. To prevail on a claim of ineffective assistance of counsel, Patterson must show that his attorney's performance was deficient and that he was prejudiced as a result of that deficiency. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Patterson must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, Patterson must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697.

¶7 Patterson raises three ineffective assistance of counsel claims. We address and reject each in turn.

¶8 First, Patterson contends counsel was ineffective by failing to object to what Patterson characterizes as a breach of the plea agreement. An accused has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. When the breach is material and substantial, the defendant may be entitled to an order vacating the agreement or to resentencing. ***Id.***, ¶38. An "end run" around a plea agreement may constitute a breach. *See* ***id.***, ¶42. "'The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended.'" ***Id.*** (citation omitted).

¶9 A party seeking resentencing based on an alleged plea agreement breach bears the burden of showing, by clear and convincing evidence, "not only that a breach occurred, but also that it was material and substantial." ***State v. Jorgensen***, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987). A breach is material and substantial when it "'defeats the benefit for which the accused bargained.'" ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220 (citation omitted). When a defendant alleges that the State undercut the negotiated recommendation, the court must examine the entire sentencing proceeding to evaluate the prosecutor's comments. ***Williams***, 249 Wis. 2d 492, ¶46.

¶10 The terms of a plea agreement and the historical facts of the State's conduct allegedly constituting a breach of that agreement are questions of fact reviewed under the clearly erroneous standard. ***Id.***, ¶5. Whether the State's conduct constitutes a breach of the agreement and whether the breach is material and substantial are questions of law that we review independently. ***Id.***

¶11 Here, Patterson challenges the prosecutor's statements at sentencing that the shooting was "orchestrated prior to it occurring" and that "this was an execution." Patterson contends that the statements conveyed the "covert message" that this was a first-degree intentional homicide case and undercut the State's concession that it would be unable to disprove that Patterson believed he was in imminent danger of death or great bodily harm. We are not persuaded that the prosecutor's comments breached the plea agreement.

¶12 As noted above, Patterson pled guilty to an amended charge of party to the crime of second-degree intentional homicide. In exchange for his plea, the State agreed to recommend "in the area of 20 years" of initial confinement and

"ask the judge for consideration for the defendant's cooperation, willingness to testify truthfully, and any truthful testimony given at trial." The State also agreed it would ask for restitution and "leave any extended supervision period up to the Court." Patterson, therefore, fails to show that a benefit of his bargain with the State was that the prosecutor would not make the sort of references at issue here. Under the plea agreement, the State never committed to taking a factual position on Patterson's imperfect self-defense claim. The State merely conceded that it could not disprove beyond a reasonable doubt that Patterson believed he was in imminent danger of death or great bodily harm. Because Patterson fails to establish that the State breached the plea agreement, much less materially and substantially breached the agreement, counsel was not deficient for failing to raise an objection.

¶13 Second, Patterson contends that counsel was ineffective by failing to object to the circuit court's consideration of inaccurate information. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. ***Id.*** To be entitled to resentencing, Patterson must show that the information was inaccurate and that the circuit court actually relied on the inaccurate information at sentencing. ***Id.***, ¶26. If the defendant meets his or her burden of showing that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. ***Id.***, ¶3.

¶14 Patterson argues that the sentencing court relied on inaccurate information when it twice described the shooting as an "execution." Patterson stresses that there were "no forensic tests, nor testimony or written statements

from the people who did the tests, giving an opinion that this shooting was an execution." Ballistics evidence, however, demonstrated that Patterson shot Beason in the head five times at close range. Ultimately, the court's description of the shooting as an execution was just that—a description, and not a statement of fact. Moreover, in light of the sentencing court's comments, it is clear that the court was not under the misimpression that this was an unprovoked execution-style homicide. The court stressed that Patterson "made an extraordinarily bad choice" to get into a van with people he was "concerned about" while armed with weapons. The court further noted that the "credible explanation" for Patterson's conduct was that Patterson was "motivated by a perception of fear and a concern about his own safety." Because Patterson has failed to establish that he was sentenced based on inaccurate information, counsel was not deficient for failing to raise an objection.

¶15 Third, Patterson contends that counsel was ineffective by failing to object when the sentencing court overlooked or declined to consider the victim's criminal history. Patterson focuses on the following comments by the sentencing court: "As others have indicated, I'm not going to judge Mr. Beason.… And I have no job here or role here to try to judge his character or even to judge his conduct." The court also stated: "So what I'm left with is this account whereby [] both victims, to one degree or another, are characterized as, over a period of time, armed and dangerous and selling drugs and threatening others and robbing others.… This characterization of the victims may or may not be true." Patterson contends that it was unreasonable for the court to "disregard the victim's criminal history" and question whether Beason "was armed and dangerous or threatening to Patterson."

¶16 The record, however, reflects that the sentencing court considered evidence regarding the victim's criminal history and the relationships between the parties. The court acknowledged that it had an "extraordinary number of homicide cases involving claims of provocation, not instances where the victim is concededly blameless, cases where there are at least allegations that the victim contributed substantially to the circumstances which led to the final shooting, the final moment." The court continued:

> These are difficult cases for lots of reasons. Nobody likes to speak badly about the dead. Nobody wants to add to the grief and struggle that a victim['s] family is going through. But unless we're going to treat all shootings as the same, we need to consider the circumstances under which the shootings occur; and that, inevitably, leads to the kind of cases I've seen so many of recently: cases where there are substantial allegations of threats, provocation, fear induced by the victim's conduct.

Although the court made no finding that the "armed and dangerous" allegations about the victim were true, the court accepted the effect those allegations had on Patterson. The court noted that "[t]his case had a history to it, and that history is pertinent in trying to judge Mr. Patterson's culpability." Because the sentencing court considered the evidence bearing on conduct of Beason's that could have threatened, provoked, or scared Patterson, Patterson's argument to the contrary and derivative ineffective assistance of counsel claim fail.

¶17 Finally, Patterson intimates that the circuit court's order denying his postconviction motion without a hearing was clearly erroneous because the court merely adopted the State's brief, thereby failing to exercise any independent rationale for its decision. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the

circuit court has discretion to deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). A circuit court properly exercises its discretion if it reaches "a reasonable conclusion, based upon a consideration of the appropriate law and facts of record." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995).

¶18 Although not cited by Patterson, the State acknowledges that this court rejected the circuit court's adoption of a party's brief as its decision in a divorce case, ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1993). In that case, we concluded that, by adopting the wife's memorandum in its entirety, "the court failed to articulate the factors upon which it based its decision as required" because the memorandum was "devoid of any explanation or reasoning as to why the court accepted [the wife's] views regarding the disputed facts and law over [the husband's] views." ***Id.*** at 542. That is not the situation here.

¶19 Here, although the circuit court adopted the State's brief in its entirety, the State's brief properly set forth appropriate facts and law and, unlike the wife's brief in ***Trieschmann***, contained a well-reasoned rationale for its conclusions. Consequently, in adopting the State's brief as its reasoning, the circuit court properly exercised its discretion.

By the Court.—Order affirmed.

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