COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP350 **Cir. Ct. No. 1997CF972429**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER MICHAEL HAWLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Christopher Michael Hawley appeals from an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06

(2011-12).[1] He argues: (1) that he received ineffective assistance of trial counsel; (2) that the prosecutor engaged in misconduct; (3) that the circuit court misused its sentencing discretion; and (4) that he received ineffective assistance of appellate counsel. We affirm.

¶2 On July 22, 1997, Hawley pled guilty to one count of first-degree reckless homicide while armed, as a party to a crime. He also pled no contest to one count of first-degree recklessly endangering safety. The circuit court sentenced him to an indeterminate term of forty-five years of imprisonment on the first count, consecutive to his revocation on a different case, and five years of imprisonment on the second count, to be served consecutive to count one. Attorney John Wallace, III, was appointed by the Office of the State Public Defender to represent Hawley on appeal, but no appeal was filed.

¶3 On June 7, 2006, Hawley filed a *pro se* motion to reinstate his appellate rights and for an order directing the SPD to remove Wallace as his appointed appellate counsel. We denied the motion because Hawley had not explained why he waited eight years to take any steps to protect his postconviction rights. On February 2, 2012, Hawley filed a postconviction motion in the circuit court pursuant to WIS. STAT. § 974.06, which the circuit court denied. Hawley appeals the circuit court's order denying the motion.

¶4 Hawley first argues that he received ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, a defendant must show both that his lawyer's performance was deficient and that the

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

deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of this test if the defendant makes an insufficient showing on either one. *See* ***id.*** at 697. A hearing is required only if the defendant alleges facts which, if proven true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Therefore, to be entitled to a hearing, Hawley was required to allege facts that, if true, would show that his lawyer performed deficiently and that the deficient performance prejudiced his defense. ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334.

¶5 Hawley first contends that his trial lawyer should have objected to the criminal complaint at the initial hearing and the preliminary hearing on the ground that the alleged facts did not fit the crime; specifically, Hawley contends that it was wrong to charge him as a party to a crime because there was no one else involved. As ***Bentley*** explains, however, Hawley must do more than merely allege that he would have pled differently had his attorney objected to the fact that he was charged as a party to a crime. *See* ***id.***, 201 Wis. 2d at 310-11. Hawley was required to support the allegation with "objective factual assertions," *see* ***id.*** at 313; that is, he needed to explain *why* he would have decided not to enter a plea if his lawyer had objected to the party-to-a-crime designation. Because Hawley has not done that, this claim of ineffective assistance of counsel is unavailing, and the circuit court properly exercised its discretion in denying his motion without a hearing.

¶6 Hawley next contends that he received ineffective assistance of trial counsel because his attorney did not object when the prosecutor amended the charges against him two times. He contends that "he did not know what charges he was being charged with in order to prepare a defense." Hawley's lawyer did

not render ineffective assistance of counsel in failing to object to the amended charges because there was no legal basis for an objection. As for Hawley's assertion that he did not know what the charges against him were, this assertion is belied by the record. Before the circuit court accepted Hawley's pleas, it reviewed with him the two charges against him and Hawley indicated that he understood what the charges were. Therefore, we reject this claim.

¶7 Hawley next contends that his trial lawyer was ineffective for failing to satisfactorily investigate his case. He contends that had his attorney adequately investigated, there is a reasonable probability that he would have been acquitted of all charges. When a defendant argues that his trial lawyer was deficient for failing to investigate, the defendant must allege with specificity what the attorney should have investigated and how that investigation would have assisted his case. *See* ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Hawley asserts that his attorney "knew there was an eyewitness [who] saw the shooter" and described the shooter as having long french braids, while he had a bald head. Beyond Hawley's bare assertion that his attorney "knew" this information, Hawley has not alleged with specificity who the eyewitness was, how his attorney knew this information, or what investigation he believes his attorney should have undertaken to gather more information about this eyewitness. He also does not explain why it would have made a difference in his case. This claim of ineffective assistance of trial counsel is therefore unavailing.

¶8 Hawley next argues that he received ineffective assistance of trial counsel because his lawyer should have filed a petition for leave to appeal the

circuit court's ruling that he was properly advised of his ***Miranda***[2] rights. He contends that he felt compelled to enter a plea as a result of his trial lawyer's failure to file a petition for leave to appeal because he did not want to face life imprisonment.

¶9 "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Even if counsel's decision not to file a petition for leave to appeal was characterized as an error, which it is not, Hawley cannot show prejudice. Petitions for leave to appeal are granted only in rare circumstances not applicable to this case. *See* WIS. STAT. § 808.03(2). Hawley cannot show prejudice because he cannot show that we would have granted a petition for leave to appeal even if his lawyer had filed one. This claim is unavailing.

¶10 Hawley next contends that he received ineffective assistance of trial counsel because his attorney met with him only one time before he entered his pleas and his attorney failed to "investigate" the State's witnesses. Like some of Hawley's claims above, Hawley was required to support these allegations by objective factual assertions; that is, he should have explained *why* he would have decided not to enter his pleas if his lawyer had acted differently. Because Hawley has not made objective factual assertions in support of his claims and has not shown why he would have decided not to plead to the charges, these claims of ineffective assistance of counsel are unavailing. *See* ***Bentley***, 201 Wis. 2d at 313.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶11 Hawley next argues that the prosecutor failed to provide him with discovery, acted improperly in amending the information three times, and acted improperly by bringing charges that did not fit the alleged facts. Hawley waived his right to raise these claims by entering his pleas. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (a plea of guilty or no contest waives all non-jurisdictional defects, including constitutional claims). Therefore, we reject these arguments.

¶12 Hawley next argues that the circuit court erroneously exercised its sentencing discretion by imposing consecutive sentences. We presume that the circuit court acted reasonably in imposing sentence because there is a "strong public policy against interference with the sentencing discretion of the trial court." ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999) (citation and internal quotations omitted). When imposing sentence, the circuit court should consider three primary factors: the gravity of the offense; the character of the offender; and the need for protection of the public. ***State v. Smith***, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997). The circuit court has wide discretion to consider a host of other factors in imposing sentence, like the defendant's prior criminal record, his remorse, and his age and job history. ***Id.***

¶13 The circuit court properly exercised its sentencing discretion in imposing consecutive sentences. The circuit court explained that Hawley should be kept in prison for a long time to protect the public in light of Hawley's violent criminal history and the seriousness of his crime. Consecutive sentences serve these goals by extending the length of time Hawley will be kept incarcerated. The circuit court explained its sentencing decision in light of the appropriate sentencing factors and imposed a sentence that was both well-reasoned and reasonable in light of the circumstances present here. We reject the claim of

ineffective assistance of appellate counsel premised on counsel's failure to challenge the sentence on direct appeal because a sentencing challenge would not have been successful.

¶14 Finally, Hawley contends that he received ineffective assistance of *appellate* counsel because his attorney failed to pursue a direct appeal on his behalf without his consent. Hawley initially raised this claim before the circuit court, but the circuit court declined to consider the issue, ruling that Hawley should have raised the issue by petition for writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (Ct. App. 1992). When Hawley filed his appellant's brief addressing the circuit court's denial of his postconviction motion, he included in the brief a petition for writ of *habeas corpus* pursuant to ***Knight*** in order to bring the issue before us.

¶15 As we previously explained in our 2006 order denying Hawley's motion to reinstate his appellate rights and remove Wallace as appointed counsel, Hawley has not explained *why* he waited until eight years after Wallace should have filed an appeal to move this court for relief. Hawley has included in his appendix a letter he received from Wallace dated April 8, 1998, in which Wallace stated that he had concluded that there was no merit to an appeal, and told Hawley that he would file a no-merit report if Hawley disagreed. Hawley has also included documentation that shows that Wallace met with him shortly thereafter, on April 15, 1998, and Hawley agreed with Wallace's conclusions. Therefore, Hawley has not stated a claim of ineffective assistance of appellate counsel because he has not alleged facts that, if proven true, show that his lawyer failed to pursue a direct appeal on his behalf without his consent.

¶16 To the extent that Hawley's brief could be construed to raise additional issues, we deny them and conclude that they lack sufficient merit to warrant individual attention. "'An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.'" ***County of Fond du Lac v. Derksen***, 2002 WI App 160, ¶4, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted).

By the Court.—Order affirmed.

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