COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1443 **Cir. Ct. No. 2005CF793**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD M. CLYTUS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Reginald M. Clytus, *pro se*, appeals an order denying his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06. He argues: (1) that he received ineffective assistance from his postconviction lawyer; (2) that he should have been placed under oath during the

plea hearing; (3) that he should be allowed to withdraw his guilty plea because the circuit court's plea colloquy was inadequate to establish that he understood the plea; and (4) that he should be allowed to withdraw his guilty plea based on newly discovered evidence. We affirm.

¶2 Clytus was convicted of first-degree reckless homicide and attempted armed robbery with threat of force in 2005. The circuit court sentenced him to a total of twenty-five years of initial confinement and ten years of extended supervision. On direct appeal, we affirmed the judgment of conviction. Since his first appeal as of right, Clytus has filed three postconviction motions, the last of which is now before us on appeal.

¶3 Clytus first argues that he received ineffective assistance from his postconviction lawyer. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his lawyer's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his lawyer's acts or omissions were not reasonable under prevailing professional norms. ***Id.*** at 688. To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We will not second-guess a lawyer's "'exercise of a professional judgment in the face of alternatives that have been weighed by … counsel.'" *See* ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471, 476 (Ct. App. 1996) (quoted source omitted). In fact, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶4 Clytus contends that his postconviction lawyer performed deficiently by not seeking relief on his behalf based on a 2007 affidavit of his co-defendant Terrance Davis. In the affidavit, Davis recanted his statement implicating Clytus in the shooting death and attempted armed robbery of the victim. The affidavit was provided to Clytus's lawyer during the initial stages of Clytus's direct appeal of his conviction.

¶5 Clytus's argument that his lawyer performed deficiently is unavailing because Clytus's lawyer exercised reasonable professional judgment in deciding not to pursue plea withdrawal based on Davis's affidavit. In a letter dated October 10, 2007, Clytus's lawyer explained to Clytus:

> I considered whether Mr. Davis' affidavit constitutes "new evidence" within the meaning of case law justifying a post-conviction motion for plea withdrawal. If you were not aware in advance, not present for, and had no involvement in the murder, you would have known that before you pled guilty. Instead, you knew what you were accused of. Subject to your motion to suppress, you admitted that complaint was true. At sentencing, you said you were taking responsibility for your actions. You did not assert total innocence either at the plea hearing, at the sentencing hearing, when I met with you on June 6, 2006, or thereafter. If you had been maintaining your innocence throughout that time, the arrival of the affidavit to buttress your claims would possibly have amounted to new information changing the calculus you were required to make when you decided to plead. Instead, it is merely a new claim that runs counter not only to what Mr. Davis previously claimed (as his affidavit admits, though he does not really explain his dramatic change of heart), but counter to your repeated admissions of guilt.

Clytus's lawyer concluded that Davis's affidavit was not believable because it ran counter to Clytus's repeated admissions of guilt to the police and in open court. This was a reasonable exercise of professional judgment. Clytus's postconviction

lawyer did not perform deficiently by choosing not to seek plea withdrawal based on the 2007 affidavit.

¶6 Clytus next argues that he should have been placed under oath during the plea colloquy, citing WIS. STAT. § 906.03(1) ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation."). The plea statute, WIS. STAT. § 971.08, does not require that a defendant be placed under oath during a plea colloquy, and a defendant is not testifying or acting as a witness, as those terms are used in § 906.03 when the circuit court conducts a plea colloquy. We reject this claim.

¶7 Clytus next argues that he should be allowed to withdraw his guilty plea because the circuit court did not ensure that he understood the plea. The transcript of the plea hearing shows that the circuit court conducted an exhaustive colloquy with Clytus, ascertaining that he understood the crimes charged against him, the constitutional and other rights he was waiving by entering the plea, and the penalties he faced. The Record conclusively establishes that Clytus understood the plea he was entering. Therefore, we reject this argument.

¶8 Finally, Clytus argues that he should be allowed to withdraw his plea based on "newly discovered evidence," an affidavit filed by Terrance Davis in 2011 that fleshes out Davis's 2007 recantation of his original statement implicating Clytus.

¶9 "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, 710 (1997). The defendant must show that: "(1) the evidence was discovered after conviction;

(2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Id.***, 208 Wis. 2d at 473, 561 N.W.2d at 710–711. Additionally, "when the newly discovered evidence is a witness's recantation, the recantation must also be corroborated by other newly discovered evidence." ***Id.***, 208 Wis. 2d at 473–474, 561 N.W.2d at 711. If a defendant establishes that these criteria are met, "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***, 208 Wis. 2d at 473, 561 N.W.2d at 711.

¶10 Assuming for the sake of argument that the first five criteria are met, Clytus is not entitled to withdraw his plea because he cannot show that there is a reasonable probability that there would be a different result—that is, that he would be acquitted—if there was a trial that included Davis's 2011 affidavit elaborating on Davis's 2007 recantation of his statement implicating Clytus. Clytus confessed to the police that he killed the victim, including details in his statement that Davis did not provide to the police, thus undermining any assertion that the police fabricated Clytus's confession based on information Davis provided. Clytus admitted that the facts alleged in the complaint were true at the plea hearing and took responsibility for his actions during sentencing, explaining that he shot the victim because he was afraid. Davis's new affidavit is totally at odds with Clytus's confession and with Clytus's statements in open court. Moreover, Davis's recantation does not explain *why* Clytus would have confessed and acknowledged his guilt in open court had Clytus not actually committed the crimes. Clytus is not entitled to withdraw his plea based on newly discovered evidence because there is no reasonable probability that Clytus would not be convicted if he went to trial with Davis's 2011 affidavit.

By the Court.—Order affirmed.

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