

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-0930
99-0931**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDDIE L. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Eddie L. Thomas appeals pro se from orders denying his motion for postconviction relief under WIS. STAT. § 974.06

(1997-98).¹ He claims that he should be allowed to withdraw his guilty plea based on ineffective assistance of trial counsel and because his plea was not knowingly and freely entered. We affirm the orders.

¶2 On August 7, 1996, Thomas entered a guilty plea to four counts of forgery contrary to WIS. STAT. § 943.38(2).² He was sentenced to twelve years in prison and a sixteen-year prison term was imposed but stayed in favor of ten years' probation. In March 1998, Thomas filed a pro se motion under WIS. STAT. § 974.06. Thomas alleged that trial counsel was ineffective for not giving due consideration to or investigating a possible NGI defense³ to the charges. He also claimed that because of his mental illness, he was not capable of entering the guilty plea. Counsel was appointed to assist Thomas at the evidentiary hearing on his motion. Thomas's motion to withdraw his plea was denied.

¶3 A plea may be withdrawn if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *See id.* Determining whether a defendant who has entered a plea has been denied effective assistance of counsel requires the application of a two-part test. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The first inquiry is whether counsel's performance fell below the objective standard of reasonableness. *See id.* at 57. The second inquiry focuses

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² Thomas was originally charged with eight counts for crimes occurring between April 9 and May 15, 1996.

³ NGI stands for not guilty by reason of mental disease or defect. *See* WIS. STAT. § 971.15(1).

on whether counsel's constitutionally ineffective performance affected the outcome of the plea. *See id.* at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show 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." *Id.*

¶4 These issues present mixed questions of law and fact. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's underlying factual findings unless they are clearly erroneous. *See id.* at 634. The questions of deficient performance and prejudice are questions of law which we decide independently of the trial court's determination. *See id.*

¶5 Trial counsel testified that Thomas said he had a past diagnosis of schizophrenia, was treated in the past for mental illness, and that he had not been taking prescribed medication. When asked whether he had discussed a possible NGI defense, trial counsel indicated that he recalled going over it once with Thomas and he indicated to Thomas that it was not something the defense should pursue. Counsel explained that "in a first-degree murder case that's a critical defense and in other cases I think it's ridiculous." The trial court found that trial counsel's performance was not deficient. We need not decide whether the information counsel possessed was enough to require investigation of a possible NGI defense or, as Thomas claims, whether counsel possessed an unreasonable bias against using a NGI defense in any case but a murder case. We resolve Thomas's claim of ineffective assistance of counsel on the prejudice prong. *See State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993) (if we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient).

¶6 A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Thomas failed to demonstrate that an NGI defense was viable. Specifically, he did not produce any expert testimony that at the time of the commission of the crimes he suffered from a mental disease or defect and as a result he lacked the capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to that required by law. A consulting psychiatrist for the Department of Corrections acknowledged that Thomas had been diagnosed schizophrenic in October 1996. He indicated that without medication Thomas would likely exhibit symptoms.⁴ However, there was no evidence making the critical link that at the time of the crimes Thomas was ill and that the symptoms of schizophrenia would diminish his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to that required by law.⁵ *See Davis v. Alabama*, 596 F.2d 1214, 1221 (5th Cir. 1979) (evidence of past mental illness is not enough to determine whether counsel's failure to investigate an insanity defense was prejudicial because the evidence was not connected to the defendant's condition at the time of the crime). Additionally, Thomas failed to demonstrate that in the absence of the perceived deficiency in trial counsel's performance, he would not have entered a guilty plea and would have

⁴ The psychiatrist described schizophrenia as a "disorder of thought, often manifested by auditory hallucinations, delusions, feelings of prosecution, persecution, paranoia. They're often quite withdrawn and isolative. Without treatment they may have a difficult time functioning in society."

⁵ Thomas testified that he had been off medication from early January to August 1996. Because the psychiatrist had never seen Thomas present symptoms, the psychiatrist was unable to offer an opinion to a reasonable degree of medical certainty that Thomas would not have been thinking clearly on August 7, 1996, the day of the plea hearing. To reach back to the date of the crimes was even more speculative.

insisted on going to trial on all eight counts. We conclude that Thomas was not prejudiced by trial counsel's performance and therefore was not denied the effective assistance of trial counsel.

¶7 Thomas contends that he lacked the capacity to knowingly, intelligently and voluntarily enter his guilty plea. He suggests that because of his history of schizophrenia and the lack of medication for several months, the trial court should have continued the plea hearing and ordered a competency evaluation.⁶ Whether a plea was correctly entered is a question of constitutional fact and is examined independently on appeal, while the trial court's findings of historical fact will not be reversed unless contrary to the great weight and clear preponderance of the evidence. See *State v. Kywanda F.*, 200 Wis. 2d 26, 42, 546 N.W.2d 440 (1996).

¶8 Competency proceedings are required only when there is evidence giving rise to a reason to doubt competency. See *State v. Byrge*, 2000 WI 101, ¶29, 225 Wis. 2d 702, 594 N.W.2d 388. "Whether there is evidence giving rise to a reason to doubt competency is a question left to the sound discretion of the trial court." *State v. Weber*, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). A history of psychiatric illness does not compel a conclusion that the defendant's competency is questionable. See *Byrge*, 2000 WI 101 at ¶31. The trial court's determination of whether there is reason to doubt competency is driven by factual observations. See *State v. Garfoot*, 207 Wis. 2d 214, 223, 558 N.W.2d 626

⁶ Thomas asks this court to establish a rule that where there is a history of mental illness and no psychological evaluation has been conducted, trial courts must order an examination prior to accepting the plea unless the defendant waives the issue on the record. That is not a function within the authority of this court. Cf. *State v. Perez*, 170 Wis. 2d 130, 137, 487 N.W.2d 630 (Ct. App. 1992).

(1997). The trial court is in a superior position to observe the defendant's demeanor and credibility and apprise the pivotal factors. *See Byrge*, 2000 WI 101 at ¶44.

¶9 A reason to doubt competency can arise from a defendant's demeanor in the courtroom or a colloquy with the court. *See id.* at ¶29. At the plea hearing, the trial court addressed Thomas's history of schizophrenia and the purpose of the medication he had stopped taking. Specifically, the court inquired whether Thomas was hearing voices or having hallucinations. Thomas indicated that he was not and had not for at least the past week. Thomas confirmed that he was thinking clearly, that he understood what the plea hearing was about, and that he had had no trouble communicating with trial counsel. The record gives no indication of any inappropriate behavior or misunderstanding at the plea hearing.

¶10 Additionally, the trial court found incredible Thomas's testimony at the postconviction motion hearing that he did not know what he was doing when he entered his guilty plea and that trial counsel had induced his plea. The court recalled that Thomas was not confused at the plea hearing. It found trial counsel's testimony that he believed Thomas to be competent at the plea hearing credible. Implicit in the trial court's finding that Thomas's plea was knowingly, understandingly, freely and voluntarily entered is the determination that there was no reason to doubt his competency. That determination is a proper exercise of discretion in light of the trial court's observations.

¶11 Thomas was not denied the effective assistance of counsel. His plea was properly accepted in a proceeding in which there was no reason to doubt his competency. There is no manifest injustice supporting plea withdrawal.

By the Court.—Orders affirmed.

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

