COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2447-CR **Cir. Ct. No. 2002CF5610**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. DORSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Brian J. Dorsey appeals from a judgment entered after he pled no contest to one count of robbery with use of force as party to a

crime, contrary to WIS. STAT. §§ 943.32(1)(a) and 939.05 (2003-04).[1] He also appeals from an order denying his postconviction motion seeking to withdraw his plea. He claims that the trial court erroneously exercised its discretion when it summarily denied his withdrawal motion. Because Dorsey failed to allege sufficient facts to entitle him to an evidentiary hearing, the trial court did not erroneously exercise its discretion when it denied his motion. Therefore, we affirm.

BACKGROUND

¶2 On September 21, 2002, Alan Bozora was robbed in his own garage. He was bound and gagged. There were two men involved in the incident. One was Kenneth Hare. The other, identified by Bozora, was Dorsey. Dorsey contends that he was not involved in the robbery at all, although he admits to being with Hare in the Bozora garage.

¶3 Dorsey states that at approximately 5:45 a.m. on the morning in question, he left his home to drive to work, but experienced car problems. As Dorsey was standing on the side of the road, an acquaintance of his, Hare, drove by and offered him a ride to work. During the trip, Hare informed Dorsey that he wanted to make a quick stop. Hare parked his van on the side of the road, placed two guns in his waistband, and exited the vehicle. After waiting several minutes, Dorsey exited the van and walked down the road to a garage where he heard Hare yelling at someone. When he looked into the garage, he saw Bozora bound and gagged, and Hare attempting to place the victim underneath a truck in the garage.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 While Hare went into the Bozora residence, Dorsey remained in the garage. After a short time, Hare exited the Bozora residence with a red coffee can full of change. Hare and Dorsey left the garage and began walking down the street. Dorsey stated he turned to walk away from Hare but, a short time later, Hare pulled his van alongside Dorsey and told him to get in.

¶5 In the meantime, Bozora had freed himself and phoned police. A short time later, police located Hare's van. When officers approached the van, Hare fled in one direction and Dorsey fled in the other direction. Dorsey admitted that he took a gun with him from the car, wrapped it in his sweatshirt and dropped it while he was running away. The police discovered the gun and sweatshirt and apprehended Dorsey.

¶6 Dorsey was originally charged with armed robbery with threat of force and possession of a firearm by a felon. Pursuant to plea negotiations, the charge was amended to robbery with use of force and the gun possession charge was dismissed. In exchange, Dorsey agreed to plead no contest. On March 17, 2003, he entered a no contest plea and was sentenced to ten years in prison with six years' initial confinement followed by four years' extended supervision.

¶7 Shortly thereafter, he filed a postconviction motion seeking to withdraw his guilty plea on the basis that trial counsel provided ineffective assistance. The trial court summarily denied the motion. Dorsey now appeals.

DISCUSSION

¶8 Dorsey claims he was entitled to a hearing on his claim that ineffective assistance of trial counsel constituted a manifest injustice and,

therefore, he should have been permitted to withdraw his plea. This court is not convinced.

¶9 When a defendant seeks withdrawal of his plea after sentencing has occurred, he must prove by clear and convincing evidence that a manifest injustice exists. ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). In reviewing claims on plea withdrawal requests, we will reverse the trial court's decision only if it erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶10 We have repeatedly held that if a defendant received ineffective assistance of trial counsel, such can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Dorsey claims here that he received ineffective assistance of trial counsel, which resulted in a manifest injustice. In order to establish ineffective assistance of trial counsel, Dorsey must prove both that counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both of the ***Strickland*** components, if the defendant fails to make a sufficient showing on one. ***Id.*** at 697.

¶11 In order to prove prejudice, Dorsey must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (footnote omitted). This presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. Factual findings will be reviewed under the clearly erroneous standard, but whether counsel's performance was prejudicial is a question of law, which we review independently. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶12 Finally, a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion claim. Rather, the trial court is required to conduct a hearing only if the defendant's motion alleges facts which, if true, would entitle the defendant to relief. If the defendant fails to allege sufficient facts in the motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may, in the exercise of discretion, deny the motion without a hearing. ***Bentley***, 201 Wis. 2d at 309-10 (citation omitted).

¶13 In his postconviction motion, Dorsey asserted that his trial counsel's performance was deficient because he failed to independently interview witnesses; he failed to exercise Dorsey's right to a preliminary hearing; he was unprepared for trial; and he promised Dorsey that he would receive only two years in prison concurrent to any parole revocation. He also suggests that trial counsel was deficient for failing to file any pretrial motions. After rejecting each contention, in turn, we conclude that the trial court did not err in summarily denying Dorsey's postconviction motion.

A. Inadequate Investigation.

¶14 Dorsey first asserts failed performance with regard to counsel's investigation. In order to succeed on this claim, Dorsey must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶15 Here, Dorsey alleged that trial counsel should have investigated the credibility of the victim, and should have taken the opportunity to cross-examine the victim at the preliminary hearing instead of waiving the preliminary hearing.

Dorsey, does not, however, set forth with specificity what the result of any investigation would have revealed. Instead, he asserts probabilities and speculation.

¶16 The same is true with regard to his claim that counsel should have further investigated Hale's recounting of events. It is clear from the record that all parties knew Hale was the major actor in the armed robbery, that he claimed Dorsey had nothing to do with the robbery, and would have testified on behalf of Dorsey if the case had gone to trial. Dorsey fails to specify how further investigation of Hale would have altered the outcome of this case.

¶17 Likewise, Dorsey's other investigation allegations about counsel's failure to interview and subpoena other witnesses, such as police officers, are legally insufficient. Dorsey does not allege specifically what these witnesses would have testified to and how that would have resulted in a different outcome in this case. Accordingly, there was no basis to conduct an evidentiary hearing on Dorsey's claim that counsel failed to conduct sufficient investigation.

B. Preliminary Hearing Waiver.

¶18 Dorsey asserts that he was forced to waive his preliminary hearing because his trial counsel was not prepared to proceed. Dorsey does not, however, explain how the outcome of this case would have changed if he had not waived the preliminary hearing. Accordingly, this allegation does not generate sufficient facts to justify an evidentiary hearing.

C. Trial Preparation.

¶19 Dorsey next contends that trial counsel was not prepared for trial. He bases this contention on the absence of material in the defense file such as

subpoenas, and that defense witnesses were not in court on the date the trial was to commence. Dorsey does not, however, specify that defense witnesses would not have been available for the trial, or that if they were present in court on day one, that he would not have pled no contest. It is not unusual for defense witnesses not to be present on the first day of trial as other proceedings occupy the time before the defense presents its case. Therefore, we are unable to conclude that Dorsey was prejudiced based on the contentions in his postconviction motion with respect to this claim.

D. Sentencing.

¶20 Dorsey next argues that trial counsel promised him that if he accepted the plea agreement, he would only receive a two-year sentence. The record reflects, however, that Dorsey told the court he had not been promised anything in order to induce his plea. Further, counsel's incorrect prediction concerning Dorsey's sentence is not enough to support a claim of ineffective assistance of counsel. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272.

E. Pretrial Motions.

¶21 Next, Dorsey claims the lack of any pretrial motions demonstrates that his trial counsel provided ineffective assistance. Specifically, he contends his counsel should have filed a motion challenging the police stop of the vehicle, which led to Dorsey's arrest. Again, Dorsey's claim is without merit.

¶22 The police stopped the van in which Dorsey was a passenger because it matched the description of a van observed at scenes of similar armed robberies. The police also stopped the van because a license plate check revealed

that the van had been reported stolen. This was sufficient information to stop the van and conduct further investigation. A motion challenging the investigatory stop would have been fruitless. Thus, counsel's failure to bring a motion, which would have failed, does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

F. Postconviction Hearing.

¶23 Based on the foregoing, we conclude Dorsey's claim that the trial court erroneously exercised its discretion by summarily denying his motion without conducting an evidentiary hearing is meritless. None of Dorsey's alleged instances of ineffective assistance of trial counsel satisfied the specificity requirements necessary to justify a hearing. Accordingly, we must affirm.

By the Court.—Judgment and order affirmed.

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