COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2244-CR **Cir. Ct. No. 2003CF1930**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEVELAND BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cleveland Brown appeals from a judgment convicting him of one count of burglary, party to a crime, upon his guilty plea. Brown also appeals from an order denying his postconviction motion to withdraw his plea. Brown contends that his plea was involuntary due to his incompetence

and that he was denied the effective assistance of counsel during his plea hearing. Because we conclude that Brown failed to demonstrate that he was incompetent at the time of his plea colloquy or was denied the effective assistance of counsel, we affirm the judgment and order.

¶2 Brown was charged with committing a residential burglary. On the day of trial, he elected to enter a guilty plea pursuant to a plea bargain. The State promised to recommend a five-year sentence comprised of one year of initial confinement followed by four years of extended supervision. The parties also stipulated to restitution in the amount of $1,080.00. The circuit court accepted the guilty plea and subsequently imposed a six-year sentence, comprised of three years of initial confinement followed by three years of extended supervision.

¶3 Brown moved the circuit court for permission to withdraw his guilty plea. The circuit court denied the motion without a hearing.

¶4 A defendant seeking to withdraw a guilty plea after sentencing bears "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 (1997). A plea that is involuntary violates due process, *see* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997), and amounts to a manifest injustice under ***State v. Merten***, 2003 WI App 171, ¶6, 266 Wis. 2d 588, 668 N.W.2d 750.

¶5 The determination of whether a plea is voluntary presents a question of constitutional fact. ***Id.***, ¶5. The appellate court reviews questions of constitutional fact under a *de novo* standard. ***Id.*** However, an appellate court "will not upset the circuit court's findings of historical or evidentiary fact unless the findings are clearly erroneous." ***Id.***

¶6 A defendant's request to withdraw a guilty plea is addressed to the circuit court's discretion. Accordingly, the court will not disturb the circuit court's decision to deny a motion to withdraw a guilty plea unless the decision resulted from an erroneous exercise of discretion. ***Id.***, ¶4.

¶7 Here, Brown claimed that his plea was involuntary because he was not competent at the time of the hearing. Brown's postconviction motion contended that his mental condition at the time of the plea rendered him incapable of understanding the rights he was surrendering. Specifically, his affidavit submitted in support of his postconviction motion alleged that he was "both illiterate and paranoid schizophrenic." He also alleged that he heard voices and was unable to concentrate on the rights he was relinquishing during his guilty plea colloquy and earlier when he met with counsel. His affidavit indicated that during the plea colloquy he would look to his counsel "for an indication as to how he should answer the court's questions and answer as he was directed to by [counsel]." His affidavit also charged that the only reason he entered a guilty plea was because he believed that his counsel was unprepared for trial.

¶8 The trial court rejected Brown's motion, concluding that the transcript of its plea colloquy with Brown refuted his postconviction assertions that he was hearing voices and was unable to concentrate on the proceedings at hand. The trial court also rejected Brown's allegations that counsel was unprepared for trial because the plea transcript contradicted this allegation as well.

¶9 The circuit court's finding of historical facts are fully supported by the record. During the plea colloquy, the circuit court specifically questioned Brown about his mental status:

> THE COURT: Before you came to court today, did you have alcohol or illegal drugs?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you take medication for depression and schizophrenia and for paranoia?
>
> THE DEFENDANT: Yes, I do, sir.
>
> THE COURT: Does the medication work for you?
>
> THE DEFENDANT: Yes, it does.
>
> THE COURT: Have you been hearing voices or feeling too depressed to make a decision in your case today?
>
> THE DEFENDANT: No. I got my medication. No.

Later, the trial court questioned Brown about his counsel's representation:

> THE COURT: Have you understood everything Mr. Ksicinski discussed with you?
>
> THE DEFENDANT: Yes, I did, sir.
>
> THE COURT: Have you understood my questions?
>
> THE DEFENDANT: Yes, I did, sir.
>
> THE COURT: Did you have enough time to talk to Mr. Ksicinski about your case and about your decision to plead guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you satisfied with his advice?
>
> THE DEFENDANT: Yes, I am.

In addition, the "Plea Questionnaire/Waiver of Rights" form, executed by Brown shortly before he entered his plea, indicated that Brown understood the plea proceedings.

¶10 The circuit court fully examined Brown to determine whether he was competent to assist in the proceedings against him and whether his mental health issues interfered with his ability to positively and truthfully admit to committing a felony or understanding the consequences of a guilty plea. *See* ***State v. Weber***, 146 Wis. 2d 817, 827, 433 N.W.2d 583 (Ct. App. 1988). We independently conclude that the circuit court properly held that this historical record supported its finding of constitutional fact that Brown was competent and voluntarily entered his guilty plea to the burglary charge.

¶11 We turn now to Brown's contention that he was denied the effective assistance of trial counsel. The standard for reviewing this postconviction issue was addressed in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges fact which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11 (citations omitted). Further, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or 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 its legal discretion deny the motion without a hearing.'" ***Id.*** at 309-10 (citation omitted).

¶12 For a defendant to succeed in an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), must be satisfied. A defendant "must show that counsel's performance was both deficient and prejudicial." ***Bentley***, 201 Wis. 2d at 312. Further, if a

defendant fails to show the prejudice prong, this court need not address the deficient performance prong. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). "In order to show prejudice, '[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶13 Brown submitted an affidavit to the postconviction court contending that counsel was unprepared to go to trial. The allegation is contradicted by the record. The transcript of the final pretrial indicates that defense counsel was evaluating two defenses, a claim of alibi and a third-party defense. Consistent with this, the plea hearing record indicates that counsel told the circuit court that

> I have specifically gone over the defense as I indicated to the Court. Prior there might have been a defense concerning alibi, and I discussed with him some problems that he would have should we proceed with that as well as what I refer to at the—what I refer to as the frame-up defense that we might have tried to present.

¶14 As a second ground, Brown's affidavit contended that counsel was ineffective for failing to apprise the trial court of the fact that Brown was hearing voices during his plea hearing. Again, this allegation is contradicted by the record. The record shows that Brown's attorney specifically told the court that although Brown heard voices at times, "he indicated to me he has not heard voices today." Brown agreed with that statement on the record moments later.

¶15 Finally, Brown's affidavit contended that his counsel chose to conceal his concerns about Brown's competence to proceed. This allegation is also contradicted by the record. The plea hearing record and "Plea

Questionnaire/Waiver of Rights" form show that counsel informed the trial court of Brown's mental health difficulties and his use of medication to address those difficulties.

¶16 We conclude that under the totality of the circumstances, the record contradicts Brown's affidavit and conclusively demonstrates that Brown failed to show deficient performance by his trial counsel.

¶17 We also conclude that Brown did not show prejudice from counsel's alleged negligence because the other evidence of Brown's guilt was sufficient for a jury to convict. The complaint and preliminary hearing record contain testimony from a neighbor of the burglary victim who saw Brown removing the stolen items from the victim's house in broad daylight at a distance of fifteen to twenty feet. The witness subsequently identified Brown to police as the burglar.

¶18 In light of the record presented to the circuit court, we hold that the circuit court properly determined that Brown failed to demonstrate that he was incompetent at the time of his plea colloquy or that he was denied the effective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

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