COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1695-CR **Cir. Ct. No. 2001CF1101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. FLORES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Robert J. Flores, *pro se*, appeals from a judgment of conviction and an order denying a motion to withdraw his no contest plea to two counts of felony murder, party to a crime, contrary to WIS. STAT.

§§ 940.03 and 939.05 (2001-02).[1] He claims that due to the ineffectiveness of his trial counsel, a manifest injustice occurred warranting the withdrawal of his no contest plea. Because Flores has failed to meet the proper burden of proof for an examination of his claim, we affirm.

BACKGROUND

¶2 The factual background forming the genesis of this appeal is somewhat complex. We shall attempt to elucidate. The State charged Flores with two counts of felony murder, party to a crime. These charges related to the killing of an innocent couple on South Muskego Avenue in the City of Milwaukee, on December 29, 2000. The State also charged Flores with two separate burglaries, party to a crime, that occurred on December 17, 2000, on West Lapham Boulevard in the City of Milwaukee and on November 25, 2000, on East Capitol Drive in the City of Milwaukee.

¶3 Prior to Flores's arrest, police were investigating a series of crimes that took place in Milwaukee from November 2000, through January 2001. The focus of the investigation was upon Flores and several other individuals—Robert Velez, Miguel Hirecheta and Donovan Crowe. Velez, one of the individuals under investigation, was arrested on February 18, 2001. Velez was questioned at least six times about the crimes and who was involved. Three of the interviews occurred before a polygraph examination and three after. During the interviews, Velez implicated Flores in two separate robberies that occurred on West Orchard Street on December 17, 2000, and on West National Avenue on January 9, 2001.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

As a result, Flores was arrested at 10:05 a.m. on February 23, 2001. At 1:15 p.m. the next day, February 24, 2001, probable cause was found to hold Flores for his participation in the Orchard Street and National Avenue robberies. Early in the morning of February 25, 2001, after receiving his ***Miranda***[2] rights and undergoing further questioning, Flores admitted his involvement in the homicides that occurred on South Muskego Avenue on December 29, 2000. He claimed, however, that Hirecheta and Crowe, his co-actors, fired the fatal shots in the homicides. Later in the day, he also confessed to committing two other burglaries, with which he was later charged.[3]

¶4 In April 2001, Flores testified for the State at the preliminary hearing of co-defendant Crowe and, in August 2001, Flores testified against Crowe at his trial. As a result of Flores's testimony, Crowe ended up pleading guilty. Flores's testimony against Crowe was also instrumental in Hirecheta's decision to plead guilty to the homicide and robbery charges he faced.

¶5 Flores, by counsel, filed several pretrial motions. He moved to suppress his own inculpatory statements to police because they were obtained in violation of ***Miranda***. He also sought to suppress his testimony from the preliminary hearing and trial of co-defendant Crowe on the basis that his trial attorney was ineffective in either: (1) failing to challenge an alleged breach of the plea agreement by the State; or (2) for misleading him into believing that a plea agreement had been struck to drop the homicide charges in exchange for his

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

[3] The State never pursued charges against Flores for the robberies on West Orchard Street or West National Avenue.

testimony against Crowe. Flores did not contest the legality of his arrest in the pretrial motions.

¶6 The trial court denied his motions. Flores did not appeal from the denial of the motions. Flores then entered a plea of no contest to the two counts of felony murder. In return, the State dismissed the two burglary counts. As a result of the plea agreement, Flores faced a maximum penalty exposure of 160 years. The State agreed to recommend a twenty-year bifurcated sentence, leaving the period of extended supervision in the discretionary hands of the trial court. This recommendation was the same as had existed at the time that Flores testified for the State against Crowe. The trial court imposed a sentence of twenty-five years on the first count of felony murder, consisting of thirteen years in prison followed by twelve years of extended supervision. As for the second count of felony murder, the court imposed and stayed a forty-year prison sentence—thirty years in prison followed by ten years of extended supervision, and placed him on probation for twenty years, consecutive to the first count.

¶7 After a judgment of conviction was entered, Flores filed a *pro se* motion to withdraw his no contest plea pursuant to WIS. STAT. § 809.30. In his postconviction motion, Flores claimed, for the first time, that his arrest was illegal for four reasons: (1) it occurred without probable cause to arrest; (2) he was not afforded a probable cause hearing within forty-eight hours of his arrest in violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 54-60 (1991); (3) the State omitted material information from the probable cause presentation to the trial court, which violated his rights under ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); and (4) his trial counsel was ineffective in failing to raise each of these three issues at the appropriate time.

¶8 The postconviction court rejected all of Flores's claims. It gave two reasons for its decision. The court first ruled that because Flores had pled no contest, he waived his right to challenge the probable cause for his arrest and detention. It next ruled he failed to make a sufficient preliminary showing that his trial counsel performed deficiently and prejudiced his defense. An order to that effect was entered. Flores now appeals *pro se* from the trial court's order.

ANALYSIS

A. Ineffective Assistance of Counsel.

¶9 In this appeal, Flores raises the same claims that were rejected by the trial court in its postconviction order. Although we conclude that the first three claims can be resolved by applying the precepts of waiver, in the interests of finality we shall, as did the trial court,[4] examine the claims under the rubrics of ineffective assistance of counsel.

APPLICABLE LAW AND STANDARD OF REVIEW

¶10 In his main brief, Flores contends that he should be allowed to withdraw his guilty plea because of the three violations he sets forth or because his

[4] By entering a plea to the charges without raising the four issues, Flores waived his right to raise these issues on appeal. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986) (a voluntary and intelligent guilty or "no contest" plea waives all nonjurisdictional defects and defenses, including alleged constitutional violations); ***State v. Jones***, 2002 WI App 196, ¶24, 257 Wis. 2d 319, 651 N.W.2d 305 (An untimely challenge alleging material misstatements or omissions from the probable cause determination at the trial court level waives any right to review at the appellate court level.); ***State v. Aniton***, 183 Wis. 2d 125, 128-30, 515 N.W.2d 302 (Ct. App. 1994); ***State v. Smith***, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986) (A challenge to an illegal arrest is waived by a guilty or "no contest" plea because it is not a jurisdictional defect.). Thus, it follows that an unreasonably long detention leading to a confession is not a jurisdictional defect.

trial counsel failed to raise the three issues. The decision whether to grant or deny a motion to withdraw a guilty or no contest plea is addressed to the sound discretion of the trial court and will not be reversed by this court unless discretion is erroneously exercised. ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999). A defendant seeking to withdraw a guilty or no contest plea after conviction and sentencing carries a heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a "manifest injustice." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶11 In his reply brief, however, in response to the State's waiver argument, Flores refocuses his argument, claiming that he is seeking withdrawal based on his counsel's failure to raise the Fourth Amendment violations. Because Flores waived the right to raise the merits of the underlying issues by entering a no contest plea, we address his claims only in the context of whether his trial counsel was ineffective for failing to assert them.

¶12 When the postconviction motion to withdraw a guilty or no contest plea alleges ineffective assistance of counsel, the court applies the two-pronged test for deficient performance and prejudice established in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under ***Strickland***, the defendant is entitled to relief if he is able to establish that counsel's performance was both deficient and prejudicial. ***Id.*** A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶13 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Id.*** at 689-90. To satisfy the prejudice prong, an appellant must demonstrate that counsel's deficient performance was "so

serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be a showing 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.*** at 694.

¶14 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. The ultimate conclusion, however, of "whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law" for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶15 The right to effective assistance of counsel does not guarantee a criminal defendant either the best defense or the best defense attorney possible. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993). "'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***Id.*** (citation omitted). Counsel is not, as a matter of law, ineffective for failing to file meritless suppression motions. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶16 In addition, an appellant is not automatically entitled to a hearing on a claim of ineffective assistance of counsel. To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion.

Bentley, 201 Wis. 2d at 313-18. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***Id.*** at 309-10. Whether the motion sufficiently alleges material facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶17 Flores's postconviction motion to withdraw his no contest plea due to ineffective assistance of trial counsel consisted of three pages and twelve paragraphs. Paragraphs 8 to 12 relate to his ineffective assistance of counsel claim. We cite them in their entirety.

> 8. Attorney Scott Anderson never filed a Motion to Suppress the confession based on an arrest without Probable Cause or Unreasonable Delay, or omitting information in the probable cause determination, which if disclosed, would have caused the arrest warrant not be issued.
>
> 9. Had Attorney Scott Anderson filed a Motion to suppress the confession of defendant on the grounds stated in paragraph 8, the motion would have probably been granted.
>
> 10. On February 1, 2002, the defendant appeared at his sentencing hearing, and at that hearing, the State made a Recommendation that the defendant receive confinement time of Twenty (20) years.
>
> 11. The sentence Recommendation of Twenty (20) years was not what the State agreed to do, thus it is a breach of the plea agreement.
>
> 12. If I would have known that a Motion to Suppress any statements on grounds referred to in

> paragraph 8, would probably had been successful, I would not had entered a plea to the charges.

¶18 Based on these allegations, the trial court summarily denied Flores's motion without conducting an evidentiary hearing. We conclude that the trial court did not err in reaching its determination that Flores woefully failed to make a preliminary showing that his trial counsel's conduct was deficient or prejudicial.

¶19 We acknowledge that Flores was a *pro se* party in the postconviction motion process and occupies the same capacity on this appeal. Although we have, as a matter of course, applied the rule of leniency to *pro se* litigants in the application of rules of appellate procedure, we also must insist that the right to self-representation is not a license for noncompliance with substantive law. ***Waushara County v. Graf***, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992). A reviewing court does not have the duty to point defendants to the proper substantive law. ***Id.*** at 452.

¶20 Our inquiry initially begins with a careful review of Flores's motion to withdraw his no contest plea. Were Flores to have alleged sufficient facts to support his claim that he was denied the effective assistance of counsel, we would have to remand for an evidentiary hearing on the issue. We conclude, however, that Flores's motion, though laced with conclusory allegations, contains no factual assertions entitling him to a hearing. Assertions that his trial counsel "never filed a motion to suppress the confession based upon an arrest without probable cause" or "unreasonable delay" or "omitting information in the probable cause determination, which if disclosed, would have caused the arrest warrant not be issued" or "the motion would have been granted" or "the sentence recommendation of twenty (20) years was not what the state agreed to do, thus is a breach of the plea agreement" are mere conclusory statements and not the type of

allegations that raise a question of fact. Thus, as a matter of law, the postconviction court committed no error in denying that portion of Flores's motion.

B. ***Franks v. Delaware*** *Motion.*

¶21 The only issue meriting further consideration is Flores's claim of a ***Franks v. Delaware*** violation. During the course of the postconviction proceedings, the trial court, *sua sponte*, invited briefing on the various statements Velez made to the investigating officers including the statements made during a polygraph examination for the purposes of a ***Franks*** analysis. After briefing was complete, the trial court found that Flores's counsel's failure to bring a ***Franks*** challenge did not constitute deficient performance.

¶22 The factual backdrop for this issue involved a polygraph exam Velez took on February 21, 2001. The subject of the exam was the Orchard Street robbery. The answers to four questions formed the basis for the examiner to conclude that Velez was "lying regarding his denials" of involvement in the Orchard Street robbery.

¶23 The first question concerned whether "Topak" (an alias for co-defendant Hirecheta), and "Speedy" (an alias for Flores), were involved in the Orchard Street robbery. Velez answered "yes" when asked whether "Topak" and "Speedy" "robbed the drug house on 23rd and Orchard." In contrast, in response to questions two, three and four, Velez denied robbing the "drug house on 23rd and Orchard," denied hearing "any shots fired during the robbery of that drug house on 23rd and Orchard," and denied receiving "any of the stolen property from the drug house." Although it is not clear how the examiner's opinion about Velez's own initial denials of involvement in the Orchard Street robbery relates to

the question and answer about Hirecheta's and Flores's involvement in the Orchard Street robbery, the opinion is clearly associated with the last three questions and answers. In any event, Velez subsequently admitted he was involved in the Orchard Street robbery, and maintained that Flores was also involved.

¶24 Flores claims that the police deliberately, or with reckless disregard for the truth, withheld the contents of the polygraph exam and the examiner's opinion about the truthfulness of the answers provided by Velez. On this basis, he contends that counsel should have filed a motion seeking to challenge the validity of his probable cause determination. He argues that if the trial court had conducted a ***Franks*** hearing, the omission of the polygraph results would have eliminated the basis for his probable cause determination, resulting in suppression of the "fruits" of his illegal arrest.

APPLICABLE LAW

¶25 The ***Franks*** rule declares that when police request a search warrant, if the affiant provides false information intentionally or with reckless disregard for the truth, and the information is necessary to establish probable cause, the Fourth Amendment requires that a hearing be conducted. ***Franks***, 438 U.S. at 155-56. If, at the hearing, it is proved that false information was presented intentionally or with reckless disregard for the truth, and after setting aside the materially false information, there is no longer probable cause, the search warrant must be voided and any fruits from it are to be excluded from evidence to the same extent as if probable cause was lacking on the face of the affidavit in the first place. ***Id.***

¶26 We extended the ***Franks*** rule in Wisconsin to include misstatements forming the basis for a criminal complaint. ***State v. Manuel***, 213 Wis. 2d 308,

313, 570 N.W.2d 601 (Ct. App. 1997). In ***State v. Mann***, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985) our supreme court further extended the ***Franks*** rule beyond affirmative misstatements of fact and included material omissions of fact from the search warrant affidavit or from the complaint. ***Manuel***, 213 Wis. 2d at 314. We subsequently declared that the same analysis should apply when a defendant challenges what he or she contends are material omissions from a complaint in support of an arrest warrant. We agree with the State that this same analysis should apply to the judicial probable cause determination required in a ***Riverside*** challenge.

¶27 The court in ***Mann***, 123 Wis. 2d at 389, further declared that a material omission of fact is considered to be the same as a deliberate falsehood or a falsehood made with reckless disregard for the truth when it is an undisputed fact critical to a fair determination of probable cause. The omitted information must be a critical, undisputed fact capable of only one meaning. ***Id.*** Mere credibility determinations, the weighing of evidence, or the drawing of one of several inferences from a given fact, are not the sort of material omissions or misstatements of fact governed by the ***Franks*** rule. ***Id.***

¶28 Flores claims that the critical fact which is capable of only one meaning omitted from the probable cause determination is the polygrapher's opinion that Velez lied when he denied his involvement in the Orchard Street armed robbery. We are not persuaded for several reasons.

¶29 First, the question of the veracity of Velez's account of his involvement in the Orchard Street robbery is an issue of credibility alone, not governed by the ***Franks*** rule. Second, as observed by the trial court, "In the complicated context of the many Velez interviews, both before and after the

polygraph, the examiner's opinion was not a critical fact capable of only one meaning." Third, a circumstance of equal significance is the fact that the probable cause showing related to an additional crime; i.e., the National Avenue robbery to which the omitted material did not relate. From this review of the record, we conclude the trial court properly exercised its discretion when it ruled that Flores's postconviction motion did not show that trial counsel performed deficiently in failing to bring a ***Franks v. Delaware*** challenge.

¶30 In summary, we conclude the postconviction court neither committed any error of law nor erroneously exercised its discretion in denying Flores's postconviction motion without conducting a hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.