COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2003AP2748-CR

Cir. Ct. Nos. 2001CF5194; 2001CF6100

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD K. MELVILLE,

DEFENDANT-APPELLANT.

APPEAL from amended judgments and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Amended judgments affirmed; order affirmed in part, reversed in part and cause remanded with directions.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Richard K. Melville appeals from amended judgments of conviction for theft from a person, and for robbery with the use of force, and from a consolidated postconviction order summarily denying his postconviction motion. The issues are: (1) whether Melville was entitled to an evidentiary hearing on his motion for postconviction plea withdrawal predicated on his claims that: (a) trial counsel was ineffective for failing to investigate his alibi, and (b) his plea under ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970), was entered unknowingly and involuntarily; and (2) whether the trial court erroneously exercised its sentencing discretion. We conclude that Melville was entitled to an evidentiary hearing on his ineffective assistance claim, but not on his claim that his plea was unknowingly and involuntarily entered. We further conclude that the trial court properly exercised its sentencing discretion. Therefore, we affirm the amended judgments and those parts of the consolidated postconviction order summarily denying his claims for plea withdrawal for an unknowing and involuntary plea and for sentence modification, and reverse that part of the postconviction order summarily denying his ineffective assistance claim, and remand that cause for further proceedings.

¶2 Melville was charged with two purse snatchings. The first occurred at approximately 2:00 p.m. on September 27, 2001; the second occurred several hours later. Both were charged as robberies with the use of force, contrary to WIS. STAT. § 943.32(1)(a) (2001-02).[1] The State reduced the first robbery charge to a theft from a person, contrary to WIS. STAT. § 943.20(1), and recommended probation in exchange for Melville's ***Alford*** plea; Melville pled guilty to the robbery charge for the second purse-snatching.[2] Despite the State's

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

[2] An ***Alford*** plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***Alford***, 400 U.S. at 37-38; *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

recommendation of probation for the theft, the trial court imposed a five-year sentence, comprised of one- and four-year respective periods of confinement and extended supervision. For the robbery, the trial court imposed a sixty-month consecutive sentence, comprised of two thirty-month periods of confinement and extended supervision. Melville filed postconviction motions seeking to withdraw his ***Alford*** plea, and to modify his sentences to run concurrently. The trial court summarily denied the motions.

¶3 Melville challenged his ***Alford*** plea and alternatively sought concurrent sentences. His plea and sentencing challenges were each predicated on dual grounds. He sought to withdraw his ***Alford*** plea, claiming: (1) ineffective assistance of trial counsel for failing to investigate his alibi; and (2) an unknowing and involuntary plea because he was pressured by his counsel and the trial court. He sought sentence modification, claiming: (1) his girlfriend's suicide constituted a new factor; and (2) the trial court failed to consider his positive attributes as mitigating factors, and that concurrent sentences were more appropriate for what should have been treated as one crime spree rather than two separate incidents.

¶4 In rejecting Melville's claims for plea withdrawal, the trial court: (1) determined that Melville had not clearly and convincingly established his newly-discovered evidence claim because he knew of his alibi before trial; and (2) viewed his allegations, that he was pressured into entering an ***Alford*** plea in exchange for probation, as conclusory. In rejecting Melville's sentencing claims the trial court ruled that: (1) his girlfriend's suicide did not constitute a new factor; and (2) its express consideration of different positive attributes than those specifically alleged by Melville did not constitute an erroneous exercise of sentencing discretion.

¶5 The supreme court reiterated the well-established standards for a postconviction movant to obtain an evidentiary hearing.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*State v.*] *Bentley*, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. *Id.* at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498. *See Bentley*, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶6 Unlike the trial court, we do not assess Melville's claimed alibi as newly-discovered evidence, but as incident to an ineffective assistance claim. "To withdraw his plea after sentencing, [the defendant] needed to establish by clear and convincing evidence, that failure to allow a withdrawal would result in a manifest injustice." ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. "'Manifest injustice' may also be found on the merits: … the defendant may have a complete defense to the crime charged." ***State v. Krieger***, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991) (citation omitted).

¶7 To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must allege "factual-objective" rather than "opinion-subjective" information. ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). "[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted).

¶8 In his postconviction affidavit, Melville averred that he had an alibi: he was in custody from approximately 6:30 a.m. until 2:00 p.m. on the date of the alleged theft. Melville averred that he did not commit the theft because it occurred at approximately 2:00 p.m., when he was in custody. He further averred that his trial counsel failed to investigate this alibi, which could have established his actual innocence.

¶9 Melville does not prove his alibi, but proffers evidence that he was taken into custody with Tanya Sears incident to an unrelated investigation. Although Melville had no documentation regarding his apprehension, he attached confirmation that Sears was apprehended at approximately 7:30 that morning. Melville identified Milwaukee Police Officer Joe Roberson as one of the apprehending officers, and also identified Roberson's partner as potential witnesses to confirm his alibi. Melville further averred that shortly after he left the police station, he returned to retrieve property he had forgotten there. After retrieving his property, Melville averred that he "walked all the way to the south side of Milwaukee. Upon arriving there, at approximately 5:00 p.m. on 9/27/01, I did indeed commit the [robbery to which I pled guilty.]" Melville also averred that his trial counsel failed to investigate his alibi, essentially compelling him to enter an ***Alford*** plea on the day of trial.[3]

¶10 Melville alleges sufficient "factual-objective" information that he was in custody at the approximate time of the first purse-snatching (theft). He also averred that trial counsel failed to investigate his alibi, and thus Melville "felt that we were not ready for trial." We conclude that Melville's "fe[e]l[ing]," that proceeding to trial when trial counsel had failed to investigate his alibi defense, sufficiently alleged how the outcome would have been altered: namely, that this theft charge would have been resolved by something other than an ***Alford*** plea.[4] *See* ***Flynn***, 190 Wis. 2d at 48. Melville has provided sufficient "factual-objective" information that, if true, would entitle him to relief. We therefore remand this matter for an evidentiary hearing to find the facts and determine whether trial counsel was ineffective for failing to investigate Melville's claimed alibi.

¶11 We reject Melville's second basis for plea withdrawal that, apart from the foregoing alibi issue, his plea was entered unknowingly and involuntarily. Melville averred that he "felt pressured" to plead to rather than defend the charges, and that the trial court "le[]d [him] to believe" that if he did, it would impose probation rather than imprisonment. Specifically, Melville averred:

[3] When Melville entered his ***Alford*** plea, he maintained that he did not remember the purse-snatching incident because he was using crack cocaine. He acknowledged, however, that the State had sufficient proof of his guilt. Had his lawyer investigated and confirmed his alibi, it is probable that Melville would have rejected the prosecutor's plea proposal.

[4] Had trial counsel investigated Melville's claimed alibi, he may have discovered that Melville had a complete defense to the theft, or at least potential evidence of reasonable doubt to an offense to which Melville had consistently maintained, at best, his innocence, or at worst, his lack of recollection.

> I entered into this Alford plea on the date that this case was set for trial. I felt pressured into doing so and I do not feel that the plea was knowingly and voluntarily made. Despite advising my trial counsel of my alibi defense, my counsel did not investigate same and was not prepared to present same at the trial. I felt that we were not ready for trial.
>
> As evidenced in the Alford plea transcript, prior to the entry of my plea, the attorneys and I were in the judge[']s chambers. To an extent, the judge took part in the plea negotiations and I was le[]d to believe by that which the judge said that I would receive probation in 01CF005194 & 01CF000610. That did not occur.

¶12 Melville's conclusory averment, that an immediate ***Alford*** plea would allow him to avoid imprisonment, is also belied by the record. In addition to the mandatory inquiries for validly accepting a (variation of a) guilty plea, the trial court specifically asked Melville if he understood:

> the ramifications of an ***Alford*** plea;
>
> it could not accept an ***Alford*** plea unless it was satisfied "to a high degree" that he committed the crime;
>
> it expressly and directly confirmed that Melville had not been threatened with or promised anything in connection with his plea;
>
> it would not impose a more lenient sentence for an ***Alford*** plea than it would for a guilty plea; and
>
> the trial court was not required to follow the State's sentencing recommendation, and was empowered to sentence him to a ten-year prison sentence and a $10,000 fine.

The trial court confirmed that Melville had sufficient time to confer with his lawyer about his decision to plead to the charge, and even addressed the potential issues Melville may have pursued absent an ***Alford*** plea regarding his alleged identification by the complainant. Melville's postconviction allegations are conclusory or belied by the record, and are thus insufficient to warrant an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶13 Melville also challenges his consecutive sentences as an erroneous exercise of discretion.[5]

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted). The primary sentencing factors are the gravity of the offenses, the character of the offender, and the need for protection of the public. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***State v. Spears***, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999). Whether to impose concurrent or consecutive sentences is within the sentencing court's discretion. *See* WIS. STAT. § 973.15(2)(a); ***Larsen***, 141 Wis. 2d at 427.

¶14 "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (citation omitted). Our inquiry is whether discretion was exercised, not whether it could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

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[5] He abandoned his new factor claim on appeal.

¶15 In its postconviction order, the trial court acknowledged that it did not mention the specific positive attributes that Melville identified; it did, however, recognize some of his other positive character attributes. The trial court is not required to mention each character attribute of a defendant during sentencing. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). More significantly, the trial court explained that it was unlikely that it would have imposed a more lenient sentence had it expressly considered the positive attributes Melville described. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (the trial court has an additional opportunity to explain its sentence when challenged by postconviction motion).

¶16 Melville claims that the trial court should have imposed concurrent sentences to "[p]roper[ly] credit" him for entering an ***Alford*** plea. Imposition of concurrent or consecutive sentences is discretionary. *See* WIS. STAT. § 973.15(2)(a). Imposition of consecutive sentences for two separate offenses against two different victims at different times and locations is not an erroneous exercise of discretion. *See* ***State v. Hamm***, 146 Wis. 2d 130, 157, 430 N.W.2d 584 (Ct. App. 1988) ("No explanation is necessary for making separate … counts involving different persons at different times and locations consecutive to each other. It is entirely reasonable to make those sentences consecutive.").

¶17 The transcript of the trial court's sentencing remarks, as further explained in the postconviction order, demonstrates the trial court's consideration of the primary sentencing factors and the reasonableness of its decision. The trial court properly exercised its sentencing discretion: that Melville preferred it would have done so differently does not render its exercise erroneous. *See* ***Hartung***, 102 Wis. 2d at 66.

By the Court.—Amended judgments affirmed; order affirmed in part, reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).