COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP285-CR **Cir. Ct. No. 2014CF3795**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK YAWSA ROBINSON,

DEFENDANT-APPELLANT.

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

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Derrick Yawsa Robinson appeals from a judgment of conviction for three drug-related felonies. Robinson, who pled guilty pursuant to a plea agreement, also appeals from an order denying his postconviction motion. Robinson asks this court to vacate his three convictions and remand for a trial, arguing that remedy is appropriate in light of the State's actions with respect to an amended information and the ineffective assistance of trial counsel. In the alternative, Robinson seeks resentencing on grounds that it was improper for his trial counsel, the State, and the trial court to meet outside his presence just prior to the sentencing hearing. We reject Robinson's arguments and affirm.

BACKGROUND

¶2 On August 25, 2014, police officers executed a search warrant at a residence where Robinson's girlfriend lived.[1] Cocaine, marijuana, a digital scale, and nearly $2000 in cash were recovered. Officers also found mail addressed to Robinson and his girlfriend. Robinson was charged with possession with intent to deliver cocaine as a second or subsequent offense. *See* WIS. STAT. §§ 961.41(1m)(cm)4. and 961.48(1)(a) (2013-14).[2]

¶3 In September 2014, Robinson waived his preliminary hearing and the State filed an information consistent with the criminal complaint. Robinson, who was represented by a series of attorneys during the trial court proceedings, filed motions challenging the search warrant and a statement he gave to an officer.

[1] At times, the record refers to the woman as Robinson's wife. Whether the woman is legally Robinson's wife is not relevant to this appeal.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 On May 7, 2015, the trial court conducted an evidentiary hearing on Robinson's motion to suppress his statement. After the trial court denied the motion, the parties discussed plans for the upcoming jury trial. Shortly after the trial court indicated that there were only two minutes remaining before the hearing had to conclude, it asked the State whether there was anything else to discuss. The State said: "Judge, I have the amended [i]nformation that adds two additional counts for trial, I can file it now but we can address it on the morning of trial, we are right at five [p.m.]."[3] The trial court responded: "The [i]nformation is being filed today but we have run out of time and we will finish addressing it on the day of trial." Trial counsel did not object or offer any comments about the amended information.

¶5 Although the trial was scheduled for May 27, 2015, it was postponed at the defense's request due to a scheduling conflict. At subsequent hearings, there were discussions about whether the trial court should conduct the arraignment on the amended information. For instance, when Robinson's trial counsel was replaced by new counsel, the State asked the trial court to delay the arraignment, implying that new counsel might need time to review the amended information with Robinson.[4]

[3] The amended information added two additional felonies with the same date of commission as the original charge: (1) maintaining a drug trafficking place, as a second or subsequent offense and as a party to a crime; and (2) possession of THC, as a second or subsequent offense. *See* WIS. STAT. §§ 961.42(1), 961.48(1)(b), 939.05, and 961.41(3g)(e) (2013-14).

[4] In his reply brief, Robinson asserts that the State's intent was to "hold off on arraigning the defendant until they knew if there was going to be a trial in the matter" and argues that action "was wholly improper." This court will not attempt to determine the State's motivations. This information is included in the background section of this decision solely to provide context for Robinson's arguments.

¶6 Robinson was arraigned on August 14, 2015. Trial counsel did not object to the amended information or raise any concerns about its filing or the delay in the arraignment. After Robinson entered not guilty pleas to the charges in the amended information, the parties discussed the upcoming jury trial. The State said that it was considering issuing a new criminal complaint for an August 8, 2014 incident that also involved drugs, and it added that it might seek joinder of the two cases. The trial court noted that the potential for additional charges related to the August 8, 2014 incident had been raised in court at a May 22, 2015 pretrial conference. The trial court also said that there was no guarantee it would grant a motion for joinder, given the posture of the existing case.

¶7 About two months after the arraignment, at the final pretrial conference, the parties informed the trial court that they had reached a plea agreement. Pursuant to that agreement, Robinson agreed to plead guilty to the three counts in the amended information and the State agreed to recommend a global sentence of six to eight years of initial confinement and an unspecified period of extended supervision, consecutive to any other sentence. In addition, the State agreed that it would not charge Robinson with conspiracy to possess with intent to deliver cocaine based on the August 8, 2014 incident. Instead, that uncharged crime would be read in for sentencing purposes.

¶8 The trial court engaged in a plea colloquy with Robinson and found him guilty of the three charges. At sentencing, the trial court imposed a sentence of seven years of initial confinement and three years of extended supervision for count one (the crime with which Robinson was originally charged). On count two, it imposed a concurrent sentence of one year and six months of initial confinement and one year and six months of extended supervision. On count three, the trial

court imposed a concurrent sentence of one year in the house of corrections, which was a time-served disposition in light of Robinson's pretrial sentence credit.

¶9 Represented by postconviction counsel, Robinson filed a postconviction motion seeking to vacate his convictions. In the alternative, he sought resentencing. Robinson's postconviction motion raised numerous concerns about the method and timing of the filing of the amended information. The motion also suggested that the State had filed the amended information and delayed the arraignment in order to pressure Robinson into pleading guilty. Further, Robinson's motion asserted that the State "reneged on its repeated statements" that it would allow Robinson to plead to the single charge in the original information if he chose to plead guilty. In addition, Robinson argued that his trial counsel provided ineffective assistance by not objecting to the filing of the amended information and by not enforcing the State's offer to let Robinson plead guilty to the single crime identified in the original information. Finally, Robinson argued in the alternative that even if his convictions were upheld, he was entitled to resentencing because he was not present when the State, trial counsel, and the trial court met in chambers before the sentencing hearing.[5]

¶10 The State opposed the motion. The trial court denied Robinson's motion in a written decision without holding a hearing. This appeal follows.

[5] Robinson's postconviction motion presented other arguments that have not been pursued on appeal, which we will not discuss.

DISCUSSION

¶11 As noted, Robinson's postconviction motion raised several issues related to the filing of the amended information, the State's offer that he could plead to a single count, his trial counsel's alleged ineffective assistance, and Robinson's absence from an off-the-record conference that preceded his sentencing hearing. He continues to argue those issues on appeal.

¶12 We begin our analysis with the State's invocation of the guilty-plea-waiver rule.[6] *See* ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980) ("[A] guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea."). The State argues that pursuant to the guilty-plea-waiver rule, Robinson waived his right to raise issues related to the filing of the amended information when he entered voluntary and intelligent guilty pleas. The State notes that Robinson has not argued that the State's alleged errors concerning the filing of the amended information "deprived the trial court of personal or subject matter jurisdiction, the lone exception to the guilty-plea-waiver rule." Further, the State points out, Robinson has not alleged any violation of the plea acceptance procedures outlined in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986). The State argues: "By voluntarily and intelligently deciding to plead to the amended information rather

[6] Our supreme court has explained that the term "waiver" as used in the guilty-plea-waiver rule "does not convey the usual meaning of an intentional relinquishment of a known right." *See* ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886. ***Kelty*** explained: "[T]he effect of a guilty plea is to cause the defendant 'to forego the right to appeal a particular issue.'" ***Id.*** (citation omitted). The court said that if it "were writing on a blank slate, a more accurate label would be the 'guilty-plea-forfeiture' rule, or something to that effect." ***Id.***

than object to it, Robinson waived any right to appellate review of his claim that the prosecutor somehow violated [WIS. STAT.] § 971.29(1) in filing it."

¶13 In his reply brief, Robinson does not directly address the State's guilty-plea-waiver-rule argument. We are persuaded that the guilty-plea-waiver rule applies. Robinson cannot directly challenge the filing of the amended information—including his allegations about the State's motives for filing it—or the delay in his arraignment.

¶14 Application of the guilty-plea-waiver rule does not end our analysis of this case. A defendant can seek to withdraw a guilty plea by demonstrating a manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. ***Taylor*** explained: "Showing that a plea was not entered knowingly, intelligently, and voluntarily is one way to prove a manifest injustice. The defendant can otherwise establish a manifest injustice by showing that there has been a serious flaw in the fundamental integrity of the plea." ***Id.***, ¶49 (citation and internal quotation marks omitted). ***Taylor*** cited several examples of a manifest injustice, including the ineffective assistance of counsel and a prosecutor's failure to fulfill the plea agreement. *See* ***id.***

¶15 A defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and "that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). "To demonstrate prejudice, a 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." ***Id.***, ¶13. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If a court concludes that the defendant has not proven one prong of the ***Strickland*** test, it need not address the other prong. *See* ***id.***, 466 U.S. at 697.

¶16 Robinson argues that he was denied the effective assistance of trial counsel. However, he asserts in his reply brief that he is *not* attempting to withdraw his guilty pleas. Robinson states:

> The defendant does not seek, and did not seek in his Postconviction Motion or in his Appellant's Brief, to withdraw his plea. Instead, he seeks to vacate his plea on the grounds set forth in the Postconviction Motion and in the Appellant's Brief—that is, on the grounds set forth on the appeal of his convictions. A motion to withdraw a plea of guilty is a whole different matter.

Robinson does not adequately explain, in his opening brief or in his reply brief, the legal basis upon which he seeks to vacate his guilty pleas and proceed to trial without first withdrawing his guilty pleas.[7] On that basis alone we could end our analysis of Robinson's argument that this court should "vacate" his pleas and remand for a trial. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that the court "may decline to review issues inadequately briefed").

¶17 Even if we assume that there is some legal basis for Robinson to seek to vacate his guilty pleas—as opposed to withdrawing them—we conclude

[7] Robinson argues that it was "error" to allow the State to file the amended information and that his guilty pleas "should have been vacated." He explicitly asks this court to reverse the trial court's denial of his postconviction motion, "reverse[]" his guilty pleas, and order a "new trial."

that Robinson has not met his burden of demonstrating prejudice and, therefore, his ineffective assistance claim fails.

¶18 Robinson makes several allegations about his trial counsel's performance prior to the entry of his guilty pleas. First, Robinson argues that trial counsel should have objected to the filing of the amended information on grounds that the State did not seek leave of the trial court to file it and filed it for an improper purpose. Second, Robinson argues that trial counsel should have ensured that the plea agreement would allow Robinson to plead guilty to only a single count, rather than the three counts in the amended information.[8]

¶19 Robinson contends that the prejudice he suffered as a result of trial court's deficient performance was that he was convicted and sentenced on the two new charges. He does not provide additional elaboration. We are not persuaded that Robinson has demonstrated prejudice. First, Robinson has not alleged, much less demonstrated, that he would not have entered a plea agreement with the State—an agreement that limited the amount of prison time the State could recommend and shielded Robinson from the issuance of charges for the August 8, 2014 incident—if he had known his trial counsel could challenge the filing of the amended information. Second, Robinson has not explained what would have happened if the trial court had sustained an objection to the filing of the amended information or if the State had been required to allow Robinson to plead guilty to the original information. For instance, Robinson has not explained

[8] Robinson acknowledges that "this case, of course, does not involve a breach of a plea agreement" but argues that the State's "refusal … to include in the plea agreement the numerous assurances that it had given to the defendant that it would only prosecute him on the original charge if he entered a plea of guilty to that charge and did not go to trial" was "even more unfair."

why the two additional charges from the August 25, 2014 incident and the potential charge for the August 8, 2014 incident could not be issued in separate criminal cases. Because Robinson has not demonstrated prejudice, we reject his ineffective assistance claim concerning his guilty pleas.

¶20 Finally, we consider Robinson's claim that he is entitled to resentencing because prior to the sentencing hearing, his trial counsel, the State, and the trial court met privately, outside Robinson's presence. It appears that the two attorneys and the trial court discussed an offer of assistance that Robinson made to the State. At sentencing, the trial court stated:

> [B]efore calling the case on the record, I had a brief off the record discussion with [trial counsel and the State]; Mr. Robinson was not present to [sic] or part of that discussion. And, in essence, the attorneys gave me some brief information that I am going to consider at sentencing; and then ultimately, it hasn't been done yet, but ultimately, the attorneys are going to agree upon a written version of that, they are going to submit that to the [c]ourt so there is a good record of it. And upon receipt, if it is consistent with the brief information they gave me today, I will order that sealed in the court file; a record best made that way about everything that the [c]ourt is taking into consideration for the sentencings.

The State subsequently filed a short memorandum—which trial counsel preapproved—that discussed Robinson's attempts to assist the State in other matters.[9]

¶21 Robinson complains about his exclusion from the brief discussion held before the sentence hearing. He argues that there was "no justification for not

[9] The memorandum was sealed by the trial court and we will not discuss its contents, except to note that the memorandum reflects favorably on Robinson.

having [him] present during the conference and not having a court reporter present to record it" because "the fact that [he] had been cooperating with the police in other matters had been mentioned repeatedly at various pretrial conferences and at the pretrial hearing." Robinson asserts that his exclusion from the discussion violated his statutory and constitutional right to be present at sentencing, citing WIS. STAT. § 971.04(1)(g) (providing that "the defendant shall be present … [a]t the pronouncement of judgment and the imposition of sentence"), and ***State v. Koopmans***, 202 Wis. 2d 385, 397, 550 N.W.2d 715 (Ct. App. 1996) ("A defendant has a due process right to be present at a sentencing hearing.").

¶22 The State argues that Robinson forfeited "any objection to his absence from the pre-sentencing meeting by not objecting (through counsel) to holding the meeting in Robinson's absence, and again when the trial court announced for the record that the meeting had occurred before the sentencing hearing started."[10] The State continues: "Robinson does not argue that his attorney was ineffective for not objecting at either point, and does not seek discretionary reversal. This [c]ourt should, therefore, affirm due to Robinson's waiver/forfeiture of any objection alone." The State cites several cases in support of its position, including ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, and ***State v. Pinno***, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207.

[10] The State also argues that the meeting was not part of "the imposition of sentence," *see* WIS. STAT. § 971.04(1)(g), and that even if Robinson should have been present at the meeting, "the error was harmless." We do not address those arguments because we conclude that Robinson forfeited his right to challenge his absence from the meeting. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

¶23 Robinson's reply brief does not respond to the State's arguments concerning his lack of an objection at the sentencing hearing and his lack of allegations that trial counsel provided ineffective assistance by not objecting. We decline to develop an argument for him. *See* ***Pettit***, 171 Wis. 2d at 646. Instead, we deem the State's arguments admitted and affirm the trial court's order denying Robinson's request for resentencing. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure to refute a proposition asserted in a response brief in a reply brief).

¶24 For the foregoing reasons, we reject Robinson's arguments and affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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