COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1668 **Cir. Ct. No. 1993CF932309**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MIGHTY TYRONE HOWELL,

DEFENDANT-APPELLANT.

APPEAL from 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. Mighty Tyrone Howell appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. Howell claims:

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

(1) his waiver of the right to a jury trial was not knowing, voluntary and intelligent; (2) the trial court's colloquy regarding waiver of the jury trial was insufficient; and (3) trial counsel was ineffective for advising Howell to waive his jury trial. In order to overcome the procedural bar to raising these claims in a successive postconviction motion, Howell alleges that his postconviction counsel was ineffective for failing to raise these issues in the direct appeal. Because the record demonstrates that Howell's waiver was valid, the trial court's colloquy regarding the waiver was sufficient and Howell cannot prove he was prejudiced by trial counsel's advice on the waiver, we cannot conclude that Howell received ineffective assistance of postconviction counsel. Accordingly, we affirm.

BACKGROUND

¶2 On May 27, 1993, Howell, then age seventeen, shot Roger Buchholz, who was in his own car, while Howell was trying to rob Buchholz near the intersection of North 35th and West Clybourn Streets. Howell was charged with possession of a firearm by a juvenile, first-degree intentional homicide as party to a crime, and attempted armed robbery as party to a crime.

¶3 On the date set for the jury trial, Howell's trial counsel advised him to waive the jury trial and proceed with a trial to the court. Counsel indicated that he felt it would be in Howell's best interest to have the court act as factfinder because the defense theory was insufficient evidence and failure of the State to satisfy its burden of proof. When the court asked whether the parties were ready to proceed with trial, it was then informed that Howell wanted to waive his right to a jury trial. The court engaged Howell in a lengthy colloquy regarding his waiver.

> THE COURT: Have you talked to the defendant about the difference between a court trial and the jury trial?

[DEFENSE COUNSEL]: Yes, I have.

THE COURT: Are you satisfied that he understands the difference and wishes to have a court trial?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Mr. Howell, you are charged with three counts: Possession of a firearm by a juvenile; first degree intentional homicide of Roger Buchholz …. That's charged as a party to a crime. Count 3 is attempted armed robbery of Roger Buchholz also as a party to a crime. How old are you today, Mr. Howell?

THE DEFENDANT: Seventeen.

THE COURT: Do you understand what you are charged with?

THE DEFENDANT: Yes.

THE COURT: You have the right to have a trial where somebody decides whether you committed one or two or all of these offenses or not. Now, the state has the burden of proof at the trial. They have to prove you guilty. And somebody has to decide whether the state has been able to prove you guilty beyond a reasonable doubt. Under the constitution, you have the right to have that decision made by a jury of twelve people. That's what we call a "jury trial." Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have the right to have twelve people selected from a larger group of people. They would be selected to be the jury. They would sit in the jury box over here. Their job would be to listen to the evidence that [the prosecutor] would have to present and any evidence that you wanted to present and then decide whether the state had proven you guilty beyond a reasonable doubt.

As to each of these charges, while you have the right to a jury trial, you can waive a jury trial and have the Court decide whether you're guilty. That means I would decide. The trials are essentially the same. You have all of the same rights at a court trial as a jury trial. The state has the burden of proof. Your attorney has the right to help you and cross-examine witnesses. All of those things remain the same. The only difference is that at the end of a court trial, I have to think about the evidence and decide whether

you're guilty or not guilty. And at the end of the jury trial, the jury goes back in a room and deliberates. So the main difference has to do with who decides whether you're guilty or not. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about that?

THE DEFENDANT: No.

THE COURT: Have you ever been through a jury trial before?

THE DEFENDANT: No.

THE COURT: Have you ever seen one in a real life setting?

THE DEFENDANT: No.

THE COURT: There's a couple of other less important differences. Jury trials tend to take longer. We have to take several hours to pick a jury. And because we have a jury, sometimes things go a little slower than they would otherwise go. But I certainly don't want you to give up your right to a jury trial because of that. Another difference is jurors get to deliberate with each other about the evidence. They go back in the room and they talk about it. I have to just think about it and decide on my own. I have to decide one way or the other.

Now, at a jury trial the jurors all have to agree one way or the other before they can return a verdict. That means all twelve of them have to return a verdict of guilty before they can find you guilty of one of these counts and all twelve of them would have to decide that you're not guilty; that is, the state has not proven you guilty beyond a reasonable doubt before they can return a verdict of not guilty. If they can't agree. [sic] If they've deliberated as long as I think I can fairly ask them to deliberate and they cannot agree, then you can have a hung jury. It's a mistrial and then you do the whole thing over again. That doesn't happen in a court trial because there's only one person deciding, that would be me. Do you think you understand those things?

THE DEFENDANT: Yes.

….

THE COURT: But let's get back to this business about a jury trial. Mr. Howell, do you have any questions about the difference between a court trial and a jury trial?

[DEFENSE COUNSEL]: No, no.

THE COURT: What do you want to have? Do you want a jury to decide this or me to decide this?

THE DEFENDANT: You.

THE COURT: Do you feel you've had enough time to talk to your attorney about this?

THE DEFENDANT: Yes.

THE COURT: [Defense counsel], do you feel you've had enough time to talk to Mr. Howell about this?

[DEFENSE COUNSEL]: Yes, I do, judge. I also ask the Court to go into whether any promises or threats have been made to him with regard to this issue.

THE COURT: Mr. Howell, did anyone make any threats to you to get you to give up your right to a jury trial?

THE DEFENDANT: No.

THE COURT: Did anyone make any promises to you about this?

THE DEFENDANT: No.

THE COURT: If you give up your right to a jury trial and we start with a court trial, it's going to be too late for you to change your mind in the middle of it. Once we start a court trial, you will have given up your right. And it's not something you can just change you[r] mind about later on and get it back. Do you understand that?

THE DEFENDANT: Yes.

….

THE COURT: I will find that the defendant understands the difference between a court trial and a jury trial, that he has knowingly, voluntarily [and] intelligently waived his right to have a jury trial and we will proceed with a court trial.

¶4 The case proceeded to a trial to the court. At the conclusion of the evidence presented, the trial court found Howell guilty of all three crimes. It sentenced him to mandatory life imprisonment for the homicide, with a parole eligibility date of December 15, 2038. For the attempted armed robbery and possession of a firearm, Howell was sentenced to ten years and nine months, respectively, concurrent to the homicide and each other.

¶5 In December 1994, Howell's counsel filed a postconviction motion challenging the sufficiency of the evidence to support the homicide conviction. The trial court denied the motion in April 1995. On direct appeal, we affirmed the judgment and order in July 1996. The supreme court denied Howell's petition for review. On December 21, 2004, Howell filed this *pro se* WIS. STAT. § 974.06 motion. The trial court summarily denied the motion. Howell now appeals.

DISCUSSION

¶6 Howell argues that his convictions should be reversed for a new trial on the grounds that: (1) his jury trial waiver was invalid; (2) the trial court's colloquy regarding the waiver of the jury trial was inadequate; and (3) trial counsel was ineffective with respect to advising him to waive his jury trial. Howell would be procedurally barred from raising any of these issues pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), but for the fact that he proffers a sufficient reason for failing to raise these issues in his original direct appeal—namely, that postconviction counsel provided ineffective assistance.

¶7 The State assumes, for purposes of argument, that this constitutes a sufficient reason to avoid the procedural bar and addresses the merits of the issues. We do as well.

A. Valid Jury Trial Waiver/Court Colloquy.

¶8 Howell claims that his waiver of a jury trial was not knowingly, voluntarily and intelligently made and that the trial court's colloquy regarding the waiver was inadequate. We reject both claims.

¶9 A defendant has a guaranteed constitutional right to a jury trial. *See* ***State v. Anderson***, 2002 WI 7, ¶10, 249 Wis. 2d 586, 638 N.W.2d 301. A defendant may, nonetheless, waive the right to a jury trial. *See* WIS. STAT. § 972.02(1). The waiver must be "an intentional relinquishment or abandonment" of the right to a jury trial. ***Anderson***, 249 Wis. 2d 586, ¶11 (citation omitted). Thus, the defendant's waiver must be made knowingly, voluntarily and intelligently and must be made by the defendant personally, not defendant's counsel. *See* ***id.***, ¶¶11, 23.

¶10 As in this case, where the defendant personally made a contemporaneous statement in court waiving the right to a jury trial, we apply a two-step test to determine whether the waiver was valid. ***Id.***, *¶¶*24-26. First, the court must conduct a colloquy on the record to establish that the defendant's waiver satisfies the following requisites: the defendant (1) "made a deliberate choice" without being threatened or promised anything; (2) knew "of the nature of a jury trial" such as that it consists of twelve people who must agree on the elements of the charged crime; (3) knew that the court trial meant the judge would decide whether he or she was guilty; and (4) "had enough time to discuss this decision with his or her attorney." ***Id.***, ¶24.

¶11 The defendant has the initial burden to prove that an on the record colloquy did not occur or was inadequate for a specific reason and must allege that he did not understand parts two or three set forth above. *See* ***State v. Grant***, 230

Wis. 2d 90, 98-99, 601 N.W.2d 8 (Ct. App. 1999). If the defendant satisfies this burden, then we proceed to the second step, wherein the State has the burden to show by clear and convincing evidence that the defendant's jury trial waiver was knowing, intelligent and voluntary. ***Anderson***, 249 Wis. 2d 586, ¶26. If the State fails to satisfy this burden, then the defendant is entitled to a new trial by jury. ***Id.*** Our standard of review is mixed. Findings of fact and determinations of witness credibility will be upheld unless clearly erroneous. *See* ***State v. Silva***, 2003 WI App 191, ¶22, 266 Wis. 2d 906, 670 N.W.2d 385. The question of whether a defendant's waiver is valid, however, is a question of law reviewed independently. ***Anderson***, 249 Wis. 2d 586, ¶12.[2]

¶12 Howell has failed to satisfy his burden to show that the plea colloquy was inadequate to establish a valid jury trial waiver. The colloquy in the record was sufficient with respect to each of the requisites referenced above. That is, the trial court's colloquy included discerning that Howell had made a deliberate choice and was not threatened or promised anything; the trial court explained to Howell that the jury trial would require having twelve people agree unanimously on the verdict as opposed to the court trial where the judge would be the sole

[2] We agree with the State that the ***State v. Livingston***, 159 Wis. 2d 561, 565, 573, 464 N.W.2d 839 (1991) standard (where no contemporaneous statement is made, no valid waiver occurred and defendant is entitled to new trial) does not apply in this case because Howell made a contemporaneous oral statement on the record waiving his right to a jury trial.

We also decline to address whether this case should be governed by the less stringent ***State v. Resio***, 148 Wis. 2d 687, 436 N.W.2d 603 (1989) standard, as we conclude that the colloquy in this record satisfies the more stringent test set forth in ***State v. Anderson***, 2002 WI 7, ¶10, 249 Wis. 2d 586, 638 N.W.2d 301.

decision maker;[3] and that he was afforded the time he needed to make the decision. Although Howell now contends in his affidavit that the discussion with his trial counsel was only five minutes, that is not what was reflected at the time the decision was made. A self-serving affidavit filed eleven years later is insufficient to overcome the clear facts in the record.

¶13 Based on our review, we conclude that the waiver colloquy that occurred here was sufficient to satisfy the requirements set forth in ***Anderson***. Accordingly, Howell has failed to satisfy his burden of proving the first part of the ***Anderson*** test and there is no need for us to proceed to the second part of the test where the burden shifts to the State.[4]

[3] Howell contends he should have been told more specifics about the "twelve people" who would serve as jurors. We reject this contention. Although, a trial court certainly is permitted to more specifically describe the twelve people who would be on a jury, it is not required to do so. *See* ***Anderson***, 249 Wis. 2d 586, ¶24; WIS JI—CRIMINAL SM-21 at 2.

[4] Howell also argues throughout his brief that he should be afforded special consideration because he was a juvenile and because he has a fifth-grade reading comprehension level. We are not persuaded by his argument. As the State points out, the trial court knew Howell had been waived into adult court as a juvenile, that the juvenile waiver petition discloses that Howell was two months shy of his eighteenth birthday, that Howell had previously been found delinquent for burglary and placed on probation, and that he did not have any mental or developmental disabilities. The record contains documentation that Howell completed the ninth grade and that he had never been committed to a mental institution or found to be incompetent. Likewise, we agree with the State's assessment that the fact that Howell may have had a fifth-grade reading comprehension does not mean that his "intelligence" level was that of a ten-year-old boy. There is no information which convinces us that Howell was unable to make a reasoned decision to waive a jury trial in favor of a court trial, pursuant to advice from counsel. We reject Howell's contention that his "yes" and "no" answers at the time of the wavier colloquy render his waiver unknowing, involuntary and unintelligent based on age and other factors. The record clearly reflects that Howell responded personally to the trial court and indicated he understood. Thus, there is no basis for us to conclude that despite the clear colloquy, this waiver was invalid.

B. Trial Counsel Ineffective Assistance Claim.

¶14 Howell also contends that his trial counsel provided ineffective assistance with respect to advising him to waive his jury trial right. Specifically, Howell argues that trial counsel did not provide him with enough information in order to be able to make a deliberate and informed choice. We reject this contention.

¶15 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer'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." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶16 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of

performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶17 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. 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. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). 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. ***Id.*** at 313-18. Whether the motion sufficiently alleges 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 finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶18 We conclude that Howell failed to demonstrate that any deficient conduct by trial counsel resulted in prejudice to him. There is nothing in the record to suggest that even if Howell had elected to proceed with a jury trial that the result would have been different. The evidence of Howell's guilt in this case was overwhelming. As we previously concluded in Howell's direct appeal:

> [T]he trial court [stated in making] these findings of fact [on Howell's guilt]: Howell "raised his arm and pointed a gun at the victim, firing four shots at pointblank range"; the shots were fired from between ten and five feet from the

> car; one of the four gunshots killed Buch[h]olz. Our review of the record casts no doubt on these findings of fact.
>
> ….
>
> The evidence is overwhelming to support a verdict that Howell intended to kill Buch[h]olz when he fired a handgun four times at Buch[h]olz from close range.

¶19 Because there is no reasonable probability that but for defense counsel's advice, Howell would have received a different outcome, we cannot conclude that he was prejudiced by his attorney's conduct. Accordingly, his claim that trial counsel provided ineffective assistance fails.

¶20 Finally, because we have rejected each of Howell's claims of error on the merits, there cannot be any claim that postconviction counsel provided ineffective assistance for failing to raise these issues. Accordingly, we also reject Howell's claim that postconviction counsel provided ineffective assistance.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.