COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2844 **Cir. Ct. No. 1994CF944093**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY K. MURPHY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Anthony K. Murphy appeals *pro se* from an order denying his WIS. STAT. § 974.06 postconviction motion. Murphy claims that his trial lawyer was ineffective.[1] We affirm.

I.

¶2 In 1994, Murphy was charged with felony murder, as a party to a crime, for shooting and killing Terald L. Campbell during an attempted armed robbery. *See* WIS. STAT. §§ 940.03, 943.32(1)(b) & (2), 939.32, 939.05 (1993–94). Murphy pled guilty and the trial court sentenced him to thirty years in prison. After he was sentenced, Murphy was told of his right to seek postconviction relief and indicated that he did not intend to do so.

¶3 In June of 1996, Murphy, *pro se*, sought a copy of his transcripts. The trial court denied the motion, pointing out that Murphy's direct-appeal rights had expired, and concluding that Murphy had failed to allege an arguably meritorious claim.

¶4 In June of 2003, Murphy filed a *pro se* motion seeking transcripts and "other records," including his Presentence Investigation Report. The trial court denied Murphy's request for transcripts for the reasons given in the prior order, and denied Murphy's request for access to his Presentence Investigation Report because "the sentencing transcript shows that the defendant was given an

[1] Anthony K. Murphy has also sprinkled his various submissions to the trial court and on appeal with tangential assertions that are not developed, and, accordingly, we do not address. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").

opportunity to review the report with trial counsel and that he had no factual disputes."

¶5 In September of 2004, Murphy filed a *pro se* WIS. STAT. § 974.06 motion claiming, among other things, that his trial lawyer was ineffective. The trial court denied the motion without a hearing.[2]

II.

¶6 On appeal, Murphy claims that his trial lawyer was ineffective for several reasons. A defendant claiming that his or her lawyer gave ineffective representation must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We address Murphy's ineffective-assistance claims under this test.

¶7 First, Murphy claims that his trial lawyer was ineffective because the lawyer did not object when the trial court allegedly did not follow the mandatory procedures for accepting Murphy's guilty plea. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986) (to ensure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment, and the rights being given up). This claim is belied by the Record.

[2] Murphy also claimed that the trial court erroneously exercised its discretion when it imposed an allegedly excessive sentence. The trial court concluded that Murphy's sentencing claim was not cognizable in a WIS. STAT. § 974.06 motion. *See* ***Cresci v. State***, 89 Wis. 2d 495, 505, 278 N.W.2d 850, 855 (1979). Murphy does not raise this issue on appeal.

¶8 At the plea hearing, Murphy and his lawyer submitted a signed plea questionnaire and waiver-of-rights form. On the plea form, Murphy indicated, by signing the form, that he understood the elements of felony murder, the trial court could sentence him to a maximum possible sentence of forty years in prison, and the constitutional rights he was waiving.

¶9 The trial court also asked Murphy questions about his plea. In response to these questions Murphy said that he understood that the maximum penalty he faced was forty years in prison and that the State would recommend at sentencing a "very substantial incarceration." Murphy also told the trial court that he understood all of the information on the plea form, including the elements of the crime and the constitutional rights he was giving up. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987) (trial court may fulfill mandatory requirements for accepting a plea by making references to a signed plea questionnaire and waiver-of-rights form). The parties stipulated that the facts in the complaint, testimony from the preliminary examination, and a motion hearing set out an adequate factual basis for the crime, and the trial court relied on them as the factual basis for Murphy's plea. This was all sufficient to satisfy the requirements of WIS. STAT. § 971.08. Accordingly, Murphy has not shown that his trial lawyer's performance was deficient.

¶10 Second, Murphy contends that his trial lawyer was ineffective because the lawyer did not object when the trial court at sentencing relied on allegedly "misleading and inaccurate" information in the Presentence Investigation Report. Murphy contends that his trial lawyer denied him access to the Report, and he thus could not identify and correct the alleged misinformation. Murphy has shown neither deficient performance nor prejudice.

¶11 There is no evidence that Murphy sought the Presentence Investigation Report before sentencing or was denied access to it. *See* ***State v. Flores***, 158 Wis. 2d 636, 643–644, 462 N.W.2d 899, 902 (Ct. App. 1990) (a defendant must allege that he or she affirmatively sought access to the Presentence Investigation Report and was subsequently denied access to obtain an evidentiary hearing on an alleged due-process violation), *overruled on other grounds by* ***State v. Knight***, 168 Wis. 2d 509, 519 n.6, 484 N.W.2d 540, 544 n.6 (1992). Indeed, at sentencing, Murphy's lawyer told the trial court that he "went through the presentence report, read the entirety of it other than the face sheet to Mr. Murphy, and there are no factual disputes."[3]

¶12 Moreover, Murphy does not allege how the Report was inaccurate, even though he was in court when the trial court referred to it and he reviewed it at that time. *See* ***State v. Groth***, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 906, 655 N.W.2d 163, 171 (To establish a due-process violation, the defendant has the burden of proving by clear and convincing evidence that: (1) the information used in sentencing was inaccurate, and (2) the trial court actually relied on the inaccurate information in sentencing.). Accordingly, Murphy's claim fails.

¶13 Finally, Murphy claims that his trial lawyer did not file an allegedly requested notice of intent to pursue postconviction relief. Murphy did not, however, raise this issue in his WIS. STAT. § 974.06 motion. Accordingly, the trial court did not have the opportunity to asses his claim within the two-part test for an

[3] Murphy admits that he did not request access to his Presentence Investigation Report, but claims for the first time on appeal that he did not do so because "he did not know what to object to within the [Report], when he did not have access to trigger any inaccurate and misleading information." This claim is belied by his trial lawyer's representation to the trial court that he went through the Report with Murphy.

ineffective-assistance claim, and we decline to address it here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, appellate court will not review an issue raised for the first time on appeal).

By the Court.—Order Affirmed.

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