COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP613 **Cir. Ct. No. 2000CF13**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEGDRICK L. FARLEY,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, J. Segdrick I. Farley appeals *pro se* from the order denying his postconviction motion after he pled guilty to second-degree

intentional homicide, while using a dangerous weapon.[1] Farley contends that he should be allowed to withdraw his guilty plea on grounds that his trial counsel was ineffective for: (1) allowing him to plead guilty while under the influence of psychotropic medications that rendered him incompetent; (2) failing to investigate his mental state at the time of the offense as a defense; and (3) advising him to plead guilty to second–degree intentional homicide because, had he gone to trial, he could have claimed self-defense, and the offense might have been reduced to reckless homicide. He also contends that the trial court erred in denying his postconviction motion without a hearing.

¶2 We conclude that Farley's trial counsel was not ineffective because: (1) Farley had been declared competent and his responses during the plea proceedings indicated that he understood the plea; (2) Farley had decided to waive a defense based on his mental state, as the record shows that he and his trial counsel discussed but rejected such a defense, and Farley does not allege facts sufficient to support a finding of not guilty by reason of mental disease or defect; and (3) Farley waived the theory of self-defense, as the record shows that he and his trial counsel discussed but rejected the option of self-defense, and there is no indication that the offense would have been reduced to reckless homicide. Because Farley's trial counsel was not ineffective, Farley is not entitled to withdraw his plea. We also conclude that the trial court did not err in denying his motion without a hearing. Accordingly, we affirm.

[1] The plea hearing and sentencing were presided over by the Honorable Daniel L. Konkol. The postconviction motion was presided over by the Honorable Jeffrey A. Wagner.

I. BACKGROUND.

¶3 On November 26, 1999, Farley and Rickey Jamison were riding in Jamison's car; Jamison was driving and Farley was in the passenger seat. The two did not get along due to, among other things, disagreements about the territories in which each of them could deal drugs, and the two had previously made threats against each other. Jamison had apparently shot Farley in the arm a few weeks earlier and, on the night in question, the two allegedly met to discuss the court case related to that shooting. According to Farley, Jamison uttered words to the effect that one of them would be shot and reached for a gun. Farley, who was carrying a gun, reached for his gun and shot Jamison once in the head. Farley jumped out of the car, but allegedly returned to retrieve Jamison's gun and then disposed of both guns. Jamison was pronounced dead upon arrival at the hospital.

¶4 On January 3, 2000, Farley was charged with first-degree intentional homicide while using a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(a)2. (1997-98).[2] A competency evaluation was ordered. An initial evaluation diagnosed Farley with paranoid schizophrenia and depression, but was inconclusive as to competence. A subsequent inpatient evaluation declared Farley competent to stand trial and diagnosed him with "Antisocial Personality Disorder [and] Malingering."

¶5 Pursuant to a plea agreement, Farley pled guilty to second-degree intentional homicide, while using a dangerous weapon. *See* WIS. STAT.

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

§§ 940.01(2)(b), 940.05(1)(b) & 939.63(1)(a)2. Farley was sentenced to an indeterminate term not to exceed thirty years. Judgment was entered accordingly.

¶6 Farley did not file a direct appeal. On February 22, 2006, Farley filed a WIS. STAT. § 974.06 postconviction motion seeking to withdraw his guilty plea on grounds that his trial counsel was ineffective for failing to: (1) object to him entering a plea while under the influence of psychotropic medications; (2) raise his state of mind at the time of the offense as a defense; and (3) properly investigate self-defense. The trial court denied the motion without a hearing, concluding that Farley's trial counsel's assistance was not ineffective because: (1) Farley's responses to the court's questions and responses throughout the plea proceedings did not raise an inference that he was incompetent or otherwise unable to understand the nature of the proceedings; (2) the record showed that Farley's trial counsel discussed the possibility of a mental state defense with Farley and that Farley understood that he was waiving the defense by entering his plea; and (3) the records showed that Farley's trial counsel discussed self-defense with Farley and that Farley understood that he was waiving the defense. This appeal follows.

II. ANALYSIS.

¶7 On appeal, Farley renews his claim that he should be allowed to withdraw his plea because his trial counsel provided ineffective assistance and asserts that the trial court erred in denying his postconviction motion without a hearing.

¶8 A defendant seeking to withdraw a guilty plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to correct a "manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d

707 (1997). The decision to allow plea withdrawal rests in the trial court's discretion, and we will reverse only where the trial court erroneously exercised that discretion. ***Id.*** Ineffective assistance of counsel can satisfy the manifest injustice standard. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶9 To succeed on an ineffective assistance of counsel claim, the defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance," ***id.*** at 690, and to prove prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, the outcome would have been different, ***id.*** at 694. 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. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). 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," which we review independently. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶10 When a defendant seeks an evidentiary hearing in a postconviction motion, but "fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). To be granted an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must allege with specificity both deficient performance and prejudice in the

postconviction motion. ***Bentley***, 201 Wis. 2d at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law that we review independently. ***Id.*** at 310. If the trial court refuses to hold a hearing based on a finding that the record conclusively demonstrates that the defendant is not entitled to relief, we will reverse that determination only if the trial court erroneously exercised its discretion. ***Id.*** at 318.

A. Influence of Psychotropic Medications during Entry of Plea

¶11 Farley first contends that his trial counsel was ineffective for allowing him to plead guilty while under the influence of psychotropic medications. He alleges that at the time he entered his plea he was taking Prozac, Thorazine, Cogentin and Benadryl. According to Farley, these drugs caused him to not understand what was taking place during the plea proceedings and gave him an "unconscious mind."[3] He therefore contends that he was incompetent to enter his plea and that this makes his plea involuntary. We disagree.

¶12 It is undisputed that Farley suffers from mental disorders and takes medications for those disorders. What Farley appears to overlook is that mental illness alone does not equal incompetence. Rather, to be incompetent to stand trial the defendant must "lack[] the capacity to understand the nature and object of the proceedings against him [or her], to consult with counsel, and to assist in

[3] In alleging that psychotropic drugs gave him an "unconscious mind," Farley asserts that Prozac and Thorazine should not be taken together. The State challenges Farley's contention and asserts that what is prohibited is taking Prozac together with Thioridazine, not Thorazine, and that the reason for this warning is that Prozac may increase the risk of cardiac problems, not because of any effect on the person's mental state. Because the central issue for our determination is whether Farley was competent at the time he entered his plea, we focus our inquiry on that factor and decline to speculate about possible drug interactions.

preparing [a] defense." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997); *see* WIS. STAT. § 971.13(1).[4] Thus, a "person is competent to proceed if: 1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." ***Garfoot***, 207 Wis. 2d at 222**.** The trial court's determination of whether a defendant is competent to stand trial will not be reversed unless clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477.

¶13 Here, soon after Farley was charged, a competency evaluation was performed and Farley was determined to be competent. Farley does not challenge the results of the evaluation. He also does not allege that there were any changes in his condition after he was first found competent to warrant another evaluation. *See* ***State v. Meeks***, 2002 WI App 65, ¶¶60-62, 251 Wis. 2d 361, 643 N.W.2d 526, *rev'd on other grounds*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. Rather, he merely claims that he took various medications that gave him an "unconscious mind." This contention is belied by the plea colloquy. The court addressed the subject of Farley's competence with a number of questions:

> THE COURT: And at this time you're currently taking Thorazine, Prozac and one other drug listed here.
>
> THE DEFENDANT: Cogentin and Benadryl.
>
> THE COURT: With those medications, does any of that medication cause you any difficulty in understanding what's happening this morning?
>
> THE DEFENDANT: No, it doesn't sir.

[4] WISCONSIN STAT. § 971.13(1) provides: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

> THE COURT: Do you feel that you have clear mind?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Have you been able to understand your attorney when he's talked to you his morning?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you been able to understand me this morning?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you're receiving those medications for treatment at this time for a mental illness, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And what's that mental illness?
>
> THE DEFENDANT: I got paranoid schizophrenia and antisocial disorder.

¶14 In addition to the questions recited above, the trial court conducted an extensive colloquy about the Plea Questionnaire and Waiver of Rights form that Farley had signed, the constitutional rights Farley was giving up, and the consequences of giving up those rights. Farley gave clear answers to all of the court's questions, responding that he understood every question. Farley's trial counsel also indicated during the plea hearing that he was "comfortable having worked with Mr. Farley that he underst[ood] everything." The plea colloquy and Farley's trial counsel's assurance demonstrate that there was no indication that Farley was incompetent, that he did not understand what was going on during the proceeding, or that he was otherwise unaware of what he was pleading to. Farley's plea was therefore valid. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986) (a constitutionally valid guilty plea must result from a colloquy between the defendant and trial court to ensure the defendant understands

the rights being relinquished and the consequences of entering a guilty plea and knowingly, intelligently, and voluntarily waives those rights).

¶15 The record thus demonstrates that Farley's argument of an "unconscious mind" that allegedly made him incompetent is a conclusory, self-serving assertion, and Farley has fallen short of showing that for that reason his trial counsel's performance was deficient, resulting in prejudice to him. *See* ***Bentley***, 201 Wis. 2d at 313-18. The trial court hence did not err in denying Farley's postconviction motion without a hearing. *See* ***id.***

B. State of Mind at Time of Offense

¶16 Farley next contends that his trial counsel was ineffective for failing to investigate his state of mind at the time of the offense. He claims he was chemically dependent and had emotional problems, and that an investigation of his state of mind would have revealed that he was suffering from diminished mental capacity which made him unaware of the crime at the time he was committing it. Accordingly, he asserts that his trial counsel should have advised him to plead not guilty by reason of mental disease or defect. We again disagree.

¶17 "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 (citation omitted).

¶18 If a defendant enters a plea of not guilty by reason of mental disease or defect, to be acquitted, he or she must show, "to a reasonable certainty by the greater weight of the credible evidence," both: "that at the time the crime was

committed, the defendant has a mental disease or defect"; and that "as a result [he or she] lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law." WIS JI—CRIMINAL 603 (2005); *see* WIS. STAT. § 971.15.

¶19 Even assuming that Farley is able to satisfy the first prong—that he was suffering from a mental disease or defect—Farley has made no effort to show that he "lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law." WIS JI—CRIMINAL 603. As a result, he falls short of showing "with specificity" how pursuing a defense based on diminished mental capacity would have altered the outcome of the proceeding. *See* ***Provo***, 272 Wis. 2d 837, ¶15. Because Farley must prove both prongs with specificity and it is clear that Farley does not satisfy the second prong, we need not address the first.[5]

¶20 Moreover, during the plea colloquy, the trial court explicitly asked Farley whether he understood that he was giving up his right to a defense based on mental capacity: "[D]o you understand that by pleading guilty you're giving up any defenses you may have in this matter?" Farley replied "Yes." The court then asked, "[h]ave you discussed with your attorney any defenses you may have with regard to suffering from any mental illness at the time of the incident?" and Farley responded "Yes." Farley thus explicitly waived a defense based on his mental state.

[5] In light of the inpatient competency evaluation's diagnosis of only "antisocial personality disorder and malingering," it appears likely that he might not even satisfy the definition for "mental disease or defect" because WIS. STAT. § 971.15(2) specifically excludes "an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

¶21 It is readily apparent that Farley's claim that he suffered from diminished mental capacity when he shot Jamison that would have warranted a plea of not guilty by reason of mental disease of defect is unsupported and conclusory. Farley has not shown that his trial counsel's performance was deficient for failing to investigate his mental state at the time of the offense, and that this deficiency resulted in prejudice to him. *See* ***Bentley***, 201 Wis. 2d at 313-18. Because the record conclusively shows that Farley is not entitled to relief, the trial court did not err in denying his motion without a hearing. *See* ***id.***

C. Advice to Plead Guilty to Second-Degree Intentional Homicide

¶22 Finally, Farley also contends that his trial counsel was ineffective for advising him to plead guilty to second–degree intentional homicide. He asserts that his trial counsel did not adequately investigate Jamison's violent character. According to Farley, he feared Jamison because Jamison had threatened him and shot him on one occasion, and thus at the time of the offense he feared for his life and shot Jamison in self-defense. He submits that his trial counsel should not have advised him to plead guilty to second-degree intentional homicide, but should have proceeded to trial under a theory of self-defense, where the offense might have been reduced to reckless homicide. Once again, we disagree.

¶23 As noted, "[a] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***Provo***, 272 Wis. 2d 837, ¶15 (citation omitted).

¶24 The law of self-defense allows a defendant to threaten or intentionally use force against another only if "the defendant believed that there was an actual or imminent unlawful interference with the defendant's person"; and

"the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference"; and "the defendant's beliefs were reasonable." WIS JI—CRIMINAL 805 (2001); *see* WIS. STAT. § 939.48.

¶25 During the plea hearing, the defense counsel told the court that, had the case proceeded to trial, the theory under which the defense would proceed would have been self-defense:

> [DEFENSE COUNSEL]: … Were this case to have gone to trial, and at sentencing also you … would hear there were two prior occasions where there was contact between Mr. Farley and the victim, Mr. Jamison. On one of those occasions Mr. Jamison actually shot Mr. Farley. On another occasion, he shot at Mr. Farley and the second individual. The incident where Mr. Jamison was killed was a third situation where Mr. Farley was present. It was his impression that threats were made and that Mr. Jamison was reaching for a weapon and Mr. Farley then shot him.
>
> It was going to be the contention of the defense were this matter to have gone to trial that this was a self-defense, albeit perhaps an imperfect self-defense, regarding these circumstances and I think as [the prosecutor] indicated given the statement that Mr. Farley gave to the police when he was arrested and all of the totality of the other circumstances, I believe that this is not only a reasonable resolution of this case, but most likely the verdict that a jury would come back with given the opposing sides[']viewpoints in this case.

¶26 In addition, Farley's trial counsel explained to the court that more than a month before the plea hearing he had not only gone over the Plea Questionnaire Waiver of Rights form with Farley, but he had also given Farley copies of the jury instructions regarding the definition of first-degree intentional homicide, second-degree intentional homicide as it applies to his case, and self-defense, as they would be read to the jury. Farley himself verified that he had in fact received those documents and reviewed them with his trial counsel. It is

thus clear that the option of self-defense was extensively discussed but rejected by the defense.

¶27 During the plea colloquy, the trial court asked Farley whether he "underst[ood] that by pleading guilty [he was] giving up any defenses that [he] might have in this manner" and Farley responded "Yes." The court also asked Farley: "And have you discussed with your attorney the issue of self-defense?" Farley responded, "Yes. Yes, I did." Farley thus explicitly waived his right to claim self-defense. The court also confirmed that Farley was pleading guilty to second-degree intentional homicide because he was guilty of that offense:

> THE COURT: On November 26, 1999, … did you use a gun to shoot and kill Ricky Jamison?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: And when you shot him, did you intend to shoot him at that time?
>
> THE DEFENDANT: At the time, yes.
>
> THE COURT: And when you shot him you intended to kill him because you believed that either you were in imminent danger of death or great bodily harm or you believed that the force that you were using was necessary to defend yourself?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you acknowledge that either or both of those beliefs would be unreasonable under the circumstances?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Are you pleading guilty then to the charge of second degree intentional homicide while using a dangerous weapon because you are guilty of that offense?
>
> THE DEFENDANT: Yes, I am.

¶28 As to the contention that his trial counsel did not adequately investigate Jamison's alleged propensity for violence and Farley's fear of Jamison, Farley has failed to allege with any specificity what such an investigation would have revealed and how it would have altered the proceedings. *See* ***Provo***, 272 Wis. 2d 837, ¶15.

¶29 Finally, Farley's claim that, had he proceeded to trial, the offense might have been reduced to reckless homicide because he shot Jamison believing "reasonably or unreasonably, that he was in imminent danger of death or great bodily harm," is also without merit. In so arguing, Farley appears to overlook the essence of the plea agreement. The plea agreement was the result of not only him agreeing to plead guilty, but also the State agreeing to reduce the charge to second-degree intentional homicide in exchange for that plea. Had he gone to trial, the charge would have remained first-degree intentional homicide. Considering the fact that the complaint, which formed the factual basis for the plea, contained statements that contradicted Farley's claim that he feared Jamison, had Farley elected to go to trial, he would have faced the possibility of being found guilty of first-degree intentional homicide. Moreover, his description of reasonably or unreasonably shooting Jamison because he believed that his life was in danger is not a description of reckless homicide; rather, a reasonable belief constitutes self-defense, and an unreasonable belief is a mitigating circumstance that may lower a charge from first-degree intentional homicide to second-degree intentional homicide, *see* WIS. STAT. § 940.01(2)(b)[6]; precisely what the State agreed to here.

[6] WISCONSIN STAT. § 940.01(2)(b) provides in relevant part:

(continued)

¶30 We are thus satisfied that Farley has failed to show that his trial counsel's performance was deficient and caused him prejudice by advising him to plead guilty to second-degree intentional homicide. *See* ***Bentley***, 201 Wis. 2d at 313-18. The trial court hence also did not err in so concluding without a hearing. *See* ***id.***

¶31 Because we reject all of Farley's arguments for why his trial counsel allegedly provided ineffective assistance, it follows that Farley has failed to show a manifest injustice sufficient to allow him to withdraw his plea. *See* ***McCallum***, 208 Wis. 2d at 473. Consequently, we affirm the order denying Farley's postconviction motion to withdraw his guilty plea.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

> **(2) Mitigating circumstances.** The following are affirmative defenses to prosecution under this section [i.e. first-degree intentional homicide] which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ….
>
> (b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.