COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP574-CR **Cir. Ct. No. 2004CF17**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN M. TOMPOROWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Steven Tomporowski appeals a judgment convicting him of three counts of first-degree intentional homicide and an order denying his postconviction motions for plea withdrawal, a new trial, or sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 Tomporowski was charged with the three homicide counts based on allegations that he had killed his parents and an uncle on a weekend retreat. The court ordered a competency evaluation at defense counsel's request. After reviewing three expert reports, the court found Tomporowski competent to stand trial. Tomporowski then entered pleas of not guilty and not guilty by reason of mental disease or defect. Tomporowski subsequently changed his pleas to guilty on the first phase of the bifurcated proceeding, but proceeded to trial on the mental responsibility phase.

¶3 Following a bench trial, the court found that Tomporowski suffered from a mental disease, which may have been either schizophrenia or a personality disorder. However, it also found that whatever mental disease Tomporowski suffered from was "complicated" by persistent use of LSD, and that the drug use accounted for much of Tomporowski's "bizarre" behavior. Based on evidence Tomporowski had motive to kill his parents and had undertaken considerable preparation and planning to do so, and also appeared to have been feigning some symptoms while in jail, the court further found that Tomporowski's mental disease had not prevented him from appreciating the wrongfulness of his conduct or conforming his behavior to the requirements of the law. The court concluded that Tomporowski was mentally responsible, and sentenced him to three consecutive terms of life imprisonment without the possibility of extended supervision.

¶4 Tomporowski filed postconviction motions to withdraw his pleas, have a new trial or be resentenced. After these motions were denied, Tomporowski filed the present appeal. Additional facts will be set forth in the discussion of the issues raised on appeal.

DISCUSSION

Plea Withdrawal

¶5 Tomporowski contends that his pleas were invalid for three reasons: (1) the court failed to advise him that the potential maximum penalty for each count was life without the possibility of release on extended supervision; (2) the plea colloquy did not otherwise establish that Tomporowski understood that the court could decide not to allow him to be released; and (3) the plea colloquy did not show that Tomporowski understood that the sentences could be imposed consecutively.

¶6 In order to withdraw a plea after sentencing, the defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was unknowing, involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). A defendant who asserts that the procedures outlined in WIS. STAT. § 971.08 (2003-04)[1] or other court-mandated duties were not followed at the plea colloquy (*i.e.,* a ***Bangert*** violation), and further alleges that he did not understand the omitted information is entitled to a hearing on his plea withdrawal motion at which the State bears the burden of proving the plea was nonetheless knowingly and voluntarily entered. ***State v. Hampton***, 2004 WI 107, ¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant who seeks to

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

withdraw his plea on grounds constituting a manifest injustice other than a ***Bangert*** violation need only be given an evidentiary hearing when he alleges facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). No hearing is required, though, when the defendant presents only conclusionary allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We will review the circuit court's decision to deny a plea withdrawal motion without an evidentiary hearing under the de novo standard, independently determining whether the facts alleged would establish the denial of a constitutional right sufficient to warrant the withdrawal of the plea as a matter of right. *See* ***Bentley***, 201 Wis. 2d at 308; *see also* ***State v. Van Camp***, 213 Wis. 2d 131, 139-40, 569 N.W.2d 577 (1997).

¶7 We conclude that Tomporowski's allegations were insufficient to warrant a plea withdrawal hearing. First of all, it is not necessary to explicitly advise a defendant that sentences could be imposed consecutively, since a defendant could be reasonably assumed to understand that multiple counts could result in multiple sentences. *See* ***State v. Brown***, 2006 WI 100, ¶78, ___Wis. 2d ___, 716 N.W.2d 906. Secondly, a colloquy is not the only means by which a circuit court may satisfy itself that a plea is being knowingly and voluntarily entered. A court may also rely on a plea questionnaire or other portions of the record. ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). Here, in addition to personally telling the court that he understood the penalty for first degree intentional homicide was "life imprisonment," Tomporowski provided the court with a plea questionnaire that stated that the maximum penalty he faced was "LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE." The court ascertained that Tomporowski had

reviewed the form with his attorney, had signed it, and understood the information provided on it.

¶8 Because we conclude that Tomporowski failed to make a prima facie case of a ***Bangert*** violation, he was not entitled to a hearing at which the State would need to prove the pleas were nonetheless knowingly and voluntarily entered. To the extent that Tomporowski might claim that he misunderstood the potential consequences of his plea regardless of whether he was given sufficient information, his allegations were conclusory. That is, Tomporowski did not specify what led him to his alleged misunderstanding or explain how that affected his decision to enter pleas.

New Trial

¶9 Tomporowski next contends that he is entitled to a new trial based upon a mental evaluation conducted after his conviction which incorporated twenty months' of clinical observation and academic records which had not been obtained prior to trial. He claims the new report refutes the possibility that his symptoms had been primarily caused by LSD use by showing that he was symptomatic before the LSD use, and that his symptoms had not gradually diminished during his incarceration, which could be expected if they were the result of hallucinogenic drugs. He asserts that the evaluation could not have been prepared prior to trial due to the length of observation necessary, and further asserts that if the school records could have been obtained prior to trial, counsel performed ineffectively by failing to do so.

¶10 A motion for a new trial is addressed to the sound discretion of the circuit court, and we will ordinarily not reverse the circuit court's decision unless it failed to rationally apply the proper legal standard to the facts of record. *See*

State v. Eckert, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the denial of a new trial based on newly discovered evidence deprives the defendant of due process. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

¶11 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***id.*** The appellant must prove the first four requirements by clear and convincing evidence. *See* ***State v. Armstrong***, 2005 WI 119, ¶¶161-62, 283 Wis. 2d 639, 700 N.W.2d 98.

¶12 We agree with the State that, regardless whether the school records and new psychological report satisfy the first four criteria, it is not reasonably probable that they would produce a different result at trial. This is because the circuit court had already accepted the fact that Tomporowski suffered from either schizophrenia or a personality disorder. The court's conclusion that the defendant was mentally responsible was based on its additional determination that the schizophrenia or personality disorder had not prevented Tomporowski from appreciating the wrongfulness of his conduct or conforming his conduct to the law. This latter determination, in turn, was based not only on the court's belief that much of Tomporowski's bizarre behavior could be attributed to drug use, but also on:

> evidence of the defendant's anger and hatred toward his parents, which certainly provides a motive, his desire to

> escape their control, evidence of preparation and planning including the things to get list and the passport photos and other evidence of preparation and planning, including his statements to his friends, the evidence of having lured his mother up to Wisconsin for no purpose but to facilitate his escape or to complete the murders of both parents ….

As the circuit court noted, the new psychological report did not undermine any of these findings relating to the second element of the NGI defense. In other words, whether Tomporowski was suffering primarily from schizophrenia or the effects of prolonged drug use, there was still sufficient evidence for the court to determine that he was aware of what he was doing and was in control of his actions. Therefore, Tomporowski was not entitled to a new trial based on newly discovered evidence and, for the same reasons, could not show that he was prejudiced by counsel's failure to obtain the school records prior to trial. *See generally* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (setting forth the well-known standard for evaluating claims of ineffective assistance of counsel).

¶13 Tomporowski also argues that counsel provided ineffective assistance by failing to present additional expert evidence and to object to some of the State's expert evidence. Again, however, we conclude that his allegations are insufficient to require a hearing. The additional evidence Tomporowski feels counsel should have presented was included in the postconviction report discussed above, which was prepared by one of the same defense experts who testified at trial. However, that expert had already given similar testimony about whether Tomporowski satisfied the diagnostic criteria for schizophrenia at trial. Thus, the evidence was largely cumulative. Moreover, the court stated that it gave more weight to the State's experts than to the defense experts. This was a credibility determination entirely within the court's discretion. Therefore, we are not

persuaded that additional information from the same defense expert would have had any effect on the outcome of the trial.

¶14 The information which Tomporowski believes counsel should have objected to related to his apparent intelligence and the degree of planning involved in the offense. The evidence of planning included bringing the gun and ammunition to the cabin; staging the crime scene to look like a psychotic episode; calling his mother to lure her to the cabin after he had killed his father and uncle so that he could kill her too and use her car to escape; and lying to others about why he was home but his parents had not returned. Tomporowski claims this evidence confused the issue as to whether he had a mental defect—which he characterizes as some degree of retardation—with whether he had a mental disease—*i.e.* a thought disorder. However, just because a defense expert was of the opinion that Tomporowski's planning did not mean he had the ability to understand the wrongfulness of his actions does not mean that the circuit court was required to accept that view or that the evidence was irrelevant. We see no deficient performance in counsel's failure to challenge the evidence on relevance grounds.

¶15 Tomporowski next argues that he is entitled to a new trial because the court "erroneously determined that there was an insufficient basis to find [he] suffered from schizophrenia and that [his] bizarre behavior could be explained (incorrectly) merely by his LSD use." We disagree with this characterization of the court's findings, however. The court did not find that Tomporowski suffered "merely" the effects of drug use. Rather, it found that his drug use greatly "complicated" the effects of his schizophrenia or personality disorder. This view was supported by the opinions of the State's experts, and it was not clearly erroneous for the court to rely on that evidence. Tomporowski's arguments

amount to nothing more than an attempt to have this court reweigh the evidence, which we will not do.

¶16 Finally, Tomporowski argues that he should be granted a new trial in the interest of justice, on the grounds that the real controversy was not tried. *See* WIS. STAT. § 805.15(1). In order to establish that the real controversy has not been fully tried, a party must show that the fact finder "was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). We give great deference to the circuit court's decision whether the interests of justice require a new trial, because the circuit court is in the best position to observe and evaluate whether such relief is appropriate. ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). Here, additional clinical observations regarding Tomporowski's schizophrenia diagnosis would have had little relevance on an important issue because the court had already found that Tomporowski had a mental disease or defect. The real controversy was whether Tomporowski's mental illness prevented him from appreciating the wrongfulness of his conduct and conforming his behavior, and that issue was fully tried.

Sentences

¶17 Tomporowski claims that he is entitled to be resentenced because his postconviction diagnosis of schizophrenia constituted a new factor; because the court relied on irrelevant evidence to find him criminally responsible; and because his sentence was unduly harsh in light of his mental health problems. We have already rejected his argument that evidence of his planning of the murders was irrelevant. We reject his other two sentencing arguments as well.

¶18 A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, which operates to frustrate the purpose of the original sentence. Whether a particular set of facts constitute a new factor is a question of law, which we review de novo. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. Tomporowski's postconviction diagnosis of schizophrenia was not a new factor. The same diagnosis was presented to the court at trial. As we have explained above, the additional observations made by the defense expert after trial largely constituted cumulative evidence.

¶19 A sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Here, Tomporowski was convicted of killing his father and uncle, then luring his mother to the scene to kill her too, which are three Class A felonies with a mandatory life sentence. The court had the option of imposing a minimum initial incarceration period of twenty years, setting a date for extended supervision some time beyond twenty years, or denying any extended supervision other than the limited possibility of release upon diagnosis with a terminal condition. WIS. STAT. § 973.014(1g). The court explained that it was not going to set a release date because it deemed the offenses "so vile, vicious, premeditated and cold blooded that [the court was] not confident that the defendant is ever likely to be safely released," and also felt the offenses called out for the maximum punishment for punishment's sake. Given those factors, we are not persuaded that the sentences are shocking to the conscience or unduly harsh.

By the Court.—Judgment and order affirmed.

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