COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1607 **Cir. Ct. No. 2001CF3931**

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

STATE OF WISCONSIN,

PLAINTIFF–RESPONDENT,

V.

JAVON GRAY,

DEFENDANT–APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KAREN C. CHRISTENSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Javon Gray pled no contest in November 2001 to felony murder as party to a crime with attempted armed robbery as the underlying

offense. *See* WIS. STAT. §§ 940.03, 939.05, 939.32 (2001–02).[1] He appeals *pro se* from the order denying his second WIS. STAT. § 974.06 (2005–06) motion to withdraw his plea. He also appeals from the order denying his motion to reconsider. He claims that misinformation as to the maximum term of initial confinement constituted a manifest injustice. We affirm.

¶2 During the 2001 plea proceedings, the circuit court informed Gray that he faced a fifty–year maximum term of imprisonment, "broken down to potentially forty years confinement time and ten years extended supervision." Gray was sentenced to twenty–five years of initial confinement and fifteen years of extended supervision.

¶3 In his first postconviction motion, Gray challenged the validity of his plea as unknowing and involuntary, alleging that he did not understand that he was waiving his right to a trial by pleading no contest. The circuit court rejected the contention and this court affirmed.[2] ***State v. Gray***, No. 02–2283, unpublished slip op. at 2 (WI App Oct. 27, 2003).

¶4 After the Wisconsin supreme court denied Gray's petition for review, this court held that the maximum period of initial confinement for felony murder/attempted armed robbery is not forty years, but thirty–seven years and six months. ***State v. Mason***, 2004 WI App 176, ¶1, 276 Wis. 2d 434, 687 N.W.2d 526. In light of ***Mason***, Gray filed his second postconviction motion, alleging that

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

[2] In the circuit court, Gray successfully challenged the length of his extended supervision as exceeding the maximum term allowed by law. The lower court's modification of Gray's term of extended supervision was not at issue on appeal.

he was induced to enter a plea by the misinformation that he was exposed to forty years of initial confinement and asserting that he would not have pled had he known that his actual risk was less. Gray further alleged ineffective assistance of his trial and postconviction attorneys in failing to raise the issue of misinformation.[3] The circuit court determined, without a hearing, that Gray could not allege a viable ineffective assistance of counsel claim because no one knew the true maximum term of initial confinement until ***Mason*** was decided in 2004, long after Gray's plea and direct appeal were concluded in 2003. The circuit court further determined that the misinformation did not give rise to a manifest injustice necessitating plea withdrawal because the court had no duty to inform Gray of the maximum term of initial confinement at the time of the plea.

¶5 To prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance by his attorney and prejudice to the defense from the deficiency. ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893 (Ct. App. 2004). Under the deficient performance prong, the defendant must satisfy us that identified acts or omissions were outside of the wide range of professionally competent assistance. ***Ibid.*** "We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994).

[3] This was Gray's second postconviction motion, and therefore subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157 (1994). To avoid that bar, Gray asserted as a sufficient reason for a second motion the ineffective assistance of his postconviction attorney in failing to claim in the first motion the ineffective assistance of his trial attorney. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). While his appellate briefs do not argue ineffective assistance of counsel, we address the issue because it is a component of the State's brief and of the circuit court's decision and it constitutes the foundation supporting Gray's instant litigation.

¶6 In 2004, after engaging in extensive statutory analysis, reviewing the history of the felony murder statute back to 1955, and expressly describing the question as "close," this court decided that the maximum period of initial confinement for felony murder/attempted armed robbery is not forty years but thirty–seven years and six months. ***Mason***, 276 Wis. 2d 434, ¶¶1, 13–21. The issue was thus unclear prior to ***Mason***, "murky enough" that Gray's attorneys were not deficient for failing to raise it in trial and postconviction proceedings occurring in 2001–2003. *See* ***McMahon***, 186 Wis. 2d at 84–85. Ineffective assistance of counsel claims are "limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***Id.*** at 85. The issue here does not reach that level of clarity.

¶7 Gray shows no deficiency in his trial or postconviction attorneys' performance. We therefore do not reach the prejudice prong of the analysis. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶8 The remaining issue is whether the circuit court properly exercised its discretion in denying Gray's motion for plea withdrawal without a hearing. To withdraw a no contest plea after sentencing, the defendant must establish by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998). A plea which is not knowingly, voluntarily or intelligently entered is a manifest injustice. ***Id.***

¶9 Before accepting a plea, the circuit court is required to address the defendant personally and undertake the thorough examination outlined in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The plea proceeding must also comply with the requirements of WIS. STAT. § 971.08. A defendant is entitled to

an evidentiary hearing to withdraw a guilty plea upon: (1) a *prima facie* showing of a violation of WIS. STAT. § 971.08(1) or other court–mandated duties that points to passages or gaps in the plea hearing transcript; and (2) an allegation that the defendant did not know or understand information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906 (citing ***Bangert***, 131 Wis. 2d at 274). Whether Gray has established a *prima facie* violation of statutory or other duties is a question of law that we review *de novo*. *See* ***Brown***, 293 Wis. 2d 594, ¶21.

¶10 The only circuit court duty arguably implicated by Gray's claim is its obligation to establish the defendant's understanding of the range of punishments associated with the crime. *See* ***State v. Sutton***, 2006 WI App 118, ¶9, 294 Wis. 2d 330, 718 N.W.2d 146. The circuit court fulfilled that duty here. It correctly informed Gray that his maximum term of imprisonment was fifty years. The circuit court is not required to further dissect the potential punishment and ensure the defendant's understanding of the maximum initial confinement. *See* ***id.***, ¶15. Gray's postconviction motion therefore does not establish a *prima facie* violation of statutory or court–mandated duties. The circuit court gave erroneous information, but only as to a matter it had no duty to address.

¶11 Where, as here, a defendant alleges that plea withdrawal is necessary to avoid manifest injustice but does not assert a ***Bangert*** violation, the ***Nelson/Bentley*** standard[4] is used to determine whether a hearing is required. *See* ***State v. Allen***, 2004 WI 106, ¶¶12–13, 274 Wis. 2d 568, 682 N.W.2d 433

[4] ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

(describing the procedure for determining whether a postconviction hearing is required outside of the ***Bangert*** context). The motion must allege "who, what, where, when, why, and how." ***Id.***, ¶23. The circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion. ***Id.***, ¶12. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***, ¶9. "We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Ibid.***

¶12 Gray argues that he entered his plea because he believed he faced forty years of initial confinement. He claims that he would have gone to trial had he known that he faced only thirty–seven years and six months "because the stakes of receiving a harsher sentence was not as great." Gray has not shown a basis for relief.

¶13 First, as the circuit court observed, Gray cannot credibly argue that he would not have entered a plea had he been informed that the maximum initial confinement was two and one–half years less. The assertion is inherently incredible, particularly here where Gray's supporting affidavit reflects that he entered his no contest plea in order to "seek a more leenient [*sic*] sentence."

¶14 Second, Gray's allegations are merely conclusory. He offers no facts supporting the bare assertion that he would have been "less deterred from ... trial" had he known that his initial confinement exposure was not forty years but thirty–seven years and six months. Therefore, we reject Gray's contention that this matter is governed by those cases holding pleas involuntary where defendants were misinformed about matters shown to be of consequence to their plea

bargains. *Cf.*, *e.g.*, ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (plea not voluntary where defendant was wrongly informed that he would be able to circumvent the guilty–plea waiver rule and this was a purpose of the bargain); ***State v. Brown***, 2004 WI App 179, ¶13, 276 Wis. 2d 559, 567, 687 N.W.2d 543 (pleas not voluntary where defendant was wrongly informed that negotiated charges would not require him to register as a sex offender or be subject to WIS. STAT. ch. 980 and this was the purpose of the bargain).

¶15 By contrast, Gray does not describe how he analyzed his risk against the anticipated evidence or how the two and one–half years of possible exposure were considered in his analysis. Indeed, Gray's affidavit in support of his first postconviction motion averred that he "would have proceeded to trial" had he known that a no contest plea would prevent him from having a trial at a later date. This suggests that the extent of potential initial confinement was not material to his plea decision. Gray's affidavit supporting his second postconviction motion does not offer any new facts in support of a contrary conclusion.

¶16 The circuit court properly exercised its discretion in denying Gray a hearing on this record. Gray's allegations do not entitle him to relief.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).