COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2781-CR **Cir. Ct. No. 2006CM8383**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE D. GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Willie D. Griffin appeals from an order denying his motion to withdraw his guilty pleas after sentencing based on ineffective

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

assistance of trial counsel. Griffin argues that the trial court erroneously denied his motion without granting him a ***Machner***[2] hearing. We affirm.

BACKGROUND

¶2 As part of a plea negotiation involving ten misdemeanor counts in seven separate criminal cases, Griffin pled guilty to six counts of violating a domestic abuse injunction, one count of bail jumping (relating to a violation of the no-contact order while he was on bail for one of the previous injunction violations), and had three counts dismissed and read in for sentencing. During his plea hearing, Griffin indicated displeasure with his counsel, responding "Not really" to the trial court's inquiry, "Are you satisfied with the way your attorney is representing you?" Upon the trial court's further inquiry, Griffin stated, "I know a lot of these things I didn't do, but I am tired of sitting in jail for some of the things I didn't do…. I plead guilty." The following discussion then took place:

> COURT: I want to be completely certain that you are knowingly, voluntarily and freely entering your guilty pleas in this case. [Counsel], do you want to talk to Mr. Griffin? Obviously –
>
> GRIFFIN: I plead guilty.
>
> COURT: What?
>
> GRIFFIN: I plead guilty.
>
> COURT: No, but you know what the point is. Not that I am asking these question because – I have an obligation to protect your Constitutional rights.
>
> GRIFFIN: I plead guilty, sir.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> COURT: You want to plead guilty. The question is are you knowingly, voluntarily, freely doing this?
>
> GRIFFIN: Yes, yes.
>
> COURT: Listen to me. You tell me. When you have problems with your attorney, I want to make sure you're not feeling –
>
> GRIFFIN: No, I do not.
>
> COURT: You're telling me now that what you said before was not correct, that you and [your counsel] are working together and you feel comfortable with her representation?
>
> GRIFFIN: Yes, sir.

The court then inquired whether it could use the facts as stated in the criminal complaints as the factual basis for Griffin's pleas, to which Griffin's counsel answered yes, "except for all of the facts in the case ending in 383 as to Count I" in that Griffin admitted to being at the victim's residence but denied breaking her patio door. The trial court specifically asked if Griffin "admit[ted] to having contact at the location as stated in the complaint in violation of the domestic abuse injunction and in violation of the terms and conditions of bond" and Griffin's counsel answered, "Correct." The trial court then accepted Griffin's pleas.

¶3 Thereafter, as the court and parties discussed what would be needed for the sentencing hearing, Griffin requested that he be allowed to withdraw his pleas. The trial court then adjourned the hearing to determine which case would continue to trial that day and to give Griffin the opportunity to talk with his counsel.

¶4 The trial court reconvened in the late afternoon that same day. The trial court asked Griffin if he still wished to withdraw his pleas and Griffin stated that he wanted to plead guilty. The court then set a sentencing date for one week later where the trial court sentenced Griffin to nine months in jail (no Huber

release privileges) on the violation of injunction count, consecutive to any other sentence, and nine months (with Huber privileges) on the bail jumping count, to be served consecutively to the sentence for count one.[3]

¶5 Through appellate counsel, Griffin filed a motion to withdraw his guilty pleas based upon his trial counsel's failure to investigate his alibi for the incident underlying the two counts in this case. The motion set forth the grounds for the withdrawal, an ineffective assistance of counsel claim, as follows:

> 1. [Griffin] notified his counsel that he was at work during the time at which the offense is alleged to have occurred and that she should contact his supervisor to confirm that he was "punched in";
>
> 2. his counsel performed deficiently when she did not investigate his defense of an alibi nor give notice of his alibi;
>
> 3. without the alibi defense and without notice of the alibi to the state, he pled guilty to the charge at his counsel's recommendation;
>
> 4. not having an alibi defense prejudiced [Griffin] who pled guilty and was sentenced to nine months consecutive to any other sentence; and
>
> 5. [Griffin] would have asked for a trial if his defense counsel had notified the state of his alibi that would testify at trial that he was at work and could not have committed the alleged offense.

¶6 The trial court held a hearing on the motion to withdraw plea, including whether Griffin had presented sufficient facts to warrant withdrawal based on an ineffective assistance of counsel claim. The trial court found that

[3] On each of the remaining counts, Griffin was sentenced to nine months in jail, stayed, and three years probation, with each of the probation sentences to be concurrent with one another, but consecutive to the two jail sentences. Griffin is not challenging any of his sentences in this appeal.

Griffin had made only conclusory allegations in his motion, was therefore not entitled to a ***Machner*** hearing and, based on the record, denied the motion. Griffin appealed.

DISCUSSION

I. Plea withdrawal

¶7 A postconviction motion to withdraw a plea is within the discretion of the trial court. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). We will reverse only upon an erroneous exercise of the trial court's discretion. ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836

¶8 When a defendant moves to withdraw a plea after sentencing, the defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Thomas***, 232 Wis. 2d 714, ¶16; ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***Thomas***, 232 Wis. 2d 714, ¶16 (citation omitted).

¶9 Ineffective assistance of counsel has been recognized as a manifest injustice requiring a guilty plea to be withdrawn. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A trial counsel's failure to investigate an alibi can constitute ineffective assistance. ***State v. Crooks***, 2006 WI App 262, ¶¶63-65, 297 Wis. 2d 633, 726 N.W.2d 322.

A. Sufficient factual basis for acceptance of plea

¶10 Under WIS. STAT. § 971.08(1)(b), when accepting a guilty plea, a court must make sufficient inquiries to satisfy it that the defendant did in fact commit the crime. The purpose for this requirement is to make certain the defendant is pleading guilty to a crime he actually committed. *See* ***State v. Lackershire***, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23 (A sufficient factual basis requires a showing that "'the conduct which the defendant admits constitutes the offense charged.'" (citation omitted)). The defendant's admitting the facts supporting each element of the crime charged, even if he or she does not agree with other, non-dispositive facts included in these documents or testimony, is also sufficient to support a plea. *Cf.* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis for a plea exists if facts admitted to by the defendant satisfies the court that the defendant in fact committed the crime charged); ***Thomas***, 232 Wis. 2d 714, ¶¶19-23. We review a trial court's determination of a sufficient factual basis under a clearly erroneous standard. ***State v. Harvey***, 2006 WI App 26, ¶10, 289 Wis. 2d 222, 710 N.W.2d 482 ("Unless it was clearly erroneous, we will uphold the trial court's determination that there existed a sufficient basis to accept the plea.").

¶11 Here, the trial court conducted a thorough plea colloquy.[4] The court asked whether it could use the criminal complaint as a basis for Griffin's guilty pleas and Griffin agreed that the facts in the complaint—that alleged that he was with the victim on the dates specified, in violation of the injunction and no-contact

[4] *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986).

order—were correct. The plea colloquy further demonstrates that when Griffin was informed of the crimes that he was charged with and what the maximum penalties were for those crimes, Griffin answered that he understood. Griffin, upon questioning by the court, also stated that he understood that the trial court was not bound by the sentencing recommendations, but could sentence Griffin to the maximum sentence allowable for the crimes to which he was pleading guilty. When Griffin asked to withdraw his pleas, the trial court adjourned the hearing, allowing Griffin time to speak with his counsel and upon reconvening, the court had a lengthy discussion with Griffin ensuring that Griffin did want to plead guilty. Based on our review of the record, we determine that the trial court properly accepted Griffin's guilty pleas as knowingly, voluntarily and intelligently given.

B. Withdrawal of pleas—manifest injustice

1. *Ineffective assistance of counsel standard*

¶12 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation, ***Pitsch***, 124 Wis. 2d at 636-37, i.e., if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citation omitted). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances, *see* ***id.***; ***Strickland***, 466 U.S. at 688, and we

indulge in a strong presumption that counsel acted reasonably within professional norms, ***Pitsch***, 124 Wis. 2d at 637. We review the attorney's performance with great deference and "the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. "Review of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice….'" ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citation omitted).

¶13 To prove prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for counsel's error, there is a reasonable probability that the result would have been different. ***Id.***

¶14 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

2. ***Nelson/Bentley***[5] *test*

¶15 Griffin appeals the trial court's denial of an evidentiary hearing on his motion to withdraw his guilty pleas in this case based upon a claim of ineffective assistance of counsel. A defendant who has made factual allegations with sufficient specificity which, if true, would establish both prongs of the ***Strickland*** test, is entitled to the opportunity to make the necessary record in an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996); ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, before a trial court must grant a ***Machner*** hearing on an ineffective assistance-of-counsel claim, the defendant must allege sufficient facts to raise a question of fact for the court. ***State v. Washington***, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331 (Ct. App. 1993). A conclusory allegation, unsupported by factual assertions, is legally insufficient and does not require the trial court to conduct a ***Machner*** hearing. ***Washington***, 176 Wis. 2d at 214-15. We recently noted, in ***State v. Howell***, 2006 WI App 182, ¶17, 296 Wis. 2d 380, 722 N.W.2d 567, *rev'd on other grounds*, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48: "The ***Nelson/Bentley*** test asks whether a motion alleges 'facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record [otherwise] conclusively demonstrates that the defendant is not entitled to relief.'" ***Howell***, 296 Wis. 2d 380, ¶17 (citing ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (paraphrasing ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972), and ***Bentley***, 201 Wis. 2d at 309-10)); ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62.

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

¶16 The supreme court, in ***Allen***, provided additional guidance when it "explained that a motion sufficient to meet the ***Nelson/Bentley*** standard should 'allege the five "w's" and one "h"; that is, who, what, where, when, why, and how.'" ***Howell***, 296 Wis. 2d 380, ¶19 (citation omitted). The ***Allen*** court further noted that the facts supplied must be "material facts," i.e., "facts that allow a reviewing court to meaningfully assess a defendant's claim.… '[A] fact that is significant or essential to the issue or matter at hand.' In this case, they would be facts material to a claim of ineffective assistance of counsel." ***Allen***, 274 Wis. 2d 568, ¶22 (citations omitted). Significantly, the ***Allen*** court noted that these material facts must be contained within "the four corners of the [motion] itself." ***Id.***, ¶23.

¶17 The determination of whether a defendant's postconviction motion alleges facts sufficient to entitle the defendant to an evidentiary hearing is a mixed standard of review. ***Allen***, 274 Wis. 2d 568, ¶9. "First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***Id.*** If, however,

> "the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory 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."

Bentley, 201 Wis. 2d at 309-10 (citation omitted). "We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Allen***, 274 Wis. 2d 568, ¶9.

¶18 Here, the trial court found that Griffin only presented conclusory allegations regarding his trial counsel's effectiveness which were insufficient to entitle him to a ***Machner*** hearing. Analyzing Griffin's motion *de novo*, using ***Allen***'s five "w's" and one "h"—"who, what, where, when, why, and how," *see* ***Howell***, 296 Wis. 2d 380, ¶19, we determine that Griffin has not met the ***Nelson/Bentley*** test. First, Griffin claims that his supervisor would be able to provide him an alibi. However, Griffin does not identify this individual by name, by company and position within the company, or with any other specificity. Griffin does not provide any affidavit by this individual, or anyone else, confirming Griffin's alleged alibi, such as where and/or when they saw him at the time of the alleged crime, how they know his whereabouts at the time of the crime, or why they know of the existence of this alibi evidence. Griffin provides no material facts as to when he provided this alibi information to his counsel, or counsel's response in receiving this information. Rather, Griffin offers only conclusory allegations that he told his counsel about this alibi, that counsel failed to investigate it and this failure to investigate and provide an alibi notice to the State was the sole reason that Griffin pled guilty to these charges. The four corners of Griffin's motion fails to provide "sufficient material facts for [a] reviewing court[] to meaningfully assess [his] claim." *See* ***Allen***, 274 Wis. 2d 568, ¶23. Accordingly, Griffin has failed to provide sufficient material facts upon which to demand an evidentiary hearing.

¶19 The record in this case conclusively demonstrates that Griffin is not entitled to relief. As noted above, see § I.A. *supra*, the trial court had a sufficient basis for accepting Griffin's pleas as knowingly, voluntarily and intelligently made. Further, the plea colloquy and subsequent on-the-record discussions between Griffin, his counsel, and the trial court also do not support Griffin's

interpretation of events. A review of these discussions reveal that Griffin had the opportunity to, and did at one point in the plea hearing, withdraw his guilty pleas. After having an opportunity to meet with his counsel during an adjournment called specifically because Griffin had asked to withdraw his guilty pleas, the trial court then questioned Griffin extensively about whether he wished to withdraw his pleas. A review of the trial court's questioning of Griffin demonstrates that the trial court attempted to find out why Griffin had wanted to withdraw his pleas and inquired of Griffin whether he was voluntarily and knowingly pleading guilty.

¶20 When Griffin responded that he was not all that happy with his counsel, the trial court inquired further. Following up on Griffin's subsequent statement that he was pleading guilty, the trial court specifically asked: "Listen to me. You tell me. When you have problems with your attorney, I want to make sure you're not feeling – … You're telling me now that what you said before was not correct, that you and [your counsel] are working together and you felt comfortable with her representation?" to which Griffin answered, "Yes, sir." When later in the same hearing, Griffin requested to withdraw his guilty pleas, the trial court adjourned for several hours to provide Griffin with the opportunity to consult with his attorney regarding whether he wished to plead guilty as part of the negotiated plea agreement or withdraw his pleas. After reconvening, Griffin specifically stated numerous times, in response to the trial court's inquiry, that he wished to plead guilty. At no time during these discussions with the trial court did Griffin mention that he was pleading guilty because his counsel had failed to investigate a possible alibi and/or fail to provide a notice of alibi to the State; an alibi was never mentioned. Rather, when specifically questioned about his comment that he was "[n]ot really" satisfied with his counsel, Griffin stated that he was satisfied. Additionally, when asked whether he admitted to being present with

the victim at the time and location noted in the criminal complaint for the charges he is now seeking to withdraw his guilty plea, his counsel admitted that he was present, but that he disputed that he had damaged the victim's patio door. At no time did Griffin assert that he had an alibi against these charges. Griffin has not met the third element of the ***Nelson/Bentley*** test.

¶21 While not required, the trial court, as an exercise of its discretion, could still have granted Griffin a ***Machner*** hearing. ***Allen***, 274 Wis. 2d 568, ¶9. We will reverse a trial court's discretionary denial of such a hearing only if it is clearly erroneous. ***Id.*** Based on our review of the record, we determine that Griffin has not shown by clear and convincing evidence that he will suffer a manifest injustice if not allowed to withdraw his guilty pleas. Accordingly, the trial court did not erroneously exercise its discretion when it denied his motion to withdraw his guilty pleas after sentencing without holding a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)4.