COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1653-CR **Cir. Ct. No. 2006CF1101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVERNE LENARD GRAHAM,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Javerne Lenard Graham appeals from a judgment of conviction and from an order that denied his postconviction motion for plea withdrawal. Graham contends that his pleas were coerced and that the circuit

court erred by denying his postconviction motion without a hearing. We disagree and affirm.

BACKGROUND

¶2 The State charged Graham in an amended information with one misdemeanor and four felonies stemming from an incident in which a group of people battered and sodomized Tyrone A. On the day of trial, Graham told the circuit court through counsel that "he [did not] want to have a trial [that day] and that he want[ed] to fire his attorney." In response to the court's questions, Graham explained: "I never had a chance to go over my motion discovery [sic], look through my case, know my charges. I don't feel [trial counsel is] representing me right."

¶3 The circuit court questioned both Graham's attorney and the State regarding pending pretrial motions, and the parties explained their positions. The circuit court asked Graham's attorney how the statements Graham proposed to offer would be entered into evidence at trial, and counsel told the circuit court that Graham had both civilian and police witnesses under subpoena. The circuit court also asked trial counsel why Graham had not received discovery. Trial counsel explained that in fact he had provided Graham with the discovery material, and counsel described reviewing the material with Graham.

¶4 The circuit court concluded that trial counsel was both "a competent lawyer" and "prepared to try the case." The court determined that the matter would proceed to trial. When the court asked Graham if he had anything further to say, Graham responded, "not really. I'm not ready." The circuit court passed the case, indicating that trial counsel could use the time to confer with Graham.

¶5 When the proceedings resumed, the parties informed the circuit court that they had reached a plea agreement. The court conducted a plea colloquy and accepted Graham's guilty pleas to three felony charges.

¶6 After sentencing, Graham filed a postconviction motion to withdraw his guilty pleas. In his motion, Graham asserted that before he entered his pleas he met with trial counsel in a holding area and discussed the case. Graham claimed that he was coerced into pleading guilty during that meeting. In support of the claim, Graham filed an affidavit stating, in pertinent part:

> I advised [trial counsel] that I did not want to take the plea bargain because I was innocent of the sexual assault. I continued to demand that we have a jury trial.
>
> [Trial counsel] laughed and indicated that I wouldn't stand a chance and that I'd better take the plea bargain because I would lose the trial and get eighty years. [Trial counsel] told me to "either sign the plea questionnaire or get eighty years."
>
> [Trial counsel] further advised me that my family members were all outside the courtroom and [had] advised [trial counsel] that they (my family) wanted me to take the deal.
>
> I subsequently learned that none of my family members came to court that day and that none of them told [trial counsel] that.
>
> Other inmates were present during this discussion. They advised me that [trial counsel] was not on my side and that I had better just take the deal because [trial counsel] would probably lose the case.

Graham averred that he was "coerced into entering" his pleas because he "was under so much psychological pressure."

¶7 The circuit court denied Graham's motion without a hearing, concluding that the record of the plea proceeding refuted Graham's contentions.[1] This appeal followed.

DISCUSSION

¶8 On appeal, Graham acknowledges that the guilty plea colloquy in this case complied with the requirements set forth in ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08 (2007-08).[2] Indeed, the transcript reflects an impeccable plea proceeding, which included Graham's statements under oath that he had been afforded sufficient time to consult with counsel regarding the decision to plead guilty and that he was satisfied with his counsel's representation.

¶9 A defendant who seeks to withdraw a plea entered in compliance with ***Bangert*** is required to show that factors outside of the plea colloquy fatally undermine the plea. *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. The defendant "must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Milanes***, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94. Graham claims that his attorney and third parties coerced his pleas in ways that are not reflected in the record. A plea that is not voluntarily entered violates due process and is a

[1] The Honorable William Sosnay presided over the plea proceeding. The Honorable Jeffrey A. Wagner presided over the sentencing and the postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

manifest injustice. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994).

¶10 To be entitled to a hearing on his motion for plea withdrawal, Graham must allege facts that, if true would entitle him to relief. *See* ***Howell***, 301 Wis. 2d 350, ¶75. If, however:

> "the defendant fails to allege sufficient facts in his 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 [circuit] court may in the exercise of its legal discretion deny the motion without a hearing."

Id. (citation and footnote omitted). Whether a motion contains allegations that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶11 The allegations here are conclusory and insufficient to entitle Graham to relief. Graham asserts that his trial counsel falsely represented that Graham's family was at the courthouse and wanted him to plead guilty. Graham fails to explain both who would testify that the information was false and why such testimony is significant to his coercion claim. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (postconviction motion should contain sufficient material facts to demonstrate not only who the proposed witnesses are but also why the witnesses are important). Family pressure is not legally coercive. ***State v. Lackershire***, 2007 WI 74, ¶63, 301 Wis. 2d 418, 734 N.W.2d 23. Rather, such pressure is a "'self-imposed coercive element[]' which do[es] not vitiate the voluntary nature of the defendant's guilty plea." ***Id.*** (citations, one set of quotations marks, and one set of brackets omitted). Therefore, Graham has not demonstrated the relevance of trial counsel's

information, true or false, regarding Graham's family members and their wishes.[3] As to Graham's claim that inmates coerced him with advice to plead guilty, Graham cites no authority holding that advice from fellow inmates is legally significant. Assuming that such advice could support a coercion claim, Graham offers no information regarding the identity of the inmates who advised him. In sum, Graham's assertions about his family and his fellow inmates are inadequate to secure a postconviction hearing. *See* ***Howell***, 301 Wis. 2d 350, ¶75.

¶12 Graham also claims that his trial counsel advised accepting the plea bargain because Graham had no chance of prevailing at trial and would receive a lengthy sentence if he insisted on trying the case. These allegations too are insufficient to support a claim of plea coercion. "[A] coercion allegation based on 'defense counsel's enthusiasm for the negotiated plea bargain' is insufficient." ***State v. Goyette***, 2006 WI App 178, ¶26, 296 Wis. 2d 359, 722 N.W.2d 731 (citation omitted). Indeed, "'[i]f a lawyer's advice to a client that a plea offer represents a good deal amounts to coercion, then few guilty pleas could stand.'" ***Id.*** (citation omitted).

¶13 Graham nonetheless asserts that his allegations are sufficient to secure a hearing. He places substantial reliance on the decision in ***State v. Basley***, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671. There, the defendant alleged that his trial counsel "'threatened to withdraw unless ... [the defendant] accepted a plea agreement.' Counsel told [the defendant] that if he did not plead,

[3] Graham alleges only coercion as the basis for withdrawing his pleas. Therefore, we do not consider whether any of his allegations would support a claim of ineffective assistance of counsel. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (appellate court will not ordinarily consider issues that are not raised on appeal).

counsel would withdraw and it would likely take up to a year before a new attorney would be prepared to take the case to trial." ***Id.***, ¶6. We concluded that proof of these allegations would entitle the defendant to withdraw his guilty plea, and we remanded the matter for an evidentiary hearing. ***Id.***, ¶¶9, 20.

¶14 The result in ***Basley*** turned on the unreasonable choice allegedly presented to the defendant by his attorney: accept a plea agreement, or go without counsel for as long as a year while awaiting trial. Graham's allegations are not the equivalent of the claims made in ***Basley***, and ***Basley*** therefore does not govern here. Rather, the outcome in this case is dictated by the supreme court's analysis of a coercion claim more closely akin to Graham's offered by the defendant in ***Lackershire***, 301 Wis. 2d 418, ¶¶62-65.

¶15 In ***Lackershire***, the defendant claimed that her guilty plea was involuntary because she feared that a trial would adversely affect her pregnancy. ***Id.***, ¶62. The supreme court rejected the claim. '"When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced.'" ***Id.***, ¶63 (citation omitted). The supreme court concluded that the defendant in ***Lackershire*** could have asked the circuit court to postpone her trial but she chose not to do so. Therefore, the defendant's concerns about the effect of a trial on her pregnancy did not undermine the voluntary nature of the plea, because the defendant was not denied "a fair or reasonable alternative to choose from such that her choice was coerced." ***Id.***, ¶64.

¶16 In the instant case, Graham had the choice of going to trial on the day that he entered his plea. Defense witnesses were under subpoena. Discussion on the record reflected that counsel had reviewed the discovery with Graham, was familiar with the issues, and had crafted a strategy for seeking admission of

disputed evidence. The circuit court found that Graham's attorney was both competent and prepared to try the case.

¶17 In his postconviction motion, Graham showed that his trial counsel strongly advised him against taking the case to trial. Graham's allegations reflect his counsel's position that the risk of losing at trial was insurmountably high, but his counsel had an obligation to advise Graham regarding his risks and exposure. "'Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, [the lawyer] should use reasonable persuasion to guide the client to a sound decision.'" ***State v. Rock***, 92 Wis. 2d 554, 564, 285 N.W.2d 739 (1979) (citation omitted).

¶18 Nothing in Graham's postconviction submission suggests that his trial counsel refused to try the case or threatened to withdraw if Graham insisted on a trial. Graham had a choice: try the case, with the attendant risks, or plead guilty. He chose to plead guilty.

By the Court.—Judgment and order affirmed.

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