COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2350-CR **Cir. Ct. No. 2006CF2165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO M. WILDER,

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., Kessler and Brennan, JJ.

¶1 PER CURIAM. Antonio M. Wilder appeals from a judgment of conviction and an order denying his postconviction motion for plea withdrawal. He contends that his trial counsel performed ineffectively by failing to investigate potential witnesses. Because we conclude that Wilder's postconviction motion did

not sufficiently allege that Wilder was prejudiced by his trial counsel's performance, we affirm.

BACKGROUND

¶2 Wilder fired a fatal shot into the chest of Louis Williams and fled from the scene. The State charged Wilder with first-degree reckless homicide while armed. Wilder developed a self-defense theory based in part on his knowledge that the victim sometimes carried a gun and was a "dope fiend." On the day set for trial, however, Wilder accepted a plea agreement and pled guilty to first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (2007-08).[1] The circuit court sentenced Wilder to thirty years of imprisonment, bifurcated as twenty years of initial confinement and ten years of extended supervision.[2]

¶3 After sentencing, Wilder moved to withdraw his guilty plea on the ground that his trial counsel performed ineffectively by failing to investigate or interview four witnesses. Wilder alleged that all four witnesses would have testified that the victim was very big and intimidating. Three of those witnesses would have testified that they saw the victim punch Wilder without provocation just before the shooting. Wilder asserted that his trial counsel's failure to investigate the four witnesses prejudiced his defense. The circuit court denied the motion without a hearing and this appeal followed.

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

[2] Before sentencing, Wilder unsuccessfully moved to withdraw his guilty plea on the ground that he was misled by his trial counsel as to the penalties he faced upon conviction. On appeal, he does not pursue any issues related to this motion. We deem any such issues abandoned and we do not address them. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998).

DISCUSSION

¶4 We review a circuit court's decision to deny a postconviction motion without an evidentiary hearing using a mixed standard of review. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

> 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. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if 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.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶5 To withdraw a plea after sentencing, a 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. The burden is heavy because, after sentence is imposed, the State's interest in finality is substantial and "the presumption of innocence no longer exists." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836.

¶6 "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***Bentley***, 201 Wis. 2d at 311. To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Wilder must show that his counsel's performance fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice,

Wilder must show "'that there is a reasonable probability that, but for [] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *See* ***Bentley***, 201 Wis. 2d at 312 (citation omitted). Wilder must show both deficiency and prejudice to be afforded relief. *See* ***Allen***, 274 Wis. 2d 568, ¶26. If Wilder fails to show either one, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶7 Wilder failed to make a sufficient showing in his postconviction motion to warrant a hearing. Although Wilder alleged that his trial counsel performed deficiently by not interviewing four witnesses who could have supported a theory of self-defense, Wilder failed to allege that, but for the allegedly deficient investigation, he would not have pled guilty and would have insisted on going to trial. Thus, the postconviction motion lacked an allegation essential for showing prejudice. *See* ***Bentley***, 201 Wis. 2d at 312.

¶8 Wilder suggests that he has demonstrated prejudice by alleging that a proper investigation might have led his trial counsel to recommend a plea "only to a lesser charge." Wilder asserts that, "at the very least, [he] pled to a more serious charge than" necessary. This argument is unavailing. First, ***Bentley*** unambiguously requires an allegation that the defendant would have demanded a trial in the absence of counsel's error. ***Id.*** Assuming, however, that ***Bentley*** permits dispensing with this requirement in some circumstances, Wilder's proposed alternative basis for showing prejudice is inadequate here because it is not supported by objective facts. *See* ***id.*** at 313-14 (motion for plea withdrawal must be supported by objective factual assertions). Only if the State amended the existing charge of first-degree reckless homicide could Wilder have pled guilty to a less serious offense. *See* ***State ex rel. Richards v. Foust***, 165 Wis. 2d 429, 434, 477 N.W.2d 608 (1991) (decision to charge a crime and discretion to select the

crime charged rest solely with the State). There is no indication that the State would have offered such an amendment in this case.

¶9 The State must prove three elements beyond a reasonable doubt in order to convict a defendant of first-degree reckless homicide: (1) the defendant caused the victim's death; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS JI CRIMINAL—1020. Wilder argues that the missing witnesses would have provided evidence that "his actions did not show an utter disregard for life." Nothing in the record suggests, however, that if Wilder had produced those witnesses the State would have necessarily conceded an inability to satisfy its burden of proof.

¶10 The statements from the witnesses reflect that Wilder shot his victim in response to a punch and fled. The supreme court concluded that similar actions could reasonably be viewed as conduct showing utter disregard for human life. *See* ***State v. Davis***, 144 Wis. 2d 852, 864, 425 N.W.2d 411 (1988) (concluding that aiming a loaded gun at a vital part of a victim's body, shooting at close range, and fleeing the scene demonstrate utter lack of concern for life and safety); *see also* ***Terrell v. State***, 92 Wis. 2d 470, 474-75, 285 N.W.2d 601 (1979) (concluding that shooting victim at close range after victim struck defendant may reasonably be viewed as conduct regardless of human life). Thus, trial counsel's investigation of the witnesses would not have compelled the State to reduce the charge against Wilder. Wilder appears to believe that the State would have responded to information from the missing witnesses by reducing the charge against him, but this is mere conjecture on his part. Speculation of this nature does not constitute the necessary factual showing that Wilder was prejudiced by his trial counsel's failure to investigate. *See* ***Bentley***, 201 Wis. 2d at 313.

¶11 Wilder argues that he is excused in this case from the obligation to show that his counsel's performance prejudiced the defense. Citing a decision from the Wyoming Supreme Court, Wilder asserts that prejudice is presumed when trial counsel fails to interview eyewitnesses. *See* ***King v. State***, 810 P.2d 119, 123 (Wyo. 1991). The State accurately points out that ***King*** does not reflect the law in Wisconsin. In this state, a defendant claiming that counsel was ineffective by failing to investigate must demonstrate prejudice in order to prevail. ***State v. Flynn***, 190 Wis. 2d 31, 47-48, 527 N.W.2d 343 (Ct. App. 1994). This court is not free to disregard established Wisconsin precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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