COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2020AP395-CR **Cir. Ct. No. 2016CF3932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARIUS DARNELL MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHELLE ACKERMAN HAVAS, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Dugan, Graham and White, JJ.

¶1 PER CURIAM. Darius Darnell Moffett appeals his judgment of conviction entered upon his guilty pleas for driving a vehicle without the consent of the owner, burglary, and felony bail jumping, all with a habitual criminality penalty enhancer. Moffett also appeals the circuit court order denying his motion for postconviction relief without a hearing. Moffett argues that his motion alleged sufficient material facts to show his pleas were not entered knowingly after he learned of potentially exculpatory evidence at the sentencing hearing. We agree and, therefore, we reverse the circuit court order in part and remand for an evidentiary hearing on his motion for plea withdrawal. Additionally, Moffett argues trial counsel stipulated to a restitution amount that was more than Moffett was responsible for; therefore, he claims counsel was ineffective. Regarding this claim, we disagree and affirm that part of the circuit court order.

BACKGROUND

¶2 The case against Moffett arises out of a series of crimes in August 2016, when Moffett was charged with six counts, all with the habitual criminality penalty enhancers: three counts of operating a motor vehicle without the owner's consent (OMVWOC) involving two different vehicles, one count of burglary, one count of bail jumping, and one count of resisting arrest.

¶3 The first and third counts for OMVWOC were based on Moffett driving a 2013 blue Honda Accord, which had been taken along with car keys and other items on August 19, 2016, from a house in Wauwatosa. On August 22, 2016, Wauwatosa police observed the Accord on a parking slab behind Moffett's girlfriend's residence. On August 23, 2016, Wauwatosa police observed Moffett walk to the parked Accord, enter it, and drive away. The police lost sight of Moffett after he drove away. On August 24, 2016, a Milwaukee County District

Attorney's Office Investigator observed the Accord parked on the 1300 block of North 44th Street, observed Moffett walk toward the vehicle, enter it, and then saw Moffett drive away.

¶4 Count two for OMVWOC was based on allegations that Moffett took and drove away a 2014 white Chevrolet Malibu on August 24, 2016, from a driveway in Wauwatosa. The residents notified police that the house had been broken into sometime in the night, with the Malibu's keys stolen, even though the Malibu was present when they discovered the burglary. Late in the morning, a landscaper at the house noticed a man walk around the block and then get into the Malibu and drive it away.

¶5 Count four of the complaint for burglary of a building or dwelling was based on the allegation that Moffett entered a dwelling in the 4300 block of West Martin Drive in Milwaukee on August 24, 2016, with an intent to steal. A window screen had been cut and a number of items were removed from the residence without consent. After Moffett was apprehended, the police searched the Accord and identified property stolen from the West Martin Drive residence and property stolen from the Wauwatosa residence where the Malibu had been taken from.

¶6 In December 2017, Moffett entered into a plea agreement with the State, in which Moffett pled guilty to counts one, four, and five; and counts two, three, and six would be dismissed and read in. Moffett's plea agreement also resolved two additional uncharged read-in offenses for (1) an attempted misdemeanor theft on June 9, 2015, on North 54th Boulevard, and (2) OMVWOC as a felon on August 15, 2015, involving a vehicle taken from E.A.'s residence. The State's recommendation included $2,500 in restitution for E.A. to cover

multiple insurance deductibles.[1] Although the State only read in one OMVWOC offense, the vehicle Moffett operated without consent was previously stolen in a burglary of E.A.'s home, during which car keys and two other vehicles also went missing. Thus, E.A. requested $500 for each of the three vehicles taken from his house and $1,000 for his home insurance deductible. After a plea colloquy, the circuit court accepted Moffett's guilty pleas.

¶7 In January 2018, the circuit court conducted the sentencing hearing. Relevant to this analysis, at sentencing the prosecutor told the court that before the charge in count three—OMVWOC—occurred, the Wauwatosa police placed a GPS device on the Accord that Moffett had been seen driving on August 23, 2016. The prosecutor stated that on August 24, 2016, police tracked Moffett to the location of the burglary charged in count four. This was the first time that the prosecutor disclosed the fact that the GPS device was used to track Moffett at the time of the burglary.

¶8 The State reiterated the restitution requests against Moffett. Trial counsel argued that Moffett disputed the basis of the request for E.A.'s restitution. The issue with restitution is examined more thoroughly below but, ultimately, the court ordered restitution of $2,500 for E.A. for all of the insurance deductibles. The court imposed a sentence of nineteen years, divided as ten years of initial confinement and nine years of extended supervision.

[1] The State's recommendation also included $4,903.32 in restitution for the insurance company for the Malibu driven in count two for OMVWOC. Moffett does not make any argument on appeal relating to this restitution request, and we discuss it no further.

¶9 In February 2020, Moffett filed a motion for postconviction relief, moving to withdraw his pleas because his plea was not knowingly entered because the State failed to preserve potentially exculpatory GPS evidence,[2] and for ineffective assistance of counsel because trial counsel stipulated to restitution on charges that were not read in at the time of the guilty pleas, resulting in an order for $2,500 in restitution, rather than $500. The circuit court denied his motion without a hearing. This appeal follows. Additional relevant facts are included below.

DISCUSSION

¶10 Moffett argues that the trial court erred when it denied his motion for postconviction relief without a hearing because he alleged sufficient material facts to require an evidentiary hearing on his claims for plea withdrawal and ineffective assistance of counsel. As to his claim for plea withdrawal, Moffett argues that the circuit court did not accept his allegations as true, but instead accepted the allegations in the complaint to determine that the GPS data would not be exculpatory. We conclude that Moffett has alleged sufficient facts to be entitled to an evidentiary hearing on his motion to withdraw his pleas. Additionally, Moffett argues that the circuit court erred when it denied his claim of ineffective assistance of counsel based on his assertion that trial counsel stipulated to the court's authority to order $2,500 restitution to E.A. On this issue we conclude that Moffett's claim fails. The record shows that trial counsel did not stipulate to the restitution; therefore, Moffett's counsel was not deficient.

[2] Moffett contends that the GPS evidence is exculpatory because it would show that he did not enter the neighborhood where the burglary occurred until after the burglary occurred, thereby refuting the police statements in the complaint.

I. Plea withdrawal and GPS evidence

¶11 We turn first to the issue of plea withdrawal. "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. As noted, Moffett alleges that the State possessed potentially exculpatory GPS evidence and did not provide it to Moffett prior to the plea hearing; therefore, his guilty pleas were not made knowingly because he was not aware of the existence of exculpatory evidence.

¶12 The circuit court's decision to grant or deny an evidentiary hearing on a postconviction motion for plea withdrawal is addressed under a mixed standard of review. "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." ***Bentley***, 201 Wis. 2d at 310. "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** If the defendant fails to allege sufficient material facts, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A defendant must "allege facts which allow the court to meaningfully assess his claim[.]" ***Bentley***, 201 Wis. 2d at 318. The defendant's motion must "allege … who, what, where, when, why, and how … within the four corners of the document itself" with "material factual objectivity[.]" ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 585, 682 N.W.2d 433.

¶13 First, we review Moffett's allegations drawn from his postconviction motion to determine whether Moffett has alleged sufficient material facts that would entitle him to a hearing on withdrawal of his guilty pleas. Moffett contended that no GPS data was turned over to him or to his counsel during discovery. Moffett asserted that he was unaware that the police had placed a GPS tracking device on the Accord. Moffett affirmatively alleged that had he known there was GPS evidence, he would not have entered guilty pleas. Moffett contended that the GPS evidence would have been exculpatory to count four, the burglary charge, because the evidence would have shown that he did not enter the neighborhood where the burglary occurred until shortly before he was arrested, such that there was insufficient time to commit the burglary before the officers observed him.

¶14 Moffett's motion also asserted that postconviction counsel attempted to obtain the GPS evidence from the State, but the data was no longer accessible and the police could not find an archive of the data. Moffett asserts he had a due process right to discovery of potentially exculpatory evidence, noting that it is not known whether the evidence would have been exculpatory, under what circumstances the police failed to preserve the evidence, and whether the evidence was destroyed in bad faith.

¶15 The State contends that Moffett's allegation that the GPS evidence was exculpatory is not an objectively factual assertion. Objectively factual assertions refer to facts in the sense of what is "really true," as opposed to subjective opinion assertions, which refer to "mere 'opinion' or personal taste." ***State v. Jeninga***, 2019 WI App 14, ¶14, 386 Wis. 2d 336, 925 N.W.2d 574 (citation and emphasis omitted), *review denied*, 2019 WI 84, 388 Wis. 2d 650, 931 N.W.2d 532. The State argues that Moffett merely offers his opinion that the GPS

evidence was exculpatory; however, the Accord's location and his time of arrival would be objective facts, not Moffett's opinions.

¶16 Moffett argues that the circuit court erred because it failed to assume that the factual allegations in his motion were true, and if he would be entitled to relief under those facts. Moffett asserts that the circuit court instead accepted the facts in the complaint as true. In its decision denying his postconviction motion, the circuit court concluded that the GPS evidence was not exculpatory because of police statements in the complaint to the contrary: "After police tracked the blue Honda to the area of the burglary, they observed the defendant repeatedly driving and parking his vehicle around the block and walking between different yards and houses. They also observed him with an armful of items that he put into the vehicle."

¶17 The State argues that the circuit court correctly relied on the record, which it argues conclusively demonstrated that Moffett's claim failed. However, the record here consists almost entirely of the criminal complaint and the prosecutor's recounting of the allegations in detail during the sentencing hearing. We now must consider whether the record conclusively refutes Moffett's claim.

¶18 In relation to count four, the burglary charge, the complaint states that on August 24, 2016, an investigator observed the stolen Accord parked on the 1300 block of North 44th Street, observed Moffett walk toward the vehicle, and then saw Moffett drive away. The investigator observed Moffett stop and park the Accord on the west side of the 1100 block of North 44th Street, where it crosses West Juneau Avenue. The investigator observed Moffett as he exited the Accord, "hurried into a yard area, and returned to [the] Accord approximately 30 seconds later carrying numerous items which he placed into the vehicle through the

driver's side door." The investigator then observed Moffett enter the Accord and drive around the neighborhood before parking on North 44th Street directly to the west of the house burgled on West Martin Drive, where he then exited the vehicle and walked away. Shortly after, a Wauwatosa Police detective observed Moffett walking toward the Accord. A detective confronted Moffett, who then ran away through various yards and onto rooftops. An officer took Moffett into custody on the rooftop of a house on North 43rd Street. The key to the blue Accord was on Moffett's person at the time of his arrest.

¶19 Here, Moffett alleges that the GPS evidence would show he did not commit the burglary because it would show that he did not enter the neighborhood where the burglary occurred until after the burglary occurred. He alleges the GPS evidence would contradict the police version of events in the complaint. The circuit court's postconviction decision does not appear to accept Moffett's factual allegations as true, but instead relies on allegations in the complaint as the record to show that Moffett was "caught red-handed."[3]

¶20 In any case, when the circuit court is faced with postconviction allegations that creates a prima facie question of fact that would entitle Moffett to relief—here the question of fact is whether GPS evidence would show that Moffett was not where police said he was on the night in question and did not commit the burglary—then the court must order an evidentiary hearing to resolve the issue. *See* ***Nelson***, 54 Wis. 2d at 497. Contrary to the State's argument, Moffett

[3] A close reading of the complaint shows only one instance of the investigator seeing Moffett emerge from the yard "approximately 30 seconds later carrying numerous items," which he placed in the Accord. However, we note that the investigator's observation of Moffett emerging with allegedly stolen items referred to an address a block away and on the opposite side of the street from the West Martin Drive address of the discovered and charged burglary.

contends that the record does not conclusively refute his allegations, but raises a question of fact. Unlike some postconviction cases, here, the record does not conclusively refute this factual dispute. *Cf.* ***State v. Sulla***, 2016 WI 46, ¶43, 369 Wis. 2d 225, 880 N.W.2d 659 (concluding that the record conclusively refuted the defendant's "claim that he was misinformed of and therefore did not understand the effect a read-in charge could have at sentencing. The record [was] replete with indications that Sulla was properly informed and understood that the sentencing court could consider the read-in charges when it determined his sentence."). Here, there is a factual dispute whether Moffett was in the area at the time of the robbery—Moffett says no and the police say yes.

¶21 Additionally, Moffett asserts that the circuit court erred when it considered his allegations conclusory and insufficient to support his motion for plea withdrawal. The circuit court stated that Moffett did not make an "allegation that the [GPS] information would have been useful as to the other five charges … and he provides no explanation … why he would have proceeded to trial on *all six counts* and risked up to *53.5 years of total imprisonment* if he had been given this information." In a plea withdrawal analysis, "the defendant must provide a 'specific explanation of *why* the defendant alleges he [or she] would have gone to trial ....'" ***Jeninga***, 386 Wis. 2d 336, ¶14 (citation omitted). Moffett argues his allegations provide a specific explanation why he would have gone to trial: the GPS evidence would show that he was not guilty of the burglary charge. He contends that the law requires him to provide an explanation, not that it has to be a perfect explanation, acknowledging that he risked increased prison time exposure if he proceeded to trial on all six counts. We conclude that Moffett has provided a specific reason and that satisfies the legal standard.

¶22 The State further argues that Moffett has failed to properly allege a due process violation because he did not claim that the police destroyed the GPS evidence in bad faith. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). We disagree that Moffett was required to allege bad faith. Moffett did not seek a dismissal of the charges on the basis that the State deliberately destroyed exculpatory evidence violating his due process rights. *See* ***id.*** at 66. Instead, Moffett argues that his guilty pleas were not knowingly and intelligently made because he was not aware of exculpatory evidence when the State failed to provide the GPS evidence to the defense. *See* ***Taylor***, 347 Wis. 2d 30, ¶25 ("A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process[.]").

¶23 Therefore, we conclude that Moffett has raised sufficient material facts to require an evidentiary hearing on his motion for plea withdrawal.

II. Ineffective Assistance and Restitution

¶24 Finally, we turn to Moffett's claim of ineffective assistance of counsel. Here, we affirm the circuit court order, but on different grounds.[4] To prove ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the defendant was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both ***Strickland*** inquiries if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

[4] Although we affirm the circuit court order with regard to the ineffective assistance claim on the restitution order, we do not adopt its reasoning. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) ("If a trial court reaches the proper result for the wrong reason it will be affirmed.").

¶25 Moffett argues that trial counsel was ineffective for agreeing that the circuit court had authority to order restitution for E.A.'s insurance deductibles for his house and all three cars, even though the State only read in one uncharged OMVWOC offense, based on only one of E.A.'s cars. Although Moffett's argument for ineffective assistance of counsel contends that the circuit court did not have such authority, he does not directly challenge the restitution imposed. Therefore, we limit our review to whether trial counsel performed ineffectively. Our examination of the record does not show that trial counsel stipulated or agreed to the restitution. Accordingly, counsel is not deficient for a non-existent stipulation.

¶26 At Moffett's sentencing hearing, the State addressed a restitution request from E.A., who had his house broken into and had three cars stolen in August 2015, for $2,500 to cover insurance deductibles related to the incident. The State informed the court that Moffett admitted to driving one of E.A.'s automobiles without consent. The State expressed uncertainty about the request, stating, "I guess I would leave to the Court whether all three of those are appropriate or just one based on the one he's admitted to driving." Trial counsel informed the court that Moffett disputed "the basis for [E.A.'s] request." Moffett believed that "[i]f any amount should be issued" it should be "the $500 for the one vehicle that he admitted to driving on that occasion, but not the other two vehicles nor the homeowner's deductible."

¶27 The circuit court discussed with trial counsel and the State about its legal authority to order restitution based on read in charges, to which the State responded that the restitution statute and case law support restitution for victims of read in crimes. We recite the discussion between trial counsel and the court:

> [TRIAL COUNSEL:] I think that Statute 973.20 allows a crime for which a defendant was convicted in and any read-in crime to—for restitution to be ordered. For the read-in crime definition, it says any uncharged or that is dismissed as a part of a plea agreement.
>
> THE COURT: Okay. So we agree that I have the authority to do it.
>
> [TRIAL COUNSEL:] I think so.[5]
>
> THE COURT: Your challenge to it is the challenge to the amounts, like you don't think those are legitimate amounts, or he doesn't—he doesn't believe, and he's hoping I don't order it? Those are different things that send me down different paths as far as scheduling things.
>
> [TRIAL COUNSEL:] Sure. I think that in regards to [E.A.'s] claim for the $2,500 amount, I think that the number we are challenging, but he believes that the $500 for the Avalon, I believe it was, that he admitted to driving is fair and appropriate. But the amounts for the other cars and then the homeowner's deductible he's challenging.
>
> ….
>
> Well, he's not sure why he's setting the deductible because the car he admitted to driving was returned, so we're not sure why the $500 is being asked for. It's also my understanding there was no damage to that car, so I just don't understand, I guess.

¶28 The State argues that trial counsel was not ineffective because the circuit court had the authority to order restitution for E.A.'s insurance deductibles. However, we do not address this argument because the record does not reflect the central premise of Moffett's claim that trial counsel stipulated or agreed to the

[5] We note that trial counsel appears to agree that the circuit court has authority to impose restitution for read in charges, but this does not address restitution for offenses that were not read in nor does it address the causal nexus required for restitution for the full course of conduct. *See* ***State v. Queever***, 2016 WI App 87, ¶11, 372 Wis. 2d 388, 887 N.W.2d 912.

amount of restitution owed to E.A., or even to the idea that the uncharged read in OMVWOC offense would fall within the course of conduct for the dwelling break in and burglary and the theft of the other two cars. Trial counsel's performance is deficient when it falls below an objective standard of reasonableness. *See* ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. The record reflects that trial counsel did object to the $2,500 restitution amount and did question the connection between the claimed damages and Moffett's OMVWOC, and there is nothing in the record demonstrating that trial counsel stipulated to anything, as Moffett claims. Therefore, we conclude that Moffett has failed to prove deficient performance on the part of counsel. We do not need to address the prejudice inquiry and, accordingly, Moffett's claim for ineffective assistance of counsel fails.

CONCLUSION

¶29 We conclude that Moffett has raised sufficient material facts to be entitled to an evidentiary hearing on his request for plea withdrawal based on allegedly exculpatory GPS evidence. We reverse this part of the circuit court order and remand for further proceedings consistent with this decision. We also conclude that Moffett has failed to show deficient performance by trial counsel regarding the restitution order; therefore, his ineffective assistance claim fails and we affirm this part of the circuit court order.

By the Court.—Order affirmed in part; order reversed in part and remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2019-20).