COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP257-CR
2009AP258-CR

Cir. Ct. Nos. 2007CF4378
2008CF1882

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYREESE LAMONT ROWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and KEVIN E. MARTENS, Judges. *Affirmed*.

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

¶1 PER CURIAM. Tyreese Lamont Rowell appeals from a judgment of conviction for possessing a firearm as a felon and for felony bail-jumping, and from a postconviction order denying his motion for plea withdrawal and other

relief.[1] The issues are whether: (1) Rowell is entitled to presentence plea withdrawal; (2) trial counsel rendered ineffective assistance relating to Rowell's guilty pleas; (3) the trial court erroneously exercised its sentencing discretion generally, and specifically with respect to its declaration of Rowell's ineligibility for the Earned Release and Challenge Incarceration Programs ("sentencing reduction programs"); and (4) the trial court meaningfully reviewed its decisions prior to denying postconviction relief. We conclude that: (1) Rowell has not met his burden of showing a fair and just reason to withdraw his guilty pleas; (2) trial counsel did not render ineffective assistance in advising Rowell about pleading guilty; (3) the trial court did not erroneously exercise its sentencing discretion by assessing Rowell's character differently than Rowell had hoped it would, or in any other respect; and (4) our rejection of Rowell's specific contentions necessarily supports the postconviction order. Therefore, we affirm.

¶2 Rowell was charged with being a felon in possession of a firearm, felony bail-jumping, and endangering safety by using a dangerous weapon. Rowell also had another felon in possession of a firearm charge pending from a 2007 case. Incident to a plea bargain, Rowell pled guilty to the possession of a firearm and the bail-jumping charges, and the State moved to dismiss the

[1] Appeal No. 2009AP257-CR is from Milwaukee County Circuit Court Case No. 2007CF4378 ("2007 charge"), in which another felon in possession of a firearm charge was dismissed and read-in for sentencing incident to the plea bargain entered in Milwaukee County Circuit Court Case No. 2008CF1882, the case that is the main focus of this appeal. Both circuit court cases were assigned to the Honorable Jeffrey A. Kremers. In that 2008 case, the trial court entered a judgment convicting Rowell of being a felon in possession of a firearm, which is Appeal No. 2009AP258-CR (a different felon in possession of a firearm charge from the dismissed and read-in charge from 2007). This court consolidated these two appeals for briefing and dispositional purposes since Rowell's appellate challenges all involve the plea bargain that includes guilty pleas to the two offenses and the dismissed and read-in charge from the 2007 case. Judge Kremers presided over all significant proceedings in these appeals with the exception of the consolidated postconviction motion, which was denied by the Honorable Kevin E. Martens.

endangering safety charge outright, and moved to dismiss and read-in the felon in possession of a firearm charge from the 2007 case. Rowell changed his mind the next day and moved for plea withdrawal, contending that his plea was invalid, and that his trial counsel rendered ineffective assistance in that he was rushed and confused, and did not realize that the 2007 charge was read-in and not dismissed outright. After conducting an evidentiary hearing at which Rowell and his then trial counsel testified, the trial court denied the motion, finding that Rowell had not demonstrated a "fair and just reason" for plea withdrawal in that the record did not support his claim that he was rushed or confused, and that "there's no contest" in finding "[trial counsel] much more credible than [Rowell] on these issues." A few days later, the trial court imposed a nine-year aggregate sentence, comprised of four- and five-year respective periods of initial confinement and extended supervision, which was slightly more than the State's negotiated sentencing recommendation of an eight-year aggregate sentence, comprised of four-year periods of initial confinement and extended supervision.[2]

¶3 Rowell filed a postconviction motion renewing his plea withdrawal and related ineffective assistance claims, and also challenging the sentence as an erroneous exercise of discretion for ignoring most mitigating aspects of his character, for failing to explain the length of the confinement portion of the sentence, and for failing to initially determine Rowell's statutory eligibility for the

[2] For the felon in possession of a firearm conviction, the trial court imposed a nine-year sentence, comprised of four- and five-year respective periods of initial confinement and extended supervision. For the felony bail-jumping conviction, the trial court imposed a six-year concurrent sentence, comprised of three-year periods of initial confinement and extended supervision.

programs and for otherwise misusing its discretion. The trial court summarily denied the motion.[3]

¶4 To withdraw a guilty plea prior to sentencing, the defendant must show a fair and just reason. ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

> [A trial] court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced.
>
> Although "freely" does not mean "automatically," the exercise of discretion requires the court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal. A fair and just reason contemplates "the mere showing of some adequate reason for defendant's change of heart." However, the reason must be something other than the desire to have a trial.

State v. Bollig, 2000 WI 6, ¶¶28-29, 232 Wis. 2d 561, 605 N.W.2d 199 (citations omitted).

> Upon a motion to withdraw a plea before sentencing, the defendant faces three obstacles. First, the defendant must proffer a fair and just reason for withdrawing his plea. Not every reason will qualify as a fair and just reason. Second, the defendant must proffer a fair and just reason that the [trial] court finds credible. In other words, the [trial] court must believe that the defendant's proffered reason actually exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

State v. Jenkins, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24 (citing ***State v. Canedy***, 161 Wis. 2d 565, 582-85, 469 N.W.2d 163 (1991)). This court reviews the trial court's determination for an erroneous exercise of discretion. ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989).

[3] This is the motion that was decided by the Honorable Kevin E. Martens.

¶5 Rowell moved to withdraw his guilty pleas because: (1) he was rushed into pleading guilty after not having had access to the discovery for more than a couple of days; and (2) he misunderstood the terms of the plea bargain, in that the 2007 charge was dismissed and read-in, whereas he thought that charge was going to be dismissed outright. Rowell also claims that his trial counsel's ineffectiveness contributed to the foregoing problems.[4] Because his counsel's alleged ineffectiveness was central to his plea-withdrawal claim, at the evidentiary hearing on his motion both he and his trial counsel testified.

¶6 Rowell testified that he had reviewed the discovery material with his counsel "[p]robably two times," but was not provided with the actual materials until May 19, 2008.[5] He then claimed that he read some of the discovery before he entered his guilty pleas on May 21, 2008. Rowell claimed that a fellow inmate read the remaining discovery with him on May 21, after he had pled guilty. Rowell identified the problems he had with the discovery: he thought that the probable cause statement was invalid and had been improperly modified. Rowell was also troubled that the victim and a witness claimed that they had known him longer than he thought they had.

¶7 Rowell's second complaint was that he misunderstood that the 2007 charge was being dismissed and read-in, as opposed to being dismissed outright. He claimed that he was innocent of the charge and would have proceeded to trial

[4] Rowell is not raising a ***Bangert*** challenge to the plea colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

[5] Discovery consisted of no more than thirty pages: ten to twenty pages of forms, and no more than ten pages of witness statements and investigative material.

had he known that the charge was being read-in, and could be considered at sentencing.

¶8 Trial counsel testified that she reviewed "everything" with Rowell on May 8 and again on May 18, specifying that "everything" meant "all of the reports … includ[ing] the probable cause statement." Trial counsel then described precisely how she reviewed the discovery with him, "flip[ping] the pages in front of [him] and … show[ing him] what the discovery says." She continued that it was her practice to "skip through [the pedigree and background material] and … review [the narratives]." She admitted that Rowell "complain[ed] that discovery was given to him on May 18th, and at that point [she] indicated to him that we had reviewed discovery before … and had also discussed the details of the case." Although the plea hearing had been scheduled for May 20, 2008, trial counsel told the trial court that "[Rowell] would like additional time to consider the State's offer"; the trial court adjourned the plea hearing until the next morning.

¶9 Trial counsel had repeatedly attempted to negotiate an outright dismissal of the 2007 charge, which she knew was important to Rowell. Rowell offered to act as an informant or otherwise cooperate with law enforcement; however, the prosecutor would not agree to an outright dismissal of the 2007 charge.[6] Trial counsel testified that she explained to Rowell that by agreeing to the reading-in of the 2007 charge it could be considered for sentencing purposes, although it did not require Rowell to admit to anything about it, and would preclude any prosecution for that charge. She also told Rowell that the read-in

[6] We do not address that part of the plea bargain that resulted in the outright dismissal of the endangering safety charge because Rowell obviously does not complain about his trial counsel's effectiveness in negotiating that dismissal.

charge did not involve any restitution. Trial counsel confirmed that Rowell was disappointed; she said that Rowell "didn't like it, but he didn't have questions."

¶10 The trial court denied the motion, explaining that this involved principally "a credibility determination between [Rowell and trial counsel] as to what [Rowell] knew, when [he] knew it, did [he] understand and have adequate time to … look at all the discovery, didn't understand what was all in there … [and assess his other] problems with it." The trial court continued that "there's no contest" on the credibility assessment, as "[trial counsel] was as credible as any witness [the trial court has] ever seen in all [its] years as a lawyer or as a judge. [The trial court] was very, very impressed with [trial counsel's] recollection and her notations of everything that occurred." It rejected Rowell's claim that he was rushed, remembering very clearly that it had afforded him an additional day as he requested to give him "more [time] to think about it." As the trial court reasoned, "there's no question in [the trial court's] mind that you had plenty of time to think about it, you had all the information for several weeks, [and] you had the discovery in your own hands for several days." It also rejected the claim about the materiality of how long the victim and the witness had known Rowell; precisely how long each knew Rowell was of minimal importance except to the extent that each knew him well enough to identify him.[7]

¶11 The trial court also rejected Rowell's claim that he misunderstood that the 2007 charge was being read-in, and not dismissed outright. As the trial court recalled:

[7] The trial court only mentioned Rowell's complaint about the probable cause statement. Rowell's postconviction counsel advised Rowell that the probable cause statement did not provide a valid basis for plea withdrawal; we agree.

> With respect to the read-in issue, I really am at a loss to understand that one. The offer that was made to you that you acknowledge was made to you was plead guilty to the three counts in the '08 case and the '07 case would be dismissed and read[-]in.
>
> You didn't like that and you told [your trial counsel] that and you told her you wanted to get a better deal which would include an outright dismissal of the '07 case and maybe lesser time if you were allowed to work with the State as some kind of informant.
>
> And she comes back to you and she gets a better deal, meaning that the third count in the – in the '08 case [endangering safety] was dismissed but told you that the State was still not willing to do an outright dismissal [of the '07 charge], and you wanted time to think about that.
>
> The Court gave you time to think about that, put it over for another day, brought you back to court, and there's just nothing in this record, nothing in the documents, nothing anywhere to suggest that anything had changed with respect to the read-in nature of the '07 case.

The trial court then reviewed the explanation of the consequences of a read-in offense given to Rowell at the plea hearing:

> [the prosecutor] put it on the record at the beginning of the hearing and I talked to you about it in the middle of the hearing and you had an opportunity at that point to tell me wait a minute, I didn't know this was going to be a read-in or I don't agree with this or something to that effect.
>
> You gave absolutely no indication that there was any problem with that or your understanding that it was going to be read in, and so I – I don't find any basis for a claim that you were surprised by that, that you were pressured into it.
>
> The evidence again is to the contrary, that you had adequate time to think about it and asked for more time, and again that's unusual in most courts that the court would on the eve of trial say okay, fine, you can have another day to think about it and we'll bring you back tomorrow. We don't usually do that.

> I did that in your case. I brought you back the next day so you had again another 24 hours or more to think about it and you indicated that you wanted to enter a plea and you did.

¶12 The trial court was not convinced "exactly what [Rowell's] reason [wa]s," much less that it was fair, just or even "adequate." The trial court properly exercised its discretion in determining that Rowell had not met his burden to establish a "fair and just" reason to allow him to withdraw his pleas.

¶13 Rowell's related claim is that his trial counsel was ineffective in "fail[ing] to explain to and ascertain" that Rowell understood the elements and consequences of the read-in offense, and for failing to timely "read and review discovery" with Rowell. To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶14 Rowell claimed that had he known that the 2007 charge was being read-in, as opposed to being dismissed outright, he would not have proceeded with the plea bargain. We have addressed the testimony and the trial court's reasons for rejecting Rowell's factual claim about the read-in offense. Trial counsel

testified about her repeated attempts to negotiate an outright dismissal of the 2007 charge, to no avail. The best offer she was able to negotiate was a dismissal and read-in. She recounted Rowell's disappointment, but eventual willingness to accept that offer. She also testified that she explained the consequences of the read-in offense to Rowell. The trial court recounted its explanation of the consequences of the read-in offense, and its adjournment to afford Rowell an additional day to decide whether he wanted to plead guilty according to the negotiated proposal, or whether he preferred to proceed to trial. Rowell's claim is also problematic in that the read-in offense had the same elements as one of the offenses to which he pled guilty, as both were being a felon in possession of firearm, in violation of WIS. STAT. § 941.29(2) (2007-08).[8] Rowell has not shown deficient performance on the part of his trial counsel regarding the read-in offense.

¶15 Rowell's next claim against trial counsel is that he did not have sufficient time to review the discovery material. Trial counsel read and reviewed the discovery with Rowell. Additionally, she gave Rowell the thirty pages of discovery, no more than ten pages of which were substantive, several days before he pled guilty. The trial court also adjourned the plea hearing to afford Rowell additional time. Rowell's identified complaints with his belated review of the discovery were legally inconsequential. His own postconviction lawyer advised him of the immateriality of the probable cause statement; Rowell has offered nothing to contradict that advice. Rowell did not explain how the length of time the victim and witness knew him compromised their identification of him. The trial court repeatedly emphasized how the record belied Rowell's claim that he

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

was rushed. Rowell has not shown that his trial counsel performed deficiently, or how the trial court erred in its findings or conclusion on the ineffective assistance claim.

¶16 Rowell also challenges the trial court's exercise of sentencing discretion in two respects: (1) by ignoring the mitigating aspects of his character and failing to explain the length of its imposed confinement; and (2) by failing to initially determine Rowell's statutory eligibility for the sentencing reduction programs, and then misusing its discretion in denying eligibility. There is no merit to these sentencing challenges.

¶17 A defendant's character is one of the primary sentencing factors that the trial court considers when exercising its sentencing discretion: the other two being the gravity of the offense, and the protection of the public. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court accords each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). That the trial court could have exercised its discretion differently does not constitute an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶18 The trial court did not ignore Rowell's character; it simply did not consider each and every positive aspect that Rowell wanted it to. The trial court characterized Rowell's background as not "the worst … in terms of number o[f] convictions or length of time." The trial court was troubled by the fact that Rowell's "time on the street, so-to-speak, since [he] committed that [prior] offense has been relatively short." It noted that Rowell claimed that he was unable to

read, and agreed with Rowell that it was important for him to focus on his reading. These are relevant aspects of Rowell's character. Rowell identifies factors that are not sufficiently consequential or related to these offenses that failure to consider them would constitute an erroneous exercise of discretion.[9]

¶19 Rowell also contends that the trial court failed to explain the length of confinement that it imposed, four years. The trial court imposed the sentences in accordance with the prosecutor's negotiated sentencing recommendation.[10] It explained that four years of confinement for the felon in possession of a firearm conviction was appropriate for the reasons it mentioned in explaining its consideration of the primary sentencing factors. It imposed a three-year concurrent period of initial confinement for the bail jumping case. The trial court explained the reasons for its sentence, and its explanation was reasonable. It was not obliged "to provide an explanation for the precise number of years chosen." ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (citing ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)); ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion").

[9] For example, Rowell criticizes the trial court for failing to mention that he had not concealed his appearance, was not involved with a gang, was willing to cooperate (a consideration repeatedly emphasized in his unsuccessful attempts to obtain an outright dismissal of the 2007 charge), was remorseful, and had an ongoing conflict with the victims. The trial court never said that Rowell had concealed his appearance, was involved with a gang, or not remorseful.

[10] The prosecutor's negotiated recommendation was for an eight-year aggregate sentence comprised of four-year periods of initial confinement and extended supervision. Consequently, the trial court imposed one year longer of extended supervision than the prosecutor recommended.

¶20 Rowell also criticizes the trial court for declaring him ineligible for the sentencing reduction programs without first mentioning his statutory eligibility, and for erroneously exercising its discretion in denying him eligibility. Technically, the trial court should first determine if the defendant meets the statutory eligibility requirements to participate in the programs, pursuant to WIS. STAT. §§ 302.045(2) and 302.05(3). The trial court then exercises its discretion to determine whether the defendant is otherwise suited to participate in the programs. *See* WIS. STAT. § 973.01(3g) and (3m) (amended Apr. 3, 2008); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112.

¶21 The trial court denied Rowell eligibility for each program:

> because of the use of the weapon and presence of the weapon.
>
> Those are, those facts alone make you ineligible for those programs. Even if I thought you were eligible, the Department of Corrections wouldn't let you in and I happen to agree with those conditions and would not make you eligible, even if I could, based on the use of the gun.

The trial court's analysis presumed his statutory eligibility. It explained that "[e]ven if … [he] were eligible" it would not allow him to participate for his use of a firearm regardless of his statutory eligibility. Its failure to first declare Rowell statutorily eligible before explaining why it was otherwise denying his right to participate in the programs is inconsequential. Rowell's secondary criticism that the trial court erroneously exercised its discretion in denying him eligibility is belied by the record, as evidenced by the foregoing remarks.

¶22 Rowell's remaining challenge is to the trial court's failure to "meaningfully reevaluate its assessment" of his postconviction claims before summarily denying them. Our affirming the trial court's rejection of Rowell's

individual claims seriatim necessarily defeats his challenge to the postconviction order.

By the Court.—Judgment and order affirmed.

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