COURT OF APPEALS DECISION DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2171-CR **Cir. Ct. No. 2007CF1384**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. ANTHONY,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. John M. Anthony, *pro se*, appeals from a judgment, entered after he pled no contest to second-degree reckless homicide while armed and second-degree recklessly endangering safety, and from an order denying his

postconviction motion to withdraw his pleas. For the reasons which follow, we affirm the circuit court.

BACKGROUND

¶2 On March 13, 2007, the State filed a criminal complaint against Anthony, charging Anthony with first-degree reckless homicide while armed. The complaint alleged that on March 7, 2007, while driving a vehicle with three other passengers, Anthony shot at Myron McNutt with whom he had been feuding. McNutt was riding in another vehicle, travelling in the opposite direction and passing Anthony's vehicle when Anthony stuck his hand out the driver's side window to take the shot. Instead of hitting McNutt, however, the bullet pierced the windshield of a van driven by Prentice Barnes, an innocent bystander, striking him in the right eye. Barnes died as a result of his injuries.

¶3 On November 12, 2007, the case was scheduled for trial, but after Anthony accepted an offer from the State, a plea hearing was held instead. Before the hearing, Anthony signed a plea questionnaire and waiver of rights form, stating, among other things, that he "decided to enter th[e] plea of [his] own free will." At the hearing, the court conducted a plea colloquy during which Anthony stated that his pleas were made voluntarily, knowingly, and intelligently and that no one made any threats or promises in exchange for his pleas. Following the plea colloquy, Anthony pled no contest to second-degree reckless homicide while armed and second-degree recklessly endangering safety.

¶4 Days later, on November 21, 2007, Anthony filed a *pro se* motion, requesting that he be allowed to withdraw his pleas because he claimed Attorney Reyna Morales, the public defender who represented him during the plea hearing, "coerce[ed] [him] into taking [the] plea" and "told [him] to plea[d] no contest and

[he] would [receive] probation." Thereafter, Attorney Morales moved to withdraw as counsel. The circuit court granted Attorney Morales' motion to withdraw as counsel, and scheduled a hearing on Anthony's motion to withdraw his pleas. Prior to the hearing, Anthony hired new counsel who filed a more formal motion to withdraw on Anthony's behalf.

¶5 On December 14, 2007, the circuit court held a hearing on Anthony's motion to withdraw his pleas. Anthony, his girlfriend, and Attorneys Steven Kohn and Morales—both of whom had represented Anthony at different times while the case was pending before the circuit court—testified. The circuit court denied the motion, holding that the pleas were taken in compliance with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and that Anthony had not presented a fair and just reason for his pleas to be withdrawn.

¶6 In March 2008, the circuit court sentenced Anthony to eighteen years of initial confinement followed by seven years of extended supervision on the second-degree reckless homicide while armed count, and to four years of initial confinement followed by five years of extended supervision on the second-degree recklessly endangering safety count, to be served consecutively.

¶7 Thereafter, Anthony filed a *pro se* postconviction motion, again asking the circuit court to allow him to withdraw his pleas. This time he claimed that he had received ineffective assistance of counsel. The circuit court denied the motion without a hearing. Anthony appeals.

¶8 Additional factual details are included in the discussion as necessary.

DISCUSSION

¶9 The bulk of Anthony's claims stem from his assertions that his pleas were coerced and that the plea colloquy was deficient. He also alleges that the double jeopardy clause is implicated. We address Anthony's claims regarding the alleged coercion of his pleas below. However, Anthony raises his claims regarding the deficiency of the plea colloquy[1] and double jeopardy for the first time on appeal. By failing to raise these issues in his postconviction motion, Anthony has waived his right to pursue them on appeal because the circuit court never had the opportunity to rule on these claims in the first instance. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52 (2007-08).[2] Consequently, we will not address them on appeal.[3] *See* ***Wirth***, 93 Wis. 2d at 443-44.

¶10 In his attempt to demonstrate that his pleas were coerced, and therefore not entered knowingly, intelligently, and voluntarily, Anthony attacks

[1] The State notes and the record confirms that in its order denying Anthony's motion to withdraw his plea before sentencing, the circuit court noted that the plea colloquy was sufficient and taken in compliance with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). However, our review of Anthony's motion to withdraw the plea, filed by counsel, reveals that Anthony did not pursue a deficient-plea-colloquy claim before the circuit court and that the circuit court's reference to the sufficiency of the plea colloquy was meant only as a factor in support of its ultimate conclusion that Anthony's plea was not coerced by Attorney Morales. *See* ***State v. Jenkins***, 2007 WI 96, ¶63, 303 Wis. 2d 157, 736 N.W.2d 24 ("A fair and just reason to withdraw a plea before sentence does not depend upon either a deficient plea colloquy or the existence of a constitutionally invalid plea.").

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

[3] We decline Anthony's invitation to otherwise address his double jeopardy claim pursuant to WIS. STAT. § 901.03(4). *See* ***State v. Mayo***, 2007 WI 78, ¶¶28-29, 301 Wis. 2d 642, 734 N.W.2d 115.

the circuit court's denial of both his motion to withdraw his pleas before sentencing and his postconviction motion. We address each order—and Anthony's corresponding claims—in turn.

I. Motion to Withdraw Pleas Before Sentencing

¶11 First, Anthony argues that the circuit court erroneously exercised its discretion when it denied his motion to withdraw his pleas prior to sentencing. Because the record demonstrates "'that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach,'" we affirm on this ground. *See* ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted).

¶12 In order to withdraw a guilty plea prior to sentencing, the defendant must show a fair and just reason. ***Libke v. State***, 60 Wis. 2d 121, 124-28, 208 N.W.2d 331 (1973). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). "Fair and just" means some adequate reason other than that the defendant simply had a change of mind and desires to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The burden is on the defendant to establish a proper reason by a preponderance of the evidence. ***Id.*** at 583-84.

¶13 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 circuit court finds credible. In other words, the circuit court must believe that the defendant's proffered reason actually exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

Jenkins, 303 Wis. 2d 157, ¶43 (citations omitted).

¶14 "[T]he decision to grant or deny the motion to withdraw the plea rests within the sound discretion of the circuit court." ***Id.***, ¶29 (citation and internal quotation marks omitted). We review the circuit court's decision for an erroneous exercise of discretion. ***Id.***, ¶30. "If the defendant does not overcome [the three] obstacles in the view of the circuit court, and is therefore not permitted to withdraw his plea[s], the defendant's burden to reverse the circuit court on appeal becomes relatively high." ***Id.***, ¶44.

¶15 Before the circuit court, Anthony alleged that his pleas were coerced and that in the interest of fairness and justice he should be permitted to withdraw them. More specifically, Anthony contended that he felt pressured into accepting the State's offer on the eve of trial because he had little confidence in Attorney Morales and did not believe she was prepared to proceed with trial. Anthony argued that he was further pressured to accept the State's offer when, at the request of Attorney Morales, Attorney Kohn, Anthony's previous counsel, visited him and told him he should accept the offer, despite being unfamiliar with the particulars of Anthony's case since he withdrew as counsel.

¶16 The circuit court held a hearing on Anthony's motion to withdraw his pleas prior to sentencing, at which Anthony, his girlfriend,[4] and Attorneys Kohn and Morales testified.

¶17 Anthony testified that Attorney Morales told him on the day of trial that he was "in a lose-lose situation" and that he was "toast" if the case went before a jury, leading Anthony to believe she would "present [his] case as if [he] was going to lose." Anthony also testified that Attorney Morales told him that if he accepted the State's offer he could "go home on probation" and that other defendants charged with homicide had received probation.[5] He stated that she told him there was no time to confer with family regarding the pleas because the circuit court was "real strict." Anthony further testified that he distrusted Attorney Morales' ability to represent him at trial because "[s]he never prepared for [his] case ever … [because she] thought [Anthony] was going to hire [Attorney] Kohn back."

¶18 With respect to Attorney Kohn, Anthony testified that on the day of the plea hearing he and Attorney Kohn spoke about the pleas. Anthony testified that Attorney Kohn told him that the State's attorney was "charming" and that Anthony should "be afraid of him because he is good with juries." Ultimately,

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[4] Anthony's girlfriend's testimony was brief. She only testified that after Anthony pled no contest to the charges, Attorney Morales told her it was possible that Anthony would be sentenced to probation.

[5] During the hearing on Anthony's motion to withdraw his plea, his counsel argued that Attorney Morales' purported assertion that Anthony would receive probation for the homicide charge was coercive. The circuit court was unpersuaded by the argument, and Anthony has abandoned that claim on appeal.

Anthony stated that Attorney Kohn told him to "plead out" but that Anthony still wanted to go to trial.

¶19 Attorney Morales testified that she was an experienced public defender and that she had represented defendants in at least ten to fifteen homicide trials. Attorney Morales stated that she had met with Anthony on approximately four different occasions to prepare him for trial, and that an investigator and another attorney from the public defenders office may also have visited Anthony on her behalf. She testified that contrary to Anthony's testimony, when she visited him the night before the trial was scheduled to begin, Anthony appeared nervous and told her to approach the State for an offer. When she approached Anthony with the State's offer, he initially rejected it.

¶20 Attorney Morales testified that at the time she was ready and prepared to take the case to trial but that she advised Anthony to take the offer because, although he asserted that he was not the shooter, he admitted to driving the vehicle from which the fatal shot was fired and to making a U-turn so that the actual shooter could take the shot.[6] Because, as a party to the crime, Anthony's exposure would be the same, Attorney Morales attempted to explain to Anthony that the State's offer was in his best interest. When Attorney Morales saw Attorney Kohn in the hallway of the courthouse he offered to speak with Anthony about the State's offer. It was after speaking with Attorney Kohn that Anthony agreed to accept the plea agreement.

[6] At Anthony's sentencing hearing, Attorney Scott Anderson, who was representing Anthony at the time, stated on the record that Anthony told him that "there was a passenger that reached across, fired the shot." Also during the sentencing hearing, Anthony stated, "I made [a] foolish decision, and I am going to have to pay for it dearly." On appeal, Anthony denies being at the scene of the crime.

¶21 Attorney Kohn testified that on the day of the plea hearing he believed he had a positive relationship with Anthony, even though he had withdrawn as Anthony's counsel for financial reasons. Attorney Kohn testified that since his representation of Anthony had terminated he had remained in contact with Anthony through third parties, and he recalled that someone had contacted him a day or two prior to the plea hearing "interested in [Attorney Kohn's] input and possible continued representation of [Anthony]." Attorney Kohn testified that the day of the plea hearing he spoke with Anthony, with Attorney Morales present, and that the "discussion had to do with whether the offer that had been made to [Anthony] was in his best interest or whether he should go to trial."

¶22 Attorney Kohn testified that his opinion was based on his previous knowledge of the case and without the benefit of any investigation that had been done since his representation of Anthony had terminated. However, he told Anthony that he thought the State's offer "was a good one" and that "based on [his] recollection of the facts there certainly was the possibility [Anthony] could be convicted of the more serious offense [first-degree reckless homicide while armed] and from that perspective [Attorney Kohn] thought it was a good offer."

¶23 In a written decision following the hearing, the circuit court held as follows:

> When the court takes this in its totality, the court has to obviously take a look at the record, assess the credibility of the witness who testified. There is no doubt that defense counsel [Attorney Morales] acted as an advocate in her role. Mr. Kohn apparently came down and acted in a role that he previously acted upon before because of the trust that he had built up with his former client and discussed the pro[]s and con[]s of entering a plea or going to trial.

> … The bottom line is that it was [the defendant's] decision to plead after discussing all the considerations, going through the guilty plea questionnaire.
>
> When you take into consideration the guilty plea questionnaire and the transcripts that have been generated and those contents and the credibility of the witnesses who testified, that have testified, I give much greater weight to Mr. Kohn's testimony and Ms. Morales' testimony than I do the defendant's.
>
> ….
>
> In the representation of Ms. Morales as to the defendant, the defense counsel would be remiss to advise to go to trial knowing that a conviction was highly likely. I think that's the responsibility of any good advocate. There was no rush or evidence that the court could find that the plea colloquy was flawed….
>
> Thus, the court would make a finding that the defendant has failed to present sufficient evidence that he was improperly coerced into pleading [no contest]. Therefore, there is no fair and just reason … to grant the plea withdrawal.

¶24 In finding that Attorneys Morales and Kohn were more credible than Anthony, the circuit court rejected Anthony's argument that he was coerced, either directly or indirectly by Attorney Morales' purported lack of preparation for trial. Anthony failed to overcome the first two obstacles for withdrawal of a plea prior to sentencing, namely, he failed to set forth credible evidence of "a fair and just reason" for withdrawing his pleas. *See* ***id.*** Moreover, the circuit court is "the 'ultimate arbiter of the credibility of a witness,'" and Anthony has not demonstrated that the circuit court's credibility determination was "based upon caprice, an abuse of discretion, or an error of law." *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (citation omitted). Consequently, there is no basis for Anthony's claim that the circuit court erroneously exercised its discretion.

II. Postconviction Motion Requesting Plea Withdrawal

¶25 Anthony appeals the circuit court's denial of his postconviction motion on three grounds: (1) the circuit court improperly applied the higher manifest-error standard; (2) Anthony received ineffective assistance of counsel; and (3) the circuit court erroneously exercised its discretion. In the alternative, he asks that we remand the case to the circuit court for an evidentiary hearing because the court erred in not holding one in the first instance. None of his arguments are persuasive.

A. Improper Legal Standard

¶26 Anthony again sought to withdraw his pleas following sentencing and filed a postconviction motion requesting to do so. In his postconviction motion, he argued that the lower plea withdrawal burden—fair and just reason—applied because he had originally brought his motion prior to sentencing. Anthony is incorrect. After sentencing, a guilty plea may not be withdrawn unless the defendant proves by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The high post-sentencing burden reflects the State's interest in the finality of convictions and reflects the fact that the presumption of innocence no longer exists. ***Id.*** A manifest injustice occurs when there has been "'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (quoting ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)).

¶27 Here, the sentencing court applied the manifest injustice standard to Anthony's post-sentencing request. The circuit court noted that Anthony's postconviction motion "set[] forth essentially the same claims that were before the

court when [Anthony] sought to withdraw his plea[s] prior to sentencing," and that following a hearing on that motion the circuit court "found that [Anthony] did not meet his burden (fair and just reason) of showing he was entitled to withdraw his plea[s]." The court continued:

> Given that many of the same claims are presented and given that the court previously heard testimony on these issues from the defendant and his attorneys and found the defendant had not met the fair and just reason standard for withdrawing his plea prior to sentencing, the court cannot find that he has met the higher postconviction standard of showing the existence of a manifest injustice.

¶28 Anthony attempted to add weight to his argument by presenting what he described as "new evidence": (1) an affidavit from Precious Ward, dated July 3, 2009, stating that he was with Anthony in the holding cell when both Attorneys Morales and Kohn advised Anthony to enter the pleas; and (2) Anthony's affidavit in which he claims that James McNutt told him that James' brother, Myron McNutt, told him (James) that Youantis Wright was the shooter. Anthony's affidavit, signed by both Anthony and James McNutt, contains three layers of hearsay.

¶29 First of all, Anthony fails to meet the requisite legal showing for "new evidence." *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) ("Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred.").

> For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea[,] the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court

> must determine whether a reasonable probability exists that a different result would be reached in a trial.

Id. Anthony provides no information as to whether he knew of Ward and McNutt's statements at the time of his pleas and first motion to withdraw or why he did not earlier bring them to his attorneys' or the court's attention. Second, McNutt's testimony would be inadmissible hearsay, and Ward's testimony contributes nothing to the material portions of Anthony's defense. As the circuit court recognized, that evidence "d[id] not establish the existence of a manifest injustice."

¶30 Finally, even if we were to review Anthony's plea withdrawal motion by the lower fair-and-just-reason standard, as Anthony requests, we would conclude he failed to meet his burden. As we have already established, the circuit court rationally exercised its discretion in denying Anthony's request to withdraw his pleas under that more lenient standard. Anthony has set forth no reason why the circuit court would now rule differently. In fact, Anthony concedes that his postconviction motion to withdraw "is, for the most part, based on the reasons provided prior to sentencing" in his first motion to withdraw his pleas. Consequently, we affirm.

B. Ineffective Assistance of Trial Counsel

¶31 Anthony next asserts that the circuit court erred in not finding that the ineffective assistance of his numerous attorneys meets the manifest-injustice standard. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (The Wisconsin Supreme Court has "recognized that the 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel."). Because we conclude that Anthony fails to meet his burden of showing deficient representation

by his attorneys, we hold that he has not shown a manifest injustice in the denial of his post-sentencing plea withdrawal motion.

¶32 A defendant asserting an ineffective assistance of counsel claim must demonstrate that: (1) trial counsel's performance was deficient; and (2) trial counsel's deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a successful ineffective assistance of counsel claim requires that the defendant show both deficiency and prejudice, the court need not address both components of the inquiry if the defendant fails to make a sufficient showing on one. ***Id.*** at 697.

¶33 To satisfy a showing of deficient performance, a defendant must allege specific acts or omissions of trial counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, counsel must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. The right to effective counsel is not a right to the perfect or even best possible defense, but rather it is a right to reasonably effective professional representation given all of the circumstances. ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is "a strong presumption that counsel acted reasonably within professional norms," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), and we grant great deference to counsel when reviewing claims of ineffective assistance, ***Strickland***, 466 U.S. at 689.

¶34 To prove prejudice, the defendant must demonstrate "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted). "A defendant must do more than merely allege that he would

have pled differently; such an allegation must be supported by objective factual assertions." ***Id.*** at 313.

¶35 Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will uphold any factual findings by the circuit court unless the findings are clearly erroneous. ***Id.*** However, the ultimate conclusion of whether counsel's performance was deficient and prejudicial, such that it constitutes ineffective assistance, is a question of law that we review independently of the circuit court. ***Id.*** at 128.

¶36 Anthony was represented by numerous attorneys throughout the time his case was pending before the circuit court. Attorney Thomas Flanagan represented Anthony at his initial appearance.[7] Anthony then hired Attorney Kohn to represent him, and Attorney Kohn did so, waiving Anthony's preliminary hearing and attending a scheduling conference. Later, the circuit court granted Attorney Kohn's motion to withdraw as counsel, and the public defender's office appointed Attorney Morales. Attorney Morales represented and advised Anthony at the plea hearing. Days after his pleas were entered, Anthony filed a *pro se* motion with the circuit court, requesting, among other things, new counsel. Anthony hired Attorney William Marquis to represent him at the hearing on his motion to withdraw his pleas, and Attorney Marquis did so. But eventually Attorney Marquis also moved to withdraw as attorney of record and the court granted the motion. The public defender's office then appointed Attorney Scott

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[7] Anthony mentions in passing that Attorney Flanagan "did no investigation." Anthony does not elaborate upon his claim and we will not construct his argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Anderson who represented Anthony at the sentencing hearing. Anthony alleges numerous claims against these attorneys.

¶37 First, Anthony claims that Attorney Kohn was ineffective because he advised Anthony to accept the State's offer without fully apprising himself of the investigations done by both the defense and the State since he had withdrawn as counsel. Initially, we note that we do not decide the threshold question of whether Attorney Kohn was *representing* Anthony when he spoke to him at the time he entered his pleas. The parties agree that Attorney Morales was representing Anthony at that time.

¶38 But even assuming that Attorney Kohn was representing Anthony at that time, Anthony fails to state what difference it would have made to his plea decision if Attorney Kohn had learned of the investigation developments since he stopped representing Anthony. Further, because Anthony does not allege that had Attorney Kohn been fully apprised of the details of the case he would have advised Anthony differently, or that he would have turned down the State's offer if Attorney Kohn had so advised, there is no prejudice. His argument is undeveloped and merely conclusory and fails to meet his burden. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶39 Next, Anthony claims that Attorney Morales was ineffective because she failed to request that the State turn over certain discovery materials, failed to interview or subpoena key witnesses, and failed to ensure that the State preserved certain pieces of evidence. Anthony raised these same concerns before the circuit court in his postconviction motion and the circuit court held that "the fact that [Anthony] would have pursued an investigation somewhat differently than the one pursued by the public defender's office does not invalidate the investigative

attempts that had been made. [Anthony's] complaints about the way witnesses were investigated does not support a finding that counsel was ineffective." We agree.

¶40 Further, given that the plea colloquy set forth the serious sentencing exposure that Anthony faced, we fail to see how Attorney Morales' purported failure to be prepared for trial would cause Anthony to plead no contest to crimes he now alleges that he did not commit. Even though the State's offer included a reduction in charge, the exposure was still substantial:

> [THE STATE]: … I filed … an Amended Information in this case charging the defendant with second degree reckless homicide while armed; Count Two, second degree recklessly endangering safety. The defendant will enter pleas other than not guilty to both of those counts. The recommendation by the State would be that he serve between 20 to 25 years of confinement followed by [10] years of extended supervision and pay any restitution that may be deemed appropriate in this case.
>
> ….
>
> THE COURT: And you understand that, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you still understand the Court's not bound by any negotiations or plea bargains? The Court could impose up to 30 years on the first count including the penalty enhancer?
>
> THE DEFENANT: Yes.
>
> THE COURT: You understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Up to ten years on the second count?
>
> THE DEFENDANT: Yes.

> ….
>
> THE COURT: And, as I said, you understand the Court is not bound by any negotiations or plea bargains?
>
> THE DEFENDANT: Yes, [Y]our Honor.
>
> THE COURT: Okay. You have read the Complaint or had it read to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So you understand what you're charged with?
>
> THE DEFENDANT: Yes.

¶41 Having been aware of the serious consequences of his pleas—facing up to thirty years on count one alone—it makes no sense that Anthony would plead no contest simply out of fear that his counsel was unprepared for trial. Anthony could have expressed his concerns about his lawyer to the circuit court during the plea colloquy, in lieu of stating that his pleas were knowingly, intelligently, and voluntarily given. Simply put, Anthony has not set forth "objective factual assertions" that persuade us that he would have pled differently or gone to trial, had he believed that Attorney Morales was more prepared.

¶42 Anthony also asserts, with respect to Attorney Morales' representation, that she failed to inform him that another attorney in the public defender's office was representing one of the State's witnesses. Anthony states that had he known of the conflict of interest he would not have consented to it. However, Anthony provides no evidence of the alleged conflict of interest and states only that "Attorney Rick" with the state public defender's office was representing one of the State's "key witnesses." Even if true, Anthony does not explain how the conflict affected his decision to plead no contest. His claims against Attorney Morales have no merit.

¶43 Finally, Anthony argues in an undeveloped argument that Attorneys Marquis and Anderson ineffectively represented him by failing to challenge the effectiveness of Attorneys Kohn and Morales. Because we have concluded that Attorneys Kohn and Morales did not ineffectively represent Anthony, these claims fail as well.

C. Erroneous Exercise of Discretion

¶44 Anthony also contends that the circuit court's denial of his postconviction motion was an erroneous exercise of discretion. He repeats his argument that the circuit court's finding, that Attorney Morales was more credible than Anthony, was erroneous. However, in support of that argument he only offers that the circuit court disregarded Anthony's allegations that Attorney Morales was unprepared for trial and found Attorney Morales' assertion that she was prepared for trial credible. As we have stated before, such credibility determinations are well within the purview of the circuit court's discretion. Accordingly, after reviewing the circuit court's decision, we see no basis for this claim, and we conclude "'that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" *See* ***Jenkins***, 303 Wis. 2d 157, ¶30 (citation omitted).

D. Evidentiary Hearing

¶45 Anthony also argues that the circuit court erred in denying his postconviction motion without a hearing. Indeed, when a postconviction motion raises an ineffective assistance of counsel claim, an evidentiary hearing is frequently required. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, the circuit court may deny the hearing if the motion

fails to allege sufficient facts, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d 303, 309-10. This court reviews a circuit court's denial of a motion for an evidentiary hearing *de novo*. *See* ***State v. Toliver***, 187 Wis. 2d 346, 359, 523 N.W.2d 113 (Ct. App. 1994).

¶46 Here, the record conclusively demonstrates that Anthony was not entitled to relief. His postconviction motion raised essentially the same issues he raised previously in his motion to withdraw his pleas prior to sentencing. His postconviction motion merely added new conclusory statements. The circuit court held a hearing on Anthony's claims when he filed the first motion, and as we have established, Anthony has set forth no reason for us to overrule that decision on appeal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.