COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2471 **Cir. Ct. No. 2005CF346**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON P. KROCKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Aaron Krocker appeals an order denying his motion for postconviction relief. Krocker argues the circuit court erred by denying his motion without an evidentiary hearing. We disagree and affirm.

BACKGROUND

¶2 A criminal complaint charged Krocker with one count of attempted first-degree intentional homicide, one count of burglary with use of a dangerous weapon, and four counts of substantial battery with use of a dangerous weapon. The complaint alleged that, during a burglary of Patrick and Michelle Dillon's home, Krocker attempted to kill Michelle and intentionally caused substantial bodily harm to Michelle, her two young children, and a family friend.

¶3 Attorney Thomas Harris was initially appointed to represent Krocker. However, before the preliminary hearing, Krocker's parents retained attorney Robin Shellow to represent their son. Both Harris and Shellow appeared at the preliminary hearing, and Harris moved to withdraw. The State objected, based on the fact that Shellow also represented Torri Williams, whom the State intended to call as a witness against Krocker.

¶4 Shellow admitted she represented Williams as a "courtesy pro bono local counsel" on behalf of Williams' lead attorney, Robert Ritchie of Knoxville, Tennessee. Shellow stated that she had made some appearances in Williams' case for the purpose of scheduling, but that Ritchie negotiated Williams' plea and intended to appear at his sentencing. Shellow also stated she would withdraw from further participation in Williams' case and would find other local counsel for him. Shellow presented written waivers of the conflict of interest signed by both Krocker and Williams.

¶5 The circuit court permitted Shellow to represent Krocker. The court determined the conflict of interest was only a potential conflict, not an impermissible conflict under SCR 20:1.7. The court further found that Krocker freely, knowingly, and intelligently waived the conflict.

¶6 Krocker subsequently agreed to plead guilty to attempted first-degree intentional homicide, burglary with use of a dangerous weapon, two counts of physical abuse of a child, and two counts of substantial battery. The court accepted Krocker's pleas and sentenced him to forty years' initial confinement and twenty years' extended supervision on the attempted homicide count, together with an additional aggregate of seven-and-one-half years' consecutive confinement on the remaining counts.

¶7 Krocker moved for postconviction relief, seeking to withdraw his guilty pleas or, in the alternative, seeking resentencing. The circuit court denied the motion without an evidentiary hearing, and Krocker appeals.

DISCUSSION

¶8 When a postconviction motion alleges facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the defendant has alleged facts sufficient to warrant relief is a question of law that we review independently. ***Id.*** If the defendant's motion does not allege facts sufficient to warrant relief, or if the record conclusively shows the defendant is not entitled to relief, the circuit court has discretion to grant or deny a hearing. ***Id.*** We deferentially determine whether the circuit court properly exercised its discretion. ***Id.*** "We require the circuit court 'to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.'" ***Id.*** (quoting ***Nelson v. State***, 54 Wis. 2d 489, 498, 195 N.W.2d 629 (1972)).

¶9 In this case, the circuit court determined that the record conclusively showed Krocker was not entitled to relief, but it did not state its reasons for

exercising its discretion to deny an evidentiary hearing. However, when a circuit court fails to explain its reasoning, we may search the record to determine if it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Here, our independent review reveals that the record conclusively refutes Krocker's claims. Thus, the circuit court's decision to deny an evidentiary hearing was proper because a hearing would not have had any effect on the ultimate disposition of Krocker's postconviction motion.

I. Plea withdrawal

¶10 Krocker contends the circuit court erroneously exercised its discretion by denying his motion for plea withdrawal without a hearing. To withdraw a guilty plea after sentencing, a defendant "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (quoted source omitted). Krocker makes three arguments as to why manifest injustice will result if he is not permitted to withdraw his pleas.

A. Pleas not entered knowingly, intelligently, and voluntarily

¶11 A defendant can establish manifest injustice by showing that a plea was not entered knowingly, intelligently, and voluntarily. ***Id.***, ¶18. Krocker argues his guilty pleas were not knowing, intelligent, and voluntary because he did not understand the "intent" element of the first count in the complaint – attempted first-degree intentional homicide. Krocker contends he told Shellow before the plea hearing that he "never intended to kill anyone, not for one second" and he "didn't believe he was guilty of the crime charged in Count One." Krocker apparently claims he could not be found guilty of attempted first-degree

intentional homicide because he did not have the mental purpose to kill Michelle Dillon.

¶12 However, the intent necessary to attempt to commit first-degree intentional homicide is no different from the intent necessary to commit any intentional crime. *See* ***State v. Weeks***, 165 Wis. 2d 200, 206-08, 477 N.W.2d 642 (Ct. App. 1991). A defendant has the necessary intent not only when the defendant has the actual mental purpose to commit the crime, but also when the defendant is aware that his or her intentional acts are practically certain to cause the crime to be committed. ***Id.*** at 206-07; *see also* WIS JI—CRIMINAL 1070 (Apr. 2001). Thus, even if Krocker did not have the mental purpose to cause Michelle Dillon's death, he would be guilty of attempted first-degree intentional homicide if aware that his intentional conduct was practically certain to cause her death.

¶13 Any claim that Krocker did not realize his actions were practically certain to cause Michelle Dillon's death would be patently absurd. According to the criminal complaint,[1] Krocker and another man entered the Dillon home during the early morning hours of March 25, 2005. Before going into the house, they armed themselves with wooden table legs they found on the patio. Each table leg was about four inches in diameter and three to four feet long. Once inside the house, Krocker repeatedly hit Michelle Dillon over the head with one of these table legs. After she fell to the ground, he continued beating her while she laid on the floor. Michelle tried to get up, but one of the intruders hit her again over her

[1] At the plea hearing, Krocker admitted the facts set forth in the criminal complaint were true and correct.

head and back. The two men left Michelle on the floor, bleeding from the head. A few minutes later, Krocker returned and forced Michelle into a bathroom. There, he stabbed her repeatedly in the left side of the neck, not stopping until blood began to gush from her throat. Krocker cannot plausibly claim he was unaware that these actions were practically certain to cause Michelle's death.[2]

¶14 Moreover, the record conclusively demonstrates that Krocker understood the intent element of attempted first-degree intentional homicide when he entered his guilty plea. At the plea hearing, the court asked Krocker whether he understood that, if the case went to trial, the State would have the burden of proving beyond a reasonable doubt that he intended to kill Michelle Dillon. Krocker responded, "I do understand, your Honor." Apparently, Krocker paused a moment before responding, which led Shellow to interject:

> [I]t's difficult, conceptually, for a layperson, and even a lawyer, to understand the relationship between an intent necessary for attempt, which requires the taking of a substantial step which contains within it preparation and planning, and the mental state element of intent, which can be formed almost contemporaneously or simultaneously with an act and requires that he knew the act could practically certainly have a result to which he attempted.
>
> And so the reason he paused on that, on the court asking him about intent, is because we spent some time talking about that it is conceptually difficult to understand how intent can be formed contemporaneously or almost contemporaneously, but intent is almost a premeditated factual step that must be formed in advance.
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> *And so, he does admit that the acts which he did could practically certainly have caused the death of Ms. Dillon, and that he took a substantial step towards that, and that's the way it's been explained to him.* And it is difficult now

[2] This is particularly true given that Krocker ranks in the top two to five percent of his age group in intelligence.

> for him, sitting here, to hear the word that he could possibly commit an act that would take someone's life. And I just wanted to put that on the record, because he knows it could have. (Emphasis added.)

¶15 The court then questioned Krocker further regarding his understanding of the intent element. Krocker indicated he understood intent to kill could be formed at any time, including the instant before the act. He said he understood he could be convicted of attempted first-degree intentional homicide if he did acts which demonstrated that he intended to kill and would have killed Michelle Dillon except for the intervention of some extraneous factor. Krocker told the court he had reviewed the element of intent with Shellow, he did not have any questions about that element, and he understood the plea hearing would be the time to raise questions.

¶16 Shellow added that Krocker's "only trepidation" was that by admitting intent to kill "he would somehow be saying to the Dillons today that he wanted them dead" when actually "he did not want them dead." Shellow said she had explained to Krocker that "intending to attempt was not the same thing as wanting someone dead." She said Krocker realized "his acts were practically certain to have caused the death of Mrs. Dillon had there not been an intervention."

¶17 Later on in the plea hearing, the court asked Krocker if he had any questions, and he stated he did not. The court asked Krocker if anything was unclear to him, and he responded, "No, your Honor, everything's clear." The court gave Krocker the opportunity to speak with Shellow in private about any questions or concerns, and Krocker replied, "I think I understand everything, your Honor."

¶18 The court's colloquy conclusively shows Krocker understood the intent element of attempted first-degree intentional homicide. He knew that intent to kill could be legally imputed to him even though he did not have an actual desire to kill, as long as he knew the acts he performed were practically certain to cause Michelle Dillon's death. He knew that intent could be formed at any time, including in the instant before the act. He was hesitant to admit the element of intent only because he was afraid the Dillon family would think he had wanted to kill Michelle. The court repeatedly asked whether Krocker had questions, and each time he responded that he did not. On this record, there is no basis for a claim that Krocker did not understand the intent element of attempted first-degree intentional homicide.

¶19 Krocker also contends his pleas were involuntary because Shellow pressured him to plead guilty. Again, the record refutes Krocker's claim. At the plea hearing, Krocker stated no one had threatened or coerced him into pleading guilty. He stated he was satisfied with Shellow's services and did not have any questions for either Shellow or the court.

¶20 Additionally, the record does not support Krocker's claim that Shellow had a financial or personal interest in securing his guilty pleas. There is no indication that the State would have renewed its concerns about Shellow's conflict of interest had the case gone to trial, given that Shellow ceased representing Williams the day after Krocker's preliminary hearing.[3] There is no

[3] CCAP, which provides online records of court proceedings in Wisconsin, indicates that Shellow moved to withdraw as local counsel for Williams in Waukesha County Circuit Court Case No. 2004CF351 on April 8, 2005. The preliminary hearing in Krocker's case was held on April 7, 2005.

indication that Shellow would have had to return any legal fees had Krocker's case gone to trial. Nor is there any indication that Shellow's professional relationship with Ritchie, Williams' lead counsel, would have suffered had Krocker not pled guilty. The record simply does not support a claim that Shellow pressured Krocker to plead guilty because of her own personal or financial interest.

B. Conflict of interest

¶21 Krocker next argues he is entitled to plea withdrawal because Shellow's representation of Williams created a conflict of interest that amounts to a manifest injustice. Krocker acknowledges that he waived this conflict on the record during the preliminary hearing and also executed a written waiver. However, he argues that his waiver of the conflict was invalid and that the circuit court should have disqualified Shellow from representing him.

¶22 A criminal defendant's constitutional right to counsel includes the right to counsel of the defendant's own choice. ***State v. Miller***, 160 Wis. 2d 646, 652, 467 N.W.2d 118 (1991). A defendant can waive an actual or serious potential conflict of interest that the defendant's chosen attorney might have. ***State v. Cobbs***, 221 Wis. 2d 101, 105, 584 N.W.2d 709 (Ct. App. 1998). Although the right to choose a conflicted attorney is not absolute and may be overridden in the discretion of the circuit court, ***id.*** at 105-06, the circuit court is not required to disqualify an attorney because of a conflict of interest that the client has waived, ***State v. Demmerly***, 2006 WI App 181, ¶13, 296 Wis. 2d 153, 722 N.W.2d 585. On the contrary, there is a presumption in favor of representation by the defendant's counsel of choice. ***Miller***, 160 Wis. 2d at 652.

¶23 We review a circuit court's disqualification decision for an erroneous exercise of discretion. ***Demmerly***, 296 Wis. 2d 153, ¶10. The court

should conduct a colloquy to ensure that the defendant understands the possibility of a conflict and knowingly and voluntarily waives any objection to the conflict. ***Id.***, ¶12; ***Cobbs***, 221 Wis. 2d at 105. Although the colloquy need not follow any precise format, the court should affirm that the defendant's attorney has revealed the conflict, that the defendant understands how the conflict could arise, and that the defendant understands substitute counsel could be appointed. ***Cobbs***, 221 Wis. 2d at 106 n.2.

¶24 The record in this case shows that the circuit court accomplished these ends. Before the preliminary hearing, Krocker executed a written waiver of Shellow's conflict of interest. The waiver stated Krocker was aware that Shellow had represented Williams, whom the State planned to call as a witness against Krocker. It stated Krocker understood Williams was going to testify about a statement Krocker allegedly made while both men were inmates in the Waukesha county jail.

¶25 At the beginning of the preliminary hearing, Krocker told the court he wanted Shellow to represent him. Shellow then informed the court she represented Williams as local counsel on behalf of Ritchie, Williams' lead attorney.[4] Shellow disclosed her limited involvement in Williams' case and stated she would withdraw from further representation of Williams and find other local counsel for him. Shellow stated she did not think her level of involvement in Williams' case would prejudice Krocker in any way. The prosecutor confirmed that Shellow's appearances in Williams' case were limited to nonevidentiary

[4] Shellow also disclosed that her firm and Ritchie's firm were representing "a series of civil defendants" who were incarcerated at a correctional institution in Tennessee. The record does not show that Williams was involved in the Tennessee civil litigation.

proceedings, and Williams later testified that Shellow had only appeared for him a few times as a courtesy to Ritchie.

¶26 At the court's request, Krocker confirmed that he had been present during the discussion of Shellow's conflict of interest. He also confirmed that he had signed the written conflict waiver. The court then determined Shellow's conflict of interest was not an impermissible conflict under SCR 20:1.7 and further found that Krocker freely, knowingly, and intelligently waived the potential conflict. Accordingly, the court allowed Shellow to represent Krocker.

¶27 The record shows that the circuit court's decision was not an erroneous exercise of discretion. Supreme Court Rule 20:1.7(b) (2005), the rule in effect at the time of the preliminary hearing, permitted an attorney to represent a client even if the representation might be "materially limited by the lawyer's responsibilities to another client," as long as: (1) the attorney reasonably believed the representation would not be adversely affected; and (2) the client consented in writing after consultation. Here, Shellow told the court she did not believe her representation of Williams would adversely affect Krocker. The court determined this belief was reasonable, given Shellow's limited involvement in Williams' case and her intent to withdraw as Williams' local counsel.

¶28 Furthermore, both Krocker and Williams executed written waivers of the conflict and orally waived the conflict during the preliminary hearing. Because Krocker had been present during the discussion of the conflict, the court knew he was aware of the conflict and how it could arise. *See* ***Cobbs***, 221 Wis. 2d at 106 n.2. Krocker had been represented by an appointed attorney before his parents retained Shellow, so he was implicitly aware that an attorney other than

Shellow was available to him. *See* ***id.*** The court therefore had enough information to determine that Krocker's waiver of the conflict was valid. *See* ***id.***

¶29 Given these facts, the court did not erroneously exercise its discretion by allowing Shellow to represent Krocker. The record conclusively refutes Krocker's claim that the conflict of interest amounts to a manifest injustice that would allow him to withdraw his guilty pleas.

C. Ineffective assistance of counsel

¶30 Krocker also argues he is entitled to plea withdrawal because he received ineffective assistance from Shellow. To prove ineffective assistance, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. Applying the ineffective assistance standard in the plea withdrawal context, a defendant may establish a manifest injustice by showing that counsel's conduct was objectively unreasonable and that, but for counsel's error, the defendant would not have entered the plea. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

¶31 Krocker contends he received ineffective assistance from Shellow because she agreed to represent him even though her previous representation of Williams created an unreasonable conflict of interest. Krocker argues this conflict prevented Shellow from representing him effectively because: (1) had the case gone to trial, Shellow would have been required "to [publicly] employ negative confidential information gathered from her representation of Williams" in violation of ethical rules; and (2) due to the conflict, Shellow allowed him to plead

guilty to attempted first-degree intentional homicide even though he had a meritorious defense.[5]

¶32 A valid waiver of a conflict of interest generally waives any right to claim ineffective assistance of counsel based on the conflict. ***Demmerly***, 296 Wis. 2d 153, ¶¶15-16. Specifically, a waiver of the conflict waives any challenge to counsel's decision to present or withhold evidence that would help one client but hurt the other. ***Id.***, ¶18. Thus, to the extent Krocker claims Shellow would have been prevented from using confidential information gathered from Williams for impeachment purposes at trial, Krocker waived this claim by waiving the conflict. Moreover, the record does not show that Shellow acquired any confidential information from Williams during the limited time she acted as his local counsel. Thus, the problem of whether to present or withhold confidential information never really would have arisen in this case.

¶33 Krocker also contends that, because of the conflict, Shellow allowed him to plead guilty to attempted first-degree intentional homicide even though he had a meritorious defense. This claim arguably falls into an exception to the general rule that waiver of a conflict of interest also waives ineffective assistance claims based on the conflict. *See* ***id.***, ¶17. However, because there is no merit to

[5] In a footnote, Krocker asserts Shellow was also ineffective by: (1) failing to seek suppression of Krocker's allegedly inculpatory statement to Williams; (2) failing to cross-examine Williams adequately during the preliminary hearing; (3) failing to seek removal of false information from the presentence investigation; and (4) unreasonably submitting a "comprehensive psychological evaluation" which the court used to impose a sentence in excess of the State's forty-year recommendation. Because Krocker does not develop any of these claims, we will not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

Krocker's assertion that he had a meritorious defense, he cannot show that Shellow performed deficiently by allowing him to plead guilty.

¶34 Krocker's allegedly meritorious defense is that he did not intend to kill Michelle Dillon, in the sense that he did not have the mental purpose to cause her death. Yet, as discussed previously, a defendant can be guilty of attempted intentional homicide if aware that his or her intentional acts were practically certain to cause death. *See* ***Weeks***, 165 Wis. 2d at 206-07. Thus, Krocker could not have successfully defended himself by arguing he did not want to kill Michelle Dillon, given that he understood his actions were practically certain to kill her.

¶35 The record conclusively demonstrates Krocker is not entitled to withdraw his guilty pleas. Therefore, the circuit court did not err by denying Krocker's motion for plea withdrawal without a hearing.

II. Resentencing

¶36 In the alternative, Krocker argues he is entitled to resentencing because his sentence was based on inaccurate information. A defendant who requests resentencing on this basis must show: (1) that there was inaccurate information before the sentencing court; and (2) that the court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Here, Krocker alleges the sentencing court relied on inaccurate statements in the presentence investigation that Krocker's mother stabbed him and that there was child pornography on Krocker's computer.

¶37 However, Krocker did not raise this claim in the circuit court. In his postconviction motion, Krocker contended the court sentenced him "without adequate sentencing information on Count One." Specifically, he argued the court

sentenced him "without having been fully apprised of the circumstances surrounding [his] criminal conduct and mental state." He did not claim that any information in the presentence investigation was inaccurate. Because Krocker failed to argue in the circuit court that his sentence was based on inaccurate information, we will not consider this argument on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1993).

¶38 Krocker also argues he is entitled to resentencing because his sentence is harsh and excessive. However, a motion for postconviction relief under WIS. STAT. § 974.06[6] may not be used to attack a circuit court's exercise of sentencing discretion "when a sentence is within the statutory maximum or otherwise within the statutory power of the court." ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Krocker does not contend that his sentence is in excess of the statutory maximum.

¶39 Moreover, even if we were to construe Krocker's motion as seeking sentence modification pursuant to WIS. STAT. § 973.19, Krocker's claim would fail. Paragraph 973.19(1)(a) requires that a motion for sentence modification be brought within ninety days of sentencing. This time limit applies to a motion claiming a sentence is unduly harsh. ***State v. Noll***, 2002 WI App 273, ¶9, 258 Wis. 2d 573, 653 N.W.2d 895. Krocker's motion was not filed within ninety days of sentencing, so, if construed as a § 973.19 motion, it is untimely.

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

By the Court.—Order affirmed.

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