COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1814-CR **Cir. Ct. No. 2006CF6145**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

UNDELL C. HOOKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Undell C. Hooker, *pro se*, appeals from an amended judgment convicting him of two counts of third-degree sexual assault

and from an order denying his postconviction motion seeking plea withdrawal.[1] Hooker argues that the circuit court erred when it denied his postconviction motion without an evidentiary hearing. We disagree and affirm.

I. BACKGROUND

¶2 Hooker was charged with one count of first-degree sexual assault while armed in violation of WIS. STAT. § 940.225(1)(b). After discharging three appointed lawyers, Hooker, with the assistance of his fourth appointed lawyer, pled guilty to two counts of third-degree sexual assault contrary to WIS. STAT. § 940.225(3). On each count, Hooker received a ten-year sentence comprised of five years' initial confinement and five years' extended supervision, to run consecutively.

¶3 Hooker's appellate lawyer filed a no-merit notice of appeal. At Hooker's request, this court subsequently dismissed his no-merit appeal, relieved his appellate attorney of representing him, and granted him a new deadline to file a postconviction motion or notice of appeal.

¶4 Hooker, *pro se*, filed a motion in the circuit court requesting plea withdrawal. The circuit court denied Hooker relief based on its conclusion that Hooker's motion failed to set forth sufficient facts or allegations to warrant a hearing. Hooker now appeals.

[1] The Honorable John A. Franke presided over the plea hearing and entered the amended judgment of conviction. The Honorable Jeffrey A. Conen entered the order denying Hooker's postconviction motion.

II. ANALYSIS

¶5 At issue is whether the circuit court erred when it denied, without a hearing, Hooker's motion seeking to withdraw his guilty pleas. Hooker's filing contained elements of both a ***Bangert*** motion, *see* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), which alleges defects in a plea colloquy, and a ***Nelson/Bentley*** motion, *see* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), which alleges factors extrinsic to the plea colloquy rendered a plea invalid. Our review of the circuit court's decision to deny Hooker's postconviction motion is the same under both lines of cases: *de novo*. *See* ***State v. Howell***, 2007 WI 75, ¶¶30, 78, 301 Wis. 2d 350, 369, 388, 734 N.W.2d 48, 57, 67.

A. *Bangert*

¶6 We first address Hooker's motion under ***Bangert***. During the course of a plea hearing, a circuit court must address the defendant personally and fulfill several duties under WIS. STAT. § 971.08 and judicial mandates to ensure that the plea of guilty is constitutionally sound. ***State v. Brown***, 2006 WI 100, ¶¶34–36, 293 Wis. 2d 594, 616–618, 716 N.W.2d 906, 916–918. This includes "[e]stablish[ing] the defendant's understanding of the nature of the crime with which he is charged" and "[a]scertain[ing] personally whether a factual basis exists to support the plea." ***Id.***, 2006 WI 100, ¶35, 293 Wis. 2d at 617, 716 N.W.2d at 917. If a plea colloquy is deficient and the defendant alleges that he or she did not understand an aspect of the plea because of the omission, the defendant is entitled to an evidentiary hearing. ***Id.***, 2006 WI 100, ¶36, 293 Wis. 2d at 618, 716 N.W.2d at 917–918.

¶7 As stated, Hooker pled guilty to two counts of third-degree sexual assault. *See* WIS. STAT. § 940.225(3) ("Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony…."); *see also* § 940.225(5)(c) (defining "sexual intercourse"). He claims the plea colloquy was deficient because the circuit court failed to ensure that he understood the factual basis of the charges against him and the elements of the crime.

¶8 During the plea colloquy, the circuit court advised Hooker that according to the complaint, Hooker forced the victim to engage in a number of different sex acts. The circuit court then asked whether that was what happened. Hooker answered affirmatively. The circuit court went on to ask Hooker whether Hooker knew that the victim did not consent to the intercourse or sexual acts, to which Hooker responded, "Yeah, I knew." The circuit court further inquired whether Hooker agreed that at least two different acts of intercourse, which would include oral sex, occurred. Hooker responded: "Yeah. I agree to it, yes, yes, yes, yes, yes." The court continued:

> Q. Now, before you could be found guilty of a third[-]degree sexual assault charge at a trial, a jury has to be satisfied and the [S]tate has to prove beyond a reasonable doubt that you had sexual intercourse, as that term is defined in the statute, with [the victim] and that she did not consent. Do you understand those are the things that would have to be proven beyond a reasonable doubt?
>
> A. Yes.
>
> Q. Do you have any questions about that?
>
> A. I'm just ready to move on with my life, man. I'm just ready to close this chapter. I'm just ready to get sentenced. I'm just ready to get it over with, please.

¶9 Having reviewed the colloquy, we are satisfied that there is no merit to Hooker's claim that the circuit court failed to ensure that he understood the factual basis of the charges against him and the elements of the crime. There is no basis under ***Bangert*** to justify an evidentiary hearing regarding plea withdrawal.

B. ***Nelson/Bentley***

¶10 We now address Hooker's motion under ***Nelson/Bentley*** given that a number of his claims relate to problems extrinsic to the plea colloquy. Pursuant to ***Nelson/Bentley***, Hooker must establish, by clear and convincing evidence, that withdrawal is necessary to remedy some manifest injustice. *See* ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). Scenarios presenting "manifest injustice" include, among other things, the ineffective assistance of counsel. *See* ***id.***, 213–214 n.2, 500 N.W.2d at 335 n.2.

¶11 To successfully withdraw his plea based on ineffective assistance of counsel, Hooker must show that his trial counsel's conduct or advice was objectively unreasonable and prejudicial—that, but for trial counsel's error, Hooker would not have entered the plea. *See* ***Bentley***, 201 Wis. 2d at 311–312, 548 N.W.2d at 54. A reviewing court need not consider both the deficient performance and prejudice prongs of the ineffective assistance of counsel test. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). Here, the prejudice prong is dispositive.

¶12 Hooker claims his trial counsel performed deficiently in a number of ways:

- by not raising the issue of the victim's alleged perjury during the preliminary hearing;
- by committing a number of errors during and related to Hooker's preliminary hearing;
- by not obtaining all discovery material;
- by not investigating exculpatory evidence Hooker gave him;
- by not "vindicat[ing]" Hooker's cause related to discovery issues;
- by not informing Hooker of matters concerning chain of custody;
- by defending the prosecutor and not objecting to threats made by the prosecutor;
- by committing a number of errors during Hooker's sentencing; and
- by coercing Hooker into pleading guilty.

Setting aside the lack of factual support for the majority of these claims, Hooker fails to show that but for these alleged errors, he would not have entered the pleas. Therefore, he is not entitled to withdraw his plea based on ineffective assistance of counsel. *See* ***Bentley***, 201 Wis. 2d at 311–312, 548 N.W.2d at 54.

¶13 Hooker's remaining claims of deficiencies extrinsic to the plea colloquy also fail to pass ***Nelson/Bentley*** muster. He alleges due process violations ranging from the State's failure to properly file the information and its failure to turn over discovery materials to the purported denial of his right "to a meaningful effective hearing." The facts, however, as alleged in Hooker's motion are insufficient to support these conclusory allegations. Consequently, the circuit

court properly exercised its discretion in denying the motion without a hearing.[2] *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 385, 734 N.W.2d 48, 66 (Circuit court may deny ***Nelson/Bentley*** motion without an evidentiary hearing if "'the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'") (citation omitted).

By the Court.—Judgment and order affirmed.

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

[2] Hooker argues that he was denied his right to due process because the circuit court failed to afford him an opportunity to amend his postconviction motion in order to further develop his claims. This argument is premised in large part on Hooker's belief that he was automatically entitled to a ***Machner*** hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), to develop his claim that he received ineffective assistance of counsel. Unfortunately for Hooker, there is no automatic entitlement to a ***Machner*** hearing; instead, he needed to first raise facts sufficient to entitle him to relief. As detailed above, Hooker failed to do so. In addition, we are not aware of any case law supporting Hooker's claim that due process in the context of a postconviction filing requires the circuit court to give notice to a litigant "so that he may have an opportunity to correct or supplement the pleadings before any final judg[]ment to deny is entered."