COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3128-CR **Cir. Ct. No. 01CF001373**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARQUES D. MILLER,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Marques D. Miller appeals from a judgment of conviction entered after he pled no contest to first-degree reckless homicide with the use of a dangerous weapon, first-degree intentional homicide, and attempted first-degree intentional homicide. *See* WIS. STAT. §§ 940.02(1), 939.63, 940.01(1)(a), 939.32. He also appeals from orders denying his postconviction motion to withdraw his

pleas or, in the alternative, his postconviction motion for resentencing. Miller alleges that he should be allowed to withdraw his no-contest pleas because he asserts that: (1) his trial lawyers were ineffective, and (2) his pleas were not knowingly, voluntarily, and intelligently entered. Miller also claims that the trial court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 The State charged Marques D. Miller with two counts of first-degree intentional homicide for shooting and killing Sonja Glover and Shaukunda Bowie, and one count of attempted first-degree intentional homicide for shooting and injuring Reanatta Bufford. After the police arrested Miller, he admitted to them that he shot at Sonja Glover on March 8, 2001. He told them that he left his apartment "angry" and "out of control" because he had been drinking and fighting with his girlfriend. While he was walking around, he saw Glover and began to follow her. Miller told the police that when Glover turned around, he shot at her three times.

¶3 Miller also admitted that he shot Shaukunda Bowie and Reanatta Bufford on March 14, 2001. According to Miller, he left his apartment with a gun after fighting with a "Nanette." He saw the two women walking toward him. As he passed them, he turned, pointed his gun at them, and shot four times. Miller told the police that he was ten to twelve feet away when he started to shoot at the women, but that he walked toward them as he was shooting until he was four or five feet away.

¶4 The State plea-bargained the case. On the day his trial was scheduled to begin, Miller pled "no contest" in exchange for the State's promise to move to amend the first-degree intentional homicide charge for Glover to first-

degree reckless homicide while armed. Before the plea hearing, Miller and his lawyers, John Moore and Barry Slagle, submitted a signed plea questionnaire and waiver-of-rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). On the form, Miller acknowledged, by initialing it, that he understood the elements of first-degree intentional homicide and first-degree reckless homicide.

¶5 At the plea hearing, the trial court asked Miller questions about his plea. In response to these questions, Miller said that his lawyers reviewed the elements of the crimes with him by using the jury instructions, and that he understood those elements. The trial court used the complaint and preliminary-examination transcripts as the factual basis for the pleas; neither party objected to that procedure. The trial court then found Miller guilty and determined that his pleas were knowingly, voluntarily, and intelligently entered.

¶6 At the sentencing hearing, the State recommended forty years of initial confinement and twenty years of extended supervision in connection with the killing of Glover, life in prison without the possibility of extended supervision in connection with the killing of Bowie, and twenty years of initial confinement and twenty years of extended supervision in connection with the killing of Bufford. Miller's lawyers asked the trial court to permit Miller to petition for extended supervision after forty years of imprisonment. The trial court agreed with the State, and sentenced Miller according to its recommendation. All the sentences were ordered to run concurrently.

¶7 As we have seen, Miller filed a postconviction motion to withdraw his no-contest pleas or, in the alternative, for resentencing. The trial court held a

hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Miller's motions.

II.

A. Plea Withdrawal.

¶8 We will sustain a trial court's ruling denying a motion to withdraw a guilty plea as long as the trial court acted within its discretion, which requires an appropriate consideration of the facts of record and the proper application of the relevant legal standards. ***State v. Canedy***, 161 Wis. 2d 565, 579–580, 469 N.W.2d 163, 169 (1991). We analyze Miller's desire to withdraw his pleas against this background.

1. Ineffective Assistance.

¶9 Miller claims that he should be allowed to withdraw his no-contest pleas because his trial lawyers were ineffective. After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 135, 624 N.W.2d 363, 368. The manifest-injustice test is satisfied if the defendant's plea was the result of the ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213–214, 500 N.W.2d 331, 335 (Ct. App. 1993).

¶10 In order to prove ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice in

the context of a plea withdrawal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he or she would not have pled guilty, and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996).

¶11 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶12 Miller argues that his trial lawyers were ineffective when they advised him to plead no contest because, he claims that: (1) he had a viable defense to the first-degree intentional homicide charges based on his contention at the ***Machner*** hearing that he did not intend to kill anyone, and (2) the State was going to recommend a sentence of life in prison. Miller has not shown that his trial lawyers' performance was deficient.

¶13 As material, the trial court, in its written decision, made the following findings based on the testimony by Miller's lawyers at the ***Machner*** hearing:

> • Miller's lawyers, John Moore and Barry Slagle, believed it was unlikely a jury would find that Miller did not intend to kill Bowie and Bufford because Miller knew that Glover had died as a result of the first shooting when he shot at Bowie and Bufford.

> • Moore and Slagle explained intent to Miller and told him that it was likely a jury would find that someone who shot a gun from four to five and one-half feet away from the victim intended to kill her.

Based on these findings, the trial court concluded that Miller's lawyers "reached a professional opinion that a defense based on lack of intent was unlikely to succeed." We agree.

¶14 First, Miller does not show how the trial court's findings are clearly erroneous. *See* ***State v. Pote***, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 441, 659 N.W.2d 82, 89 ("We accept the trial court's findings in this case inasmuch as they are largely based on its credibility determinations."). Second, the facts, as found by the trial court, support its conclusion. As we have seen, not only did Miller shoot at Bowie and Bufford at close range, he shot at them with the knowledge that he had killed Glover under similar circumstances. *See* ***State v. Weeks***, 165 Wis. 2d 200, 210–211, 477 N.W.2d 642, 646 (Ct. App. 1991) (when defendant shoots at close range, it is reasonable to conclude that the defendant intended to kill the victim).

¶15 The trial court also found, again based on the testimony by Miller's trial lawyers, that:

> • Slagle and Moore believed that if Miller went to trial, he would be found guilty.
>
> • Slagle believed it was in Miller's best interest to plead no contest because it would show Miller's cooperation, remorse, and acceptance of responsibility. Slagle believed that this would provide Miller with an opportunity to persuade the trial court to impose a lesser sentence.
>
> • Moore and Slagle told Miller that the State would likely recommend life in prison without extended supervision, and that the defense was going to request a different sentence based on the factors they had discussed with Miller.

The trial court concluded that the advice by Miller's lawyers that Miller should enter no-contest pleas was a "reasonable professional judgment[] because it … afforded [Miller] the best opportunity of receiving a sentence which provided him the chance to petition for release on extended supervision at some future date." Again, we agree.

¶16 Here too, Miller has not shown how the trial court's findings are clearly erroneous. Further, those facts support its legal conclusion. It was reasonable for Miller's lawyers to advise Miller to plead no contest in the hope that this would persuade the trial court to be lenient at sentencing. That the leniency did not materialize did not render Miller's lawyers ineffective. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 852, 681 N.W.2d 272, 279 (A guilty plea can often be a mitigating factor in the sentencing process, and a lawyer's incorrect prediction concerning a defendant's sentence is not enough to support an ineffective-assistance claim.).

¶17 Miller also contends that his trial lawyers were ineffective because they did not file timely a motion to suppress his statements and a motion to sever the charges. He claims that the alleged late filings are "evidence of [his lawyer's] overall performance," and implies that his lawyers advised him to plead no contest because they were not prepared to take the case to trial. This claim is belied by the record for two reasons.

¶18 First, Miller's lawyers filed the motions timely. The pretrial scheduling order set May 31, 2001, as the final day for filing motions, and July 9, 2001, as Miller's trial date. At a May 23, 2001, hearing, one of Miller's lawyers told the trial court that the parties had agreed to address the admissibility of Miller's statements to the police on the day of the trial. At a July 2, 2001, hearing,

the lawyer told the trial court that he was going to present a motion to suppress and a motion to sever on the day of the trial, and no one objected. The motions, although withdrawn as a result of Miller's pleas, were timely when Miller's lawyers filed them on July 9, 2001, the first day of the scheduled trial.

¶19 Second, the record as found by the trial court, contradicts Miller's assertion that his lawyers advised him to plead no contest because they were not prepared for trial. At the ***Machner*** hearing, Moore and Slagle discussed in detail the reasons why they advised Miller to plead no contest. From this testimony, the trial court concluded that:

> Mr. Slagle and Mr. Moore advised the defendant to enter no contest pleas pursuant to the [plea bargain] after making professional determinations and discussing with the defendant that,
>
> a) a *Miranda/Goodchild* hearing would not result in suppression of the defendant's statements;
>
> b) the defendant had no viable intoxication defense at trial;
>
> c) the defendant had no viable [not guilty by reason of mental disease or defect] defense at trial;
>
> d) at trial, a jury, acting reasonably, would probably conclude that the State had met its burden of proof as to intent, and the defendant would probably be convicted of two counts of First Degree Intentional Homicide and one count of Attempted First Degree Intentional Homicide, were he to proceed to trial; and
>
> e) entry of no contest pleas to an amended charge of First Degree Reckless Homicide, one count of First Degree Intentional Homicide and one count of Attempted First Degree Intentional Homicide offered the defendant his best opportunity of obtaining a sentence that would permit him to petition for release to [extended supervision] at some point in the future.

There is no evidence, and Miller does not point to anything, that shows that his lawyers were not prepared for trial.

2. Validity of Miller's Pleas.

¶20 Miller also contends that he should be allowed to withdraw his no-contest pleas because, he asserts, they were not knowingly, voluntarily, and intelligently entered. *See* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 53–54, 644 N.W.2d 891, 898 (manifest injustice where plea not knowingly, voluntarily, and intelligently entered). He claims that he did not understand the elements of first-degree reckless homicide because the trial court did not review the elements with him, and the plea questionnaire and waiver-of-rights form does not show that his lawyers reviewed the elements with him. We disagree.

¶21 To ensure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being given up. ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986). The trial court can do this by: (1) colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charge and the rights he or she gives up; or (3) referring to a signed plea questionnaire and waiver-of-rights form. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24; ***Moederndorfer***, 141 Wis. 2d at 827, 416 N.W.2d at 629.

¶22 In this case, the trial court found, based on the testimony of Miller's lawyers at the ***Machner*** hearing, that Miller's lawyers used the jury instruction to review the elements of first-degree reckless homicide with Miller, and that the lawyers showed the jury instruction to Miller and he appeared to read it. The trial court further found that Miller had reviewed a plea questionnaire and waiver-of-

rights form with his lawyers, and that he initialed the "portion of the form acknowledging that the elements of the offenses had been explained to him."

¶23 The trial court also found that during the plea colloquy Miller said that he had reviewed the elements of the crime with his lawyers, and that he understood those elements. These findings are not "clearly erroneous," and the trial court thus concluded that Miller's no-contest plea to first-degree reckless homicide was knowingly, voluntarily, and intelligently entered. That conclusion was not error.

¶24 In a related contention, Miller asserts that his plea was not knowingly, voluntarily, and intelligently entered because the trial court did not explain how the facts in this case "fit" the elements of first-degree intentional homicide. He admits that he understood the elements of the crime, but claims that the trial court should have "list[ed] the elements of first degree intentional homicide on the record and … solicit[ed] more information about what formed the factual basis … in light of [his] denials of intent." Again, we disagree.

¶25 A trial court's duty to ensure that a defendant's plea is knowing, voluntary, and intelligent does not require "magic words or an inflexible script." ***State v. Hampton***, 2004 WI 107, ¶43, 274 Wis. 2d 379, ___, 683 N.W.2d 14, 24. Rather, a trial court is required to do no more than ascertain that the defendant understands the essential elements of the crime. *See* ***Trochinski***, 2002 WI 56, ¶29, 253 Wis. 2d at 61, 644 N.W.2d at 902 ("a valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements"). As we have seen, Miller admits and the record shows that he understood the essential elements of first-degree intentional homicide. The trial court properly denied Miller's motion to withdraw his pleas.

B. Sentencing.

¶26 Miller claims that the trial court erroneously exercised its sentencing discretion and points to the heightened focus of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, which requires that trial courts "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Id.***, 2004 WI 42, ¶46, 270 Wis. 2d at 560, 678 N.W.2d at 208.[1] Specifically, Miller contends that the trial court did not properly weigh the serious nature of his offenses against the "severe mental and physical … abuse" he suffered as a child, which, apparently, the State does not dispute. We disagree.

¶27 Sentencing is committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512, 520 (1971). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). A defendant claiming that his or her sentence was unwarranted must "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v.***

[1] In its brief on appeal, the State argues that ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, does not apply to this case because it was decided after Miller was sentenced. We agree. ***Gallion*** *in haec verba* applies only to "future cases." *See* ***id.***, 2004 WI 42, ¶76, 270 Wis. 2d at 572, 678 N.W.2d at 214 ("In sum, we reaffirm the standards of ***McCleary*** [***v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971),] and require the application to be stated on the record for *future cases*.") (emphasis added). Nevertheless, Miller's sentencing passes muster under ***Gallion***'s gloss on ***McCleary*** and its progeny as well. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, ___ Wis. 2d ___, ___, 688 N.W.2d 20, 24 ("While ***Gallion*** revitalizes sentencing jurisprudence, it does not make any momentous changes.").

Borrell, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992). Miller points to nothing.

¶28 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted); *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight to be given to each of these factors is within the trial court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975); *see also* ***Gallion***, 2004 WI 42, ¶62, 270 Wis. 2d at 566, 678 N.W.2d at 211.

¶29 The trial court here considered the appropriate factors. It considered the seriousness of the crimes, describing the killings as "unimaginable … horrific and senseless." It also noted that the victims were "struck down … in the parking lot, one was walking the streets. Those individuals have the right to use the streets, the parking lots in this City without having fear." The trial court also

considered Miller's character. It recognized that Miller was "extremely dangerous," noting that between the killings, Miller had the ability to think about what he had done the first time, but he "chose to go out and do it a second and third time."

¶30 The trial court also considered Miller's abuse as a child. Although it empathized with Miller's apparent sad upbringing, the trial court found that this was not an excuse for the killings. We agree. *See* ***State v. Morgan***, 195 Wis. 2d 388, 428–432, 536 N.W.2d 425, 440–441 (Ct. App. 1995) (defendant's psycho-social history not relevant at guilt stage of trial), *grant of habeas corpus rev'd*, ***Morgan v. Krenke***, 232 F.3d 562 (7th Cir. 2000). Finally, the trial court addressed the need to protect the public when it correctly commented that Miller's crimes were "every person in this community's nightmare."

¶31 We also disagree with Miller's assertion that his sentence was harsh and unconscionable. A sentence is beyond the pale of reasonableness "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. Given the severity of the crimes and the need to protect the public, the sentence imposed was not "shocking" to the public sentiment.

By the Court.—Judgment and orders affirmed.

Publication in the official reports is not recommended.