COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP257-CR **Cir. Ct. No. 1994CF940760**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ALFRED SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Alfred Smith appeals from a judgment of conviction entered following his guilty plea to one count of robbery with use of force. He also appeals from a postconviction order denying his motion to withdraw his plea. He asserts that his conviction constitutes a manifest injustice

because he did not know when he entered his plea that the prosecution's complaining witness had died. We reject his contentions and affirm.

BACKGROUND

¶2 The State charged Smith in 1994 with the armed robbery of a seventy-four-year-old woman. He denied the charge, but a jury convicted him after a trial at which he represented himself. The circuit court imposed a fifteen-year prison sentence. After many years of postconviction litigation, a federal circuit court held that he was denied his sixth amendment right to counsel and determined that he was entitled to a writ of *habeas corpus*. On June 11, 2009, a federal district court ordered the State to retry him within 120 days or release him from custody.

¶3 State court proceedings resumed, and, on June 17, 2009, the circuit court conducted a hearing. Smith appeared by telephone. After the circuit court and Smith spoke briefly about the outcome of the federal litigation and the State's opportunity to retry the case within 120 days, the prosecutor stated: "as to the armed robbery charge itself, I can tell the court that the victim is deceased, which obviously puts us in a position of difficulty." The prosecutor then addressed other issues, including the State's concern that Smith had refused to accept appointed counsel. When the circuit court next addressed Smith, it discovered that the telephone connection had been severed. The circuit court re-established a connection, afforded Smith the opportunity to speak off the record to a representative of the public defender's office, and set a new hearing date.

¶4 At a status conference on July 10, 2009, the State was represented by a prosecutor who had not appeared at the June 17, 2009 hearing. An attorney from the office of the state public defender appeared as a friend of the court and said

that Smith had refused public defender representation. Smith did not attend the hearing. The circuit court stated that it would ask Smith to respond to a court order "to see if he can satisfy [the court] that he can proceed on his own." The circuit court then asked the State whether it could proceed to trial, and the prosecutor replied: "I can apprise the [c]ourt that we have every reason to believe, although we have not obtained anything definite, that the victim in this case is deceased." The prosecutor explained that the State would be able to retry Smith "only if the [c]ourt were to allow [the State] to proceed with the trial testimony [from the first trial]."

¶5 Later that day, the circuit court entered a three-page order advising Smith of the risks entailed in proceeding *pro se*. The circuit court explained to Smith that "some of the issues that promise to present themselves in this case are quite complex, for example, whether Mr. Smith can be tried again on the previous trial testimony of a witness who may now be deceased." The circuit court asked Smith to respond to the order in a way that demonstrated his understanding and awareness of this complicating factor and other considerations relevant to the decision to proceed *pro se*.

¶6 Smith filed a seventeen-page handwritten response. He began by discussing his interest in a plea bargain, explaining that the State "may want to avoid the cost of another trial, especially when there is no guarantee that [the State would] win without evidence." His response also included a full reiteration of the circuit court's order of July 10, 2009, including the circuit court's advisement that a witness "may now be deceased."

¶7 On July 23, 2009, Smith filed a document in circuit court that he characterized as a "copy of a plea negotiation agreement." The document is a

letter from Smith addressed to the district attorney offering to plead guilty to a reduced charge of the robbery in exchange for a time-served disposition. Ultimately, the State agreed to this resolution of the matter, and the case was never set for retrial.

¶8 On August 27, 2009, Smith appeared with trial counsel for a plea hearing.[1] At the outset of the hearing, the State filed an amended information charging Smith with robbery. The State explained that the amendment followed "attempts to locate the victim in this case.... Based on the efforts and our inability to locate her, the State does believe that that amendment is appropriate." The circuit court allowed the amendment and accepted Smith's guilty plea to the amended charge of robbery. The circuit court then imposed a ten-year sentence with credit for the ten years that Smith had already served.

¶9 In September 2010, Smith, by postconviction counsel, moved to withdraw his guilty plea on the ground that the plea was not "knowing, intelligent and voluntary ... because he had not been aware definitively that the victim was, in fact, deceased at the time of his plea, and therefore, would not have been able to testify against him at a new trial in this matter." In support of the claim, counsel stated that, "upon information and belief, [Smith] ... failed to hear [the prosecutor] advise the Court [on June 17, 2009,] that the victim was deceased or that that fact put [the State] 'in a position of difficulty.'"

[1] The circuit court required Smith to meet with a representative of the public defender's office before he decided whether he wished to proceed *pro se* or with counsel. The guilty plea colloquy indicates that Smith elected to accept representation.

¶10 The circuit court denied the motion without a hearing. The circuit court reminded Smith that its own order cautioned him about the complex issues in his case, including the issue of whether he could be retried using previous trial testimony of a witness "who may now be deceased." The circuit court therefore concluded that Smith should be held to his plea. He appeals.

DISCUSSION

¶11 A defendant who moves to withdraw a plea after sentencing must establish by clear and convincing evidence that the circuit court should permit plea withdrawal to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The "manifest injustice" test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Some examples of a manifest injustice are:

> "(1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement."

State v. Daley, 2006 WI App 81, ¶20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146 (citation omitted). Here, Smith rests his claim on an assertion that "he had not been made definitively aware of the fact that the victim was deceased by the time of the plea hearing."

¶12 A claim that a plea is infirm for reasons extrinsic to the plea colloquy invokes the authority of ***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). ***State v. Howell***, 2007 WI 75, ¶¶2, 74, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant pursuing a ***Nelson/Bentley*** motion for plea withdrawal must satisfy a high standard of pleading. *See* ***Howell***, 301 Wis. 2d 350, ¶75. The circuit court has discretion to deny the motion without a 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.'" ***Id.*** (citation omitted). Moreover, a postconviction motion for plea withdrawal should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. A motion containing the specificity proposed by the ***Allen*** court "will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim." ***Id.***

¶13 We review a ***Nelson/Bentley*** motion under two standards. We determine as a matter of law "whether a defendant's motion to withdraw a guilty plea 'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Howell***, 301 Wis. 2d 350, ¶78 (citation and footnote omitted). When the defendant fails to meet the pleading requirements and the record does not justify relief, we determine whether the circuit court properly exercised its discretion in granting or denying an evidentiary hearing. ***Id.***, ¶79.

¶14 We begin with the observations that Smith offers no authority supporting the proposition that he was entitled to receive information about a witness's death before he entered his guilty plea, nor does he articulate the legal doctrine that guarantees him this disclosure. We will not complete these tasks for

him.[2] *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge.").

¶15 Next, we conclude that Smith's motion fails the ***Allen*** test completely. Although Smith contends that he suffered a manifest injustice because he "had not been made definitively aware" of a witness's death, he does not explain who had the obligation to provide the information, why that person or entity had such an obligation, how the obligation arose, or what timeframe governs the required disclosure.

¶16 Indeed, Smith's motion fails to demonstrate that a question of fact exists at all. Assuming without deciding that a defendant suffers a manifest injustice by pleading guilty without knowledge that a witness has died, this assumption aids Smith only if a witness in this case was dead at the time of his plea. Smith relies on the district attorney's statement at the initial status conference of June 17, 2009, to demonstrate that a witness had died. Our supreme court, however, cited with approval the seventh circuit's requirement that a defendant seeking postconviction relief "'must provide some evidence that allows the court to meaningfully assess his or her claim.'" *See* ***Bentley***, 201 Wis. 2d at 314-15 (citation omitted). Statements of counsel are not evidence. *See* WIS JI—CRIMINAL 157.

[2] In similar circumstances, a Florida appellate court observed: "the defendant's argument, plainly stated, is that he should have been advised of the death of the victim, the state's key witness, before he entered his plea. The defendant fails to cite any authority supporting this argument, and we decline the invitation to create such." ***Adler v. State***, 666 So. 2d 998, 999 (Fla. Dist. Ct. App. 1996).

¶17 Moreover, the prosecutor who appeared on June 17, 2009, never appeared in this case again; the next prosecutor to appear clarified that the State believed the complaining witness had died but that the State had "not obtained anything definite" supporting that belief. Smith proved himself no better able than the State to obtain such definite information. His postconviction motion offered not a shred of either documentary or testimonial evidence showing that the complaining witness was deceased at the time of his plea. Smith may not rest a postconviction motion on a claim that he was denied "definitive" information about a witness without showing that such definitive information exists. Such a claim is merely a conclusory allegation and must be denied. *Cf.* ***Allen***, 274 Wis. 2d 568, ¶29 (claim that trial counsel was ineffective by not searching for a letter failed for lack of facts showing that the letter actually existed).

¶18 Further, Smith's burden is to offer "facts that are material to the issue." *See* ***id.*** (emphasis omitted). "A 'material fact' is: 'a fact that is significant or essential to the issue or matter at hand.'" ***Id.*** (citation and one set of brackets omitted). Smith fails to explain precisely why specific information about the reason for the complaining witness's unavailability is material under the circumstances of this case. To be sure, he asserts in his brief that knowledge of the witness's death would have led him to reject the option of pleading guilty because "the State would have had no legal evidence to present to the jury to establish that he was guilty of robbery." Smith's letter to the State offering to plead guilty to a reduced charge, however, explained to the State that "there's no guarantee your office would win another conviction without a lick of evidence." Smith's letter to the circuit court reiterating his offer to plead guilty explained both that he did "not want to risk another conviction and long prison sentence" and that "the Milwaukee County District Attorney may want to avoid the cost of another

trial, especially when there is no guarantee that they'd win without evidence." Smith does not explain why more information about the reason for a witness's unavailability would have been significant to his assessment of how best to proceed when he understood at the time of his plea that the State lacked evidence to convict him.

¶19 Finally, the record conclusively demonstrates that Smith is not entitled to relief. Our supreme court recently stated:

> [a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action....
>
> ... We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

State v. Cross, 2010 WI 70, ¶29, 326 Wis. 2d 492, 786 N.W.2d 64, *citing* ***Brady v. United States***, 397 U.S. 742, 757 (1970) (ellipses in ***Cross***).

¶20 Here, Smith moved to withdraw his guilty plea thirteen months after entering it. He concedes that, when he pled guilty, he knew that the State had failed to locate the key witness against him. His current claim that some unidentified entity should have "made him aware ... that the victim was, indeed, deceased" is nothing more than an effort to withdraw his plea because the State may have faced greater logistical impediments to proving its case than Smith thought at the time of the plea hearing. Were we to assume that the complaining witness was deceased as of August 27, 2009—an assumption unsupported by the

record—Smith's claim that he lacked knowledge of her death does not state a basis for relief.[3] *See* ***Cross***, 326 Wis. 2d 492, ¶29.

¶21 Because Smith did not allege sufficient facts that would entitle him to relief, and because the record conclusively demonstrates that relief is not warranted, the circuit court properly exercised its discretion by denying his motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶34. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[3] Smith's postconviction motion rests on his lawyer's assertion that Smith failed to hear the district attorney say on June 17, 2009: "the victim is deceased, which obviously puts us in a position of difficulty." Counsel's assertion is offered on information and belief. We note that "the lack of an affidavit from [a defendant] setting forth his assertions as averments does not render [the defendant's] motion infirm." ***State v. Basley***, 2006 WI App 253, ¶10 n.5, 298 Wis. 2d 232, 726 N.W.2d 671. Normally, however, a defendant seeking plea withdrawal should "state what he did not understand." ***State v. Brown***, 2006 WI 100, ¶67, 293 Wis. 2d 594, 716 N.W.2d 906. This is particularly so where, as here, the defendant seeks plea withdrawal based on information outside the plea colloquy. *See* ***id.***, ¶¶62, 64. We do not consider the effect of Smith's failure to include in his motion a forthright statement about what he did or did not hear during the telephone conference on June 17, 2009, because his motion was otherwise inadequate and would not have been aided by the missing information.