COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2010AP2510-CR
2010AP2511-CR

Cir. Ct. Nos. 2009CF3
2009CF34

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRES MORENO-RICHEY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Pierce County: JOSEPH BOLES, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Andres Moreno-Richey appeals orders denying his postconviction motion to withdraw his pleas resulting in judgments convicting him of burglary and two sexual assault charges. Moreno-Richey contends that he was

entitled to an evidentiary hearing on whether the pleas were knowingly, voluntarily, and intelligently entered and whether counsel provided ineffective assistance. We affirm for the reasons discussed below.

BACKGROUND

¶2 The charges against Moreno-Richey arose out of two separate incidents. In the first case, a woman awoke to find a naked stranger in her bed, kissing her and grabbing her breast. In the second case, Moreno-Richey told a third party that he had intercourse with a woman who was intoxicated beyond the point where she could give consent. The second victim had no memory of the assault, but she awoke with her underwear off, and testing of the underwear revealed Moreno-Richey's DNA. We will set forth additional facts more specifically relating to the plea withdrawal motion in our discussion below.

STANDARD OF REVIEW

¶3 A defendant who makes a supported allegation that the procedures outlined in WIS. STAT. § 971.08 (2009-10)[1] or other mandated duties were not followed at the plea colloquy, and further alleges that he did not understand information related to one or more defects in the colloquy, is entitled to a hearing on his plea withdrawal motion. ***State v. Hampton***, 2004 WI 107, ¶¶65-67, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant who seeks to withdraw his plea on other grounds constituting a manifest injustice, such as ineffective assistance of counsel, need only be given

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

an evidentiary hearing when the defendant alleges facts which, if true, would entitle him or her to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (discussing hearing standard); ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991) (discussing manifest injustice standard). No hearing is required when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A conclusory allegation is one which provides insufficient information to allow the court to meaningfully assess a claim. ***State v. Allen***, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion de novo, based on the four corners of the motion. ***Id.***, ¶¶9, 27.

DISCUSSION

¶4 Moreno-Richey sought to withdraw his pleas on the grounds that: (1) his trial counsel failed to request a continuance to investigate new witnesses; (2) counsel disclosed a confidential health record of Moreno-Richey's without first exploring or challenging alleged factual errors in it—namely that Moreno-Richey said he was going to wear a mask in the future (as opposed to regretting that he had not worn one in the past) and that he had begun using drugs at age thirteen (as opposed to later in his teens); (3) counsel failed to effectively cross-examine witnesses at the preliminary hearing or challenge the sufficiency of the evidence for bindover; (4) counsel did not appear at a hearing to amend the charges; (5) counsel did not challenge the victim's identification of Moreno-Richey by reference to a Facebook page where the victim claimed to have previously seen his image; (6) counsel failed to evaluate whether there was any basis to challenge the admissibility of Moreno-Richey's statement to police; (7) counsel failed to provide the court at sentencing with favorable statements from two additional character

witnesses; and (8) both the court and counsel failed to advise Moreno-Richey of the maximum potential sentence he faced on the third-degree sexual assault charge.

¶5 The allegations in Moreno-Richey's motion relating to all but one of the claims of the assistance of counsel fail to establish the prejudice prong of ineffective assistance of counsel. Each of these claims is conclusory in that each asserts that counsel should have taken additional actions, but does not explain how those additional actions would have affected Moreno-Richey's decisions to enter the pleas. Specifically, Moreno-Richey does not specify what information counsel could have learned by getting a continuance to investigate the new witnesses; how the alleged mistakes in the psychologist's report related to any elements of the charges or any assessment as to the strength of the State's case on each charge; what additional questions counsel could have asked at the preliminary hearing and what answers such questions were likely to produce that would have defeated bindover; what factual or legal basis counsel would have had to oppose the amendment of the charges; what factual basis counsel could have discovered to challenge Moreno-Richey's statement to police; or how anything that occurred at sentencing could possibly have influenced Moreno-Richey's decision to enter the pleas. In other words, even if Moreno-Richey could establish that counsel performed deficiently in any of the ways alleged, his motion does not provide sufficient facts to establish the prejudice prong.

¶6 The claim relating to counsel's failure to challenge one victim's identification of him on a Facebook page fails to establish the deficiency prong of ineffective assistance. That is, it is apparent how a successful motion to suppress the victim's identification would affect a defendant's decision to enter a plea, but the defendant's allegations do not establish that there were actual grounds for a

suppression motion. The victim's identification was not the result of a photo array presented by the police. Rather, the victim informed police that she thought she had seen her assailant in the neighborhood and on Facebook. Since the police did not have a suspect in mind or know what pictures the victim was referring to, there was no way for them to consciously or unconsciously influence her viewing Facebook pages to locate the pictures she had in mind.

¶7 Finally, the record supports Moreno-Richey's allegation that the court did not explicitly inform him at the plea hearing of the maximum sentence on one of the sexual assault charges. However, the court did conduct a colloquy that discussed the elements of the offense, the constitutional rights the defendant would be waiving, factors that might affect Moreno-Richey's ability to make a voluntary and intelligent waiver, and the factual basis for the plea. In addition, the record includes a signed plea questionnaire, which accurately recited the maximum sentence. Moreno-Richey explicitly informed the court that he had gone over this questionnaire and understood all of the information on it. While a court should not rely entirely upon a plea questionnaire in lieu of a colloquy, it is acceptable to supplement the court's colloquy through references to a plea questionnaire. Since the record shows that Moreno-Richey was provided with correct information, he was not entitled to a hearing on this claim.

By the Court.—Orders affirmed.

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