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January 10, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2395-CR State of Wisconsin v. Daveonte S. Bell (L.C. # 2013CF5431)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daveonte S. Bell appeals from a judgment of conviction and an order denying his WIS. STAT. § 974.06 (2015-16)[1] postconviction motion asserting that his defense counsel was

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

ineffective in conveying a plea offer to him. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because Bell did not allege facts sufficient to show that prejudice resulted from the claimed ineffective legal assistance, we affirm.

BACKGROUND

On September 29, 2013, Bell went to the home of his former girlfriend, C.L., kicked at the door, threatened her, and left before the police arrived.[2] He later returned, continuing to kick the door and telling C.L. that he was going to kill her. Bell had also called her that afternoon sixty-five times. The State charged Bell with two counts of disorderly conduct, domestic abuse, repeater, WIS. STAT. §§ 947.01(1), 968.075(1)(a), and 939.62(1)(a).

On November 27, 2013, Bell chased after C.L.'s new boyfriend and shot at him with a handgun. Bell admitted to this shooting. Later that day, Bell shot at a car in which C.L. was a passenger, striking her spine and paralyzing her from the waist down. Bell denies that he shot at C.L., blaming it on a passenger in his car. The State charged Bell with first-degree recklessly endangering safety, repeater, use of a dangerous weapon, WIS. STAT. §§ 941.30(1), 939.62(1)(c), and 939.63(1)(b), endangering safety by use of a dangerous weapon, repeater, WIS. STAT. §§ 941.20(3)(a)1. and 939.62(1)(c), and first-degree reckless injury, domestic abuse, use of a dangerous weapon, repeater, WIS. STAT. §§ 940.23(1)(a), 968.075(1)(a), 939.63(1)(b), and 939.62(1)(c).

[2] The summary of the crimes is based on the complaint.

The State offered a plea agreement: Bell would plead guilty to the first-degree reckless injury count (the most serious charge), the other four counts would be dismissed and read in, and the State would recommend ten years of initial confinement and eight years of extended supervision. According to Bell, his counsel advised him that if he pled guilty, the court would likely sentence him beyond the State's recommendation and that the maximum penalty for the charge was twenty-five years. He told Bell that the trial would be difficult, but "that being acquitted at trial was not impossible" and that it was "possible to successfully defend against some of the counts." Counsel did not make a recommendation to accept or reject the offer. Bell rejected it. The State then revoked it.

The State then added two charges: felony intimidation of a victim, domestic abuse, repeater, WIS. STAT. §§ 940.45(3), 968.075(1)(a), and 939.62(1)(c), and stalking resulting in bodily harm, domestic abuse, repeater, WIS. STAT. §§ 940.32(2), (3)(a), 968.075(1)(a), and 939.62(1)(c). An additional stalking charge was determined duplicative and was therefore added as a penalty enhancer. The State also amended the first-degree reckless injury count as a party to a crime, WIS. STAT. § 939.05.

The jury found Bell guilty of all charges. The court sentenced him to twenty-eight years of initial confinement and fifteen years of extended supervision.

Bell filed a postconviction motion claiming that his attorney had been ineffective in conveying the plea offer to him. Bell alleged that he believed the maximum penalty for the reckless injury count was twenty-five years of *confinement*, and his counsel did not specify that

the twenty-five years consisted of confinement for fifteen and extended supervision for ten. He requested a ***Machner***[3] hearing to be followed by the State re-extending the original plea offer.

The circuit court denied the motion without a hearing.[4] The court determined that defense counsel was correct when he told Bell that the maximum penalty was twenty-five years if he accepted the plea offer, and that counsel had no duty to specify the components of that penalty. The court concluded therefore that there was no deficient performance, even if Bell mistakenly believed that he could have been sent to prison for twenty-five years. The court also determined that, even if counsel had performed deficiently, there were insufficient factual allegations to show that Bell suffered prejudice. "[Bell's] after-the-fact statement that he would have taken the offer if he had known that the maximum term of initial confinement was 15 years is self-serving and insufficient to warrant a ***Machner*** hearing." Bell appeals.

DISCUSSION

Standard of Review

When determining whether a postconviction motion entitles the defendant to a hearing, we first decide whether the motion alleges sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). This is a question of law that we review de novo. ***Id.*** If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** at 310. If the motion, however, does not raise such facts,

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] Bell also moved to strike DNA surcharges assessed against him. The court granted that part of the motion.

or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny a hearing. ***Id.*** at 310-11. We review such a decision under the deferential erroneous exercise of discretion standard. ***Id.*** at 311.

Defendants have a constitutional right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). That right extends to the plea bargaining process. ***State v. Frey***, 2012 WI 99, ¶59, 343 Wis. 2d 358, 817 N.W.2d 436. A defendant who asserts ineffective assistance must show: (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. "The defendant has the burden of proof on both components" of the ***Strickland*** test. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

To show deficient performance, defense counsel's representation must have fallen "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To show prejudice, counsel's deficient performance must have "actually had an adverse effect on the defense." ***Strickland***, 466 U.S. at 693. Specifically with regard to plea bargaining, the motion must allege sufficient facts showing that, but for counsel's deficient performance, there was a reasonable probability that the defendant "would have accepted the offer and avoided" the trial. ***State v. Ludwig***, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985); *see also* ***Lafler v. Cooper***, 566 U.S. 156, 164 (2012). To make this showing, the defendant's motion

should allege "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

Bell Did Not Sufficiently Allege Facts Showing that He was Prejudiced by any Deficiency

The assertions made in Bell's motion, even if true, were insufficient to show a reasonable probability that he would have accepted the plea offer had counsel told him that the maximum confinement was fifteen years. Because Bell fails to show that prejudice resulted from the deficiency he alleges, we need not and do not decide whether counsel's performance was deficient. ***Strickland***, 466 U.S. at 697 (defendant must prove both prongs).

The factual allegations and circumstances regarding the plea offer are as follows: Per the offer, Bell was to plead guilty to first-degree reckless injury; the State would recommend a sentence of ten years' confinement and eight years' supervision and dismiss the other four charges; defense counsel advised Bell that the court would likely sentence him beyond the State's recommended sentence; counsel informed him that the maximum penalty for the charge was twenty-five years; counsel also indicated that a trial would be difficult, but that "being acquitted at trial was not impossible" and that it was "possible to successfully defend against some of the counts"; no specific recommendation was made by counsel to accept or reject the offer; Bell was most concerned with the length of confinement; and Bell's eventual sentence included thirteen more years of incarceration than could have been imposed under the plea offer.

None of these allegations or circumstances explains why Bell would have accepted the offer had he been told that the maximum confinement was fifteen years.[5] Bell alleges virtually nothing about what went into his evaluation of the offer. Without knowing what factors Bell considered and how he weighed those factors, we are unable to "meaningfully assess" his claim. *See* ***Allen***, 274 Wis. 2d 568, ¶¶21, 23 (the motion must allege facts that show "what," "why," and "how").

The most that Bell offered about his thought process were conclusory statements that he would have taken the plea. *See* ***Nelson v. State***, 54 Wis. 2d 489, 496-98, 195 N.W.2d 629 (1972) (conclusory allegations, unsupported by the record or speculative in nature, are insufficient). His motion alleged the following:

> Had Mr. Bell understood that 15 years of confinement, or 5 years above the state's recommendation, was the most time that the court could give him if he accepted the plea offer, his calculation of risk would have been very different. Mr. Bell understood that the case was difficult, but believed that being acquitted on some charges at trial would not be impossible. Therefore, he rejected the offer to try and win at trial. However, had Mr. Bell known that the court could not send him to prison for 25 years, he would not have taken his chance at trial and would have accepted the plea.

These declarations fail to set forth sufficient objective factual assertions. They are largely subjective allegations of the ultimate fact that Bell needs to prove. "[A] statement of ultimate facts … is not sufficient for a petition for postconviction relief." ***Bentley***, 201 Wis. 2d at 317.

[5] Although defense counsel allegedly did not explain the breakdown of the maximum penalty, the plea offer itself, which was conveyed by defense counsel, contained a breakdown of confinement and supervision (ten years confinement and eight years supervision).

Bell does not address his consideration of the maximum sentence he would have faced if he had lost at trial—either in rejecting the offer or explaining why fifteen years rather than twenty-five would have made the difference. He alleges that, because the length of the potential twenty-five-year confinement under the offer was his chief concern, the better course was to reject the offer and take his chances at trial. But given his concern about the length of confinement, whether going to trial was a better course under either scenario required consideration of the potential punishment after an unsuccessful trial on all of the counts. Bell does not indicate what he believed the posttrial sentence could have been, much less how he weighed that sentence with the sentence under the offer. Indeed, the State asserts that the maximum punishment on all counts was forty-six years of confinement.[6] Regardless of the exact number of years, Bell had to know that losing at trial on all counts would expose him to more confinement than pleading to one count, and he critically fails to explain his reasoning for taking that risk by rejecting the offer. *See* ***Osley v. United States***, 751 F.3d 1214, 1224 (11th Cir. 2014) ("[B]y rejecting the guilty plea and proceeding to trial, [the defendant] knowingly risked at least doubling his time in prison if convicted," undercutting his claim that he would have accepted a plea offer that proposed a substantially lower sentence).

Moreover, whether going to trial was the better course also depended upon how Bell viewed the strengths and weaknesses of his trial defense. Obviously, a defendant troubled by or doubtful of his chances at trial would be more inclined to accept an offer that proposed less

[6] Bell alleged that he did not know how the penalty enhancers worked and whether they applied under the offer. Even without the enhancers, the State asserts that Bell was subject to twenty-nine years of confinement if he rejected the offer, which is still more than the twenty-five years he believed that he faced under the offer. Nonetheless, as noted, Bell does not provide what his understanding was of the posttrial sentencing possibilities, with or without enhancers.

confinement time. But Bell does not allege any facts that discuss the merits of his case and how his view of those merits would have influenced a decision to reject or take the offer. His brief summary of his counsel's opinion—a trial would be difficult, but there was the possibility of an acquittal or success on some of the charges—contains no details and sheds little light on what effect the merits of the case had on his consideration of the plea offer.[7]

Bell further fails to explain why he drastically discounted the effect and value of the State's recommendation of ten years' confinement and eight years' supervision. To be sure, his counsel advised him that the court would likely go beyond the State's recommendation. But Bell inexplicably transforms his counsel's opinion into the worst-case scenario of a twenty-five-year sentence of confinement, more than twice the State's recommendation. Bell cites no facts or reasons as to why he thought the court would so sharply defy the State's confinement recommendation.

Finally, Bell does not allege, and points to no facts in the record, that indicate he was willing to accept responsibility for his crimes. Lack of accepting responsibility or expressing remorse tends to show a defendant's inclination to reject a plea offer and to attempt vindication at trial. *See* ***Ludwig***, 124 Wis. 2d at 611-12 ("Defendant's admission to the conduct alleged by the state and her willingness to accept a sanction for that conduct would demonstrate that the [plea] offer may have been attractive."); *see also, e.g.*, ***Osley***, 751 F.3d at 1224-25 (Defendant's

[7] The State suggests that it was reasonable to think that an acquittal was "not impossible," in that Bell asserted that the passenger in his car was the shooter and that Bell was actually going to C.L.'s aid (Bell drove her to the hospital). The State's burden to prove the reckless injury count lightened, however, after the State amended the charge to party to a crime. This amendment no doubt weakened Bell's defense and may have made his rejection of the offer regrettable, but negative "consequences that … follow from strategic choices" do not necessarily serve as a basis to object or request a do-over. *Cf.* ***State v. Jones***, 179 Wis. 2d 215, 225, 507 N.W.2d 351 (Ct. App. 1993).

claim of innocence "makes it more difficult to accept his claim that he would have taken a fifteen-year plea deal.").

Bell's after-the-fact and conclusory claim that he would have accepted the offer with a different understanding of potentially ten years less incarceration time is insufficient to show prejudice. It was therefore within the circuit court's discretion to deny a ***Machner*** hearing, and we conclude that the court properly exercised its discretion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals