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January 14, 2020

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

2017AP1724-CR State of Wisconsin v. Martin Dwayne Triplett (L.C. # 2014CF824)

Before Brash, P.J., Kessler and Dugan, 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).

Martin Dwayne Triplett appeals a judgment entered after he pled guilty to delivery of a controlled substance. He also appeals a postconviction order denying his motion for plea withdrawal. Upon consideration of the briefs and record, we conclude at conference that this

matter is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

The State alleged in a criminal complaint that Triplett sold 100 grams of heroin to a confidential informant during a digitally recorded controlled buy and that Triplett's confederate, Anthony C. Buchanan, arranged the sale. The State charged Triplett, as a party to a crime, with delivery of more than fifty grams of heroin as a second or subsequent offense. Triplett retained trial counsel, and in due course he pled guilty as charged.

The claims that Triplett presents on appeal involve his multiple efforts to withdraw his guilty plea. An overview of the facts and proceedings surrounding those efforts is required.

Triplett first moved for plea withdrawal prior to sentencing, after his retained trial counsel withdrew and successor trial counsel was appointed. As grounds for the motion, Triplett alleged that he entered his plea "based upon an incomplete review of discovery and discussions thereof" with his retained trial counsel.

Triplett was the sole witness at the motion hearing. He testified that his retained trial counsel gave him discovery materials, including a DVD and a packet of papers, and that he believed he received the entirety of the discovery before he pled guilty. He said he read the written material and watched the DVD in advance of the plea hearing. Triplett testified at one point that the DVD he reviewed was one of three and that the other two discs "would not play." He reiterated, however, that he "received everything and had an opportunity to look at it."

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Triplett then said that after he pled guilty, he "looked at the DVD a few more times [and] just felt it was a lot of stuff ... that really didn't pertain to [him] and [he] felt that [he] should change [his] plea." He explicitly acknowledged that the DVD he watched after his plea "wasn't a different disc than [he] had originally reviewed." He went on to say that he "changed [his] mind" because he recognized that he was "facing a lot of time" and that "basically ... after the plea was entered [he] had a change of heart" and thought of more questions to ask his attorney.

The circuit court found that Triplett wanted to withdraw his plea because he had "some fear regarding the sentence that may be imposed" and second thoughts about the sufficiency of the State's evidence. The circuit court concluded that these reasons were insufficient. Accordingly, the circuit court denied the motion for plea withdrawal.

The case proceeded to sentencing, where both parties agreed that Triplett should receive a prison sentence. The State's argument included a discussion of a coactor, one Dwight Cobbins. According to the State, Cobbins claimed to have paid Triplett for heroin in the past and this heroin "was funneled through Mr. Triplett from the original source, [namely] Mr. Buchanan." Triplett argued that he was less culpable than Buchanan, who had received a fifteen-year term of imprisonment. The circuit court sentenced Triplett to a ten-year term of imprisonment.

Triplett obtained postconviction counsel and then filed a postconviction motion and a supporting memorandum seeking plea withdrawal on multiple grounds. First, Triplett argued that he had presented a fair and just reason for plea withdrawal before sentencing, and the circuit court therefore had erred by denying his requested relief. Second, Triplett argued that he had pled guilty before he had access to the entirety of the discovery. Third, Triplett argued that had received ineffective assistance from his two trial attorneys. In this regard, he alleged that his

original retained trial counsel was ineffective for failing to ensure that Triplett received all of the discovery in a timely manner before his guilty plea, and his successor trial counsel was ineffective for failing to "present a proper case that Triplett either did not have all the discovery or adequate time to properly review all the discovery" before the plea hearing.

Postconviction counsel included his own affidavit as an attachment to the postconviction motion. In the affidavit, postconviction counsel described the file that he received from Triplett's successor trial counsel, stating that it contained "paper documents and a total of three compact discs, and further, that the file included the documents and compact discs provided by [retained trial] counsel." Postconviction counsel also averred that he gave copies of the three discs to Triplett. Neither the affidavit nor the motion and memorandum included any details about the information on the three discs or advised whether it differed from the information in the discovery materials that Triplett received from his retained trial counsel before he pled guilty.

Triplett also submitted his own affidavit in support of the postconviction motion. In his affidavit, Triplett said he reviewed one DVD before entering his guilty plea. He said that after his sentencing, his postconviction counsel gave him three discs containing discovery material, and he "believe[d] that th[os]e discs contain[ed] more discovery materials than [he] originally had access to prior to [his] plea." Triplett went on to say that he had listed the allegedly new information on a document attached to his affidavit as "Exhibit A." He concluded his affidavit with the assertion: "had I known before I pleaded in the instant case, I would not have pleaded guilty and would have gone to trial [sic]."

The document that Triplett attached to his affidavit as "Exhibit A" was a single page with his name typed at the bottom. The document began with an assertion that the State "err[ed] by

suppressing exculpatory and impeaching evidence against the State's key witness Dwight Cobbins." The document went on to offer a variety of allegations about Cobbins, his actions and his statements, and then ended with the assertion: "to the best of my knowledge ... this information wasn't included in the fourth DVD."

The circuit court entered an order without a hearing denying all of Triplett's postconviction claims for plea withdrawal. Triplett appeals. We discuss further facts as necessary to resolve the issues he presents.

We begin by considering whether the circuit court erroneously denied Triplett's motion to withdraw his guilty plea before sentencing. When a defendant pursues such a motion, "[t]he defendant has the burden to prove by a preponderance of the evidence that he has a fair and just reason" for plea withdrawal. *See* ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. The test is a liberal one, but more is required "than the desire to have a trial or belated misgivings about the plea." *See* ***id.***, ¶¶31-32 (internal citation omitted). Whether the defendant identified a fair and just reason for relief is committed to the sound discretion of the circuit court. *See* ***id.***, ¶30. In considering the defendant's claim, the circuit court may resolve disputed facts and assess the credibility of the proffered explanation for requesting plea withdrawal. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 290-91, 592 N.W.2d 220 (1999). On review, we will uphold the circuit court's factual findings and credibility determinations unless they are clearly erroneous, and we will affirm the circuit court's discretionary decision if "the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *See* ***Jenkins***, 303 Wis. 2d 157, ¶¶30, 33 (citations omitted).

In this case, the motion that Triplett filed prior to sentencing cited "incomplete review of discovery and discussions thereof" as grounds for withdrawing his guilty plea. The circuit court found, however, that Triplett had failed to demonstrate either the existence of "any new discovery material that he is aware of now that he wasn't aware of before," or that Triplett was unable to question his retained trial counsel about the discovery before the plea hearing. The circuit court said that it believed Triplett's testimony that he "thought of new questions" after the plea hearing but found that Triplett had sufficient opportunity to question his trial counsel during the months preceding his plea. The circuit court went on to find that Triplett wanted to withdraw his plea because he had "a change of heart or mind [and] would rather take [his] chances at trial." These findings are amply supported by Triplett's testimony, and therefore we will not disturb them. *See* ***id.***, ¶33.

Triplett argues on appeal that his testimony about receiving discs that "would not play" shows that he was in fact unable to review all of the discovery before he entered his guilty plea, and he suggests that this refutes the circuit court's findings. It does not. The circuit court, not this court, assesses the evidence and determines credibility. *See* ***id.*** To the extent, if any, that Triplett's testimony was ambiguous or inconsistent, the circuit court had the obligation to resolve the contradictions and determine what actually occurred. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). In light of Triplett's frank acknowledgments that he had received and reviewed all of the discovery before he pled guilty and had not become aware of any new material afterward, the circuit court reasonably resolved any inconsistencies about Triplett's opportunity to review the discovery that Triplett may believe his testimony created.

Triplett also suggests that material in his postconviction motion supported his request for plea withdrawal prior to sentencing. Specifically, he points to the contents of his affidavit and its

attached "Exhibit A." We categorically reject this argument. The material Triplett presented only after sentencing does not in any way show that he offered a fair and just reason for plea withdrawal before sentencing.

In sum, the evidence Triplett presented in support of his motion for plea withdrawal prior to sentencing supported the circuit court's findings that he sought relief because he belatedly developed misgivings about the sentence he faced and the choice he had made. The circuit court could reasonably conclude that these concerns were not fair and just reasons for plea withdrawal. *See* ***Jenkins***, 303 Wis. 2d 157, ¶32. Accordingly, the circuit court properly exercised its discretion in denying the motion.

We turn to whether the circuit court erred by denying Triplett's postconviction motion for plea withdrawal. As Triplett acknowledges, the standard for plea withdrawal after sentencing is stringent, requiring the defendant to establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. To demonstrate manifest injustice, the defendant is required to show "a serious flaw in the fundamental integrity of the plea." ***Id.*** (citations omitted).

Here, Triplett seeks postsentencing plea withdrawal based on various alleged errors in the production and delivery of discovery materials. These reasons for plea withdrawal are extrinsic to the plea hearing itself. When a defendant alleges a manifest injustice based on factors extrinsic to the plea colloquy, the analysis is governed by ***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). *See* ***State v. Howell***, 2007 WI 75, ¶¶2, 74, 301 Wis. 2d 350, 734 N.W.2d 48.

The analysis under ***Nelson*** and ***Bentley*** is firmly established. "The first prong of the ***Nelson/Bentley*** test provides: [i]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the [circuit] court must hold an evidentiary hearing." ***State v. Sulla***, 2016 WI 46, ¶¶26-27, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). This presents a question of law that we review *de novo*. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. To satisfy the first prong of the test:

> a defendant must allege "sufficient material facts" that would allow a reviewing court "to meaningfully assess a defendant's claim." ***Allen***, 274 Wis. 2d 568, ¶23; *see also* ***Bentley***, 201 Wis. 2d at 314 ("[A] defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions."). Specifically, a defendant should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Allen***, 274 Wis. 2d 568, ¶23.

Sulla, 369 Wis. 2d 225, ¶26 (some internal citations omitted). The second prong of the ***Nelson/Bentley*** test provides:

> "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing."

Sulla, 369 Wis. 2d 225, ¶27 (citations omitted).

Triplett first claims he is entitled to postsentencing plea withdrawal because of the "late production by the State ... of the discovery compact discs." The State's failure to produce discovery in violation of WIS. STAT. § 971.23 is among the errors that can give rise to a manifest injustice warranting plea withdrawal. *See* ***State v. Harris***, 2004 WI 64, ¶2, 272 Wis. 2d 80, 680 N.W.2d 737. To prevail, however, the defendant must show, *inter alia*, that the State did not

produce the material within a reasonable time before trial, that is, "within a sufficient time for its effective use." *See* ***id.***, ¶¶2, 37.

Triplett's postconviction motion wholly failed to make the showing required by ***Harris*** because nothing in the motion demonstrated that the State did not produce the discovery in time for its effective use at trial. *See* ***id.*** As we have seen, postconviction counsel stated in an affidavit that when he entered the case, he received a total of three compact discs from Triplett's successor trial counsel. Triplett himself averred that his postconviction counsel gave him three compact discs, and Triplett suggested that they contained discovery information he had not previously reviewed. Neither affidavit, however, revealed when either of Triplett's trial counsels received the discs. Thus, nothing in the postconviction submissions showed that the State failed to deliver any of the discovery to Triplett's original retained trial counsel before Triplett pled guilty or showed that his retained trial counsel would have been unable to use the discovery effectively if the case had proceeded to trial. Accordingly, Triplett did not demonstrate that the State acted in a way that resulted in a manifest injustice under ***Harris***.

Triplett next suggests that he demonstrated a manifest injustice warranting plea withdrawal because he alleged that he personally had "limited access" to the discovery as a consequence of his lack of a computer and problems he encountered in trying to view the discovery on a computer that he borrowed. Triplett fails, however, to cite any authority holding that a represented defendant's personal difficulties in reviewing discovery amount to a manifest injustice absent the showing required by ***Harris***. Accordingly, we reject this basis for relief. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Triplett next claims that he is entitled to plea withdrawal because his retained trial counsel was ineffective for failing to ensure that Triplett received all of the discovery before he pled guilty. Ineffective assistance of trial counsel can constitute a manifest injustice warranting plea withdrawal. *See* ***Bentley***, 201 Wis. 2d at 311. A defendant claiming ineffective assistance of counsel must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a reviewing court need not consider the other. *See* ***id.*** at 697.

To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. When a defendant alleges that trial counsel's ineffectiveness requires plea withdrawal, the defendant must demonstrate prejudice with allegations of "facts to show that there is a reasonable probability that, but for the counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

Here, the circuit court assumed without deciding that retained trial counsel performed deficiently by failing to provide Triplett with a complete set of discovery discs. The circuit court concluded, however, that Triplett's postconviction motion did not demonstrate any prejudice from the alleged deficiency. We agree.

The only source of information about the content of the allegedly belated discovery is the document that Triplett attached to his affidavit as "Exhibit A," but the circuit court determined

that "Exhibit A is nothing more than a garbled narrative of a statement made by a State's witness named 'Cobbins.'" The circuit court went on to find that "[i]t is completely unclear as to what was on the [discs] that was not previously heard by [Triplett], or, more importantly, what was on the [discs] that would somehow have influenced his decision not to enter a guilty plea and to go to trial."

A litigant may not simply toss allegations at the circuit court and expect it to fashion them into an argument on the litigant's behalf. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). To prevail, Triplett was required to explain, within the four corners of his postconviction motion, precisely what information was missing from the original discovery and precisely how and why the missing information would have led him to proceed to trial rather than plead guilty. *Cf.* ***Allen***, 274 Wis. 2d 568, ¶¶9, 23. He did not do so.

In this court, Triplett seeks to fill in some of the gaps in his postconviction motion by highlighting four phrases in his "Exhibit A" and alleging that they constitute "information he believes would undercut the credibility and veracity" of Cobbins. Specifically, he points to his statements that: "Cobbins had motives to implicate Triplett"; "Cobbins committed two crimes"; "Cobbins was given a choice to work with officers and be part of their investigation that night or be arrested and go to jail"; and "Cobbins states that he was Buchanan's right-hand[] man." Relying on those portions of "Exhibit A," Triplett argues that evidence relevant to "the credibility of a key witness for the State would be one of the most important considerations in deciding whether to [enter] a guilty plea."

Triplett's argument is unavailing. It is merely a general assertion about considerations that might have an impact on a defendant's decision to plead guilty, not a showing of how such

considerations were relevant to Triplett's particular decision in this case. Such a showing is required. *See* ***Bentley***, 201 Wis. 2d at 312. As the State points out, Triplett admitted when he pled guilty that the allegations in the criminal complaint were true. Those allegations reflect that the charge against him was based on a controlled drug buy, monitored by law enforcement and digitally recorded. Triplett does not explain why, given the facts of this case, information about a coactor's history and motives would have led Triplett to forgo a guilty plea and demand a trial.

Regardless, the argument comes too late. Triplett was required to explain in his postconviction motion how and why he was prejudiced as a result of his retained trial counsel's alleged failure to provide him with discovery. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Instead, he offered only the conclusory statement that "had I known before I pleaded in the instant case, I would not have pleaded guilty and would have gone to trial [sic]." Because that statement was insufficient to satisfy his burden, the circuit court correctly denied the claim that his retained trial counsel was ineffective. *See* ***Bentley***, 201 Wis. 2d at 313**.**

Last, Triplett claims that his successor trial counsel was ineffective in pursuing plea withdrawal before sentencing. This claim is undeveloped. Indeed, the entirety of the argument appears to be the single sentence, twice repeated, that successor trial counsel "fail[ed] to present a proper case that Triplett either did not have all the discovery or adequate time to properly review the discovery prior to the plea hearing." Triplett does not explain what his successor trial counsel should have done to present "a proper case" or how Triplett was prejudiced by the action or inaction. The argument is therefore insufficient to earn relief. *See* ***State v. Washington***, 176 Wis. 2d 205, 215-16, 500 N.W.2d 331 (Ct. App. 1993) ("Assertions that [trial counsel] 'failed to keep [defendant] fully apprised of the events,' 'failed to completely review all of the ...

discovery,' and 'failed to completely and fully investigate'... are simply not the type of allegations that raise a question of fact.").

Moreover, to the extent Triplett implies that his successor trial counsel was ineffective for failing to challenge the effectiveness of his retained trial counsel *vis-à-vis* discovery, any such claim must fail. We have concluded that Triplett did not demonstrate that his retained trial counsel was ineffective. Accordingly, Triplett cannot prevail on a claim that his successor trial counsel should have pursued such an allegation. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (to show that a successor attorney was ineffective for failing to challenge trial counsel's effectiveness, the defendant must prove that the trial counsel in question was in fact ineffective). For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals