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March 16, 2020

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

2018AP1985 State of Wisconsin v. Ronald Keith Williams (L.C. # 2006CF1009)

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

Ronald Keith Williams, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2017-18) motion for postconviction relief.[1] Based upon our review of the briefs and record, we

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

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm the order.

Williams was charged with four counts of first-degree sexual assault of a child. The jury trial was rescheduled numerous times. On June 6, 2007, the parties appeared for trial, and the State filed an amended information adding a fifth count of first-degree sexual assault of a child.

Trial counsel informed the trial court that Williams was requesting that new counsel be appointed. Trial counsel acknowledged that he and Williams "have had significant difficulties in communicating in an adequate way," but he also indicated that he did not know whether withdrawal was necessary. The trial court then engaged in a discussion with the parties about whether there were negotiations in the case, whether the plea offer was communicated to Williams, whether Williams had been denied access to medical records and other evidence, and how Williams and trial counsel had communicated. The trial court said that trial counsel was "one of the best lawyers" and that it was "not inclined to release" trial counsel because of his knowledge of the case. The trial court suggested that Williams and trial counsel take a break and review the medical records that Williams said he wanted to review.

When the case was recalled, trial counsel told the trial court that he and Williams had discussed matters and that Williams had decided to enter into a plea agreement with the State. Trial counsel provided a plea questionnaire and addendum. Trial counsel said that pursuant to the plea agreement, the State had agreed to dismiss and read in four of the counts and to recommend "moderate prison."

The trial court then began its plea colloquy with Williams. When Williams told the trial court that he did not understand what "moderate" meant, the State explained that it would not be

recommending a specific number of years of confinement. The State also noted that its offer letter had given Williams the option of having the State recommend a specific sentence. Trial counsel said that he had discussed the issue with Williams and that it was more beneficial to Williams for the State to recommend a "moderate" sentence than a specific sentence. Williams did not ask for additional explanation and continued responding to the trial court's questions during the plea colloquy.

At the conclusion of the plea colloquy, the trial court accepted Williams's guilty plea, found him guilty of a single count of first-degree sexual assault of a child, dismissed and read in the other four counts, and set the matter for sentencing.[2] At sentencing, the trial court imposed a sentence of twenty-one years of initial confinement and seven years of extended supervision, concurrent to a revocation sentence Williams was already serving.

Postconviction counsel was appointed for Williams. Ultimately, postconviction counsel did not file any postconviction motions or a direct appeal.

Eleven years later, in 2018, Williams filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. He sought to withdraw his plea and proceed to a jury trial. At the outset, he alleged that his motion should not be procedurally barred because his postconviction counsel provided ineffective assistance. Next, he asserted that trial counsel was constitutionally ineffective because he: (1) failed to adequately explain the meaning of "moderate prison" and

[2] Williams told the trial court that he was pleading "[g]uilty." At sentencing, trial counsel corrected the presentence investigation report by indicating that Williams had entered an ***Alford*** plea. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970); *see also* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The trial court accepted the defense's corrections to the presentence investigation report, and the judgment of conviction reflects that Williams entered an ***Alford*** plea.

move to withdraw Williams's plea on that basis prior to sentencing; (2) failed to challenge the plea colloquy; and (3) "failed to object to plea deal bargained in bad faith at sentencing." Williams also argued that his due process rights were violated because the trial court did not allow him to replace his trial counsel and because the trial court demonstrated bad faith with respect to the plea deal.[3] The trial court denied the motion in a written order, without holding a hearing. This appeal follows.

We begin with the applicable legal standards. A defendant who seeks to withdraw a guilty or no-contest plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in [a] manifest injustice." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482 (citations and internal quotation marks omitted). One way to show a "manifest injustice is to prove that [the] plea was not entered knowingly, intelligently, and voluntarily." ***Id.*** Whether a plea was knowingly, intelligently, and voluntarily entered is a question of constitutional fact that we review independently. *See* ***id.***, ¶25.

Another way to demonstrate a manifest injustice is to show that the defendant received ineffective assistance of counsel. ***Id.***, ¶49. Applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), the defendant must show that counsel's performance

[3] Williams's motion is difficult to understand. Some language suggests that Williams did not want to enter the plea agreement. However, he did not fully develop that assertion, and the plea hearing transcript refutes it. We decline to develop arguments for Williams on this or other issues to which he alluded in his motion. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (holding that this court will not abandon its neutrality to develop arguments for a litigant); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (holding that the court of appeals will not decide inadequately briefed arguments).

was deficient and that the deficiency prejudiced the defense. This court will uphold the trial court's findings of fact unless they are clearly erroneous, but "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review *de novo*." *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (emphasis added).

A defendant who files a postconviction motion is not automatically entitled to a hearing. If the motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review a trial court's discretionary decision to grant or deny a hearing under the erroneous exercise of discretion standard. *See* ***id.*** Whether a WIS. STAT. § 974.06 motion alleges sufficient facts to require a hearing is a question of law an appellate court reviews *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

Applying those legal standards, we conclude that the trial court did not erroneously exercise its discretion when it denied Williams's WIS. STAT. § 974.06 motion without a hearing. As explained below, Williams was not entitled to a hearing on any of his assertions because he did not raise facts sufficient to entitle him to relief, because he presented only conclusory allegations, or because the record conclusively demonstrated that Williams was not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

As noted, Williams alleged that his WIS. STAT. § 974.06 motion should not be procedurally barred because his postconviction counsel provided ineffective assistance. On appeal, the State points out that the procedural bar outlined in ***State v. Escalona-Naranjo***, 185

Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), "does not apply here because the postconviction motion at issue is Williams's first postconviction effort in this case." We agree with both parties that Williams's motion was not procedurally barred. Therefore, we will not discuss further Williams's assertion that postconviction counsel was ineffective.

We turn to the postconviction motion's allegation that trial counsel provided ineffective assistance in three ways. First, Williams argued that trial counsel failed to accurately and adequately explain to him, at the time of the plea, what the State meant by a "moderate" sentence. Williams referred to a letter he wrote to trial counsel after he pled guilty wherein Williams said he wanted to withdraw his guilty plea because he "can't fully understand the deal" because he had "no idea what is meant by moderate time." Williams acknowledged that trial counsel wrote back to Williams, and Williams included trial counsel's letter in the appendix to his postconviction motion. Trial counsel's letter explained that "[i]n the [S]tate's eyes," the term "moderate" meant fifteen years of initial confinement, because that was what the State's offer letter said it would recommend if Williams wanted the State to specify a number. Trial counsel's letter indicated that he anticipated that he would be able to argue that initial confinement of "anything between five (5) years and ten-twelve (10-12) years" would be "a moderate prison term." Trial counsel did not file a motion to withdraw the plea, and Williams did not raise the issue at the sentencing hearing.

In order to demonstrate that he was prejudiced by trial counsel's alleged failure to accurately and adequately explain what the State meant by "moderate," Williams "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Williams's postconviction motion baldly asserted that his "thoughts were set on going to trial

with a new lawyer," but Williams did not explain why the State's subjective understanding of the word "moderate"—which was never communicated to the trial court—would have induced him to decline the plea offer and proceed to trial on five counts of first-degree sexual assault. In short, Williams's motion did not adequately allege how he was prejudiced by trial counsel's alleged failure to explain the State's understanding of "moderate" and then file a plea withdrawal motion based on that issue. Williams's conclusory allegations were insufficient to warrant a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

The second allegation of ineffective assistance concerns two related issues with the plea colloquy. Williams appears to suggest that trial counsel should have taken action (either at the plea hearing or afterward) when the trial court failed to adequately "ascertain the defendant's education and comprehension levels." *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (requiring the trial court conducting the plea colloquy to "[d]etermine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing"). In response, the State notes that, even if it could be shown that the trial court failed to determine the extent of Williams's education and general comprehension,[4] the plea colloquy would not be considered "prima facie defective unless [the] defendant also allege[d] to the trial court that he had a comprehension problem." *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 829 n.2, 416 N.W.2d 627 (Ct. App. 1987). The State argues that Williams's motion did not allege that he had a comprehension problem. We agree with this

[4] During the plea colloquy, the trial court did not ask Williams specific questions about his education, but it did refer to the plea questionnaire, which indicated that Williams was forty-three years old, had completed eleven years of education, had a high school diploma, GED or HSED, and had not taken any alcohol, medication, or drugs in the last twenty-four hours.

assessment. We acknowledge that Williams included a one-page "Test Report" in his postconviction motion appendix that lists some type of test scores from 2012, but Williams's motion did not refer to the report or explain how it demonstrated anything about his plea.

The other allegation that Williams's motion made with respect to the plea colloquy was that Williams's trial counsel provided an inadequate explanation of the elements of the offense when the trial court asked him to explain those elements during the plea hearing. Williams's motion argued that trial counsel's "reiterations of the elements of the crime charged are inaccurate and misleading." However, Williams did not identify which elements were incorrectly stated, and he did not assert that he failed to understand any particular element of the crime. In its order denying Williams's WIS. STAT. § 974.06 motion, the trial court rejected Williams's argument, stating:

> Although the defendant cites to [the applicable jury instruction], he does not provide any indication as to how the elements set forth in the instruction differ from counsel's recitation of the elements. The court perceives no difference whatsoever. [Trial counsel] specified sexual contact with a sexual organ of [the child], who was under the age of 13 at the time and who was incapable of giving consent due to her age, and that it was done for purposes of either sexual humiliation or sexual gratification. This sums up the instruction very nicely, and it is completely unknown what inaccurate or misleading aspects the defendant thinks exist.

(Footnote omitted.)

We agree with the trial court's conclusion. Williams has not shown that the elements were incorrectly stated. While he criticizes the trial court and trial counsel for not referring to the jury instruction during the plea colloquy, such a reference was not required. *See* ***Brown***, 293 Wis. 2d 594, ¶¶46-47 (explaining that trial court "may establish the defendant's understanding of the charges" using a variety of methods including "'reading from the appropriate jury

instructions … or from the applicable statute'" and asking trial counsel "'whether he explained the nature of the charge to the defendant and [asking] him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing'") (citations and emphasis omitted). Williams has not adequately alleged that trial counsel performed deficiently with respect to stating the elements.

For the foregoing reasons, we conclude that Williams was not entitled to a hearing on his claim that trial counsel provided ineffective assistance with respect to the plea hearing. Williams's assertions about trial counsel's performance were conclusory and did not include sufficient facts to entitle him to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

The third allegation of ineffective assistance in Williams's postconviction motion was that trial counsel performed deficiently at the sentencing hearing "by failing to object to the trial court bargaining the Plea Deal in bad Faith when the [trial] court sentenced [Williams] to 21 years of imprisonment." As best we can understand, Williams's argument was that the trial court "promised" him that he would be sentenced to probation and that trial counsel performed deficiently by failing to object to the trial court's violation of the plea agreement. Later in his motion, Williams made the related argument that his due process rights were violated when the trial court gave him a sentence greater than probation. Both of Williams's arguments appear to be based on a single reference to "probation" at the plea hearing. Specifically, the trial court stated:

> The court would tell you what the maximum sentence could be is up to 60 years as stated in the complaint as to the count, and the court is not bound by any negotiations or plea bargains. Your lawyer will be making their argument to the court. The [S]tate would be making their argument. The court could impose a sentence of probation up to 60 years.

In its decision denying Williams's postconviction motion, the trial court emphasized that it was not a party to the plea agreement and had not promised Williams probation. The trial court added:

> With respect to the transcript indicating that the court said he could get probation up to sixty years, it is clearly a typo by the court reporter or an incomplete transcription. In that same paragraph, the court apprised the defendant that the maximum sentence "could be ... up to 60 years as stated in the complaint."

(Record citation omitted; ellipses in original.)

We conclude that the record conclusively demonstrates that Williams is not entitled to relief with respect to his allegations concerning the sentence he was facing. Regardless of whether the trial court misspoke or whether the reference to "probation" was a typographical error, the record conclusively refutes Williams's assertion that he believed he was promised probation. The maximum penalties were listed in the complaint, and the trial court referenced the complaint when it told Williams that he was facing sixty years. Further, the parties discussed the State's recommendation of "moderate prison"—which would not include probation. In addition, Williams's own letter to his trial counsel explicitly acknowledged that he was "still looking at 60 years before Judge Wagner," and he expressed concern that he would "get 15 years or more with the judge looking at a 60 year window." Finally, at the sentencing hearing, Williams listened to trial counsel recommend a sentence of seven to ten years of initial confinement and did not contradict trial counsel or assert that he was promised probation. Those uncontested facts conclusively refute Williams's bald assertion that he was promised sixty years of probation. There was no basis for trial counsel to object or bring a motion concerning this issue. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16 ("Counsel does not perform deficiently by failing to bring a meritless motion.").

The final issue Williams raised in his postconviction motion was whether he was denied due process when, on the day he ultimately pled guilty, the trial court denied his motion to have new trial counsel appointed. "Whether trial counsel should be relieved and a new attorney appointed is a matter within the [trial] court's discretion. Absent an erroneous exercise of discretion, the [trial] court's judgment 'will not be disturbed.'" ***State v. Jones***, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378 (citations omitted). When reviewing a trial court's decision, an appellate court considers:

> (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id., ¶25 (quoting ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988)).

Considering those standards, we conclude that the trial court did not erroneously exercise its discretion when it addressed Williams's request for new counsel. As explained above, the trial court discussed Williams's concerns with him and trial counsel. The trial court indicated that it was not "inclined" to grant the motion, but it is not clear whether the trial court made a final decision. The transcript indicates that the trial court took a break to give Williams time to review specific medical records with trial counsel. Then, when the case was recalled, trial counsel told the trial court that Williams had decided to enter a guilty plea. Neither trial counsel nor Williams again urged the trial court to allow trial counsel to be replaced.

In his postconviction motion, Williams faulted the trial court for not explaining in greater detail why it was not inclined to replace trial counsel, but he ignores the fact that he did not

pursue his motion and instead indicated that he wanted to enter a plea agreement with the State.[5] We are not persuaded that the trial court erroneously exercised its discretion when it attempted to address Williams's concerns, gave Williams additional time to meet with trial counsel, and was ultimately told that the parties had reached an agreement that would resolve the case. We conclude that the record conclusively demonstrated that Williams was not entitled to relief.

In conclusion, the trial court did not erroneously exercise its discretion when it denied Williams's WIS. STAT. § 974.06 motion without a hearing. As explained above, each of Williams's assertions was properly denied without a hearing because he did not raise facts sufficient to entitle him to relief, because he presented only conclusory allegations, or because the record conclusively demonstrated that Williams was not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Accordingly, it was within the trial court's discretion to deny the motion without a hearing, and we discern no erroneous exercise of that discretion. *See* ***id.*** We summarily affirm the order.

IT IS ORDERED that the circuit court's order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals

[5] Even if we were to interpret the trial court's statement that it was "not inclined" to replace trial counsel to be its final decision on the matter, we are still not convinced that the trial court erroneously exercised its discretion. Williams's request for new counsel was presented on the day the case was scheduled for trial, so it was not timely. Further, although trial counsel acknowledged that he had difficulty communicating with Williams, he did not indicate that there was "a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***State v. Jones***, 2010 WI 72, ¶25, 326 Wis. 2d 380, 797 N.W.2d 378 (citation omitted).