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DISTRICT I

January 4, 2023

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

2021AP2045-CR State of Wisconsin v. Reginald H. Wheeler (L.C. # 2018CF4657)

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

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).

Reginald H. Wheeler appeals a judgment entered after he pled guilty to third-degree sexual assault. He also appeals an order denying his postconviction motion alleging that he received ineffective assistance of trial counsel and was therefore entitled to withdraw his guilty plea. He contends that the circuit court erred by denying his postconviction motion without a hearing.

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(1) (2019-20).¹ We affirm.

According to the criminal complaint, M.T., a cognitively-delayed woman with the mental capacity of a five or six-year-old child, disclosed to a family member that she had been sexually assaulted. Following an investigation, police arrested Wheeler. He gave a custodial statement acknowledging that he had encountered M.T. “while she was walking around,” and that he brought her to his home. According to his statement, Wheeler could tell that M.T. was “different” and “had a slight problem.” Wheeler admitted that he removed M.T.’s clothes and that he had penis-to-vagina contact with her. The State charged Wheeler with second-degree sexual assault.

Pursuant to a plea agreement, Wheeler pled guilty to third-degree sexual assault, and the State promised to request incarceration without specifying a recommended term of imprisonment. During the course of the plea colloquy, Wheeler told the circuit court that he had reviewed a plea questionnaire and waiver of rights form with his trial counsel. He said that he understood the form and that he wished to waive his rights and “to take full responsibility” for his actions. His trial counsel confirmed that Wheeler “accept[ed] responsibility,” explaining that Wheeler’s decision followed numerous meetings with counsel, review of videos, and the involvement of an investigator who assisted trial counsel in interviewing M.T. The circuit court accepted Wheeler’s guilty plea.

The matter proceeded to sentencing. The State, as promised, recommended incarceration. Wheeler asked the circuit court to impose a term of probation. The circuit court imposed six and

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

one-half years of imprisonment, bifurcated as two and one-half years of initial confinement and four years of extended supervision.

Wheeler obtained postconviction counsel and filed a motion for postconviction relief. In that motion, he sought plea withdrawal on the ground that his trial counsel was ineffective in twelve listed ways:

1. The lack of communication between Wheeler and trial counsel did not give Wheeler the chance to fully work through his case. According to the attached affidavit, aside from court dates, Wheeler only met with trial counsel in person once while he was in custody. Wheeler only spoke with trial counsel a handful of times on the phone despite the case being open and active for approximately seven months.
2. Despite Wheeler's requests to assert his constitutional right to a jury trial, trial counsel refused to allow Wheeler to assert his constitutional rights.
3. Trial counsel did not interview or get statements from the victim, nor did he have an investigator do so on his behalf. In fact, trial counsel never verified whether there was consent by the victim. Trial counsel did not look into the victim's background and history as requested by Wheeler, based on statements made by the victim during the incident.
4. Trial counsel did not interview nor have an investigator interview any potential witnesses including the victim's family members who reported the incident.
5. Despite Wheeler's request to do so, trial counsel never attempted to get the surveillance footage from the Sam's Club gas station where Wheeler first encountered the victim. Wheeler was adamant that the victim's conduct in this footage would lead to credibility issues with the victim.
6. Trial counsel did not file any pretrial motions other than for a bail/bond reduction/modification. Wheeler requested that trial counsel file a motion to suppress Wheeler's statements when he was arrested.
7. Despite signs that should cause pause, trial counsel never submitted a request for a competency evaluation.

8. Trial counsel did not thoroughly explain Wheeler's right to a preliminary hearing, nor did he adequately explain Wheeler's waiver of rights by entering a plea.
9. Trial counsel arrived at the courthouse the day of the Sentencing ... and showed the PSI (presentence investigation report) to Wheeler via trial counsel's cell phone. Wheeler did not have adequate time to thoroughly review the document for potential mistakes. Trial counsel never informed Wheeler that he could obtain an alternative presentence investigation. Trial counsel also never explained what was in the PSI to Wheeler.
10. Although certainly not required, trial counsel did not prepare or submit a sentencing memorandum on Wheeler's behalf.
11. Trial counsel did not prepare Wheeler for sentencing and mitigating information was not discussed. Wheeler was not prepared nor did he understand the possibility of a prison sentence.
12. Trial counsel did not review the sentence ordered by the Court with Wheeler.

In an attached affidavit, Wheeler echoed some of the allegations in the postconviction motion. He also identified eight of M.T.'s relatives as potential witnesses and alleged that his trial counsel had failed to interview them. The affidavit additionally included allegations that Wheeler's trial counsel failed to review the discovery with him before he pled guilty and never reviewed the guilty plea questionnaire and waiver of rights form with him. Neither the motion, nor the affidavit further developed the specifics of Wheeler's allegations.

The circuit court denied Wheeler's postconviction motion without a hearing on the grounds that the motion was conclusory and inadequate to support his claims. Wheeler appeals.

A defendant seeking to withdraw a guilty plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "The 'manifest injustice' test ... requir[es] the showing of 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) (citation omitted). Proof that the defendant received ineffective assistance of counsel is one way to establish a manifest injustice. See *State v. Taylor*, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482.

To prove ineffective assistance of counsel, a defendant 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). Whether counsel’s performance was deficient and whether any deficiency was prejudicial are both questions of law that we review *de novo*. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To demonstrate deficient performance, the defendant must show that counsel’s actions or omissions “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. 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, as here, a defendant alleges that trial counsel’s deficient performance necessitates plea withdrawal, the defendant must demonstrate prejudice by showing “a reasonable probability that, but for the counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” See *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). A court reviewing a claim of ineffective assistance of counsel may consider either the deficiency prong or the prejudice prong of the *Strickland* analysis first, and if the defendant does not satisfy one prong, the court need not address the other. See *id.*, 466 U.S. at 697.

Although a defendant alleging ineffective assistance of counsel must seek to preserve counsel’s testimony in a postconviction hearing, see *State v. Machner*, 92 Wis. 2d 797, 804, 285

N.W.2d 905 (Ct. App. 1979), the defendant is not automatically entitled to such a hearing, *see Bentley*, 201 Wis. 2d at 309-10. Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, “sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶¶14, 23, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant’s postconviction motion will normally be sufficient if it includes allegations that establish “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *See id.*, ¶23. Whether a defendant’s motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. *See id.*, ¶9. If a defendant’s postconviction 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 circuit court, in its discretion, may deny relief without a hearing. *See id.*, ¶¶9, 34. We review a circuit court’s discretionary decisions with deference. *See id.*, ¶9.

With the foregoing principles in mind, we turn to whether Wheeler made a sufficient showing in his postconviction motion to require the circuit court to grant a hearing on his claims.² We conclude that he did not.

Wheeler offered a long list of complaints about his trial counsel’s alleged actions and inactions, but he failed to include allegations of material fact showing, as to each claim, why the

² Although Wheeler listed twelve numbered allegations of ineffective assistance of counsel in his postconviction motion, he listed fourteen such allegations in his appellant’s brief. This court normally will not consider claims raised for the first time on appeal. *See State v. Champlain*, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889. Upon careful review of this matter, however, we agree with the State that the claims Wheeler has presented to this court are the same as those he presented to the circuit court and that he has merely arranged and subdivided them slightly differently on appeal. Accordingly, our opinion resolving the instant appeal reflects consideration of all of the claims listed in Wheeler’s appellant’s brief.

choices that his attorney made were wrong, what the omitted actions would have accomplished, when and where the allegedly improper actions occurred, and how the allegedly improper actions and omissions unfolded. The allegations were therefore inadequate to require a hearing. *See id.*, ¶¶9, 23. As the circuit court correctly explained, bald allegations that an attorney failed to investigate the case, or to communicate with the defendant, or to review documents, “are simply not the type of allegations that raise a question of fact.” *See State v. Washington*, 176 Wis. 2d 205, 215-16, 500 N.W.2d 331 (Ct. App. 1993).

Moreover, Wheeler failed to include any allegations of material fact to explain discrepancies between the record made at the plea hearing and the claims presented in his postconviction motion. Specifically, Wheeler did not explain why he told the circuit court during the plea colloquy that he had reviewed the plea questionnaire and waiver of rights form with his trial counsel if, as he now claims, he had not done so; or why he told the circuit court that he wished to “take full responsibility” by pleading guilty if, as he now claims, his trial counsel “refused to allow Wheeler to assert his constitutional rights” to a trial. Similarly, Wheeler did not explain why his trial counsel advised the circuit court that he and Wheeler had reviewed video evidence together if, as Wheeler now claims, he never reviewed any discovery with counsel before his plea; or why trial counsel advised the circuit court that counsel and counsel’s private investigator met with M.T. if, as Wheeler now claims, his “trial counsel did not interview the victim ... [or] have an investigator do so on his behalf.”³ These claims are thus merely conclusory

³ We observe that, at sentencing, the prosecutor similarly advised the circuit court that defense counsel met with M.T.

allegations that are conclusively refuted by the record and are insufficient to warrant a hearing. *See Allen*, 274 Wis. 2d 568, ¶9.

As to the allegations regarding Wheeler’s sentencing, they relate to matters that occurred after the circuit court accepted Wheeler’s guilty plea. Wheeler, however, failed to explain how and why trial counsel’s post-plea actions and omissions show “a serious flaw in the fundamental integrity of [his] plea,” *see Nawrocke*, 193 Wis. 2d at 379, and he thus failed to demonstrate that they are relevant to his claim for plea withdrawal. Accordingly, the allegations regarding trial counsel’s post-plea representation are insufficient to raise facts that, if proved, would entitle him to withdraw his plea. *See Allen*, 274 Wis. 2d 568, ¶¶33-34 (explaining that allegations “fail[] to raise sufficient material facts that would entitle [a defendant] to the relief he seeks” absent an explanation of why the allegations are relevant to the defendant’s claims).

We therefore conclude that Wheeler failed to allege any objective material facts demonstrating deficient performance by his trial counsel in connection with his guilty plea. Moreover, because Wheeler did not satisfy the deficiency prong of the *Strickland* analysis as to any of his allegations, we need not consider whether he offered sufficient allegations to satisfy the prejudice prong. *See id.*, 466 U.S. at 697. Absent “objective factual assertions” from Wheeler to support the deficiencies that he alleged, *see Bentley*, 201 Wis. 2d at 313, the circuit court properly exercised its discretion and denied his claims without a hearing.

Wheeler ends his appellate brief with a short argument that he suffered prejudice from the cumulative effect of counsel’s errors. Before Wheeler could prevail on this ground, we must conclude that the effect of multiple deficiencies prejudiced Wheeler and undermined confidence in the outcome of the litigation. *See State v. Thiel*, 2003 WI 111, ¶58, 264 Wis. 2d 571, 665

N.W.2d 305. We have determined, however, that Wheeler failed to demonstrate that his trial counsel performed deficiently in any way. Accordingly, we do not have multiple deficiencies to aggregate for cumulative impact. *See id.*, ¶61. Wheeler therefore fails to demonstrate that the cumulative effect of multiple deficiencies was prejudicial. *See id.* For all the foregoing reasons, we affirm.

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

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

Sheila T. Reiff
Clerk of Court of Appeals