COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-3494 **Cir. Ct. No. 00CF000993**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY R. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Billy R. Davis appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2001–02) motion to withdraw his no-contest

plea or, in the alternative, for resentencing.[1] Davis alleges that the trial court erred when it denied his motion because he claims that: (1) his plea was not knowingly, voluntarily, and intelligently entered; (2) there was an insufficient factual basis to support his plea; (3) he was denied the effective assistance of trial counsel; and (4) the trial court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 Billy R. Davis was charged with first-degree intentional homicide, as an habitual criminal, for shooting and killing Eunson Finnie during a bar fight. *See* WIS. STAT. §§ 940.01(1)(a), 939.62 (1999–2000). According to the complaint, Gary Moore, a bartender at the tavern where the fight took place, told the police that, on February 19, 2000, at approximately 2:05 a.m. he made a "last call" for patrons to buy alcoholic beverages. According to Moore, after the last call, he saw Davis and Finnie standing in front of him at the bar. Moore told the police that Davis and Finnie bumped into each other and then appeared to step away from each other. Moore claimed that Davis then said, "Say what man?" and Finnie, who was drinking a bottle of beer, turned the bottle so that he was holding the bottle by the neck with the larger end of the bottle coming out from his hand. According to the complaint, Moore

> told the victim and the defendant to "Freeze that shit" and they would have to take it outside, or words to that effect. … [H]e then observed both the defendant and the victim make an abrupt move towards each other as if they were going to fight, at which time they came into contact with each other and began scuffling with each other and [he] then observed the defendant and the victim then go to the floor on the other side of the bar out of his sight. At about

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

> that time he heard the first gunshot coming from right down in front of him where the defendant and the victim were, at which time [he] ducked down behind the bar and momentarily heard at least two more gunshots coming from the same vicinity. Moore … heard and observed other people leaving the bar and when he stood up from the bar again, he observed the victim laying on the floor and the defendant was gone and he subsequently observed the victim to have a gunshot wound to the chest.

An autopsy revealed that Finnie had been shot twice, once in the head and once in the chest.

¶3 According to the complaint, Davis turned himself in to the City of Milwaukee Police Department approximately four days after the shooting. A homicide detective noticed that Davis was limping and concluded that he had been shot in the leg. The complaint noted that medical care providers are required by law to notify the police when they treat a gunshot wound, and that the police were not notified that Davis had received any medical treatment.

¶4 Pursuant to a plea bargain, Davis pled no-contest to second-degree reckless homicide, as an habitual criminal. *See* WIS. STAT. §§ 940.06(1), 939.62 (1999–2000). At the plea hearing, Davis and his lawyer submitted a signed plea questionnaire and waiver-of-rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). On the plea form, Davis indicated, by signing the form, that he understood the elements of second-degree reckless homicide and the constitutional rights he was waiving.[2]

[2] The plea questionnaire and waiver-of-rights form indicated that the elements of the crime were on an "[a]ttached sheet." There is no sheet attached to the plea questionnaire in the record on appeal. At the plea hearing, however, the trial court noted that a copy of the complaint and the jury instruction for second-degree reckless homicide were attached to the plea questionnaire.

¶5 After receiving the plea questionnaire and waiver-of-rights form, the trial court asked Davis questions about his plea. In response to these questions, Davis said that he understood all of the information on the plea questionnaire, including the elements of the crime and the constitutional rights he was giving up. Davis also told the trial court that he had read and understood the criminal complaint and the jury instruction for second-degree reckless homicide. The parties stipulated that the facts in the complaint set out an adequate factual basis for the crime, and the trial court relied on those facts as the factual basis for the plea. The trial court then determined that Davis's plea was "freely, voluntarily, [and] intelligently" entered, and found him guilty of second-degree reckless homicide as an habitual criminal.

¶6 The trial court sentenced Davis to twenty-five years in prison, with fifteen years of initial confinement and ten years of extended supervision. Davis did not file a postconviction motion or challenge his conviction on direct appeal. Subsequently, he filed a *pro se* WIS. STAT. § 974.06 motion to withdraw his plea or, in the alternative, for resentencing, and requested an evidentiary hearing on his claims. The trial court denied the motion without an evidentiary hearing.

II.

A. Plea Withdrawal

¶7 Davis makes a three-part attack on his no-contest plea, alleging that the trial court erred when it denied his WIS. STAT. § 974.06 motion because: (1) the plea was not knowingly, voluntarily, and intelligently entered; (2) there was an insufficient factual basis to support the plea; and (3) he was denied the effective assistance of trial counsel. A trial court must hold an evidentiary hearing on a defendant's postconviction claims if the defendant alleges facts that, if true,

would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however:

> "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 trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). For the reasons that follow, the trial court did not erroneously exercise its discretion in not giving Davis an evidentiary hearing.

1. Knowing, Voluntary, and Intelligent

¶8 First, Davis claims that he should be allowed to withdraw his no-contest plea because it was not entered knowingly, voluntarily, and intelligently. After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow the withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. The manifest injustice test requires a defendant to show a "'serious flaw in the fundamental integrity of the plea.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (quoted source omitted).

¶9 To assure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being relinquished. ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12,

20–21 (1986). The trial court can fulfill these requirements by: (1) engaging in a detailed colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charges and the rights he or she relinquishes; or (3) making references to a signed plea questionnaire and waiver-of-rights form. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24; ***Moederndorfer***, 141 Wis. 2d at 827, 416 N.W.2d at 629.

¶10 A defendant challenging the adequacy of a plea hearing must make two threshold allegations. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. First, the defendant must show a *prima facie* violation of WIS. STAT. § 971.08 or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. Second, the defendant must allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815, 818–819 (Ct. App. 1995). Whether a defendant establishes a *prima facie* case is a question of law that we review *de novo*. ***Moederndorfer***, 141 Wis. 2d at 831, 416 N.W.2d at 631.

¶11 Davis alleges that his plea was not knowingly, voluntarily, and intelligently entered because the trial court did not inform him of, and he did not understand, the elements of second-degree reckless homicide. The record shows otherwise. At the plea hearing the trial court had the following colloquy with Davis regarding the elements of the crime:

> THE COURT: You understand that in order to convict you of this offense, the State would have to prove that you did recklessly cause the death of Eunson Finnie, another human being, on February 19th, 2000 at 2234 West Center Street, in the City of Milwaukee?
>
> [DAVIS]: Yes, sir.

> THE COURT: Do you understand that in order to convict you, the State would have to prove that there was a relation of cause and effect in which your conduct was a substantial factor in producing the death of Eunson Finnie?
>
> [DAVIS]: Yes, sir.
>
> THE COURT: Do you understand that the State would have to prove that your conduct created an unreasonable and substantial risk of death or great bodily harm to Eunson Finnie and that you were aware that your conduct created such a risk?
>
> [DAVIS]: Yes, sir.

As we have seen, Davis also told the trial court that he read and understood the plea questionnaire and waiver-of-rights form, and that he read and understood the complaint and jury instruction for second-degree reckless homicide. In his postconviction motion, Davis alleged that these "materials" and the trial court's colloquy were inadequate, however, because they did not inform him that reckless conduct, as defined by ***State v. Echols***, 152 Wis. 2d 725, 449 N.W.2d 320 (Ct. App. 1989), included conduct that "'demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury.'" ***Id.***, 152 Wis. 2d at 741, 449 N.W.2d at 325 (quoting WIS. STAT. § 940.06(2) (1985–86)). We disagree.

¶12 The elements of second-degree reckless homicide are, that the defendant: (1) caused the death of the victim; and (2) caused the death by criminally reckless conduct. WIS JI—CRIMINAL 1060. Criminally reckless conduct exists when: the defendant's conduct "created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that (his) (her) conduct

created the unreasonable and substantial risk of death or great bodily harm."[3] ***Id.*** (bullets and footnote omitted).

¶13 As we have seen, the trial court adequately explained the element of recklessness to Davis during the plea hearing. It is of no consequence that neither the trial court nor the jury instruction provided Davis with an alternate definition of reckless conduct. A trial court's duty to ensure that a defendant's plea is knowing, voluntary, and intelligent does not require "magic words or an inflexible script." ***State v. Hampton***, 2004 WI 107, ¶43, ___ Wis. 2d ___, 683 N.W.2d 14. Rather, a trial court is required to do no more than ascertain that the defendant understands the essential elements of the crime. *See* ***State v. Trochinski***, 2002 WI 56, ¶29, 253 Wis. 2d 38, 644 N.W.2d 891 ("a valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements"). Based on the record, including the signed plea questionnaire and the plea colloquy, Davis has not shown a *prima facie* violation of WIS. STAT. § 971.08.

¶14 Davis also claims that his plea was not knowingly, voluntarily, and intelligently entered because the trial court did not inform him of, and he did not understand, his constitutional rights. Again, we disagree. As noted, a trial court may refer to a portion of the record or other evidence that affirmatively exhibits the defendant's knowledge of the constitutional rights that he or she will be waiving. ***Moederndorfer***, 141 Wis. 2d at 827, 416 N.W.2d at 629; ***State v. Lange***,

[3] WISCONSIN JI—CRIMINAL 1060 was revised after Davis committed his crime. The revision, however, "involved adoption of a new format and nonsubstantive changes to the text." Comment to WIS JI—CRIMINAL 1060.

2003 WI App 2, ¶26, 259 Wis. 2d 774, 656 N.W.2d 480. The record in this case reflects that the trial court adequately advised Davis of his constitutional rights.

¶15 The plea questionnaire and waiver-of-rights form set forth each of the constitutional rights that Davis waived by the entry of his no-contest plea. Next to each of these rights is a check mark indicating that Davis understood the rights and relinquished them of his own free will. At the plea hearing, the trial court had the following colloquy with Davis:

> THE COURT: Do you understand all of the legal and constitutional rights listed on the form?
>
> [DAVIS]: Yes, sir.
>
> THE COURT: At the time you signed the form, did you understand that by pleading no contest, you would be giving up all of the rights that are listed on the form?
>
> [DAVIS]: Yes, sir.

This colloquy was sufficient to satisfy the requirements of WIS. STAT. § 971.08. *See* ***Lange***, 259 Wis. 2d 774, ¶¶26–27.

¶16 In his postconviction motion, however, Davis claimed that his colloquy with the trial court was inadequate under ***State v. Hansen***, 168 Wis. 2d 749, 485 N.W.2d 74 (Ct. App. 1992). In ***Hansen***, we held that the defendant made a *prima facie* showing that the proper plea procedures were not followed because the plea colloquy with the defendant did not include *any* discussion of the defendant's constitutional rights. ***Id.***, 168 Wis. 2d at 755–756, 485 N.W.2d at 77. In contrast, as we have seen, during the plea colloquy in this case, the trial court specifically ascertained that Davis understood the constitutional rights listed on the plea questionnaire and that Davis understood that those rights would be waived by his no-contest plea. Davis has again failed to allege a *prima facie* violation of

WIS. STAT. § 971.08, and the trial court did not erroneously exercise its discretion in denying this claim without a hearing.

2. Factual Basis

¶17 Second, Davis claims that he should be allowed to withdraw his no-contest plea because the complaint did not establish an adequate factual basis to support his crime. We disagree. Before accepting a no-contest plea, a trial court must make such inquiry as satisfies it that the defendant in fact committed the crime charged. ***Thomas***, 232 Wis. 2d 714, ¶14. A factual basis may be established by stipulation of defense counsel to the facts contained in the criminal complaint. ***Id.***, ¶21.

¶18 In his postconviction motion, Davis alleged that the facts in the complaint were insufficient to show that he caused Finnie's death "by 'use of a gun.'" Rather, he claimed that the complaint showed that the only act he committed was to wrestle with Finnie and that this act did not cause Finnie's death. We disagree.

¶19 The State need not prove each element beyond a reasonable doubt to establish a factual basis for a guilty or no-contest plea. ***State v. Spears***, 147 Wis. 2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988). It is enough if an inculpatory inference can be drawn from the facts, even if an exculpatory inference could also be drawn. ***Id.***

¶20 The facts and circumstances recited in the complaint and agreed to by Davis are sufficient to show that Davis caused Finnie's death through criminally reckless conduct. As we have seen, Finnie was shot in his head and chest, while Davis was shot in his leg. Davis fled from the scene after the

shooting. It can be inferred from the complaint that Davis fleeing from the scene reflected consciousness of guilt. It can also be inferred from the complaint that it is nearly impossible for the victim, Finnie, to have shot himself in the chest and in the head, thus causing his own death. The trial court did not erroneously exercise its discretion when it determined that an evidentiary hearing was not warranted on the issue of whether there was a sufficient factual basis for Davis's no-contest plea.

3. Ineffective Assistance

¶21 Finally, Davis alleges that he should be allowed to withdraw his no-contest plea because his trial counsel was ineffective. The two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. Under that test, a defendant must prove: (1) deficient performance; and (2) prejudice. ***Id.*** at 687. To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312, 548 N.W.2d at 54.

¶22 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at

848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶23 In his postconviction motion, Davis alleged that his trial lawyer was ineffective for several reasons. First, he claimed that his lawyer did not advise him "that accidental discharge of a weapon would have been a defense to a homicide charge." *See* ***State v. Watkins***, 2002 WI 101, ¶¶44–45, 255 Wis. 2d 265, 647 N.W.2d 244 (accident defense). Davis pointed to a written statement from his parole-revocation proceedings, in which he claimed that he did not have a gun and that he "wrestled" with Finnie to avoid being shot, to argue that there was "'some evidence'" to warrant an accident instruction at a trial. He thus alleged that "had counsel … informed him about an accident defense, he would not have plead no contest and would have insisted on going to trial." This allegation, absent more, is insufficient.

¶24 Davis made the written statement for his parole-revocation proceedings, in which he claimed that the shooting was an accident, two months before he pled no-contest to second-degree reckless homicide. Thus, when Davis entered his plea, he was aware that accident could be argued as a defense. Davis did not allege in his postconviction motion, however, what his lawyer failed to tell him that would have added to what he already knew from the parole-revocation hearing—that is, how and why his lawyer's alleged failure to explain an accident defense would have affected his decision to plead no-contest. *See* ***State v. Allen***, 2004 WI 106, ¶24, ___ Wis. 2d ___, 682 N.W.2d 433. Davis has not established prejudice.

¶25 Second, Davis claimed that his trial lawyer was ineffective because the lawyer gave him "erroneous legal advice as to a self-defense claim." Davis

points to a statement his lawyer made during sentencing, in which Davis alleged that his lawyer told the trial court that "[Davis] initially had a self-defense claim, but that he lost it when there was the second shot." Davis claimed that this was an "erroneous view of the law" because, according to his parole-revocation statement, the gun "accidentally" fired while he was "protecting himself from [Finnie]." We disagree.

¶26 Davis reads his lawyer's statement out of context. At the sentencing hearing, Davis's lawyer told the trial court:

> This is a very, very unique fact pattern that brought very, very unique characteristics, and I think it was appropriately amended down, and the defendant although he maintains certain things, Judge, he entered his plea, Judge, to a second degree reckless homicide. As you know, it would be much easier under these circumstances for the State to prove once he gets control of the gun, the second shot, that the not sticking around, all kinds of things, he very well could be convicted and justly convicted of second degree reckless homicide in this case, Judge, even though his version is, is that he may have had a self-defense claim in the very beginning of it. Professionally, legally, I think he loses that when there is a second shot and the fact that he doesn't stay around, Judge.

These statements do not show that Davis's trial lawyer misunderstood the law of self-defense. When read in context, they show that his trial lawyer was explaining to the trial court why he felt that Davis did not have a viable self-defense claim, including the facts that two shots hit Finnie and Davis fled from the scene. Aside from these remarks, Davis does not identify what legal advice his lawyer gave to him about self-defense that was allegedly incorrect. Accordingly, Davis has not alleged facts that, if true, would show that his trial lawyer gave deficient advice.

¶27 Davis also appeared to take issue with his trial lawyer's sentencing comments because they indicated that Davis shot the gun twice. Davis claimed

that his trial counsel's version of the events was incorrect because he "never told counsel that he pulled the trigger two times, and the police reports do not support counsel's statements."[4] Again, Davis did not consider his lawyer's remarks in the proper context. At the sentencing hearing, Davis's lawyer told the court:

> [U]nfortunately it's hard for me to … defend against the fact that the defendant had the gun when we don't know for sure actually who had control of the gun in the fight --
>
> All I can say is the defendant did get shot in the incident and that he does get control of the gun and at least pulls the trigger two times, as is indicated, and that's why he pled [no-contest].

These comments were proper when considered within the context of Davis's plea. "[A] no contest plea is 'an implied confession of guilt for the purposes of the case to support a judgment of conviction and in that respect is equivalent to a plea of guilty.'" ***Black***, 242 Wis. 2d 126, ¶15 (quoted source omitted). Accordingly, Davis's trial lawyer was not ineffective for stating that Davis may have shot Finnie twice when Davis impliedly admitted that he did. Thus, Davis has not alleged facts that, if true, would have entitled him to a hearing.

¶28 Third, Davis claimed that his trial lawyer was ineffective when the lawyer stipulated that there was a sufficient factual basis for his no-contest plea. Davis relied on the ineffective-assistance arguments made above, that his lawyer did not inform him of an accident defense and his lawyer gave him inaccurate legal advice about a self-defense claim, to support this allegation. As we have seen, Davis's allegations were conclusory and failed to allege facts that, if true,

[4] The police reports that Davis refers to are not in the record. Accordingly, we do not rely on them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("appellate court's review is confined to those parts of the record made available to it").

would entitle him to relief. Accordingly, this claim fails as well. The trial court did not erroneously exercise its discretion when it denied Davis's ineffective-assistance claims without a hearing.

B. Sentencing

¶29 Davis also requested resentencing in his WIS. STAT. § 974.06 motion. He alleged that the trial court erroneously exercised its discretion because it did not consider the correct sentencing factors and imposed a sentence that was unduly harsh and unconscionable. Neither these claims, nor the "new factor" claim that Davis asserts in his reply brief on this appeal, are cognizable in a § 974.06 motion. *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20, 25 (1978) (A § 974.06 motion "cannot be used to challenge a sentence because of an alleged [erroneous exercise] of discretion. … [P]ostconviction review under [§] 974.06 is applicable only to jurisdictional or constitutional matters."). The trial court properly denied Davis's § 974.06 motion without an evidentiary hearing.

By the Court.—Order affirmed.

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