COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP218 **Cir. Ct. No. 1999CF1337**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO T. MADDOX,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Antonio T. Maddox appeals from an order summarily denying his motion for postconviction plea withdrawal. The issue is whether postconviction counsel was ineffective for failing to previously seek plea withdrawal for the alleged ineffective assistance of trial counsel. We conclude

that Maddox has not shown that his trial counsel was ineffective, negating any correlative claim of ineffectiveness by postconviction counsel for failing to move for postconviction plea withdrawal. Therefore, we affirm.

¶2 Maddox shot and killed two men in a Milwaukee tavern. He pled guilty to two counts of intentional homicide with a dangerous weapon, one in the first-degree and the other in the second-degree. The trial court imposed a life sentence for the first-degree homicide, setting parole eligibility as of January 1, 2025, and a forty-five-year consecutive sentence for the second-degree homicide. He moved to modify his sentence, alleging that the trial court overlooked a psychiatric report at sentencing, and erred in its consideration of other sentencing factors. The trial court denied his sentence modification motion. On direct appeal, this court affirmed the judgment of conviction and the postconviction order. *See* ***State v. Maddox***, No. 2000AP1240-CR, unpublished slip op. at 2 (WI App July 20, 2001).

¶3 Maddox moved for plea withdrawal, contending that he was not fully aware of the elements and nature of the offenses, and that his trial and postconviction counsel were ineffective: the former for failing to explain imperfect self-defense and for urging him to plead guilty, the latter for refusing to pursue plea withdrawal in favor of or in addition to sentence modification. The trial court summarily denied his postconviction motion, ruling that the record belied Maddox's claims that his pleas were entered without his understanding of the elements and nature of the offenses and their potential defenses, which thereby negated his ineffective assistance claims.

¶4 Maddox appeals, contending that: (1) he did not "fully" understand the elements and nature of the offenses; and (2) trial counsel was ineffective for

urging him to "[t]ake the deal" and not explaining to him about imperfect self-defense, for had he known, he would not have pled guilty. He also claims that he raised these complaints with postconviction counsel whom he alleged was also ineffective for refusing to pursue them in proceedings pursuant to WIS. STAT. RULE 809.30(2) (1999-2000).[1] Maddox contends that his claims warrant an evidentiary hearing.

¶5 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] 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. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 To enter a valid guilty plea, the trial court must comply with WIS. STAT. § 971.08. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-70, 389 N.W.2d 12 (1986).

> Whenever the sec. 971.08 procedure is not undertaken or whenever the court-mandated duties are not fulfilled at the plea hearing, the defendant may move to withdraw his plea. The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Id. at 274 (citations omitted).

¶7 Maddox claims that he did not "fully" understand the elements or nature of the offenses, namely the legal meaning or significance of "intent to kill." *See* WIS. STAT. §§ 940.01; 940.05. He claims that the trial court did not explain these concepts to him, nor did it ask Maddox's trial counsel if he provided this explanation.

¶8 During the guilty plea colloquy, the trial court asked Maddox whether his trial counsel had reviewed the elements of the offenses with him, and whether Maddox understood the elements and how they related to the facts alleged in the complaint. Maddox responded affirmatively to those inquiries. Moreover, Maddox had signed a guilty plea questionnaire and waiver of rights form in which he also acknowledged that he "underst[oo]d what [he was] charged with, what the penalties are and why [he] ha[d] been charged. [He] also underst[oo]d the

elements of the offense and their relationship to the facts in this case and how the evidence establishe[d his] guilt." *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent and voluntary plea). The trial court's inquiries and Maddox's responses and signature, acknowledging compliance with the statutory requirements and his understanding of the elements and nature of the offenses, belie his contentions and prevent him from establishing a *prima facie* violation of WIS. STAT. § 971.08. *See* ***Bangert***, 131 Wis. 2d at 274.

¶9 Maddox also contends that his trial and postconviction counsel were ineffective. To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶10 Maddox's principal ineffective assistance claims are against trial counsel for failing to explain imperfect self-defense to him, which Maddox claims would have prompted him to forego pleading guilty and to instead proceed to trial. Maddox also contends that his trial lawyer urged him to "[t]ake the deal" because he allegedly told Maddox there was "simply no evidence to support [Maddox's] version of the events. And [trial counsel] would not be able to provide [Maddox] with a defense."

¶11 To claim imperfect self-defense, Maddox would be required to show that he had "a reasonable belief that [he] was preventing or terminating an unlawful interference with his person," and that

> (1) he had an actual, but unreasonable, belief that force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm; or (2) he possessed a reasonable belief that force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm but his belief regarding the amount of force necessary was unreasonable.

State v. Camacho, 176 Wis. 2d 860, 883, 501 N.W.2d 380 (1993) (footnote omitted).[2]

¶12 In his postconviction motion, Maddox alleged that:

> Trial counsel specifically informed the defendant that "it does not matter whether you felt you were going to be shot by the victims during the incident at the bar. The fact that you shot them, and no gun was found does not entitle you to use 'self-defense'. The fact that the victims may have been armed or that you believed them to be

[2] The ***Camacho*** standard applied when Maddox was allegedly misadvised by trial counsel, and when the case would have been tried, had he not pled guilty. *See* ***State v. Camacho***, 176 Wis. 2d 860, 882-83, 501 N.W.2d 380 (1993), *as modified by* ***State v. Head***, 2002 WI 99, ¶104, 255 Wis. 2d 194, 648 N.W.2d 413.

> armed or that you saw them reaching for what appeared to be a gun, does not entitle you [to] 'legal grounds' to draw a weapon and 'open fire'."
>
> "The fact that no[ ]one saw them with a gun, and no [one] witnessed them at anytime prior to the shooting with a gun, would lead a jury to believe that you were lying about the victims being armed, and that this belief comp[el]led you to shoot them. There is just simply no evidence to support your version of the events. And I would not be able to provide you with a defense. Take the deal."

Most of the witnesses interviewed by police also reported that Maddox repeatedly shot at the victims, also negating a self-defense claim. Consequently, Maddox has not shown that imperfect self-defense was a viable claim. When considered in this context, Maddox has not shown that trial counsel's alleged advice was deficient.

¶13 Maddox seeks to rewrite history. The record, most particularly the transcript of the plea colloquy, his signed guilty plea questionnaire, the facts alleged in the complaint, which Maddox agreed were "substantially true and accurate," and the multiple witness-statements that differ consequentially from Maddox's postconviction version of the incident conclusively belie his new postconviction version; he therefore is not entitled to an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9 (citations omitted). The trial court quoted and summarized those parts of the record that belied Maddox's claims. It therefore properly exercised its discretion in summarily denying his motion. *See* ***id.*** Because Maddox's ineffective assistance claims were entirely derivative of his other claim, those claims also necessarily fail.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).