COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP450-CR **Cir. Ct. No. 2009CF2823**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIUS C. BURTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and KEVIN E. MARTENS, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Julius C. Burton appeals from a judgment of conviction, entered upon his guilty pleas, on two counts of attempted first-degree intentional homicide by use of a dangerous weapon. Burton also appeals from an

order denying his postconviction motion without a hearing.[1] Burton claims that he received ineffective assistance from trial counsel regarding the availability of a bifurcated plea and trial on his mental culpability, and that the circuit court erred by not advising him of such possibility during the plea colloquy. We reject Burton's arguments and affirm.

BACKGROUND

¶2 In June 2009, Burton shot two police officers who were attempting to stop him after they observed him commit an ordinance violation. Though Burton claimed that the officers drew their guns on him, security footage from a nearby building revealed that the officers had not unholstered any weapons. One officer was shot in the shoulder, knee, and face. The other sustained injuries to his hand, shoulder, neck, face, and skull, including the loss of an eye and a portion of his brain. Burton was charged with two counts of attempted first-degree intentional homicide by use of a dangerous weapon.

¶3 It is not disputed that Burton has a history of mental health issues. At the initial appearance, the circuit court ordered a competency evaluation. Dr. Tracy Luchetta determined that Burton was competent to proceed to trial. Burton did not object to her findings, and initially pled not guilty by reason of mental disease or defect (NGI). The circuit court then ordered Dr. Kenneth Smail to conduct an examination. Smail concluded that there was insufficient evidence to support the NGI plea. After receiving Smail's report, the defense retained Dr. Diane Lytton, who concluded that sufficient evidence did support an NGI plea.

[1] The Honorable Patricia D. McMahon accepted Burton's plea and imposed sentence. The Honorable Kevin E. Martens reviewed and denied the postconviction motion.

¶4 In January 2010, the State offered to recommend fifty years' initial confinement and to stand silent on extended supervision if Burton would plead guilty to both counts as charged. Burton agreed. He completed a plea questionnaire and waiver of rights form, along with an addendum. The circuit court engaged him in a colloquy, discussing in particular the fact that Burton would no longer be pursuing an NGI plea; accepted his pleas; and adjudicated him guilty. At sentencing, the circuit court imposed forty years of initial confinement and ten years of extended supervision for each count, to be served consecutively.

¶5 In January 2011, Burton filed a postconviction motion seeking to withdraw his pleas, alleging ineffective assistance of trial counsel and a circuit court failure during the plea colloquy. The circuit court denied the motion without a hearing. Burton appeals.

DISCUSSION

¶6 An NGI plea is authorized by WIS. STAT. § 971.06(1)(d) (2009-10).[2] WISCONSIN STAT. § 971.165 provides generally for the bifurcation of guilt and mental responsibility phases.[3] That is, a defendant may plead guilty or no contest to the commission of a crime itself, but maintain that he is not guilty because of a mental disease or defect. *See* ***State v. Duychak***, 133 Wis. 2d 307, 310-12, 395 N.W.2d 795 (Ct. App. 1986). The mental culpability phase may be

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] WISCONSIN STAT. § 971.165 specifically describes the process of a bifurcated trial for both phases, where the defendant pleads not guilty to the crime's commission and maintains that, in any event, he is not guilty by reason of mental disease or defect. Neither party disputes that a defendant may plead guilty or no contest in the guilt phase and seek a jury trial on mental responsibility.

determined by a jury. *See* WIS. STAT. § 971.165. A defendant can only be found not guilty by reason of mental disease or defect if he or she first admits to the criminal conduct or is found guilty thereof. *See* ***State v. Langenbach***, 2001 WI App 222, ¶19, 247 Wis. 2d 933, 634 N.W.2d 916.

I. Ineffective Assistance of Counsel

¶7 Burton's first argument on appeal is that he received ineffective assistance of trial counsel when his attorney failed to advise him that he had the right to a bifurcated plea and trial wherein he could plead guilty but have a jury determine the mental responsibility question. Burton also asserts that it was an "abuse of discretion"[4] for the circuit court to deny his motion "without even ordering a hearing."[5]

¶8 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. The postconviction motion must contain more than conclusory allegations. *See* ***id.***, ¶15. Whether the motion alleges sufficient facts is a question of law that we review *de novo*. ***Id.***, ¶9. If it does, a hearing is required. ***Id.*** If it does not, or if the motion presents only conclusory allegations, or if the record conclusively

[4] The supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" nearly twenty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewer. Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

[5] The State contends that this was not an argument raised in the circuit court. However, any waiver or forfeiture doctrine we would apply is a matter of judicial administration; we are free to address Burton's arguments as presented on appeal. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

demonstrates the defendant is not entitled to relief, the circuit court may exercise its discretion in determining whether to grant or deny a hearing. ***Id.***

¶9 We apply a two-part test to claims of ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must show that his attorney's performance was deficient, and that the deficiency was prejudicial. ***Id.*** In particular, prejudice requires a showing that there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. The defendant must prevail on both prongs to be afforded relief. ***Allen***, 274 Wis. 2d 568, ¶26.

¶10 "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999). We review only the allegations contained within the four corners of Burton's postconviction motion, not any additional allegations in his brief. ***Allen***, 274 Wis. 2d 568, ¶27.

¶11 Burton's ineffective-assistance claim is that trial counsel was ineffective for not advising him of the availability of the bifurcated plea and trial. As relevant to that claim, Burton alleged only that "there is nothing in the record to indicate that defense counsel had ever advised the defendant of the possibility of entering such a bifurcated plea" and that "if he had been advised that he could have had the jury consider that affirmative defense even if he had pled guilty to having committed the crimes charged, there is a reasonable probability that he would not have pled guilty to the crimes." These allegations are not sufficient.

¶12 First, Burton's motion only alleges that the *record fails to show* whether trial counsel advised him about a bifurcated plea. It does not allege that trial counsel actually failed to so inform him. As the State observes, the record "ordinarily does not and should not" contain the details of all of counsel's discussions with the client. Indeed, expecting the record to do so would seem to undermine the very nature of an attorney-client relationship. Thus, we conclude that Burton has not sufficiently alleged any deficient performance by trial counsel.

¶13 Second, Burton's assertion that he would "not have pled guilty" is belied by his own motion, which specifically alleged that he was "entitled to enter a plea of guilty to the crimes charged and then request a jury trial … [on] mental disease or defect." It therefore appears that Burton actually meant that if he had been informed about the bifurcation option, he would have pled guilty to the crimes and sought a jury trial on the bifurcated issue of his mental state. However, that is not what Burton alleged.

¶14 Moreover, Burton does not allege *why* he would have refused the guilty plea in favor of a bifurcated plea. *See* ***id.***, ¶23 (To be sufficient, a postconviction motion must allege "who, what, where, when, why, and how."). That is, he does not allege how the availability of bifurcation would have persuaded him to do something other than accept the State's offer. Thus, we conclude that Burton has also failed to sufficiently allege prejudice. The circuit court did not err in denying Burton's motion without a hearing.[6] ***Id.***, ¶9.

[6] Of course, as the State points out, the circuit court was asked to address a slightly different argument than the one counsel now presents on appeal.

II. Circuit Court Error

¶15 Burton's second argument on appeal is that the circuit court failed to advise him, during the plea colloquy, that he had the right to plead guilty and then have the jury determine his mental culpability. Thus, Burton contends, his plea was not knowing, intelligent, and voluntary. Burton further contends that when the circuit court "was eliciting the defendant's plea of guilty in this matter, it was also obtaining a waiver from the defendant of his plea of [NGI]. It was not possible for such a waiver to have been knowingly, intelligently, and voluntarily made" unless the circuit court told him about the bifurcation option, and the failure to so inform Burton "denied the defendant his right to due process of law."

¶16 The "paramount principle" for a guilty or no-contest plea is that it must be knowing, intelligent, and voluntary. *See* ***State v. Hampton***, 2004 WI 107, ¶21, 274 Wis. 2d 379, 683 N.W.2d 14. WISCONSIN STAT. § 971.08 and a series of cases set forth various duties of the circuit court when accepting a plea. *See* ***Hampton***, 274 Wis. 2d 379, ¶¶23-24. Under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), a defendant may move to withdraw his plea if the specified plea procedures are not followed. The initial burden rests with the defendant to make a *prima facie* showing that there has been a violation of a mandatory duty and to allege that he did not know or understand the information which should have been provided. ***Hampton***, 274 Wis. 2d 79, ¶46.

¶17 First, Burton does not directly assert that he did not know he had a bifurcation option. Second, he asserts that "[i]n a case where the defendant has entered a plea of not guilty by reason of mental disease or defect, the Court, as a matter of due process of law, must also advise him not only that he has the right to

a jury trial but specifically that he has the right to a bifurcated jury trial[.]" However, he cites no authority for this claim, possibly because it is not the law.

¶18 "Courts engage in personal colloquies in order to protect defendants against violations of their fundamental constitutional rights. Neither the federal constitution nor our state constitution confers a right to an insanity defense or plea." ***State v. Francis***, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632. The circuit court also "had no obligation to personally address [Burton] with respect to the withdrawal of [his] NGI plea." *See* ***id.*** Thus, the circuit court correctly found that the circuit court was not obligated to advise Burton of the availability of bifurcation, and it properly denied relief.

By the Court.—Judgment and order affirmed.

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