COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1600-CR **Cir. Ct. No. 2009CF1131**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. LAUGHRIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Matthew J. Laughrin appeals the judgment, entered upon his guilty pleas, convicting him of second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1); possession of marijuana with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(h)1.; and possession of Suboxone with intent to

deliver, contrary to WIS. STAT. § 961.41(1m)(b) (2009-10).[1] He also appeals the order denying his postconviction motion. Laughrin argues: (1) the trial court erred in denying his presentence motion to withdraw his guilty pleas; (2) the trial court erred in denying his postconviction motion, which argued that trial counsel was ineffective; (3) the trial court applied the incorrect definition of "prejudice" in denying his postconviction motion; and (4) that trial counsel was ineffective for failing to raise ineffective assistance of counsel as a basis to withdraw the guilty pleas. We reject his arguments and affirm.

BACKGROUND

¶2 Laughrin was charged with numerous counts concerning the tragic death of fifteen-year-old M.K., who died from a drug overdose at Laughrin's home. Laughrin was a drug dealer; M.K. and a friend had come to his house looking to get high. Laughrin sold the girls marijuana, which they smoked at his house. He then gave M.K. a Suboxone pill, which she ingested. After M.K. took the Suboxone pill, neither Laughrin nor M.K.'s friend could revive her. Laughrin responded by taking M.K. from his house to her friend's house and leaving M.K.—unconscious—in the snow in the front yard. Laughrin then drove off, and shortly thereafter M.K. was pronounced dead.

¶3 Laughrin was charged with second-degree reckless homicide and seven drug charges. He pled guilty to second-degree reckless homicide, one count of possessing marijuana with intent to deliver, and one count of possession of Suboxone, second offense.

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

¶4 The plea process was comprehensive. Laughrin completed a plea questionnaire and waiver of rights form for each charge to which he pled guilty. The trial court conducted a plea colloquy in which the court confirmed that Laughrin understood each of the charges he was pleading guilty to and the maximum penalties he faced. The parties agreed to the following:

> [I]f the case went to trial, the State would present witnesses [who] would say that Mr. Laughrin provided the Suboxone to [M.K.], that the Suboxone in combination with the Clonopin, another benzodiazepine [M.K. had ingested], is what resulted in her death, and that Mr. Laughrin had a substantial awareness of the likelihood of that consequence.
>
> And then with regard to the drugs that the [c]ourt has found[] that he had them within his possession. Simply we would have demonstrated through witnesses that he was aware of them. He had actually given [M.K.] one Suboxone earlier. And with regard to the marijuana, he had also shared that with her, as well as [with] another juvenile.

¶5 After he pled guilty and before he was sentenced, Laughrin moved to withdraw his plea. Laughrin alleged that he should be allowed to withdraw his plea based on newly-discovered evidence: specifically, information garnered from an expert witness, Dr. Jeffrey Junig, that Buprenorphine (the generic name for Suboxone) alone did not create substantial risk of death. As pertinent to this appeal, Laughrin's motion alleged:

> To prove second degree reckless homicide, contrary to WIS. STAT. § 940.06, the State must prove two elements: (1) that Laughrin, by giving one tablet of Buprenorphine, created a *substantial risk* of death or great bodily harm to M.K., and (2) that Laughrin was *aware* of the risk he was causing.
>
> Dr. Junig has concluded, and would testify, that M.K.'s death occurred at or near the time M.K. ingested the Buprenorphine. He also opines, as an expert scientist and former addict, that death at or near the time of ingestion of Buprenorphine is known to be extremely rare, and thus is

> not expected or reasonably predictable by either medical professionals or experienced drug users.
>
> Dr. Junig opines and would testify that, if a single dose of Buprenorphine had been known likely to cause a risk of death or great bodily harm in any human being, then Buprenorphine would not have been included in Schedule III of the Wisconsin Controlled Substances Act…. The fact that Buprenorphine is listed in that Schedule indicates that it is not believed, understood, or expected to harm or kill a human being.
>
> If Dr. Junig's expert opinion is not impeached at trial, then Laughrin will not be found guilty of second degree reckless homicide, as a matter of law.

¶6 Dr. Junig's report provided that, "Suboxone and buprenorphine … do not generally cause death even when taken at high doses, even in people not tolerant to opioids…." The report additionally explained, however, that in order to suffer death from Suboxone, two factors must be present; and in M.K.'s case, both of those factors were in fact present:

> In order to suffer death from buprenorphine, at least two factors must be present. First, the person is not tolerant to opioids, namely does not take opioids on a regular basis. Second, the person must take additional respiratory depressants that the person is not tolerant to. The most commonly implicated medications for overdose due to buprenorphine would be members of a class of drugs called benzodiazepines, either clonazepam, brand name Klonopin, lorazepam, brand Ativan, or alprazolam, brand name Xanax.
>
> *The tragic death of [M.K.] required a confluence of several unfortunate events. She had other, non-opioid respiratory depressants in her system that she was not tolerant to, namely clonazepam. She then was given/took buprenorphine, which because she was not tolerant to opioids caused significant respiratory depression. The combination of respiratory depression from the clonazepam and from the buprenorphine appears to have caused her death.*

(Emphasis added.)

¶7 The report further stated that it was possible that other factors also contributed to M.K.'s death:

> Respiration is depressed to a small extent during sleep, and the addition of sleep to the effects of buprenorphine and clonazepam probably played a minor role. During sleep, carbon dioxide accumulates around the mouth and nose, and is thought responsible for some cases of sudden infant death syndrome. The placement of [M.K.]'s head and face on a pillow may have contributed to this pooling of carbon dioxide. Anatomical factors may have played a role, as flexion or extension of the head and neck impact the flow of one's breath. Airway position can be a critical difference when airflow is reduced by other factors. My point is that this horrible tragedy was far from predictable, particularly if it was not known whether or not [M.K.] was tolerant to opioids, or whether she had taken other substances that affect respiration.

¶8 The trial court denied Laughrin's motion. Specifically, the trial court found that Dr. Junig's report and proffered testimony was not new evidence, but rather a new theory that utilized information Laughrin already had in his possession:

> This opinion as I've heard it is just that. It is an expert's opinion, so I have to determine is that in fact new evidence. Is there something new here that was not available prior to the entry of the plea that was not discovered prior to the entry of the plea….
>
> Here in this case what is known[,] the toxicology report[,] was … there. It's been available. All of the facts in this case have been in the defense's hands. They were in the defense's hands prior to the plea….
>
> It's not newly-discovered evidence. There's nothing new….
>
> It's a new interpretation of evidence, and those interpretations as I said before can be found at all different times by all different people, and I have no doubt if [defense counsel] had more time she could find another expert, but I don't think that changes what's here….

> Everything had already been provided and presented. It was there. And just because there is now the belief that—that this risk is somehow able to be argued by this expert as not being as great as was thought…. I don't see that as new evidence. I don't see it as evidence discovered after the entry of the plea that meets the standard here as a fair and just reason.

¶9 After sentencing, Laughrin again filed a motion to withdraw his plea. In this motion, he alleged that trial counsel was ineffective at the plea hearing for failing to properly investigate M.K.'s cause of death. Again, Laughrin relied on Dr. Junig's report as the basis for this argument, contending that trial counsel should have garnered the report and explained its significance to him before he decided to plead guilty. Laughrin also alleged that trial counsel should have known that, by failing to properly investigate M.K.'s cause of death, she was providing ineffective assistance and, therefore, was also ineffective for failing to withdraw from the case.

¶10 The trial court denied Laughrin's postconviction motion, and Laughrin now appeals.

ANALYSIS

¶11 Laughrin presents four arguments on appeal. He argues: (1) the trial court erred in denying his presentence motion to withdraw his guilty pleas; (2) the trial court erred in denying his postconviction motion, which argued that trial counsel was ineffective; (3) the trial court applied the incorrect definition of "prejudice" in denying his postconviction motion; and (4) that trial counsel was ineffective for failing to raise ineffective assistance of counsel as a basis to withdraw the guilty pleas. We discuss each argument in turn.

(1) The trial court properly denied Laughrin's presentence motion because Laughrin did not present a "fair and just" reason to withdraw his pleas.

¶12 Laughrin first argues that the trial court erred in denying his presentencing motion to withdraw his guilty pleas based on newly-discovered evidence—in this case, Dr. Junig's report. Laughrin argues that the trial court's determination that Dr. Junig's testimony in the report was not new evidence, but rather a new interpretation of old evidence, was wrong. This is because, according to Laughrin, Dr. Junig opined about the effect of Suboxone on the human body, which is a matter of scientific fact, not a matter of opinion.

¶13 Newly-discovered evidence may constitute a "fair and just reason" to withdraw a guilty plea when a defendant shows by a preponderance of the evidence that: "(1) the evidence was discovered after entry of the plea; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Kivioja***, 225 Wis. 2d 271, 294, 592 N.W.2d 220 (1999). "Withdrawal of a guilty plea before sentencing is not an absolute right[,]" however. *See* ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. The defendant must prove by a preponderance of the evidence that there is a "fair and just reason" for doing so. ***Id.*** The reason must be something other than belated misgivings about the plea or the desire to have a trial. ***Id.***

¶14 In this instance, we review whether Dr. Junig's testimony constitutes newly-discovered evidence allowing for a plea withdrawal *de novo*. While we apply the clearly erroneous standard to findings of evidentiary or historical fact as well as credibility determinations, *see* ***id.***, ¶33, whether an expert's opinion constitutes newly-discovered evidence or whether it instead is merely "'the newly

discovered importance of existing evidence'" is a question of law we review *de novo*, *see* ***State v. Fosnow***, 2001 WI App 2, ¶12, 240 Wis. 2d 699, 624 N.W.2d 883 (citation omitted). We conclude that *de novo* review applies because all of Laughrin's arguments regarding his presentence plea-withdrawal motion stem from a single premise—Laughrin's belief that that the trial court erred in determining that Dr. Junig's testimony was not newly-discovered evidence.

¶15 Unfortunately for Laughrin, applying this more deferential standard of review does not help him because we independently conclude that he has not provided a "fair and just" reason for withdrawing his plea. We conclude that the "evidence" Laughrin claims is newly-discovered—Dr. Junig's July 13, 2010 Suboxone report—is not new evidence, but rather "'the newly discovered importance of existing evidence.'" *See* ***id.*** (citation omitted). The record indicates that defense counsel had all of the facts and materials on which Dr. Junig based his opinion before Laughrin pled guilty. For example, defense counsel explained in her motion to withdraw the plea and accompanying affidavit that she "diligently sought any and all evidence that would support Laughrin's defense," including reviewing "over 1000 pages of discovery." Similarly, the trial court found, and Laughrin does not dispute, that the toxicology report and other materials upon which Dr. Junig based his opinion were in the defense's hands prior to the plea. *See* ***Jenkins***, 303 Wis. 2d 157, ¶33 (we will uphold trial court's findings of fact unless they are clearly erroneous). In other words, while Dr. Junig's opinion may be new, the facts upon which he bases that opinion are not. His opinion is nothing more than another interpretation of the same evidence counsel had in her possession well before Laughrin pled guilty. *See* ***Fosnow***, 240 Wis. 2d 699, ¶12. Additionally, we cannot conclude that Laughrin was not negligent in seeking the evidence—particularly as Laughrin himself admits that

trial counsel should have garnered Dr. Junig's opinion earlier. *See* ***Kivioja***, 225 Wis. 2d at 294.

(2) Trial counsel was not ineffective for failing to properly investigate the cause of M.K.'s death or for failing to withdraw.

¶16 Laughrin next challenges the trial court's refusal to hold an evidentiary hearing on his ineffective assistance of counsel claims. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] 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 [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, 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 circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (emphasis added; citations omitted).

¶17 To succeed on this claim, Laughrin must allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To establish deficient

performance, Laughrin must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***id.*** To demonstrate prejudice, Laughrin "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If he fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶18 With these standards in mind, we consider Laughrin's arguments concerning trial counsel's ineffectiveness. After Laughrin was sentenced, he filed a postconviction motion claiming that trial counsel was ineffective in two respects. First, trial counsel failed to properly investigate M.K.'s cause of death. Second, "knowing that there was an arguable claim of ineffective assistance of counsel, Laughrin's trial counsel did not withdraw." Laughrin alleges prejudice in that he would not have pled guilty if he had known about Dr. Junig's testimony. He also argues that counsel's failure to withdraw prevented him from arguing ineffective assistance of counsel as a basis to permit him to withdraw his guilty pleas.

¶19 We conclude, first, that trial counsel did properly investigate M.K.'s cause of death and was therefore not ineffective in this respect. Specifically, Laughrin argues that, "prior to advising him to enter a guilty plea, trial counsel failed to adequately investigate the properties of Suboxone insofar as those properties relate to the risk of death or great bodily harm created by giving M.K. one pill of Suboxone; and, further, whether Laughrin was aware of this risk." He further argues that Dr. Junig's report "calls into question whether Laughrin's conduct in giving M.K. one Suboxone pill, in fact, created a risk of death or great

bodily harm that was unreasonable and substantial," and "calls into [] question whether Laughrin was aware of any such risk."

¶20 As noted, however, trial counsel explained in her motion to withdraw the plea and accompanying affidavit that she "diligently sought any and all evidence that would support Laughrin's defense," including reviewing "over 1000 pages of discovery." Similarly, the trial court found, and Laughrin does not dispute, that the toxicology report and other materials upon which Dr. Junig based his opinion were in the defense's hands prior to the plea.

¶21 Additionally, we note that Dr. Junig's report does not, contrary to what Laughrin argues, show that "administration of Suboxone to M.K. under the circumstances in this case did not create an unreasonable and substantial risk of death or great bodily harm" "and that Suboxone was not a substantial factor in causing M.K.'s death." Rather, the report is inconclusive regarding the cause of M.K.'s death. As noted, the report explains that in order to suffer death from Suboxone, two factors must be present; and in M.K.'s case both of those factors were in fact present:

> In order to suffer death from buprenorphine, at least two factors must be present. First, the person is not tolerant to opioids, namely does not take opioids on a regular basis. Second, the person must take additional respiratory depressants that the person is not tolerant to. The most commonly implicated medications for overdose due to buprenorphine would be members of a class of drugs called benzodiazepines, either clonazepam, brand name Klonopin, lorazepam, brand Ativan, or alprazolam, brand name Xanax.
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> The tragic death of [M.K.] required a confluence of several unfortunate events. She had other, non-opioid respiratory depressants in her system that she was not tolerant to, namely clonazepam. She then was given/took buprenorphine, which because she was not tolerant to opioids caused significant respiratory depression. The

> combination of respiratory depression from the clonazepam and from the buprenorphine appears to have caused her death.

Contrary to what Laughrin argues, this portion of the report strongly supports the allegation that giving Suboxone to M.K. under the circumstances *was* a substantial factor in causing her death. While the report also stated that it was possible that other factors—such as the positioning of M.K.'s body and the consequent airflow available to her—also contributed to M.K.'s death, it most certainly did not conclude that Suboxone did *not* cause it.

¶22 Furthermore, while Laughrin implicitly challenged the plea colloquy in his postconviction motion, the plea colloquy was, as noted, comprehensive. The trial court conducted a thorough plea colloquy in which the court confirmed that Laughrin understood each of the charges he was pleading guilty to and the penalties he faced. As the trial court noted, Laughrin "admitted during the plea hearing that he was aware of the risk of death or great bodily harm from the administration of Suboxone with the drug Clonopin and of its likeliness." Nothing in Dr. Junig's report changes that.

¶23 Therefore, given that trial counsel did in fact prepare quite extensively for Laughrin's case, and given that Dr. Junig's report does not establish that Suboxone was not a substantial factor in causing M.K.'s death, we cannot conclude that trial counsel performed deficiently regarding the timeliness of garnering Dr. Junig's report, or that counsel's performance prejudiced Laughrin. Therefore, Laughrin has not pled sufficient facts entitling him to a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9; ***Wesley***, 321 Wis. 2d 151, ¶23. Accordingly, because counsel did not provide ineffective assistance regarding trial

preparations, we also conclude that trial counsel had no need to withdraw from the case.

(3) Because we independently conclude that trial counsel was not ineffective, we need not consider whether the trial court applied the proper definition of "prejudice" in deciding Laughrin's postconviction motion.

¶24 Laughrin also argues that the trial court applied the incorrect standard of review to Laughrin's postconviction motion. Specifically, he argues that the trial court did not apply the correct definition of "prejudice." Because we have independently determined that trial counsel was not ineffective, we need not address this argument. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground).

(4) Trial counsel was not ineffective for failing to raise ineffective assistance of counsel as a basis to withdraw the plea.

¶25 Laughrin additionally argues that trial counsel was ineffective at the presentencing motion hearing because she did not raise ineffective assistance of counsel as a basis to withdraw the plea. As noted, Laughrin provided only two bases for relief in his postconviction motion: (1) that trial counsel failed to properly investigate M.K.'s cause of death; and (2) that "knowing that there was an arguable claim of ineffective assistance of counsel, Laughrin's trial counsel did not withdraw." He did not argue that trial counsel should have raised ineffective assistance of counsel as a basis to withdraw the plea. He has therefore forfeited his right to argue this issue on appeal. *See* WIS. STAT. § 809.30(2)(h) (an appellant "shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised"); ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 ("As a general rule, issues not raised in the circuit court will not

be considered for the first time on appeal."). Nevertheless, we will address this argument in the interest of justice.

¶26 As noted, the standard for ineffective assistance of counsel claims is well-settled. *See* ***Strickland***, 466 U.S. at 687.

¶27 Laughrin cannot meet this standard because he cannot show prejudice. According to Laughrin, he sustained prejudice due to the fact that "[i]n the postconviction motion, the trial court subjected Laughrin to the onerous 'manifest injustice' standard. Had ineffective assistance of counsel been raised when it should have been, the standard would have been 'fair and just reason.'" We disagree, however, for two reasons. First, the trial court did apply the "fair and just reason" standard to the presentence plea withdrawal proceedings.

> Everything had already been provided and presented. It was there. And just because there is now the belief that—that this risk is somehow able to be argued by this expert as not being as great as was thought…. I don't see that as new evidence. *I don't see it as evidence discovered after the entry of the plea that meets the standard here as a fair and just reason.*

(Emphasis added.) Second, even if this were not the case, as we explained in Part (1) above, under our independent review of the facts, Laughrin did not provide a fair and just reason for withdrawing his guilty plea. Therefore, there is no prejudice in trial counsel's decision not to raise ineffective assistance of counsel as a basis to withdraw the plea. *See* ***id.*** at 694. Because there is no prejudice, we need not determine whether trial counsel provided deficient performance, *see* ***id.*** at 697, and we conclude that trial counsel was not ineffective for failing to raise ineffective assistance of counsel as a basis to withdraw the plea.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.