COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2432-CR **Cir. Ct. No. 2009CF5594**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. SHALLCROSS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Scott R. Shallcross appeals from a judgment of conviction entered upon his guilty pleas to two counts of homicide by intoxicated use of a motor vehicle. He also appeals from an order denying his motion for postconviction relief. Shallcross claims that he is entitled to withdraw his guilty

pleas because his trial counsel was ineffective. We conclude that the circuit court properly denied his claims without a hearing, and we affirm.

BACKGROUND

¶2 According to the criminal complaint, Shallcross was driving a Honda Civic at speeds of eighty to one hundred miles per hour on a city street early in the morning of November 27, 2009, when he struck a pickup truck and killed its occupants, Jeremy Neuenfeldt and Thomas Ballman. Police found Shallcross and a companion, Daniel Gorectke, alive in the Honda but seriously injured, and the two survivors were taken to the hospital. A blood test revealed that Shallcross had a blood alcohol concentration of .158 percent within three hours of the collision. The police questioned Shallcross and Gorectke while the two men were hospitalized. Both men said that Shallcross was driving the Honda at the time of the collision and that he crawled into the backseat of the car afterwards.

¶3 The State charged Shallcross with five crimes, and he retained defense counsel. Incident to a plea bargain, he pled guilty to two counts of homicide by intoxicated use of a motor vehicle. The circuit court imposed two consecutive eighteen-year terms of imprisonment.

¶4 After sentencing, Shallcross retained new counsel and filed a postconviction motion to withdraw his guilty pleas on the ground that his trial counsel was ineffective in numerous ways. In support of his claims, he alleged that his trial counsel failed to take various investigative steps, including hiring experts and seeking recorded witness interviews. He further alleged that toxicological analysis showed that Neuenfeldt had controlled substances in his blood at the time of the collision, and Shallcross complained that his trial counsel

therefore erred by not obtaining toxicology reports regarding Neuenfeldt and Ballman until after Shallcross entered his guilty pleas. Additionally, Shallcross complained that his trial counsel did not seek suppression of his inculpatory statements. The circuit court denied the claims without a hearing, and this appeal followed.

DISCUSSION

¶5 Shallcross seeks plea withdrawal. Because he first sought that relief after sentencing, he must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "Ineffective assistance of counsel can constitute a 'manifest injustice.'" ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted).

¶6 A defendant who claims that trial counsel was ineffective must prove both that trial 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 the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

¶7 To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** 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. In the

context of a guilty plea, a defendant must demonstrate prejudice by showing that, but for trial counsel's errors, the defendant would not have pled guilty but would have insisted on a trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶8 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This also presents a question of law for our independent review. ***Id.*** If, however, the petitioner does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶9 We begin our review of Shallcross's substantive complaints by considering the claim that trial counsel failed to conduct an adequate investigation. Shallcross contends that his trial counsel was ineffective because counsel did not: (1) retain an expert in accident reconstruction; (2) ensure that a private investigator interviewed a citizen witness whose statement to police is reflected in the discovery; or (3) seek recorded interviews with Gorectke or other witnesses. We are not persuaded.

¶10 "[A] defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Shallcross's postconviction motion did not reveal the information that an expert in accident reconstruction, a private investigator's efforts, or recorded witness interviews would have disclosed, nor did the motion reveal why the information would have led Shallcross to plead differently. Because he did not offer specific material facts showing why and how the missing steps would have affected his decision-making in this case, his allegations of failure to investigate are insufficient to require a hearing on his claim that trial counsel was ineffective.

¶11 Next, Shallcross alleges that his trial counsel was ineffective by not obtaining toxicology reports regarding the victims until after he entered his guilty pleas. His postconviction motion shows, however, that his trial counsel sent him a copy of the toxicology reports two months before the sentencing hearing, yet he neither moved to withdraw his guilty pleas before sentencing nor told the circuit court at sentencing that he no longer wished to proceed in light of the reports. Because Shallcross continued with sentencing after his trial counsel gave him documents that he did not have at the time of his pleas, he cannot seek plea withdrawal on the ground that he lacked the documents when he entered his pleas. *See* ***State v. Damaske***, 212 Wis. 2d 169, 192-93, 567 N.W.2d 905 (Ct. App. 1997) (defendant who learned before sentencing that circuit court would consider statements from alleged victims at sentencing could not withdraw his pleas after sentencing on the basis that the circuit court considered those statements). "'The situation is not so much waiver of claimed error, rather it is an abandonment of

right to object by persisting in a plea strategy after the basis for the claim of error is known to defendant.'" ***Id.*** at 193 (citation omitted).

¶12 Moreover, to show prejudice, Shallcross must allege material facts demonstrating why the toxicology reports were exculpatory or would have been relevant to his decision-making. *See* ***Allen***, 274 Wis. 2d 568, ¶33. To satisfy this burden, Shallcross emphasizes that the reports show Neuenfeldt had controlled substances in his blood, and Shallcross argues: "assuming that [Neuenfeldt] was driving ... and that he turned left across traffic with an obstructed view ... it would be a matter of fact for a jury to decide whether or not Neuenfeldt's actions were to blame for this accident."[1] This argument fails to offer material facts that connect the toxicology reports with either Shallcross's decision to plead guilty to homicide by intoxicated use of a motor vehicle or with a viable defense to the charges.

¶13 To obtain a conviction for homicide by intoxicated use of a motor vehicle, the State must prove, *inter alia*, that the defendant's intoxicated operation of a vehicle caused the death of the victim. *See* WIS. STAT. § 940.09(1) (2009-10).[2] Pursuant to WIS. STAT. § 940.09(2), a defendant has a defense to the charge upon proving "'by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant.'" ***State v. Lohmeier***, 205 Wis. 2d 183, 195, 556 N.W.2d 90 (1996) (citation omitted). Thus, a victim's conduct can be

[1] In Shallcross's view, the facts suggest that Neuenfeldt was driving the pickup truck at the time of the collision. He does not identify anything in the record that definitively establishes whether Neuenfeldt or Ballman was the driver.

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

the basis of a statutory defense if, "because of [that] conduct, an accident would have been unavoidable even if the defendant had been driving with due care and had not been under the influence." ***Id.***

¶14 Shallcross points to nothing in the toxicology reports showing that an accident "would have been unavoidable" had Shallcross been sober and driving with due care within the speed limit of forty miles per hour. He identifies nothing in the reports that shows who was driving either of the vehicles involved in the collision or the ways in which either driver behaved behind the wheel. He demonstrates only that one of the reports reveals the presence of controlled substances in the body of a man killed in the collision. As the circuit court explained, "the toxicology reports do not undermine causation." Accordingly, Shallcross fails to show that the toxicology reports were exculpatory or to explain why he would have pled differently if he had first received the reports. In sum, his allegations in regard to the toxicology reports are insufficient to warrant relief. *See* ***Allen***, 274 Wis. 2d 568, ¶¶33-34.

¶15 Shallcross also claims that his trial counsel was ineffective by failing to pursue a motion to suppress his inculpatory statements on the ground that they were involuntary. We disagree.

¶16 "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions." ***Strickland***, 466 U.S. at 691. Here, the record reflects that trial counsel did not file a suppression motion because Shallcross did not want to contest the charges. Trial counsel explained at sentencing: "we talked about the possibility of a ***Miranda***

Goodchild [hearing].[3] Scott Shallcross said 'no, I knew what I was saying, the cops didn't threaten, intimidate me, I wanted to accept responsibility.'"

¶17 Shallcross suggests that his counsel's statements at sentencing should not be given weight in assessing his claim, but that contention is inaccurate. When assessing whether a guilty plea constitutes a manifest injustice, a reviewing court may examine "the totality of the circumstances. 'The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well [as] the defense counsel's statements ... among other portions of the record.'" ***State v. Cain***, 2012 WI 68, ¶31, 342 Wis. 2d 1, 816 N.W.2d 177 (citations omitted, ellipsis in ***Cain***). Here, trial counsel's sentencing remarks explain why Shallcross did not pursue a suppression motion, and the explanation is supported by the record of the plea hearing. During the guilty plea colloquy, the circuit court asked Shallcross whether he had discussed with his trial counsel "fil[ing] any motions seeking suppression of evidence." Shallcross told the circuit court that he had had such a discussion with his trial counsel. He said that he was satisfied with the legal advice that he had received, and that he wanted to give up his rights and plead guilty. Further, Shallcross signed and filed a guilty plea questionnaire and waiver of rights form explicitly confirming his understanding that by pleading guilty he was giving up the right to challenge the constitutionality of any police action, including taking his statement.

[3] In Wisconsin, "hearings considering the admissibility of confessions are known as ***Miranda-Goodchild*** hearings after ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965)." ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798.

¶18 The record shows that Shallcross made the decision to accept responsibility for the crimes in this case rather than file a suppression motion. The decision was his to make. *See* ***State v. Gordon***, 2003 WI 69, ¶21, 262 Wis. 2d 380, 663 N.W.2d 765. His lawyer did not act deficiently by abiding by that decision.

¶19 We need go no further with the analysis. *See* ***Strickland***, 466 U.S. at 697. Shallcross, however, alleged in his postconviction motion that he "was never made aware that he had grounds for a motion to suppress." Therefore, for the sake of completeness, we examine whether Shallcross made a showing that he suffered prejudice because he had viable grounds for a suppression motion that his trial counsel failed to pursue.

¶20 We begin by observing that Shallcross contends his trial counsel should have pursued suppression of his statements on the ground that they were involuntarily made, but he does not dispute receiving the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[4] "'[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare.'" ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted). Thus, to show that trial counsel was ineffective, Shallcross must show that his trial counsel could have successfully demonstrated that this is such a rare case. *See* ***Berggren***, 320 Wis. 2d 209, ¶21

[4] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda***, 384 U.S. at 478-79.

("attorney is not ineffective for not making a motion that would have been denied").

¶21 Circuit courts assess the voluntariness of a custodial statement by conducting "a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407. If, however, "there is no evidence of either physical or psychological coercive tactics by [law enforcement officers], the balancing test is unnecessary." ***Berggren***, 320 Wis. 2d 209, ¶30.

¶22 Here, Shallcross points to his physical condition and the morphine he received at the hospital as bases for challenging his statements, but questioning a suspect who is injured and intoxicated is not improper or coercive police conduct and does not render a statement involuntary. *See* ***State v. Clappes***, 136 Wis. 2d 222, 238-39, 401 N.W.2d 759 (1987). Similarly, police do not act improperly by questioning a hospitalized person who is being treated with morphine. *See* ***State v. Hanson***, 136 Wis. 2d 195, 216, 401 N.W.2d 771 (1987) (no evidence that morphine dose had any effect on voluntariness of defendant's statement).

¶23 Shallcross also is not aided by his contention that the police misled him during his first interview by making "deceitful suggestions" that witnesses had identified him as the driver of the Honda. Shallcross's claim of deceit appears to stem from a belief that, at the time of the first interview, no witness had named him as the driver. This claim is not supported by the record. Shallcross acknowledged in his postconviction motion both that police first interviewed him on a Saturday and that Gorectke identified Shallcross as the driver of the Honda during an evening interview on Friday, November 27, 2009, the date of the

collision. Moreover, assuming without deciding that the police were in some way "deceitful" by confronting Shallcross with allegations that he drove the Honda, deceit and coercion are not the same.[5] *See* ***State v. Albrecht***, 184 Wis. 2d 287, 302, 516 N.W.2d 776 (Ct. App. 1994) (officer's conduct in giving suspect false information, while deceitful, was not coercive and therefore did not render statement involuntary). "In the battle against crime, the police, within reasonable bounds, may use misrepresentations, tricks and other methods of deception to obtain evidence." ***Id.*** at 300.

¶24 Shallcross further suggests that his statements were involuntary because the police did not end the interrogation after he asked: "how do I go about getting a lawyer? Can I try to contact my mother?" A suspect in custody has a constitutional right to counsel during an interrogation, and the police therefore must immediately stop questioning a suspect who unequivocally invokes that right during a custodial interrogation. ***State v. Jennings***, 2002 WI 44, ¶26, 252 Wis. 2d 228, 647 N.W.2d 142. If, however, a suspect makes an ambiguous or equivocal request for a lawyer, the police are not required to stop the interrogation or to ask the suspect clarifying questions. ***Id.***, ¶36.

¶25 Whether a defendant sufficiently invoked the right to counsel is a question of constitutional fact that is resolved using a two-part standard. ***Id.***, ¶20. A reviewing court will uphold the circuit court's findings of historical fact unless they are clearly erroneous but will independently assess the circuit court's application of constitutional principles to the historical facts. ***Id.*** Here, the

[5] We also note that confronting a suspect with inculpatory evidence does not render a confession involuntary. *See* ***Krueger v. State***, 53 Wis. 2d 345, 356, 192 N.W.2d 880 (1972).

relevant historical facts are undisputed, because the DVD that Shallcross filed with his postconviction motion contains the audiorecording of his first interrogation, and he does not challenge the accuracy of that recording. Further, he does not challenge the circuit court's description of the exchange that took place when Shallcross talked about "getting a lawyer." The circuit court found:

> [i]n the recording, just after [Shallcross] says, "[h]ow do I go about getting a lawyer? Can I try to contact my mother?" an officer asks for clarification. "You don't want to talk to us any more?" [Shallcross] responds, "[n]o, no...." The officer then asks, "[i]s it okay to come and talk with you without a lawyer present?" [Shallcross] replies, "[t]hat's fine." He stated he just wanted to clear this up.

¶26 The record thus shows that Shallcross at most posed an ambiguous inquiry about the mechanics of getting a lawyer. That inquiry did not obligate the officers to stop questioning him. *See* ***id.***, ¶36. The officers nonetheless sought clarification, and he agreed that they could talk to him without a lawyer present. Under these facts, Shallcross could not show that he made an unequivocal request for counsel that required suppressing his statements. *See* ***Berggren***, 320 Wis. 2d 209, ¶36 (vague remarks about counsel followed by an agreement to talk to police would not support a viable suppression motion).

¶27 As to Shallcross's inquiry about contacting his mother, "[a] request to speak with family members triggers no constitutional rights in the manner that a request to speak with counsel does." *See* ***State v. Ward***, 2009 WI 60, ¶39, 318 Wis. 2d 301, 767 N.W.2d 236. To be sure, a police officer's refusal to contact the parents of a juvenile suspect is evidence of coercion. ***Id.***, ¶41. Shallcross, however, was not a juvenile when the police questioned him. The record is undisputed that he was twenty-eight years old. His wish for his mother had no constitutional significance.

¶28 In sum, Shallcross fails to demonstrate that a motion to suppress his statements would have been successful. Therefore, his trial counsel was not ineffective by foregoing such a motion. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶29 Shallcross also claims that, if each alleged deficiency in his trial counsel's performance did not prejudice him, he nonetheless suffered prejudice from the cumulative effect of multiple alleged deficiencies. *See* ***State v. Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d 571, 665 N.W.2d 305 (stating that, "in determining whether a defendant has been prejudiced as a result of counsel's deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***"). We reject the claim.

¶30 To demonstrate prejudice from cumulative errors, a defendant must show that "'at least two errors were committed.'" *See* ***United States v. Allen***, 269 F.3d 842, 847 (7th Cir. 2001) (citation omitted). Shallcross, however, has not successfully demonstrated that his trial counsel performed deficiently in any respect. Moreover, his complaints that his trial counsel failed to take various actions are unaccompanied by a showing of what the actions would have accomplished. His allegations, individually and collectively, thus fail to offer anything that might undermine our confidence in the outcome of the proceedings. *See* ***Thiel***, 264 Wis. 2d 571, ¶62 (inquiry when considering cumulative impact is the effect of deficiencies on the reliability of the outcome).

¶31 Shallcross's postconviction motion did not allege sufficient material facts that, if proved, would demonstrate that trial counsel's performance was prejudicially deficient. The decision to deny Shallcross's claims without a hearing

therefore rested in the circuit court's discretion. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We review that decision solely to determine whether the circuit court erroneously exercised its discretion. *See* ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 673 N.W.2d 369. In light of our discussion, we are satisfied that the circuit court appropriately declined to permit Shallcross an opportunity for further exploration of claims that he failed to show had merit.[6] *See* ***Bentley***, 201 Wis. 2d at 313 (defendant seeking plea withdrawal may not rely on unsupported allegations, hoping to substantiate them at a hearing).

¶32 We close by noting that the statement of issues in Shallcross's opening brief poses the question: "[w]as Shallcross entitled to post[]conviction discovery?" Nowhere in his table of contents, however, does he direct our attention to any portion of the brief devoted to an argument in regard to this issue, and his brief-in-chief contains little more than passing references to this issue subsumed within his discussion of trial counsel's alleged ineffectiveness. Although Shallcross offers some additional remarks related to postconviction discovery in his reply brief, our review of his appellate submissions discloses no argument that sufficiently explains why any material he might hope to obtain in postconviction discovery is consequential and would have probably changed the outcome of the proceedings. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588

[6] In his reply brief, Shallcross asserts that his postconviction motion was "by no means compressive [sic]," and he offers "a more exhaustive list" of errors that he might have alleged in that motion. We assess the sufficiency of a postconviction motion, however, solely by examining the allegations contained in the four corners of the motion and not any additional material in the appellant's briefs. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, we do not consider issues presented for the first time in a reply brief. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999).

N.W.2d 8 (1999). We do not address arguments that are insufficiently developed. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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