COURT OF APPEALS
DECISION
DATED AND RELEASED

November 28, 1995

NOTICE

No. 94-3314-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TURHAN V. TAYLOR,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JANINE P. GESKE and DAVID A. HANSHER, Judges.[1] *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Turhan V. Taylor appeals *pro se* from a judgment of conviction for first-degree reckless homicide, as a habitual criminal, and from

[1] The Hon. Janine P. Geske entered the judgment of conviction. The Hon. David A. Hansher presided over and denied Taylor's postconviction motion to withdraw his ***Alford*** plea.

an order denying his postconviction motion to withdraw his plea. The conviction results from a bifurcated proceeding in which Taylor entered an ***Alford*** plea on the question of guilt, and received a bench trial on the question of his responsibility for the offense. He presents this court with three issues for our review: whether the trial court erred by failing to grant his postconviction motion to withdraw his ***Alford*** plea; whether the trial court erroneously found that at the time of the crime he had the substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law; and whether the trial court erred by including the "habitual criminality" penalty enhancer in his judgment of conviction. We reject all three of Taylor's arguments and affirm.

The trial court accepted the following facts, as provided in the criminal complaint, Taylor's statement to police, and the preliminary hearing testimony, as a factual basis for Taylor's ***Alford*** plea. Taylor met the victim, Charles Hiler, on the evening of November 13, 1992, outside a City of Milwaukee tavern. Hiler offered Taylor money in exchange for sex, and when Taylor agreed, Hiler took him to his apartment. They had sexual relations and Taylor spent both that night and the following day with Hiler.

The next night, Taylor and Hiler got into an argument. Taylor tried to leave the apartment, but the door was bolted, preventing his exit. When he tried to leave through another door, Hiler demanded that he stay. According to Taylor, at that point he picked up a carving knife in order to "persuade" Hiler to let him leave. Hiler then threw an afghan blanket at Taylor. Taylor "freaked out" and fatally stabbed Hiler in the chest. Taylor took the keys to Hiler's car and left the apartment with the vehicle.

Police arrested Taylor and the State charged him with first-degree intentional homicide while armed and operating a motor vehicle without owner's consent, both as a habitual criminal. Taylor's counsel sought the appointment of a psychiatrist in order to evaluate a possible plea of not guilty by reason of mental disease or defect, based on a claim that at the time of the homicide Taylor was suffering from post-traumatic stress disorder resulting from one or more gang rapes Taylor had experienced while incarcerated in the Missouri prison system. One week before the trial, the prosecutor orally informed Taylor that he was going to amend the information and add an armed robbery count to the original charges.

On the scheduled trial date, the parties informed the court that a plea had been negotiated. In exchange for Taylor's ***Alford*** plea in the guilt phase of the bifurcated proceeding, the prosecutor agreed to reduce the first-degree intentional homicide charge to first-degree reckless homicide as a habitual criminal, and to dismiss the operating a motor vehicle without the owner's consent charge. The prosecutor additionally agreed that, in the event that Taylor were found responsible in the second phase of the bifurcated proceeding, the prosecutor would not recommend a specific prison term during sentencing.

At the hearing on the plea agreement, Taylor stated that it was his understanding of the agreement that first-degree reckless homicide was a 30-year felony and habitual criminality added a potential 10-year enhancement. The trial court and Taylor had a prolonged colloquy concerning Taylor's understanding of the agreement and its ramifications. The court repeatedly asked the defendant if he understood the plea agreement he had made with the prosecutor and he stated a number of times that he did.

Taylor waived a jury trial on the second phase of the bifurcated proceedings and it was conducted to the bench. During this phase, the parties presented conflicting expert testimony on the issue of Taylor's mental state at the time of the homicide. Psychologists Kenneth Smail and Calvin Langmade testified that they believed Taylor suffered from post-traumatic stress disorder at the time of the homicide, but while Langmade testified that the defendant was not able to appreciate the wrongfulness of his conduct at the time of the incident, Smail concluded that he was. Doctor George Palermo testified that Taylor was not suffering from post-traumatic stress disorder, but only suffering from an antisocial personality disorder and from cocaine abuse. The trial court ultimately concluded that Taylor had been suffering from a mental defect at the time of the slaying, but that he had failed to meet his burden of showing that he was substantially unable to appreciate the wrongfulness of his conduct or to conform his behavior to the law at the time of the homicide. Thereafter, the trial court sentenced Taylor to a fifteen-year term of incarceration.

In November 1994, Taylor filed a *pro se* postconviction motion for withdrawal of his ***Alford*** plea, arguing: (1) that the prosecutor had erroneously exercised his discretion in overcharging him in the original complaint; (2) that the bindover at the conclusion of the preliminary hearing was legally

insufficient; (3) that the plea was coerced by the state, evidenced by the prosecutor's stated intention to file an additional charge at the commencement of the trial; and (4) that Taylor was denied effective assistance of counsel, which thereby affected the voluntary, knowing, and intelligent submission of his plea. The trial court denied Taylor's motion without an evidentiary hearing on December 1, 1994. Taylor now appeals from both the original judgment of conviction and the order denying his motion for postconviction relief.

Taylor contends that he should be permitted to withdraw his ***Alford*** plea. In addition to his four previous assertions made in his postconviction motion concerning the alleged deficiencies surrounding his ***Alford*** plea, Taylor further asserts that the trial court's denial of postconviction relief without an evidentiary hearing was an erroneous exercise of discretion. We address each assertion *seriatim*.

The first issue we address is whether the trial court erroneously exercised its discretion by denying Taylor's postconviction motion without an evidentiary hearing. We conclude the trial court properly exercised its discretion.

If a motion to withdraw a guilty plea after judgment and sentence alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Tatum***, 191 Wis.2d 548, 551 n.2, 530 N.W.2d 407, 407 n.2 (Ct. App. 1995) (citing ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979) and ***State v. Washington***, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993)). Where the trial court does not hold such a hearing and the defendant challenges this determination, we independently review the allegations and moving papers to determine whether they allege facts sufficient to raise a question of material fact necessitating a hearing. ***Id***. at 551, 530 N.W.2d at 408 (citing ***State v. Toliver***, 187 Wis.2d 346, 360-61, 523 N.W.2d 113, 118 (Ct. App. 1994)).

A trial court must grant a defendant's request to withdraw a guilty or no contest plea after sentencing only if the defendant establishes by clear and convincing evidence that the withdrawal of the plea is necessary to correct a manifest injustice. ***State v. Woods***, 173 Wis.2d 129, 136, 496 N.W.2d 144, 149 (Ct. App. 1992). A conclusory allegation of manifest injustice unsupported by

any factual assertions does not entitle Taylor to an evidentiary hearing on a motion to withdraw a guilty plea. *See* ***Washington***, 176 Wis.2d at 214, 500 N.W.2d at 335.

We now review the allegations made by Taylor in support of his motion to withdraw his plea. Taylor first claimed that the prosecutor failed to prove intent at the trial court level. The only support for his contention was that "the record is completely devoid of facts from which intent to cause death can be inferred." While Taylor was originally charged with first-degree intentional homicide, he pleaded to the amended charge of first-degree reckless homicide. No proof of intent to kill was necessary on the amended charge and thus there was simply no reason for mandating an evidentiary hearing on this allegation.

Taylor next challenged the adequacy of the bindover for trial, but failed to show how the bindover was inadequate and failed to cite authority supporting the proposition. In the absence of supporting facts, this allegation was merely a conclusory statement which was insufficient as a matter of law for compelling an evidentiary hearing. Further, this defense was waived when Taylor entered into the ***Alford*** plea knowingly, intelligently and voluntarily, as evidenced by the transcript of the colloquy at the time his plea was entered.

Taylor's third challenge to the validity of the plea was alleged prosecutorial coercion by threat of increased charges. Taylor offered no additional support for the trial court's consideration, but only reiterated facts known at the time the plea was entered. Approximately a week before the scheduled trial date, at the status hearing, the prosecutor informed Taylor that the charge of armed robbery was being considered. This charge, however, was not filed as a condition of the ***Alford*** plea. Taylor asserts that "the state[']s stacking of added potential penalties should the defendant choose to proceed to trial only served to increase the pressure on (the defendant)," and that the combined pressures caused him to enter the plea. The prosecutor was well within his authority to consider additional charges, and Taylor sets forth no additional facts that warrant an evidentiary hearing on this issue. Thus, the trial court could properly reject this argument without a hearing.

Finally, Taylor asserts that he received ineffective assistance of trial counsel. While alleged ineffective assistance of counsel is a legitimate basis to

request post-sentencing withdrawal of a guilty plea, ***Washington***, 176 Wis.2d at 213-14, 500 N.W.2d at 335, to receive a ***Machner*** hearing on the issue defendants must still advance sufficient allegations in their pleadings to raise a question of fact. Taylor's pleadings did not meet this requirement and, therefore, the trial court could properly reject Taylor's argument without a hearing.

Wisconsin uses a two-pronged test set out by the Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984), to review effectiveness of trial counsel. ***Tatum***, 191 Wis.2d at 555, 530 N.W.2d at 409. The first requirement focuses on trial counsel's performance and requires that the defendant show that counsel's performance was deficient. ***Tatum***, 191 Wis.2d at 555, 530 N.W.2d at 409. This demonstration must defeat a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990).

The second of the ***Strickland*** requirements is that the defendant demonstrate that the errors were prejudicial; that is, serious enough to render the resulting conviction unreliable. ***Tatum***, 191 Wis.2d at 555, 530 N.W.2d at 409. We will accept the trial court's findings of fact unless they are clearly erroneous; however, the trial court's determinations on counsel's performance and whether it was prejudicial are questions of law that we review *de novo*. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Further, if the defendant cannot show one prong of the test, we need not address the other. ***Strickland***, 466 U.S. at 697.

Taylor maintained in his motion that his counsel was ineffective in failing to challenge the prosecutor's original charging decision; to pursue a motion challenging bindover at the preliminary hearing; to inform him of a legal basis for objecting to the State's filing of an amended information; and to advise Taylor concerning a self-defense defense. He also alleged that counsel had a conflict of interest arising out of counsel's alleged acceptance of a position with the United States Attorney in Chicago, Illinois.

The trial court concluded both, *inter alia*, that the plea colloquy completely refuted Taylor's allegations and that Taylor had failed to allege sufficient facts in his allegations to raise a question of fact necessitating a hearing. Therefore, as a matter of law, the trial court concluded that Taylor's

allegations of ineffective assistance of counsel as pleaded in his motion were insufficient to establish by clear and convincing evidence that withdrawal of his ***Alford*** plea was necessary to correct a manifest injustice. After our review of the allegations of counsel's performance, we conclude that the trial court properly denied Taylor's motion without a hearing. None of the allegations raise questions of fact necessitating a hearing, and, further, none rise to the level of prejudice necessary under ***Strickland***.

Taylor next challenges the trial court's determination that he failed to meet his burden of proving that he was substantially unable to appreciate the wrongfulness of his conduct or conform his behavior to the law at the time of the offense.

Our standard of review on a finding of a defendant's responsibility for his or her actions is set forth in ***Schultz v. State***, 87 Wis.2d 167, 274 N.W.2d 614, (1979):

> The issues of credibility of witnesses and whether the defendant has met his burden of proving lack of capacity by reason of mental defect are for the trier of fact to determine. In cases of conflicting expert testimony, it is the role of the trier of fact to determine weight and credibility. This role is not different when the trial court, instead of a jury makes the determination of capacity under sec. 971.15. Even when the state presents no expert testimony of lack of capacity, the trier of fact is not obliged to believe defense experts, at least where other evidence undercuts their opinion.

Id. at 173, 274 N.W.2d at 617.

Taylor insists that this court should review the trial court's determination on a *de novo* basis. It is, however, the role of the fact finder—in this case, the bench—to decide issues of fact. The trial court already considered the conflicting testimony of the two doctors and, based on weight and

credibility attributed to each doctor's testimony, determined that Taylor was responsible for his actions. The decision of the fact-finder should stand, if "[t]here is nothing so inherently unreasonable about [the doctor's] opinion as to make it incredible as a matter of law." ***Id***. at 173-74, 274 N.W.2d at 617. Given the evidence presented at the hearing, it was entirely reasonable for the trial court to conclude that Taylor had failed to sustain his burden.

The final issue on appeal is whether Taylor's habitual criminal status, *see* § 939.62, STATS., contained in the judgment of conviction, is invalid. Taylor cites ***State v. Harris***, 119 Wis.2d 612, 350 N.W.2d 633 (1984), as authority for his argument that the reference to his habitual criminal status, § 939.62, STATS., should be deleted from the judgment of conviction.

Taylor's reliance on ***Harris*** is misplaced, however, as it involved imposition of an improper sentence which erroneously allocated a portion of the sentence based on the defendant's habitual criminal status. ***Harris*** merely condemns the improper allocation of a portion of a sentence to a defendant's status as a habitual criminal, not the citation of a defendant's previously-adjudicated habitual criminal status in the judgment of conviction. Taylor's sentence is distinguishable in that there is no improper sentence to vacate because the entire sentence was properly within the ordinary statutory maximum. There is no error here.

By the Court.—Judgment and order affirmed.

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