COURT OF APPEALS
DECISION
DATED AND RELEASED

December 17, 1996

NOTICE

No. 95-1447

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY BARNER,

Defendant-Appellant.

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

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

PER CURIAM. Troy Barner, *pro se*, appeals from an order denying his postconviction motion for relief. He raises essentially the following issues for review: (1) whether the trial court erred when it denied his postconviction motion without a hearing; (2) whether the trial court based its sentence on inaccurate information; and (3) whether his sentence was unduly harsh. We conclude that the trial court properly denied Barner's postconviction motion

without a hearing because Barner's motion contained only conclusory allegations. Further, Barner has not shown how his sentence was based on inaccurate information. Finally, he cannot raise a claim challenging the trial court's sentencing discretion in a motion pursuant to § 974.06, STATS. Accordingly, we affirm the order denying postconviction relief.

I. BACKGROUND.

Barner pleaded guilty to one count of armed robbery, one count of first-degree reckless injury, and one count of first-degree recklessly endangering safety. The last count arose out of an incident where gunshots were exchanged between Barner and another man. The other two counts arose out of an incident that occurred the next day. Barner, driving a car, drove into the car in front of him. Barner then exited his car, ordered the driver to give him his necklace, and when he refused, shot the victim with a handgun and tore the necklace from the victim's neck. Barner admitted to police that the encounter occurred, but told them that the gun went off in a struggle and the necklace fell off.

Before accepting Barner's guilty plea, the trial court conducted the following colloquy with Barner and his counsel:

> THE COURT: Sir, do you understand by pleading guilty to those three counts in the criminal complaint and the Information that you are waiving those constitutional rights that are contained in the form that you signed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand the complaint, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Discussed it with your lawyer?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the penalties the Court could impose?

THE DEFENDANT: Yes, sir.

THE COURT: Discussed those with your lawyer also?

THE DEFENDANT: Yes, sir.

THE COURT: You also understand by pleading guilty to those three counts you are going to be waiving your right to trial by jury as to each count. And all twelve jurors must agree unanimously as to a verdict in each count. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You would be waiving your right to have the State prove you guilty beyond a reasonable doubt as to each and every single element of the offenses. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In addition thereto you are going to be waiving your right to cross examine the State's witnesses and call witnesses on your own behalf. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you are going to be waiving any defenses that you might have to each of those counts.

THE DEFENDANT: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

[DISTRICT ATTORNEY]: I didn't hear an answer.

THE COURT: He said yes.

[DISTRICT ATTORNEY]: Okay. Thank you.

THE COURT: Is there anything that you do not understand by pleading guilty to those three counts?

THE DEFENDANT: No, sir.

THE COURT: Discussed everything with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: And, counsel, you are satisfied the defendant's intelligently, voluntarily and knowingly waiving those constitutional rights?

[DEFENSE COUNSEL]: Yes, I am, Judge.

Barner faced a total possible sentence of thirty-five years for the three offenses. On May 27, 1992, the trial court sentenced him to a total twenty-one-year sentence.

Nearly three years later, in April 1995, Barner filed a motion pursuant to § 974.06, STATS., requesting a plea withdrawal or sentence modification. He raised myriad reasons in his motion, including: (1) that he did not knowingly enter his guilty plea because "he was unaware of the penalties the court could imposed [sic] by pleading guilty to the offenses;" (2) that he received ineffective assistance of trial counsel because his counsel allegedly promised him that he could receive "no more than 10 years in prison for pleading guilty to the offenses;" (3) that he pleaded guilty because of "threats on his life" by "inmates in the county jail;" and (4) that information in his presentence investigation report was inaccurate.

The trial court denied Barner's motion without a hearing. This appeal follows.

II. ANALYSIS.

A. Need for evidentiary hearing.

Barner first argues that the trial court erred when it denied his postconviction motion without a hearing. We disagree.

Our standard of review on this issue was recently stated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53. Further, if "`the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id***. at 309-10, 548 N.W.2d at 53 (citation omitted). We address each of the issues raised by the trial court *seriatim*.

1. Ineffective assistance of counsel.

To succeed in an ineffective assistance of counsel claim the defendant must satisfy the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). Thus, "a defendant must show that counsel's performance

was both deficient and prejudicial." ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Barner alleged in his postconviction motion that: (1) "his attorney promised and coerced him into pleading guilty by telling him that he would receive no more than a 10 year sentence as a result of pleading guilty;" and (2) his trial counsel did not give him his presentence investigation report in a timely manner and that he did not get a chance to check the report for misinformation.

In order to show prejudice under ***Strickland***, Barner needed to show that there was a reasonable probability that he would not have pleaded guilty but for his counsel's alleged error. ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54. Here, Barner made only conclusory allegations in his motion that he would have insisted on a trial if he would have known he could be sentenced for 35 years. The trial court could properly reject Barner's argument on this issue without a hearing because he made only conclusory allegations. ***Id***. at 309-10, 548 N.W.2d at 53.

Further, the trial court could properly reject Barner's second claim of ineffective assistance of counsel because the record refutes his argument. Barner alleged that he did not have time to read the presentence investigation report because his counsel did not provide it to him in a timely manner. Barner did not present anything, however, to refute his counsel's statement to the trial court at the plea hearing that counsel had gone over the presentence report with him and that he had personally read the report. Barner has only raised conclusory allegations to the contrary.

2. Knowing guilty plea.

Barner next argues that the trial court should have granted him an evidentiary hearing on his claim that he would not have pleaded guilty had he known he could be sentenced to thirty-five years in prison for the three offenses. We reject this argument.

The trial court found that the record of the plea hearing showed that Barner was both aware of the maximum penalties and aware that he could receive the maximum penalties. The trial court's finding was based on the fact that Barner had signed the guilty plea questionnaire and waiver of rights form that informed him of the penalties and informed him that the trial court was not bound by any agreement between Barner and the State. Further, Barner acknowledged that he understood the penalties that the court could impose. As such, there was no reason to grant an evidentiary hearing on this issue because the record conclusively demonstrated that he was not entitled to relief. ***Id***. at 310, 548 N.W.2d at 53 (citation omitted).

3. Involuntary guilty plea.

Barner also argues that his plea was not voluntary because he was partly motivated by a desire to get away from county jail inmates. His motion alleged: "part of the reason I pled guilty was to get out of the County Jail so I wouldn't be around those people who were threatening me."

Again, this is a conclusory allegation. Barner did not provide sufficient facts to support this allegation. *See* ***id***. at 313-14, 548 N.W.2d at 55. As such, the trial court could reject his claim without a hearing.

B. Sentencing information.

Barner next argues that his sentence was based on inaccurate information. The trial court rejected this argument, concluding that the trial court did not base its sentence on the alleged inaccurate information. We conclude that Barner has not shown how this information, if inaccurate, prejudiced him.

A defendant has a constitutional right to be sentenced on the basis of accurate information. ***State v. Coolidge***, 173 Wis.2d 783, 788, 496 N.W.2d 701, 705 (Ct. App. 1993). To gain relief, however, the defendant must show by clear and convincing evidence that the information was both inaccurate and prejudicial. ***Id***. at 789, 496 N.W.2d at 705. We review this question *de novo*. ***Id***.

Barner's presentence report contains the following statement:

> The defendant told me he was placed on probation in 1986 or 1987 on an Assault and Battery charge. He indicated that he spent a short period of time, about three months, in a facility called St. Charles. I have written to the Cook County Juvenile Court for specifics on the defendant's juvenile record but there has been no response.

We need not determine whether the above information was inaccurate as Barner claims, because there is no showing of prejudice based on this information. The trial court, in rejecting Barner's claim, stated that the sentence was based on other aggravating factors not on any juvenile conduct. The sentencing record supports this conclusion. The trial court did focus on Barner's past criminal record in sentencing him, but Barner had been convicted twice in Wisconsin of assault crimes and was facing another charge in Illinois. Thus, there is no showing that any reference to Barner's juvenile adjudications, even if inaccurate, effected the trial court sentence.

C. Unduly harsh sentence.

Finally, Barner argues that his twenty-one-year sentence was unduly harsh. We reject this argument because a challenge to a judge's sentencing discretion cannot be made in a § 974.06 motion when the sentence is within the statutory maximum. *See* ***Smith v. State***, 85 Wis.2d 650, 661, 271 N.W.2d 20, 25 (1978). Here, Barner's sentence was within the possible maximum of thirty-five years.

III. SUMMARY.

In sum, the trial court properly rejected Barner's motion without a hearing because he raised nothing more than conclusory allegations. Further, we reject Barner's attacks on his sentence because he has not shown any prejudice arising out of the alleged inaccurate sentencing information and because his attack on the trial court's sentencing discretion was improperly raised.

By the Court.—Order affirmed.

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