COURT OF APPEALS
DECISION
DATED AND RELEASED

June 3, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1515-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY L. CLAY,

DEFENDANT-APPELLANT,

ANTONIO DANTA AMPHY,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

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

PER CURIAM. Gregory L. Clay appeals from a judgment of conviction, following his guilty pleas, to the amended charges of second-degree

reckless homicide while armed and first-degree recklessly endangering safety while armed, each as party to a crime. He also appeals from an order denying his postconviction motion. Clay argues that the trial court erred in denying his motion to withdraw his guilty pleas and in concluding that his trial counsel was not ineffective. We reject his arguments and affirm.

I. BACKGROUND

On September 14, 1994, Clay was contacted by his friend, Antonio Amphy, Clay's co-defendant in this case, to get some guns and accompany him to settle a dispute with some members of a gang, at a prearranged time and place. On arrival at the meeting place, Amphy and Clay, armed with a shotgun and .32 caliber handgun, respectively, began walking into an alley where the gang members were stationed. Within moments, the two groups exchanged gunfire. Stephen Beamon, an innocent bystander working on a car parked near the alley, was killed by one of the gunshots. Andre Carter, working with him, was not struck by gunfire but ultimately became the subject of the recklessly endangering charge.

The State originally charged Clay with one count of first-degree intentional homicide, but later amended the charges. On January 17, 1995, Clay pled guilty to the reduced charges. The trial court sentenced him to twenty-four years in prison. Clay then filed a postconviction motion, which alleged: (1) that his pleas were defective; (2) that his guilty pleas were not knowingly, voluntarily, or intelligently entered; and (3) that his trial counsel was ineffective. Following a hearing, the trial court denied his motion.

II. ANALYSIS

Clay first claims that the trial court erroneously exercised discretion when it denied his motion to withdraw his guilty pleas. He contends that his pleas were defective because the trial court failed to determine whether he understood the rights he was giving up or the elements of the offenses to which he was pleading guilty. Specifically, Clay argues that "[t]he defect in the plea hearing is that the Court, in meeting the requirements under sec. 971.08, Stats., relie[d] on answers to questions of a 'yes,' 'no,' and 'that's correct' type. This fail[ed] to determine [his] understanding and voluntariness of the rights he [was] giving up, and the elements of the offense to which he [was] pleading guilty." Clay also contends that he did not knowingly, voluntarily, or intelligently enter his pleas because his lawyer failed to advise him of the elements of the crimes and the possible defenses.

The State responds that Clay has not shown that the plea hearing was defective, and argues that the trial court engaged in a complete, legally effective colloquy with the defendant, fulfilling all the statutory obligations. In addition, the State contends that any doubt about the knowing and voluntary nature of Clay's plea is dispelled by a review of the postconviction hearing. The State is correct.

A postconviction motion to withdraw a guilty plea after sentencing is addressed to the discretion of the trial court and is granted only when necessary to correct a "manifest injustice."[1] ***State v. Giebel***, 198 Wis.2d 207, 212, 541

[1] Under ***State v. Krieger***, 163 Wis.2d 241, 471 N.W.2d 599 (Ct. App. 1991):

> [E]xamples of [manifest injustice] include: (1) ineffective assistance of counsel; (2) the defendant did not personally enter

(continued)

N.W.2d 815, 817 (Ct. App. 1995). To challenge a plea, a defendant must meet two threshold requirements. ***Id.*** at 216, 541 N.W.2d at 818. "First, the defendant must make a showing of a prima facie violation of § 971.08, STATS., or other mandatory duties." ***Id.*** Whether a defendant has made a prima facie showing is a question of law, which we review *de novo*. ***State v. James***, 176 Wis.2d 230, 237, 500 N.W.2d 345, 348 (Ct. App. 1993). "Second, the defendant must allege that he or she in fact did not know or understand the information that should have been provided at the plea hearing." ***Giebel***, 198 Wis.2d at 216, 541 N.W.2d at 818.

If the defendant makes a showing of a prima facie violation, then the burden shifts to the State to show by clear and convincing evidence that, despite the defect, the plea was knowingly, voluntarily, and intelligently entered. ***Id.*** at 216, 541 N.W.2d at 819. Whether, in spite of the plea defect, the defendant nonetheless knowingly and voluntarily entered his pleas is a matter within the discretion of the trial court, which we review with deference. ***State v. Mohr***, 201 Wis.2d 693, 701, 549 N.W.2d 497, 500 (Ct. App. 1996). Thus, we will reverse a trial court's decision only if the court has erroneously exercised discretion. ***Id.***

Clay first suggests that the trial court failed to ascertain whether he understood the charges and the rights he was waiving by pleading guilty. The record, however, reveals that the trial court satisfied the legal requisites. *See*

> or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

Id. at 251 n.6, 471 N.W.2d at 601 n.6.

generally ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The trial court addressed Clay personally to determine whether he understood the plea agreement, the amended charges, and the rights he was waiving, as memorialized in the guilty plea questionnaire and waiver of rights form. The trial court questioned Clay's counsel who reported that he had reviewed the charges with Clay and had explained the plea agreement to him. In the few instances in which Clay's responses showed hesitancy, the trial court took care to ensure that Clay had the requisite understanding.[2] After clarifying Clay's responses, the trial court

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[2] Clay claims that the following excerpt illustrates his confusion:

> THE COURT: Mr. Clay, what is your plea to the amended charge in Count 1 of second degree reckless homicide, while armed, as it relates to Steven Beamon, what's your plea?
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> THE DEFENDANT: For ten years.
>
> THE COURT: What's your plea to the charge?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: And in Count 2 of the amended case now is first degree recklessly endangering safety, and the victim's name is Andre Carter, what is your plea, sir?
>
> THE DEFENDANT: Andre Carter? I don't know, guilty.

The trial court continued, however, to assure itself of Clay's understanding:

> THE COURT: Do you understand that Andre Carter is the person who's alleged to have had his life recklessly endangered while you were armed?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Or while your coactor was armed, do you understand that charge?
>
> THE DEFENDANT: Yes, I do.

concluded that Clay had "voluntarily, intelligently, and freely waived [his] right to a trial ... [and] order[ed] that [his] guilty pleas be entered in the record ...."

At the postconviction hearing, Clay admitted that he had understood the plea colloquy. Clay testified that he had had time to think about the plea agreement and discuss it with his father; that he had understood that he was originally facing a forty-five-year maximum on the single charge of first-degree reckless homicide; that he had known the plea agreement reduced his maximum exposure to twenty-four years; that he had been truthful when he stated that he was satisfied with his attorney and that, prior to his pleas, he had had no questions for his attorney or the court.

At the conclusion of the postconviction hearing, the trial court ordered the parties to submit briefs. On May 6, 1996, the trial court denied the defendant's motion, concluding:

> The credible facts adduced at the Machner hearing revealed that both trial counsel and the defendant perceived significant time was spent discussing the evidence and the defendant's options in this case…. The hearing record revealed "selective" memory of the defendant as to his level of review, [and] the details of what he reviewed with his lawyer….

We agree. The record establishes that Clay gave appropriate answers during the plea colloquy—responses that would not have been made by a person blindly following counsel's advice to answer "yes" to every question. *See* ***Bangert***, 131 Wis.2d at 266-72, 389 N.W.2d at 22-27. Moreover, the evidence at the ***Machner***[3] hearing, including Clay's testimony, supported the trial court's conclusion that

[3] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Clay understood the elements of the crimes to which he pled and entered his pleas knowingly, voluntarily, and intelligently.

Clay next claims that his trial counsel was ineffective. In making this claim, Clay repeats many of the same arguments that formed the bases for his motion to withdraw his guilty pleas. Additionally, he asserts that the facts do not support the amended charges and, therefore, that counsel was deficient for allowing him to enter guilty pleas to the charges. We disagree.

In evaluating a defendant's claim of ineffective assistance of counsel, this court applies the two-part test enunciated in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id.

Whether counsel's performance was deficient and prejudicial are questions of law that we review *de novo.* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). We need not address both the deficient performance and prejudice prongs if the defendant fails to make a sufficient showing regarding one of them. ***Id.*** At a postconviction hearing on the claim, the trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses. *See* ***Dejmal v. Merta***, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). We will reverse a trial court's findings of fact only if they are "clearly erroneous." ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985).

The ***Machner*** hearing evidence supports the trial court's conclusion that Clay's attorney was not ineffective. Clay's counsel testified that he had discussed the facts of the case with Clay and had told him that a self-defense theory might be possible because the bullet that killed Beamon did not come from either Amphy's or his gun. He further explained, however, why he told Clay that he thought such a defense would be without merit. Citing § 939.48(2), STATS., (provocation affects the privilege of self-defense), counsel stated that he believed that the court might not even give a self-defense instruction. Trial counsel also explained how and why he advised Clay that the endangering charge had a factual basis.[4]

Counsel also stated that, in preparation for this case, he hired an investigator who spent over thirty hours investigating the information he (counsel) had received from Clay. In addition, counsel testified that he had reviewed the discovery material with Clay and had had four meetings with him, including one final meeting just prior to the plea hearing. During this final meeting, counsel again reviewed possible defenses, explained the details of the plea agreement and the amended charges, and presented Clay with the guilty plea questionnaire. Counsel testified that, at the conclusion of this final meeting, he was confident that Clay understood the terms of the agreement and its ramifications.

After considering the briefs on the postconviction motion, the trial court concluded:

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[4] *See* ***State v. Spears***, 147 Wis.2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988) ("A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts ... even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference."); *see also* ***State v. Stanton***, 106 Wis.2d 172, 316 N.W.2d 134 (Ct. App. 1982) (defendant charged as party to a crime may be liable for the actions of his co-actors).

> The record in this case does not support the defendant's claim of defective assistance or prejudice. The record discloses that the trial counsel spent a sufficient amount of time talking with the defendant about his case, reviewed the case files records and the law with the defendant. Additionally, trial counsel indicated that the defendant's decision to plead was deliberately done and even involved the defendant's consultation with his father about the defendant's options.
>
> The defendant failed to show to this Court that his trial attorney's performance was deficient.... Likewise, the defendant's motion to withdraw his plea[s] based on a claim of manifest injustice also fails since the underpinnings of his complaint is ineffective assistance of counsel, which is unsupported by the record.

We agree. Accordingly, we conclude that the trial court correctly denied Clay's postconviction motion.[5]

By the Court.—Judgment and order affirmed.

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

[5] Clay further claims that his guilty pleas should be set aside because all the previous arguments, added together, create a "manifest injustice." In his brief to this court, Clay generally alleges that his "motion and supporting affidavit shows [sic] that facts, if true, would clearly establish manifest injustice." Yet Clay never explains precisely what he means and only refers us to an affidavit, which is not included in his appendix, and for which he provides no record reference. Accordingly, we decline to consider his claim for lack of specificity. *See* § 809.19(1)(e), STATS., and ***State v. Peck***, 143 Wis.2d 624, 639-40 n.7, 422 N.W.2d 160, 166 n.7 (Ct. App. 1988) (appellant made factual assertion in his brief-in-chief but failed to refer this court "to any other place in the record where such evidence was offered. We thus disregard his unsupported statements.").