COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1956-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT M. MADDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert M. Madden appeals from a judgment entered after he pled guilty to one count of robbery and two counts of armed robbery contrary to WIS. STAT. §§ 943.32(1)(a), 943.32(1)(b) and 943.32(2)

(1997-98).[1] He also appeals from a postconviction order denying his motion seeking to withdraw his guilty pleas. Madden claims: (1) he should be permitted to withdraw his pleas because they do not conform to the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 289 N.W.2d 12 (1986), and WIS. STAT. § 971.08; (2) he should be permitted to withdraw his pleas because the trial court failed to advise him of the consequences of a read-in offense and the trial court failed to inform him that it was not bound by the plea agreement; (3) his trial counsel provided ineffective assistance; (4) the trial court should not have denied his postconviction motion without holding an evidentiary hearing; and (5) the trial court should have advised Madden that it intended to impose a "sentence significantly in excess of any recommended pursuant to the plea agreement." Because the plea colloquy did not violate the law, because Madden cannot prove his ineffective assistance of trial counsel claim, because the trial court was not required to hold an evidentiary hearing, and because the trial court was not required to advise Madden regarding its sentencing intentions, we affirm.

I. BACKGROUND

¶2 Madden was charged with the commission of robbery and armed robbery, which occurred in November 1996. He entered into a plea agreement with the State, wherein he agreed to plead guilty to one count of robbery and two counts of armed robbery, with an additional armed robbery "read-in" at sentencing. In turn, the State agreed to recommend incarceration, but leave the length of the sentence to the discretion of the trial court.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 On May 8, 1997, the plea hearing took place. The prosecutor set forth the plea agreement, indicating: "There is one read-in offense. That's an armed robbery at Petro Pantry …. It occurred on … November 27, 1996." The prosecutor also indicated that the State was recommending incarceration, "leaving the length to the Court …." Defense counsel advised the trial court: "I just asked my client, your Honor, if that was the understanding of the offer that I communicated to him. He indicated to me that is what he understands it to be."

¶4 The trial court engaged in a plea colloquy with Madden and subsequently accepted his guilty pleas. Sentencing occurred on September 17, 1997. Defense counsel recommended a fifteen-year prison term. The trial court sentenced Madden to a total of sixty years in prison.

¶5 In May 1999, Madden filed a postconviction motion seeking to withdraw his guilty pleas. The trial court denied the motion without conducting an evidentiary hearing. Madden now appeals.

II. DISCUSSION

A. Plea Colloquy.

¶6 Madden's first two claims involve the adequacy of the plea colloquy and can be disposed of together. He claims that the plea colloquy did not satisfy the statutory requirements addressed in ***Bangert*** because the trial court failed to inquire as to Madden's understanding of the effect of the read-in offense, failed to obtain an admission to the read-in offense, and failed to advise Madden that it was not bound by the plea agreement. We are not persuaded.

¶7 Postconviction motions seeking to withdraw guilty pleas are addressed to the discretion of the trial court. *See* ***State v. Clement***, 153 Wis. 2d

287, 292, 450 N.W.2d 789 (Ct. App. 1989). When the motion seeking to withdraw the plea is made after sentencing, the trial court should only grant it when necessary to correct a manifest injustice. *See* ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). A manifest injustice exists if a plea was not entered knowingly, voluntarily and intelligently. *See* ***Bangert***, 131 Wis. 2d at 283. The issue of whether the plea was entered in that manner is a question of constitutional fact, which we review independently. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). The trial court's findings of fact, however, will be upheld unless they are clearly erroneous. *See* ***id.***

¶8 In determining whether Madden entered his pleas knowingly, intelligently and voluntarily, we apply a two-step test. First, we determine whether Madden made a prima facie showing that his pleas were accepted without following the statutory procedures set forth in WIS. STAT. § 971.08. *See* ***Bangert***, 131 Wis. 2d at 274. Second, we must determine whether Madden properly alleged "that he in fact did not know or understand the information which should have been provided at the plea hearing." ***Id.***

¶9 Applying this standard, we reject Madden's claim that the plea procedure was infirm. Madden failed to allege that he did not know that the trial court was not bound by the plea agreement or that he did not know the consequences of the read-in offense. The record suggests why Madden could not allege the former: Madden signed two plea questionnaires, both of which clearly indicated that the trial court was not bound by the plea agreement. With respect to the latter, read-in offenses do not increase the maximum sentencing exposure; therefore, the trial court was not obligated to advise Madden as to its consideration of the read-in offense.

¶10 Madden also claims that ***Bangert*** was violated because he never actually admitted that he committed the read-in offense. We reject this claim. The sentencing transcript contains the State's explanation to the trial court about the plea agreement. The State explained that at the time Madden pled guilty, the agreement required Madden to admit to the facts of the read-in and that the read-in could be considered for purposes of sentencing and restitution. After this explanation, the trial court directly addressed Madden, asking whether the State had correctly set forth the negotiations. Madden personally confirmed that the State's explanation was accurate. This affirmation confirms that the plea agreement required Madden to admit to the facts of the read-in offense. When a defendant agrees to the read-in, he or she admits that the crimes occurred. *See* ***State v. Cleaves***, 181 Wis. 2d 73, 78, 510 N.W.2d 143 (Ct. App. 1993). Madden was present when the read-in provision of the plea agreement was placed on the record. By not objecting to the crime being read in, Madden admitted to it. *See* ***id.*** at 78-79.

B. Ineffective Assistance.

¶11 Madden contends his trial counsel provided ineffective assistance by: (1) failing to inform him of the consequences of the read-in offense; and (2) failing to object to the breach of the plea agreement by the State at sentencing. We are not persuaded.

¶12 To succeed on an ineffective assistance claim, a defendant must show both that his counsel's performance was deficient and that he was prejudiced as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In the context of a plea withdrawal, to prove prejudice, the defendant must show that there is a reasonable probability that, but for the counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312-15, 548 N.W.2d 50 (1996). Our standard for reviewing this claim involves a mixed question of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. *See* ***id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law. *See* ***id.*** at 128. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697.

¶13 Madden's first alleged instance of ineffective assistance—that counsel failed to inform him of the consequences of the read-in offense—fails because Madden never alleged in his motion that he would not have pled guilty and would have proceeded to trial, if counsel had informed him of the consequences of the read-in offense. The absence of this allegation is fatal to his claim. *See* ***Bentley***, 201 Wis. 2d at 313.

¶14 Madden's second alleged instance of ineffective assistance—that counsel failed to object to a breach of the plea agreement—also fails. Madden asserts that the State breached its plea agreement during sentencing when it "implored" the trial court to set a parole eligibility date. We need not address whether this allegation supports deficient conduct because we conclude that Madden was not prejudiced by the State's discussion with the trial court about parole dates. There was no prejudice because the trial court left the parole eligibility at the one-quarter period, which is the statutory default parole eligibility

date. Accordingly, any failure to object to a breach of the plea agreement on this ground did not adversely affect Madden.[2]

C. Evidentiary Hearing.

¶15 Madden next contends the trial court should not have denied his postconviction motion without conducting an evidentiary hearing. We disagree.

¶16 A defendant is not automatically entitled to an evidentiary hearing. A hearing must be conducted only if the defendant's motion alleges facts, which, if true, would entitle the defendant to relief from the judgment. *See* ***Bentley***, 201 Wis. 2d at 309. If the motion fails to allege sufficient facts to raise a question of fact, or if the motion contains solely conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the trial court may summarily deny the motion. *See* ***id.*** at 309-10. Whether the motion alleged sufficient facts presents a question of law that we review independently. *See* ***id.*** at 310. If the motion is deficient, then the trial court's decision to summarily deny the motion is reviewed under the erroneous exercise of discretion standard. *See* ***id.*** at 310-11.

¶17 Madden's motion failed to allege sufficient facts. The motion failed to allege that Madden did not understand the consequences of the read-in offense and failed to allege that he did not know that the court was not bound by the plea

[2] In his reply brief, Madden asserts that the discussion of parole eligibility created an implied suggestion that the State was recommending a lengthy sentence; and this, in essence, was a breach of the plea agreement. We cannot agree. The record reflects that the trial court initially raised the question about parole eligibility. The State was responding to the trial court's inquiry. The State did not the raise the issue independently, and we do not construe the State's decision to answer the trial court's questions about parole eligibility as some veiled attempt to deviate from the plea agreement.

agreement. Further, Madden failed to allege sufficient facts to support relief on the prejudice component of his ineffective assistance claim because he never alleged that, but for counsel's actions, he would have gone to trial instead of pleading guilty. Accordingly, his pleadings are insufficient to require an evidentiary hearing. The trial court did not err in summarily denying his postconviction motion.

D. Trial Court's Obligations.

¶18 Madden also argues that the trial court should be obligated to advise a defendant if it does not intend to follow the bargained-for sentence recommendation. Madden concedes that current law does not require such a disclosure. *See* ***Melby v. State***, 70 Wis. 2d 368, 384-87, 234 N.W.2d 634 (1975). However, he encourages us to consider a case that was pending in the Wisconsin Supreme Court at the time he submitted his brief: ***State v. Williams***, 2000 WI 78, 236 Wis. 2d 293, 613 N.W.2d 132, where the supreme court was considering whether the current law should be changed to require the trial court to advise a defendant when it does not intend to follow the bargained-for sentence recommendation. The supreme court issued its decision in ***Williams***, holding that a trial court need not advise a defendant of its intention to impose a sentence different from what is recommended. *See* ***id.*** at ¶2. The supreme court declined the invitation to change the well-established law. *See* ***id.*** Accordingly, Madden's claim fails.

By the Court.—Judgment and order affirmed.

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