COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0505

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW B. COLLETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Andrew B. Collette appeals pro se from a judgment of conviction and an order denying postconviction relief. In his pro se postconviction motion, Collette contended that his postconviction counsel was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

ineffective, that the sentencing violated his double jeopardy protection and that the plea agreement was unconstitutional. We affirm the postconviction order.[2]

FACTS

¶2 The controlling facts are not in dispute. We take them from the criminal complaint. On March 29, 1998, Collette was an inmate of the Racine county jail. He plugged the toilet in his cell and attempted to flood an adjoining area of the jail. Deputy Tim Graves shut off the water to Collette's cell by accessing the water closet adjoining the cell. To make sure that the water was shut off, Graves reached through the bars of Collette's cell. Collette grabbed Graves' hand and said, "Don't put your fucking hands in my cell." Graves withdrew his hand and ordered Collette to stand back so that he could make sure that the water was turned off. Graves also warned Collette to not touch him again and to stand at the rear of the cell. Collette then stepped forward, reached through the cell bars and struck Graves in the face.

¶3 The ensuing complaint charged Collette with battery to a law enforcement officer pursuant to WIS. STAT. § 940.20(2) and disorderly conduct pursuant to WIS. STAT. § 947.01. The complaint also alleged that Collette was a habitual criminal pursuant to WIS. STAT. § 939.62. Attorney Domingo Cruz was appointed to represent Collette. Following a preliminary hearing at which Collette was bound over for trial, the State filed an information charging the same offenses.

[2] In the trial court, Collette asserted a fourth claim—that he was forced to abandon his right to a jury trial. Collette does not expressly raise this as a separate issue on appeal. Instead, he blends this argument into his ineffective assistance of counsel claim.

¶4 On June 2, 1998, Collette appeared without Cruz, who was ill. Although the record is not clear, it appears that the purpose of the proceeding was to address the status of the case. During this proceeding, Collette stated, "Your Honor, I would like a new appointment of counsel." Collette further complained that Cruz was pressuring him to accept a plea bargain. The trial court advised Collette to take the matter up with Cruz and the court stated it would address the matter of Cruz's representation of Collette at a further status conference on June 15, 1998.

¶5 At the June 15, 1998 status conference, Collette appeared by speakerphone with Cruz.[3] The trial court immediately addressed the question of Cruz's representation of Collette. Collette complained that Cruz had not been in touch with him. Cruz then related his unsuccessful efforts to make contact with Collette through Collette's social worker. Collette accepted this explanation, stating, "I did not know that. I am sorry, Mr. Cruz." Cruz and Collette then arranged to speak later in the week. Collette expressed his satisfaction with that arrangement. The trial court concluded the proceeding by noting that the jury trial was scheduled for June 30.

¶6 On the June 30 jury trial date, Collette appeared in person with Cruz. Both the State and the defense asked for an adjournment in light of ongoing plea negotiations. However, when the trial court asked Collette if this was acceptable to him, Collette responded, "I don't want no resolution. I want to go to jury trial." When the court asked Collette if he wished to go to jury trial that day, Collette

[3] At the time of this hearing, Collette was no longer held in the Racine county jail. Instead, he was imprisoned elsewhere.

responded, "Well, if [Cruz] isn't prepared, no, not today." The trial court replied that it would honor Collette's wish for a jury trial and rescheduled the jury trial for July 28, 1998. The court also noted that Cruz and Collette would have the opportunity for a face-to-face meeting on that date whether or not the jury trial went forward.

¶7 On the scheduled jury trial date, Collette again appeared in person with Cruz. The parties advised the court that they had reached a plea agreement whereby Collette would plead no contest to the disorderly conduct charge as a habitual criminal and the State would dismiss the battery charge. In addition, the State would stand silent at sentencing. The court then placed Collette under oath and conducted a plea inquiry with him. During the colloquy, the court confirmed that Collette had reviewed the plea questionnaire with Cruz and that Collette had signed the questionnaire. The court also confirmed that Collette understood the possible penalties on the disorderly conduct charge and that the court could impose those penalties, including the maximum, even though the State was not making a sentencing recommendation. Collette also confirmed that no one had forced him to plead no contest and that he had had sufficient time to talk to Cruz about the decision. When the court asked Collette whether he had any questions, Collette responded, "No." After accepting Collette's plea, the court determined that the evidence at the preliminary hearing stated a factual basis for the plea and the court found Collette guilty. The court ordered a presentence report and scheduled the matter for sentencing.

¶8 At the sentencing hearing, the trial court referred to the incident which prompted the charges, including Collette's act of striking Graves. The court sentenced Collette to two and one-half years in prison.

¶9 Postconviction, Attorney Jack Schairer was appointed to represent Collette. Schairer brought a postconviction motion challenging the trial court's consideration of the facts relating to the battery in the sentencing decision. The trial court rejected this argument and denied the postconviction motion.

¶10 Collette followed with the pro se WIS. STAT. § 974.06 motion which is the subject of this appeal. Collette contended that Schairer was ineffective for failing to raise the additional claim that Attorney Cruz had pressured him into accepting the plea agreement. Beyond that, Collette renewed the claim that Schairer had made regarding the trial court's consideration of the facts relating to the battery at the sentencing. In addition, Collette contended that he had involuntarily waived his right to a jury trial and that the plea bargain was unconstitutional. The trial court conducted a hearing on this motion on February 6, 2001, and denied the motion. The court's written order was entered on February 19, 2001. Collette appeals.

DISCUSSION

1. Ineffective Assistance of Postconviction Counsel

¶11 Collette argues that Schairer was ineffective for failing to argue that his plea was involuntary because Cruz had pressured him into accepting the plea agreement. While the trial court conducted a hearing on Collette's pro se WIS. STAT. § 974.06 motion, the court did not order an evidentiary hearing.

¶12 The sufficiency of a motion alleging a claim of ineffective assistance of counsel involves a two-part test. 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. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). This exercise presents a question of law that we review de novo. ***Id***.

¶13 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. This failing occurs under three possible scenarios: (1) the motion fails to raise a question of fact, (2) the motion presents only conclusory allegations, or (3) the record conclusively demonstrates that the defendant is not entitled to relief. ***Id***. at 309-10. In the motion, the defendant must do more than merely allege that he or she would have pled differently. Rather, the allegation must be supported by objective factual assertions. ***Id***. at 313. These factual assertions must allow a reviewing court to meaningfully assess the claim. ***Id***. at 314.

¶14 We first address whether Collette's motion was facially sufficient such that the trial court was required, as a matter of law, to hold an evidentiary hearing under ***Bentley***. In support of the sufficiency of his pro se motion, Collette points to his request for a new appointment of counsel at the June 2, 1998 hearing and his statement that he did not want a resolution of the case, but instead a jury trial, at the June 30, 1998 hearing. We disagree that these two episodes required the trial court to conduct an evidentiary hearing.

¶15 We do not deem it remarkable that a defendant might initially express some resistance to, or rejection of, a proposed plea agreement. The same is true regarding a defendant's assessment of his or her counsel's performance. We routinely see defendants expressing these sentiments in criminal cases. But this does not necessarily mean that the attorney-client relationship has broken down or that the defendant's will has been broken such that he or she cannot make an informed and voluntary decision whether to accept the proposed agreement.

¶16 In addition, Collette's motion offered no details regarding the alleged "pressure" applied by Cruz. In ***Bentley***, the supreme court quoted ***Key v. United States***, 806 F.2d 133, 139 (7th Cir. 1986), as follows:

> A defendant must do more than merely allege a promise by counsel; he or she must provide some evidence that allows the court to meaningfully assess his or her claim. A defendant in such a situation might allege … what the terms of the alleged promises by counsel were; when, where, and by whom such promises were made; and the precise identity of any witnesses to the promise.

Bentley, 201 Wis. 2d at 314-15. In this case, Collette's motion does not state when or where this pressure allegedly occurred. More importantly, we do not know *how* this pressure was applied. On this point, the words used by Cruz would be very important. Were they intimidating and threatening? Did Cruz say he would withdraw if Collette did not accept the plea bargain? Did Cruz say that the State would withdraw the proposal if Collette rejected it or delayed in making the decision? Did Cruz say that the court would hold it against Collette if he rejected the plea bargain? Information along these lines would help a trial or appellate court to meaningfully assess a claim of undue pressure. Collette's motion did not provide this necessary information. Instead, the motion is bare bones and conclusory. Therefore, based upon the four corners of the motion, the trial court was not required, as a matter of law, to hold an evidentiary hearing on the motion.

¶17 That brings us to the second question under ***Bentley***—whether the trial court properly exercised its discretion in denying Collette's motion without a hearing. ***Id***. at 318. This requires the trial court to form its independent judgment after a review of the record and pleadings. ***Id***. at 319.

¶18 We first note that Collette has failed to provide us with a transcript of the hearing on his pro se postconviction motion. The trial court's written order

as to this issue states, "The court denies the motion arguing ineffective assistance for post conviction of counsel [sic] finding that the information issues raised by the defendant are insufficient to necessitate testimony *and for other reasons stated on the* record." (Emphasis added.) We, of course, do not know what those other reasons were because Collette has failed to provide a transcript of the hearing.

¶19 When a party has failed to provide a necessary transcript relating to the trial court's exercise of discretion, an appellate court is compelled to accept the trial court's ruling. ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 638, 273 N.W.2d 233 (1979). In addition, when there is no transcript or only a partial transcript, our review is necessarily confined to the record before us, and we will assume that the missing record supports every fact essential to sustain the trial court's discretionary ruling. *See* ***D.L. v. Huebner***, 110 Wis. 2d 581, 597, 329 N.W.2d 890 (1983). On this threshold basis, we conclude that the trial court did not err in the exercise of its discretion in choosing to not conduct an evidentiary hearing on Collette's motion.

¶20 Alternatively, based upon our independent examination of the record that is before us, we affirm the trial court's ruling. The trial court was very solicitous of Collette's statements about Cruz's representation. When Collette asked for another attorney at the June 2, 1998 status hearing, the court scheduled a further status conference to specifically address the representation question. At that further hearing, Collette accepted Cruz's explanation as to why Cruz had not been able to contact him. The court also observed that Collette and Cruz would have a further opportunity to discuss the matter face to face when Collette would be transported to the court for purposes of the jury trial on June 30. And on the June 30 jury trial date, when Collette said he wanted a jury trial, not a resolution, the court said it would honor that request if it was still Collette's wish on the

rescheduled jury trial date. In summary, the court took special pains to accommodate and address Collette's concerns.[4]

¶21 That brings us to the plea hearing itself. The trial court's plea colloquy with Collette was thorough and exhaustive. As germane to this case, we take particular note that the court established that Collette had had sufficient time to speak with Cruz about the plea decision and that no one had forced him to enter the plea. Because the trial court conducted the plea hearing in textbook fashion, Collette understandably makes no direct challenge to its adequacy.

¶22 We hold that the trial court did not err in the exercise of its discretion when it chose to not conduct an evidentiary hearing on Collette's claim of ineffective assistance of postconviction counsel.

2. The Sentencing and Double Jeopardy

¶23 Collette claims that the trial court violated his protection against double jeopardy at the sentencing when the court alluded to that portion of the facts that referenced the battery to Graves. Collette claims this was improper because the battery charge was dismissed outright, not as a read-in charge.

¶24 Double jeopardy protects against (1) prosecution for the same offense after acquittal, (2) prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). Although it is not entirely clear, we read Collette's brief to invoke the first and third protections under ***Sauceda***.

[4] We thus reject Collette's argument that the trial court applied "psychological" pressure against him to accept the plea bargain.

¶25 In the trial court, Collette cited to ***State v. McQuay***, 154 Wis. 2d 116, 452 N.W.2d 377 (1990), in support of his argument. There the supreme court stated that in assessing the defendant's character and the need for incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct. ***Id***. at 126. However, in a footnote, the court distinguished this process from a "read-in" procedure, which specifically allows a court to consider a "read-in" charge in the sentencing decision. ***Id***. at 126-27 n.4. From this footnote, Collette reasons that the trial court could not consider that portion of the criminal event that supported the battery charge.

¶26 We see nothing in ***McQuay*** that prohibited the trial court from addressing the entire factual scenario that produced the disorderly conduct charge, even though a portion of those facts related to the battery charge that was dismissed outright and not "read in." As the trial court rhetorically asked at the postconviction hearing, "Is not disorderly conduct defined as being violent, abusive, profane, boisterous, unreasonably loud or otherwise disorderly conduct?" If the State had chosen to originally charge this event only as disorderly conduct, the trial court obviously would have been entitled to speak to Collette's assault against Graves as part and parcel of that offense.[5] We see no reason why such reference becomes improper where the matter is originally charged as disorderly conduct and battery and the latter charge is then dismissed outright.

¶27 In summary, Collette was not punished for battery. He received a single punishment for a single offense—disorderly conduct.

[5] For that very reason, the State advised the trial court at the postconviction hearing that it would not seek dismissal of the battery charge as a "read in."

3. Constitutionality of the Plea Bargain

¶28 Collette argues that the plea bargaining process unconstitutionally tramples on the right to a jury trial. But plea bargaining is well established in our law and, if properly administered, can serve positive factors. *See* ***State v. Wills***, 187 Wis. 2d 529, 536, 523 N.W.2d 569 (Ct. App. 1994), *aff'd*, 193 Wis. 2d 273, 533 N.W.2d 165 (1995). ***State v. Bangert***, 131 Wis. 2d 246, 265, 389 N.W.2d 12 (1986), requires that the constitutional right to a jury must be properly waived in a plea bargain situation. Since that is so, it logically follows that the plea bargain process is not per se unconstitutional. We reject Collette's argument.

CONCLUSION

¶29 We hold that postconviction counsel was not ineffective. We hold that the trial court's sentence did not violate Collette's double jeopardy protection. Finally, we hold that the plea bargaining process is not unconstitutional.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.