COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-2507
01-2508

Cir. Ct. Nos. 97-CF-1155
97-CF-1771

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM S. CHERRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. William S. Cherry appeals an order denying him postconviction relief. Cherry argues that the circuit court erroneously denied his postconviction motion asserting ineffective assistance of counsel without an evidentiary hearing. He contends he was entitled to an evidentiary hearing on

whether his trial attorneys should have raised a multiplicity challenge. Cherry also argues he is entitled to plea withdrawal with respect to one of his convictions because there was an inadequate factual basis to support a conviction on the underlying charge. We reject both arguments and affirm.

Background

¶2 Cherry was charged with several drug offenses and penalty enhancers arising out of events occurring on June 13, 1997. On that day, an undercover officer went to an apartment and purchased cocaine from Cherry. Based on information obtained during that drug buy, police obtained a search warrant for the apartment where the buy occurred, apartment 804, and an apartment across the hall, apartment 803. The warrant was executed the same day. In apartment 803, police found a box in a bedroom closet containing in excess of 120 grams of cocaine. During the same search, police located two sandwich bags with several "knotted baggie corners" in the living room of apartment 803 between a wall and a couch. The cocaine in the two baggies found in the living room weighed 8.4 grams. Several other items associated with drug trade were located in both apartments, including a handgun and smoking devices used for cocaine.

¶3 Charges in circuit court case no. 97 CF 1771 (appellate case no. 01-2508) stem from the initial drug buy. Charges in circuit court case no. 97 CF 1155 (appellate case no. 01-2507) stem from the evidence found during execution of the search warrant. Cherry eventually entered into a plea agreement which involved the dismissal of two charges and all penalty enhancers, and his

plea to three drug charges relating to both circuit court case numbers. Additional details will be provided as needed below.[1]

Discussion

¶4 Cherry first contends that the circuit court erroneously denied his postconviction motion asserting ineffective assistance of counsel without an evidentiary hearing. Accordingly, this court must independently review Cherry's postconviction motion to determine whether it contains sufficient allegations to necessitate an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶5 Cherry's postconviction motion alleges ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel has the burden of showing that his counsel's performance was deficient and that he suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶6 When assessing performance, courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). Professionally competent assistance of counsel encompasses a "wide

[1] This case is before us on appeal from the denial of a motion under WIS. STAT. § 974.06. For reasons that are not readily apparent, Cherry chose not to pursue a timely direct appeal. His request for an extension of time to file a notice of appeal was denied. His § 974.06 motion contends that it should not be barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), because "[t]here is no ineffective [sic] assistance of postconviction counsel, because CHERRY never filed a notice for postconviction relief." On its face, this argument does not supply a "sufficient reason" under ***Escalona-Naranjo***. However, the circuit court ignored this possible procedural bar and the State has not raised the matter on appeal. Accordingly, we do not address it.

range" of behaviors. ***Strickland***, 466 U.S. at 689. "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***Johnson***, 153 Wis. 2d at 127.

¶7 Showing prejudice means showing that defense counsel's alleged errors actually had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant must show that the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id.*** at 693. Instead, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694; ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The requisite reasonable probability must be sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694; ***Moats***, 156 Wis. 2d at 101. This prejudice determination involves consideration of the totality of the evidence and the strength of the State's case. ***Strickland***, 466 U.S. at 695-96.

¶8 In relevant part, Cherry's postconviction motion asserts that his first trial counsel, Dennis Ryan, and second trial counsel, Daniel Stein, performed ineffectively because both failed to move to dismiss as multiplicitous either Count 1 or Count 2 in circuit court case no. 97 CF 1155. Cherry's motion makes the legal argument that these counts are multiplicitous because the separate quantities of cocaine supporting these counts were found at approximately the same time and within the same apartment. Cherry's motion argues that this close temporal and physical relationship between the two quantities of cocaine is

sufficient to distinguish this case from the facts in ***State v. Stevens***, 123 Wis. 2d 303, 367 N.W.2d 788 (1985). In ***Stevens***, multiple charges were found to be proper, even where it appeared that two quantities of cocaine came from the same supplies, because one quantity of cocaine was located by police during the execution of a search warrant at Stevens' apartment and the second quantity was located on Stevens' person a day later when police arrested him. ***Id.*** at 312, 320-23.

¶9 The circuit court denied Cherry's WIS. STAT. § 974.06 motion based on its conclusion that a multiplicity challenge would have failed. The court engaged in a multiplicity analysis and inquired into whether the two charges were identical in fact. The "identical in fact" inquiry involves a determination of whether charged acts are "separated in time or are of a significantly different nature." ***State v. Eisch***, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). Acts are different in nature "if each requires 'a new volitional departure in the defendant's course of conduct.'" ***State v. Anderson***, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998) (quoting ***Eisch***, 96 Wis. 2d at 36).

¶10 The circuit court concluded that possession of the cocaine in the living room involved a "volitional departure" from possession of the cocaine in the bedroom closet because Cherry separated, packaged, and moved the smaller amount to make it available for quick sale. As the court explained:

> Here, the separation is created not by time but by the nature of the conduct in preparing a portion of the supply into separate smaller packages, getting the drugs ready for sale to others, and locating them in a distinct area easily accessible for quick dissemination.

¶11 Regardless whether the circuit court's legal reasoning is correct, we conclude the circuit court properly denied Cherry's WIS. STAT. § 974.06 motion

without a hearing because Cherry's motion was otherwise inadequate to compel an evidentiary hearing.

¶12 A defendant is not entitled to an evidentiary hearing on a postconviction motion unless his motion alleges facts which, if proved true, would entitle him to relief. *See* ***Bentley***, 201 Wis. 2d at 309-11; ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A circuit court has the discretion to summarily deny a postconviction motion for any of the following reasons: the motion fails to allege sufficient facts to raise a question of fact; the motion presents only conclusory allegations; or the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-11; ***Nelson***, 54 Wis. 2d at 497-98. In effect, defendants must demonstrate to busy trial courts that there is a reason to conduct an evidentiary hearing, apart from the defendant's desire for a fishing expedition. *See* ***State v. Washington***, 176 Wis. 2d 205, 216, 500 N.W.2d 331 (Ct. App. 1993) ("[T]he motion must contain at least enough facts to lead the trial court to conclude that an evidentiary hearing is necessary.").

¶13 Assuming, for purposes of this discussion only, that Cherry's postconviction motion sets forth a valid multiplicity challenge which could have been raised by one of his two trial attorneys, Cherry's motion is nonetheless deficient because he completely fails to assert in that motion that he will demonstrate there was no reasonable strategic reason for omitting the multiplicity challenge and he fails to assert that if he had been aware of the possible challenge, he would not have entered his plea. In the context of this case, these failures mean that Cherry did not allege facts which, if proven true, would entitle him to relief.

¶14 Cherry was initially charged with five counts. Count 1 in case no. 97 CF 1155 alleged possession of more than 100 grams of cocaine with intent to

deliver, as a party to the crime, a crime punishable under WIS. STAT. § 961.41(1m)(cm)5 (1995-96),[2] with imprisonment for not less than ten years nor more than thirty years. Count 2 in case no. 97 CF 1155 alleged possession of more than five grams but less than fifteen grams of cocaine with intent to deliver, as a party to the crime, a crime punishable under § 961.41(1m)(cm)2, with imprisonment for not less than one year nor more than fifteen years. Both Counts 1 and 2 in case no. 97 CF 1155 were accompanied by penalty enhancement allegations under WIS. STAT. § 961.49, for a drug offense committed within 1,000 feet of a youth center. With respect to Count 1, this penalty enhancer added five years to the maximum. With respect to Count 2, this penalty enhancer added five years to the maximum and increased the presumptive minimum sentence from one to three years. Count 3 in case no. 97 CF 1155 alleged that Cherry knowingly, as a party to the crime, maintained a "drug house," a crime punishable under WIS. STAT. § 961.42 with up to one year of imprisonment.

¶15 Count 1 in case no. 97 CF 1771 alleged that Cherry knowingly delivered cocaine, a crime punishable under WIS. STAT. § 961.41(1)(cm)1, with imprisonment for not more than ten years. Count 2 in case no. 97 CF 1771 alleged that Cherry knowingly possessed cocaine with intent to deliver, a crime punishable under § 961.41(1m)(cm)1, with imprisonment for not more than ten years. Both Counts 1 and 2 in case no. 97 CF 1771 were accompanied by penalty enhancement allegations under WIS. STAT. § 961.49, for a drug offense committed within 1,000 feet of a youth center. With respect to both counts, this penalty enhancer added

[2] All further references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

five years to the maximum and increased the presumptive minimum sentence from zero to three years.

¶16 Cherry entered into a plea agreement in which Count 3 in 97 CF 1155, Count 1 in 97 CF 1771, and all penalty enhancers were dismissed. This agreement reduced Cherry's total exposure from an eighty-six-year maximum with a nineteen-year presumptive minimum sentence to a fifty-five-year maximum with a presumptive minimum sentence of eleven years. In this context, it is not readily apparent that Cherry would have benefited from a motion to dismiss Count 2 in 97 CF 1155 as multiplicitous. Even without that count, Cherry faced a significantly higher maximum and presumptive minimums than available under the plea agreement. More to the point, in his postconviction motion Cherry did not allege whether he had discussed the possibility of a multiplicity challenge with either counsel and did not allege what either counsel would have said if called to testify about why they did not bring a multiplicity motion.

¶17 Furthermore, one of the harms Cherry alleges is that he pled no contest to three crimes carrying a total presumptive minimum sentence of eleven years and a maximum sentence of fifty-five years. At the same time, Cherry has not alleged that, if only he had known there was a multiplicity challenge available, he would not have entered his plea. *See* ***Bentley***, 201 Wis. 2d at 312 (defendant must demonstrate there is a reasonable probability that, but for counsel's error, he would not have pled no contest, quoting and citing ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)).

¶18 In summary, even assuming that Cherry's multiplicity argument is legally correct, Cherry's WIS. STAT. § 974.06 motion was inadequate because it failed to allege facts which, if proved true, would entitle him to relief. He did not

allege facts showing his trial attorneys had no valid strategic reason for forgoing a multiplicity challenge and did not allege that the absence of such a challenge affected his decision to enter his plea. It may be that Cherry hoped to fill these holes at an evidentiary hearing. But that is exactly the point of ***Bentley***, ***Nelson***, and ***Washington***: a trial court is not required to have blind faith or to provide the opportunity for a fishing expedition.

¶19 Accordingly, we conclude, albeit on different grounds, that the circuit court properly denied Cherry's postconviction motion alleging ineffective assistance of counsel without a hearing.

¶20 Cherry also asserts that there was an insufficient factual basis for his plea to Count 1, possession of more than 100 grams of cocaine with intent to deliver. Cherry acknowledges that this argument is raised for the first time on appeal, but requests review under the plain error doctrine.

¶21 Despite the lack of a proper objection, this court may review alleged claims of error under WIS. STAT. § 901.03(4) (1999-2000) for "plain error." "Plain error is error so fundamental that a new trial or other relief must be granted …." ***State v. Vander Linden***, 141 Wis. 2d 155, 159, 414 N.W.2d 72 (Ct. App. 1987). This doctrine is to be used sparingly and only where an accused has been denied a basic constitutional right. *See* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).

¶22 Cherry's claim falls far short of plain error. Indeed, it is readily apparent that no error occurred. Cherry contends there was not a factual basis for his plea to Count 1 because there was no factual basis for the proposition that he possessed the 120 grams of cocaine found in the bedroom closet *with intent to deliver*. Cherry contends evidence of intent to deliver is lacking because both the

prosecutor and the circuit court noted that this quantity of cocaine was not packaged for sale. However, in context, it is readily apparent that the prosecutor and the court were simply distinguishing the large quantity of cocaine found in the closet, which had not *yet* been broken down for sale, with the smaller quantity of cocaine found in the living room, which was packaged for "quick" sale. Cherry's claim is meritless.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.