COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 02-2610-CR

Cir. Ct. No. 01-CF-36

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE MASON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. George Mason appeals an order denying a motion to withdraw his no contest plea. Mason argues the circuit court erred by denying the motion because: (1) he was denied the effective assistance of both trial and appellate counsel; (2) the circuit court failed to properly exercise its duties under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and Rule 11 of the

Federal Rules of Criminal Procedure; and (3) the plea questionnaire was ambiguous. We reject these arguments and affirm the order.

BACKGROUND

¶2 In March 2001, the State charged Mason with one count of first-degree reckless homicide as party to a crime, three counts of perjury and one count of physical abuse of a child, with a penalty enhancement for "abuse by certain persons." Before the scheduled trial date, the court severed the perjury counts and the parties proceeded to trial on the reckless homicide and child abuse counts. On the second day of trial, Mason decided to plead no contest to physical abuse of a child by failure to act or prevent great bodily harm, as party to a crime, contrary to WIS. STAT. §§ 948.03(4)(a) and 939.05.[1] In exchange for his no contest plea to the amended charge, the State agreed its sentence recommendation would not exceed that of the presentence investigation report. The court ultimately sentenced Mason to ten years' imprisonment.[2] Mason's postconviction motion to withdraw his plea was denied and this appeal follows.

DISCUSSION

¶3 Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Because Mason committed the offense in February 1999, the sentencing revisions of truth-in-sentencing were not applicable. *See* 1997 Wis. Act 283, § 419, creating WIS. STAT. § 973.01, (truth-in-sentencing applies to felonies committed on or after December 31, 1999).

filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Mason has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

A. Ineffective Assistance of Counsel

¶4 Mason argues that the circuit court erred by denying his motion to withdraw his no contest plea based upon claims of ineffective assistance of counsel. Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Mason must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶5 To prove prejudice, Mason must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id.***

1. Trial Counsel

¶6 In his postconviction motion, Mason alleged that trial counsel was ineffective for failing to accurately advise him of the maximum potential penalty for the child abuse charge. Mason also claimed trial counsel incorrectly advised him that he could not move to withdraw his plea prior to sentencing. At the hearing on Mason's postconviction motion, Mason testified that counsel informed him the offense carried a five-year sentence, but that the State was seeking an additional five years under a penalty enhancer. Mason further testified that when he informed counsel he did not qualify for the enhancer, counsel responded that they would let the State believe it was getting something for nothing and argue at the sentencing hearing that Mason did not qualify for the enhancer. Mason thus claimed he believed that by pleading no contest under the plea agreement, he was going to be exposed to a maximum penalty of five years' imprisonment. Mason also testified that although counsel acknowledged his mistake on the plea questionnaire prior to sentencing, counsel nevertheless told Mason he would likely be sentenced to no more than five years and he did not think Mason could withdraw his plea at that juncture.

¶7 Trial counsel disputed Mason's testimony, stating that he informed Mason about the error just before the plea colloquy, at which point Mason allegedly replied that ten years was better than forty. Trial counsel further testified that during a side bar, he informed the court of the error and asked the court to ensure that Mason understood the true maximum penalty during the colloquy. With respect to plea withdrawal, counsel testified that Mason wished to withdraw his plea because he was unhappy with the PSI's ten-year sentence recommendation, not because he misunderstood the maximum penalty. Counsel

thus informed Mason that he did not believe there were any grounds to withdraw his plea.

¶8 Following the hearing on Mason's postconviction motion, the trial court made an express credibility finding in favor of trial counsel. The credibility of witnesses is properly the function of the trier of fact. ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). The court did not believe that trial counsel would attempt to intentionally deceive either it or the State regarding the appropriate maximum penalty. Likewise, the court found that Mason understood what the maximum penalty was when he entered his plea. Counsel took prompt steps to cure his mistake and Mason was repeatedly informed by the court what the correct maximum penalty was, without any mention of a penalty enhancer. Moreover, counsel properly informed Mason that his disappointment in the PSI's sentencing recommendation would not constitute grounds for withdrawing the plea. Mason has failed to establish how he was prejudiced by any claimed deficiency on the part of trial counsel.[3]

2. Appellate Counsel

¶9 Mason alleges various deficiencies of his postconviction counsel. Although postconviction and appellate counsel are often the same person, their functions differ. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997). Pursuant to ***State ex rel. Rothering v. McCaughtry***,

[3] Mason refers to a statement made by trial counsel regarding getting the jury checked out of their motel before there would be charges for another day. Mason claims this statement shows counsel was more interested in saving the State money than in protecting his rights. The statement was made after an extensive plea colloquy, before which counsel acknowledged his mistake and asked the court to ensure that Mason understood the maximum penalty. Mason has failed to establish how counsel's comment is evidence of ineffectiveness.

205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996), a claim of ineffective assistance of postconviction counsel should be raised in the circuit court either by a petition for a writ of habeas corpus or a motion under WIS. STAT. § 974.06. Mason's issues with respect to postconviction counsel are thus not properly before this court. We nevertheless reject Mason's claims on their merits. Mason argues postconviction counsel erred by failing to object to the trial court's use of a negative inference—where the truth is the opposite of a witness's incredible testimony. *See* ***State v. Nichelson***, 220 Wis. 2d 214, 220-23, 582 N.W.2d 460 (Ct. App. 1998). Because the trial court did not rely on a negative inference, but rather chose to believe trial counsel over Mason, there was no reason for postconviction counsel to object.

¶10 Mason also claims postconviction counsel was ineffective for failing to challenge trial counsel's statement that his copy of the PSI was not the same as the one in the court's file. Our review of the record reveals that Mason misunderstood trial counsel's statement. Counsel was not saying that the substance of the PSI he reviewed was different than the PSI in the court's file. He simply stated that he received a copy of the PSI that was on file in court. To the extent Mason claims postconviction counsel was ineffective for failing to pursue his theory that trial counsel, the prosecutor and the court had conspired to impose a sentence beyond the maximum stated in the plea questionnaire, Mason provides no evidence of a conspiracy. Finally, Mason argues that postconviction counsel should have used the district attorney's reference at the postconviction motion hearing to a five-year maximum penalty as evidence that the sentence was confusing. Although the district attorney did refer to a five-year maximum when cross-examining Mason, the record suggests that the district attorney simply

misspoke. Mason has failed to establish how he was prejudiced by any claimed deficiency on the part of postconviction counsel

¶11 With regard to Mason's claim of ineffective assistance of appellate counsel, this claim is properly raised by a petition for a writ of habeas corpus in the appellate court which heard the defendant's direct appeal. ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). In any event, Mason complains that his appellate counsel refused to file anything other than a no-merit report on his behalf. Assuming appellate counsel had concluded that a direct appeal on Mason's behalf had no arguable merit, counsel was not required to file anything other than a no-merit report. *See* WIS. STAT. RULE 809.32.

B. No Contest Plea

¶12 Mason argues his plea was not voluntarily, knowingly and intelligently entered because the trial court did not comply with ***Bangert*** by ascertaining whether any promises or threats had been made to Mason in connection with his proposed plea.[4] An involuntary plea can constitute a manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). Under ***Bangert***, however, a defendant must make a prima facie showing that his or her no contest plea was accepted without compliance with WIS. STAT. § 971.08 or another court-mandated duty. ***Bangert***, 131 Wis. 2d at 274. A prima facie showing must also include a defendant's assertion that he or she did not know or understand the information at issue. ***Id.*** Whether a defendant has

[4] Mason failed to raise this argument in his postconviction motion to withdraw his plea and has thus waived the right to raise this issue on appeal. ***State v. Giebel***, 198 Wis. 2d 207, 218, 541 N.W.2d 815 (Ct. App. 1995). In any event, we conclude Mason's plea was knowingly, voluntarily and intelligently entered.

established a prima facie case presents a question of law that we review without deference to the trial court's determination. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). If a defendant makes this initial showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered, despite the inadequacy of the record at the time of the plea's acceptance. ***Bangert***, 131 Wis. 2d at 274-75. The State may use the entire record to demonstrate that the defendant's plea was knowing and voluntary and may examine the defendant or his or her counsel to shed light on the defendant's understanding and knowledge. ***Id.***

¶13 During the course of the plea colloquy in the present case, the trial court did not specifically ascertain whether any promises or threats had been made to Mason in connection with his proposed plea. During that colloquy, however, Mason answered affirmatively when the court asked: "Do you understand that you are not obligated under any circumstances to enter into this plea agreement." Moreover, the plea questionnaire and waiver of rights form that Mason signed indicates: "I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." The court confirmed that Mason understood the form and signed it of his own free will. In view of the record, the court's failure to inquire specifically whether any promises or threats had been made did not render Mason's plea unknowing or involuntary.[5]

[5] Mason also argues the trial court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 does not apply to state court actions, and Wisconsin courts are not constitutionally required to follow its procedures. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

C. Plea Questionnaire

¶14 Mason contends he is entitled to withdraw his plea because the plea questionnaire was ambiguous.[6] Specifically, Mason challenges counsel's characterization of the maximum penalty as "5 years prison … plus 5 years penalty enhancer = 10 years." Although counsel erred by describing the maximum penalty in this manner, the trial court ignored the questionnaire's description of the maximum penalty. The court correctly described the ten-year maximum penalty three times during the plea colloquy and Mason indicated he understood the maximum penalty. Where a circuit court ignores the plea questionnaire in its colloquy, the adequacy of that colloquy rises or falls on the circuit court's discussion at the plea hearing. *Cf.* ***State v. Brandt***, 226 Wis. 2d 610, 621, 594 N.W.2d 759 (1999) (plea questionnaire's inaccurate description of the elements of the crime did not render defendant's plea unknowing or involuntary where circuit court ignored the questionnaire in its colloquy and correctly described the elements to the defendant). Here, the plea colloquy clarified any ambiguity created by the questionnaire with respect to the maximum penalty.

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[6] To the extent Mason argues the trial court failed to comply with WIS. STAT. § 971.025(3), Mason is mistaken. The statute provides:

> A court may not dismiss a case, refuse a filing or strike a pleading for failure of a party to use a standard court form or to follow the format rules but shall require the party to submit, within 10 days, a corrected form and may impose statutory fees or costs or both.

Here, Mason does not contend that the plea questionnaire was not a standard court form, but that counsel made an error when completing the maximum penalty portion of the form. Section 971.025(3) does not require that errors in completing the standard court form be corrected, but rather that failure to use a standard court form be corrected.

By the Court.—Order affirmed.

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