COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2495-CR **Cir. Ct. No. 2002CF7168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY O. MCKENZIE,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Gary O. McKenzie pled guilty to a charge of possession of marijuana with intent to deliver. The circuit court imposed a forty-six-month prison sentence, with McKenzie to serve a minimum of twenty-eight

months in initial confinement. McKenzie ultimately filed a *pro se* motion to withdraw his guilty plea on a number of grounds. The circuit court denied the motion and a subsequent reconsideration request, and McKenzie now appeals *pro se*. Because we agree with the circuit court that McKenzie's motion was without merit, we affirm the judgment of conviction and postconviction orders.

¶2 Police received a 911 call dispatching them to a Milwaukee home to investigate a suspected break-in. When police arrived, they noticed that the glass window of the front door was broken. They entered the house to determine whether suspects or victims were inside. As they looked through the house, the officers noticed, among other things, a substance that appeared to be marijuana and, in a room with its door broken in half, baggies, a scale and a metal strainer. The bedroom containing these materials was McKenzie's. Police recovered almost a kilogram of marijuana in McKenzie's room, and they also found cocaine residue. McKenzie ultimately admitted to Milwaukee police that he had used materials found in his room to prepare crack cocaine. McKenzie was charged with manufacturing 5 grams or less of cocaine. Pursuant to plea negotiations, the charge was changed to possession of 500 grams or less of marijuana with intent to deliver in exchange for McKenzie's guilty plea.

¶3 After sentencing, McKenzie sought sentence modification under WIS. STAT. § 973.19 (2001-02)[1], asking that the circuit court permit him to serve a federal sentence in a different matter before commencing his Wisconsin sentence.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The circuit court denied the motion and also denied McKenzie's motion for reconsideration.

¶4 McKenzie then filed a *pro se* motion seeking to withdraw his guilty plea. In his motion, McKenzie argued that the State had failed to provide him with exculpatory evidence -- a tape of the 911 call -- despite his request. He argued that the State's failure violated his rights to due process and the right to confront witnesses. He also claimed that his trial counsel had been ineffective for failing to request the 911 tape during discovery. Finally, McKenzie claimed that his trial counsel had been ineffective for failing to file a suppression motion based on the officers' decision to enter his home and bedroom without a warrant.

¶5 The circuit court denied the motion. As to McKenzie's claim about the 911 tape, the circuit court reasoned that the argument was conclusory, because McKenzie had failed to provide a copy of the tape or a transcript. As to McKenzie's claim that his trial counsel had been ineffective for failing to request the 911 tape, the circuit court rejected the claim because the record demonstrated counsel had requested the tape. Finally, the circuit court rejected McKenzie's argument that his attorney had been ineffective for failing to file a motion to suppress the evidence, reasoning that a motion to suppress would have been denied because the police, who had been dispatched to investigate a possible burglary at the residence, were justified in entering the home "given the broken

window and the damage to the front door." McKenzie appeals from this determination and from the circuit court's denial of his reconsideration request.[2]

¶6 Postconviction motions to withdraw guilty or no-contest pleas are addressed to the circuit court's discretion. ***State v. Clement***, 153 Wis. 2d 287, 292, 450 N.W.2d 789 (Ct. App. 1989). Plea withdrawal after sentencing is permitted only to correct a "manifest injustice." ***Id.*** "The 'manifest injustice' test requires a defendant to show a serious flaw in the fundamental integrity of the plea.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). McKenzie's claims do not meet this standard.

¶7 First, we examine McKenzie's argument that the State withheld exculpatory evidence and that he would not have entered his guilty plea had he known of that evidence. As the State notes, when a defendant seeks to withdraw a guilty plea on the ground that a constitutional violation occurred, the defendant

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[2] The State argues in its brief that McKenzie's appeal under WIS. STAT. RULE 809.30 is barred due to the fact that within ninety days of his conviction, McKenzie sought sentence modification *pro se* under WIS. STAT. § 973.19. As the State notes, filing a motion to modify sentence under WIS. STAT. § 973.19 waives the right to appeal under RULE 809.30(2). *See* WIS. STAT. § 973.19(5). The State argues, with good reason, that McKenzie "having selected [WIS. STAT. § 973.19] … is precluded from [the process provided by RULE 809.30]."

Nonetheless, the court has concluded that it should address McKenzie's arguments on the merits because the court subsequently extended McKenzie's deadline for pursuing relief under WIS. STAT. RULE 809.30. The court took this step upon McKenzie's motion, which did not inform the court of McKenzie's earlier pursuit of relief under WIS. STAT. § 973.19. Consequently, the court, which did not have the record available, was unaware of the earlier proceeding. Apparently, the public defender was also not aware of the § 973.19 proceeding when it appointed counsel for McKenzie under RULE 809.30. This appeal and the underlying postconviction proceedings appear to have been undertaken based on McKenzie's misunderstanding of the appellate process. The court will address the merits of the appeal instead of penalizing McKenzie for that misunderstanding after the fact.

must demonstrate: "(1) that a violation of a constitutional right has occurred; (2) that this violation caused the defendant to plead guilty; and (3) that at the time of the plea, the defendant was unaware of the potential constitutional challenge to the case because of the violation." ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999) (citation omitted).

¶8 McKenzie claims that if he had been provided with the 911 tape regarding a possible burglary, he would not have entered his plea. The record, however, does not contain the tape or a transcript of the tape. Consequently, the contents of the tape, if it existed at the time McKenzie entered his plea, are unknown. Because the contents are unknown, McKenzie cannot demonstrate that the tape was exculpatory or that the State improperly withheld the tape if it was, in fact, requested. Neither can McKenzie demonstrate, in the absence of the tape, that he would not have pled guilty had he known the contents of the tape. McKenzie's argument regarding the tape is clearly without merit.[3]

¶9 In regard to McKenzie's second argument that his trial counsel was ineffective for failing to seek suppression of the evidence seized by police in their warrantless search of his home, we conclude that argument is equally without merit. To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate both deficiency of counsel's performance and prejudice resulting from that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to make an adequate showing as to one

[3] The record demonstrates that when McKenzie sought the tape after pleading guilty, the prosecutor informed him that its office had never had possession of the tape. In a letter to McKenzie, the prosecutor explained how McKenzie could attempt to obtain a copy or transcript of the tape. Instead of taking the steps described by the prosecutor, McKenzie apparently decided to attempt to prosecute his claim without the purportedly exculpatory information in the record.

element, the court need not address the other. ***Id.*** at 697. Although a "warrantless search of a home is presumptively unreasonable under the Fourth Amendment," ***State v. Richter***, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29, exigent circumstances, such as the threat to the safety of a suspect or others, can provide the basis for a reasonable police officer to believe a warrantless entry into a home is necessary, *see* ***id.***, ¶29.

¶10 Here, Milwaukee police received a 911 call about a possible break-in at a house where McKenzie was staying. When the police arrived, they noted that the front door of the home had a broken glass pane, and, when they looked inside, they saw broken glass on the floor and what they thought might be marijuana. They entered the home and observed a bedroom door that had been broken in half. Inside the bedroom, items, including the bedroom door knob, "were strewn about." In an open drawer, police observed three one-gallon zip-lock baggies that appeared to contain marijuana. Police also observed a phone bill with McKenzie's name on it, a scale, more zip-lock baggies and, in an open bag, other items consistent with drug-dealing. The homeowner arrived when police were there and informed them that McKenzie stayed in the bedroom. McKenzie was subsequently arrested and admitted to police that he had cooked cocaine in the room for his own use and to make crack cocaine.

¶11 These circumstances, which are not in dispute, provided a reasonable basis for a warrantless entry into the home to investigate. McKenzie suggests that the 911 call may have indicated that the caller had observed two males fleeing from the house, thereby removing the exigent circumstances for a warrantless entry. We disagree. Even assuming that the 911 caller stated that he had observed people fleeing from the house, there is nothing to indicate that those people were all of the suspects, some of the suspects, or residents of the house. Given the

information provided to them and their observations upon reaching the home, the officers had a reasonable basis to believe that a crime was in progress or had recently been completed. Exigent circumstances permitted their entry and investigation to determine whether the suspects were in the house or whether anyone in the house had been injured during the apparent break-in. McKenzie's contention that the police entry into the home violated constitutional principles is without merit. In addition, once the police were in the house, seizure of the marijuana and other drug paraphernalia in plain view was justified. *See* ***State v. Gonzalez***, 147 Wis. 2d 165, 168, 432 N.W.2d 651 (Ct. App. 1988). A suppression motion challenging the police entry and seizure of the marijuana would have been unsuccessful and therefore McKenzie cannot establish prejudice resulting from trial counsel's failure to seek suppression of the evidence.

¶12 Finally, McKenzie argues for the first time on appeal that he should be allowed to withdraw his plea because he did not understand that the sentencing court could "deviate from the presumptive minimum" sentence. He suggests that because he did not understand his potential sentencing exposure, he did not enter his plea knowingly, intelligently, and voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986) (to be constitutionally valid, guilty or no contest plea must result from a colloquy between the defendant and circuit court to ensure that the defendant understands the rights being relinquished and the consequences of entering a guilty plea and knowingly, intelligently, and voluntarily waives those rights). This argument is wholly without merit.

¶13 McKenzie acknowledged in a plea-hearing questionnaire and waiver-of-rights form that he understood that the maximum penalty he faced was 54 months, and that the minimum sentence that could be imposed was a $500 fine and a six-month drivers-license suspension. The circuit court then informed

McKenzie of the potential sentences, and McKenzie indicated that he understood. The circuit court informed McKenzie that it was not bound by any recommendation, including the State's recommendation for which McKenzie had negotiated. The record demonstrates that McKenzie was clearly informed of the full sentencing range and his potential punishment. His new claim that he did not understand that the circuit court could "deviate from the presumptive minimum" is undercut by the record.

By the Court.—Judgment and order affirmed.

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