COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3213-CR **Cir. Ct. No. 2002CF3547**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO D. TYE,

DEFENDANT-APPELLANT.

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

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

¶1 WEDEMEYER, P.J. Mario D. Tye appeals from a judgment entered after he pled guilty to one count of second-degree intentional homicide, with the use of a dangerous weapon, contrary to WIS. STAT. §§ 940.05(1)(b) and

939.63 (2003-04).[1] He also appeals from an order denying his two postconviction motions. In these motions, Tye sought to withdraw his plea on the ground that he did not understand he could be found guilty of a lesser-included offense if he went to trial, and sought resentencing on the basis that the trial court did not sufficiently explain the reasons for the sentence it imposed. Because Tye knowingly, voluntarily, and intelligently entered his plea of guilty to second-degree intentional homicide, and because an independent review of the record supports the trial court's exercise of sentencing discretion, we affirm.

BACKGROUND

¶2 The historical facts forming the backdrop for this appeal are not complex. On June 17, 2002, Tye had a physical altercation with the victim, Neelmon Love, in which Tye suffered a bruised eye and was the recipient of some not-so-nice name-calling. Tye went to his aunt's home, where he lived. He was upset and crying and told his aunt that he was going to "kill that nigga." She tried to calm him down, to no avail. In the meantime, Love had followed Tye to the aunt's house and knocked on the front door. Knowing that Love was at the front door, Tye retrieved a revolver that he kept in his apartment in the basement, ran out the back door, and around to the front of the house where Love was standing on the front porch facing the door. Tye pointed the gun at Love and fired four times from within a distance of about six feet. Love died from a gunshot wound in the left-back area. Tye stated he shot Love in self-defense, claiming that Love had a gun.

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

¶3 The State initially charged Tye with endangering safety by use of a dangerous weapon. After the preliminary hearing at which Tye did not testify, the State filed an information charging him with second-degree intentional homicide. Tye moved to suppress a statement he had given to police. At the hearing, he testified he made the statement to police only because he was not being charged with a homicide. He stated he believed he was being charged only with a Class E felony because of the self-defense element to the case. The trial court denied his motion.

¶4 Following the trial court's ruling, Tye, by his counsel, indicated a "pretty strong likelihood" that he would plead guilty to the charge of second-degree intentional homicide. The State told the court that prior to the hearing, it had informed Tye that if the case went to trial, the State would file an amended information charging Tye with one count of first-degree intentional homicide. If, however, Tye wished to resolve the matter short of a trial, the State would not increase the charge. Tye pled guilty to second-degree intentional homicide. The State agreed to recommend a substantial prison sentence, but would not make any specific recommendation. The trial court sentenced him to forty-five years in the Wisconsin prison system, comprised of twenty years of initial confinement, and twenty-five years of extended supervision.

¶5 Tye filed two postconviction motions: a motion to withdraw his plea and a motion for re-sentencing. The trial court denied both motions without a hearing. Tye now appeals.

ANALYSIS

A. Plea Withdrawal.

¶6 Tye weaves a complicated web of arguments to substantiate his claim that he should be granted the right to withdraw his plea. We trust our efforts for clarity will achieve a modicum of success.

¶7 Tye first claims his plea was not knowing, voluntary or intelligent because he did not understand that going to trial on charges of first-degree intentional homicide was not an all-or-nothing proposition. He argues that he knew that self-defense could be raised as a perfect defense at trial on charges of first-degree intentional homicide. However, he claims he was not aware that self-defense could also mitigate first-degree intentional homicide to second-degree intentional homicide, even if he went to trial and the jury decided his actions did not warrant acquittal. In other words, Tye claims he did not know that he could have raised both a perfect and an imperfect self-defense at trial on the charge of first-degree intentional homicide.

¶8 Based on this claim, Tye suggests he was never advised that he could raise both a perfect and an imperfect self-defense at a trial on first-degree intentional homicide. Thus, he argues the trial court should have conducted an evidentiary hearing on his postconviction claim, rather than summarily denying it. There is no mention in the transcripts of his trial counsel informing him of the right to raise self-defense at trial and, therefore, Tye seeks a hearing at which his trial counsel could explain his actions.

STANDARD OF REVIEW AND APPLICABLE LAW

¶9 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶10 Wisconsin courts consider six factual scenarios that could constitute "manifest injustice":

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶11 In order to satisfy his burden of proof, "[a] defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." ***Bentley***, 201 Wis. 2d at 313 (footnote omitted). A defendant challenging the adequacy of a plea hearing must make two threshold allegations. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). First, the defendant must show a *prima facie* violation of WIS. STAT.

§ 971.08 or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274. Second, the defendant must allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***Giebel***, 198 Wis. 2d at 216. Whether a defendant establishes a *prima facie* case is a question of law that we review independently. ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). The trial court's findings of fact, however, will be upheld unless they are clearly erroneous. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997).

¶12 Applying these standards, we reject Tye's claim that his plea was improperly taken. At the outset, it is clear that Tye does not advance a WIS. STAT. § 971.08 challenge in his appeal. Thus, we examine only whether he has proven the manifest injustice that his plea was entered unknowingly, involuntarily or unintelligently.

¶13 To examine the merits of Tye's claim, we review the record of the plea and sentencing hearings. On September 18, 2003, Tye entered a plea of guilty to the offense of second-degree intentional homicide. He indicated to the court that he understood the charge to which he was pleading guilty and the maximum penalty. In this process, Tye executed a guilty plea questionnaire and waiver of rights form and an addendum to the same form, which was filed with the court. The contents of these two documents stated that: Tye understood the charges to which he was pleading guilty; he further understood that the crime to which he was pleading guilty was second-degree intentional homicide and the elements to this crime were explained to him by his attorney; and, his attorney read to him the jury instructions relating to the charge. It further stated that Tye understood he was pleading guilty to second-degree intentional homicide based on

the facts set forth in the criminal complaint, which he read, and which his attorney read to him.

¶14 Before the court accepted Tye's plea, it engaged him in a lengthy colloquy concerning the circumstances surrounding Tye's agreement to plead guilty. First, through questions, the court ascertained that Tye had reviewed the plea questionnaire and its addendum with his counsel and that Tye had signed both forms acknowledging the contents and his actions. Second, the court quizzed defense counsel about his discussion with Tye concerning his plea. Counsel stated he had gone over the contents of the form with Tye, discussed the facts contained in the criminal complaint with Tye, and explained how the facts related to the elements of second-degree intentional homicide to which he was pleading guilty. Defense counsel further discussed possible defenses that could be entertained and explained what maximum penalties were associated with the charge. In response to an inquiry by the court, both Tye and his counsel agreed that the facts as set forth in the complaint could be used as a basis for accepting the guilty plea.

¶15 Tye argues that the trial court should also have elucidated the various tactical considerations that come into play when entertaining the strategy of self-defense. He reasons that if he had been told that self-defense could have been raised as a defense to first-degree intentional homicide, either by counsel or the trial court, he would have gone to trial. We reject Tye's arguments.

¶16 The lynchpin of Tye's claim of trial court error is the following statement contained in his brief. "Tye's plea was not voluntary, intelligent or knowing because he did not understand that going to trial on charges of first-degree intentional homicide was not an all-or-nothing proposition." This thesis is based upon two assumptions that are fatal to his cause. First, he implies that he

had sufficient proofs to warrant a self-defense instruction. The evidence before the trial court demonstrated that Tye shot the victim in the back. No gun was found on or near the victim after the shooting. The court concluded, based on this evidence, that it would have "never given a self-defense instruction." Hence, Tye's assumption that self-defense would have been an acceptable theory of defense for the jury to consider is erroneously premised.

¶17 The second assumption made by Tye is that the jury would believe that his actions constituted either a perfect or an imperfect self-defense. Even if we were to assume for the purposes of argument that a self-defense instruction to a first-degree intentional homicide charge was given to the jury, the jury could reject it totally based upon the physical facts, even if Tye had testified that the victim displayed a gun.

¶18 The postconviction motion documents filed by Tye seeking plea withdrawal argue not only that the trial court erred during the plea colloquy, but also, that his trial counsel was ineffective for failing to inform him that had he gone to trial on a first-degree intentional homicide charge, he could have argued for, and been convicted of, second-degree intentional homicide. The trial court examined this claim, and concluded that Tye had failed to demonstrate prejudice as a result of following his counsel's advice. The trial court reasoned that even if Tye could establish deficient performance, such performance could never be prejudicial because there was no basis on which to charge the jury with a self-defense instruction.

¶19 Based on the foregoing, we conclude that Tye has failed to prove by clear and convincing evidence that his plea was not entered knowingly, voluntarily and intelligently. There was clearly a sufficient basis in the record for the trial

court to have reasonably concluded that when Tye entered his plea of guilty to second-degree intentional homicide, he was adequately apprised of the charge to which he was pleading guilty, was aware of his range of possible defenses, and knowingly, voluntarily and intelligently waived the same.

¶20 Moreover, after thoroughly researching Wisconsin law, we cannot find any authority to support the proposition that a trial court, in taking a guilty plea with possible self-defense implications, is obliged to explain the procedural nuances involved in waiving a strategy of self-defense. The State argues: "The law does not require the circuit court to advise or ascertain a defendant's understanding of particular defenses to the offense to which the defendant is pleading guilty." We agree. Tye has provided no authority to support this proposition and, therefore, we reject his argument.

B. Evidentiary Hearing.

¶21 Tye next claims that the trial court should have conducted an evidentiary hearing on his claim of ineffective assistance of counsel.

STANDARD OF REVIEW AND APPLICABLE LAW

¶22 A trial court is required to grant an evidentiary hearing on a postconviction motion only if the motion, on its face, alleges facts which, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; ***Bentley***, 201 Wis. 2d at 310. Whether a motion alleges facts which, if true, would entitle the defendant to relief, is a question of law we review independently. ***Allen***, 274 Wis. 2d 568, ¶9.

¶23 As these standards apply to an appeal alleging failure to properly advise, the defendant must allege facts sufficient to show that but for counsel's

alleged error, there is a reasonable probability he would not have pled guilty and would have insisted on going to trial. To fulfill this standard, the defendant must plead more than the bald assertion that he would not have pled guilty because such a claim is nothing more than a conclusory allegation insufficient in itself. To the contrary, the defendant is required to set forth a specific explanation why he would have refused to plead guilty and would have gone to trial. Stated otherwise, the defendant must present specific *facts*, not conclusory statements, to allow the trial court to meaningfully assess his claim of prejudice, and the facts alleged must be material to the claim. ***Id.***, ¶22.

¶24 A review of Tye's motion papers, including his letter to his counsel, reveals no objective facts to demonstrate that, but for his trial counsel's alleged failure, he would have not pled guilty to second-degree intentional homicide, but would have insisted on going to trial on first-degree intentional homicide. Nor does he allege any objective facts that show he was entitled to a perfect self-defense instruction. The record is barren of any basis for such a claim. Tye provides no reason whatsoever why he would proceed to trial on a first-degree intentional homicide count with the associated risk that the jury could reject his alleged evidence of self-defense and consequently receive a sentence of life imprisonment solely because the jury might have convicted him of second-degree intentional homicide. Because Tye failed to provide the trial court with any specific factual allegations, the trial court did not err in denying Tye's motion for postconviction relief without conducting an evidentiary hearing.

C. Sentencing.

¶25 Tye's last claim is that the trial court erroneously exercised its sentencing discretion by not applying the factors required by ***State v. Gallion***,

2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, and ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). Thus he argues, he is entitled to re-sentencing. We reject his claim.

STANDARD OF REVIEW AND APPLICABLE LAW

¶26 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶27 The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentenance or

cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989).

¶28 The weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). After consideration of all of the relevant factors, the sentence may be based on any one of the primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶29 The erroneous exercise of discretion might be found "if the trial court failed to state on the record the material factors which influenced its decision, gave too much weight to one factor in the face of other contravening considerations, or relied on irrelevant or immaterial factors." ***Krueger***, 119 Wis. 2d at 337-38.

¶30 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. ***McCleary***, 49 Wis. 2d at 277. The trial court must engage in an explained judicial reasoning process and explain the reasons for its actions. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is "obliged to search the

record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id.*** at 282.

¶31 We begin our analysis of this claim of error by noting that Tye was sentenced on February 6, 2004. Our supreme court did not issue its decision in ***Gallion*** until April 15, 2004. Hence, ***Gallion*** does not apply to Tye's claim. Tye, however, also claims that the trial court erred in light of the dictates of ***McCleary***. Thus, we apply the standards of ***McCleary*** as set forth above.

¶32 In determining what sentence to impose in this case, the trial court had both a court-ordered pre-sentence report and a sentencing report prepared at the behest of Tye. Among other pertinent data, these reports touched on Tye's character and his rehabilitative needs. The court also took into account the content of numerous letters filed on behalf of Tye, as well as statements from his mother, the victim's sister, the arguments of both counsel, and Tye's personal allocution. Upon review, we may properly assume the trial court acted reasonably by taking into account the contents of those documents and statements in rendering its sentence. *See* ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). We further note that Tye's counsel recognized that because of the nature of the offense, probation was not a realistic sentencing option.

¶33 Tye's claim of inadequate explanation notwithstanding, the trial court's sentencing remarks are an excellent example of fundamentally sound principles to be applied by our trial courts when facing the daunting task of confronting unmitigated violence in our community. They are a classic exposition of the requirements for behavioral control and relate directly to the assessment of character and the need to protect the community.

¶34 The court imposed a sentence of forty-five years, which consisted of twenty years of initial confinement and twenty-five years of extended supervision. Tye's own pre-sentence evaluation recommended a thirty-year sentence to be divided into fifteen years of imprisonment and fifteen years of extended supervision. The trial court's sentencing remarks comprised twelve pages of transcript. A reasonable reading of those remarks belies any claim that the trial court did not explain how Tye's character, the need to protect the public, and the seriousness of the offense did not factor into the ultimate sentence. Two factors needed little expatiation—the nature of the offense and the limited intellectual skills of Tye. These factors were plainly taken into account.

¶35 From a reading of the trial court's remarks, it is obvious from a qualitative and quantitative standpoint that the trial court concentrated heavily upon the character of the defendant and the need to protect the public. Although Tye, through his counsel, disassociated himself from any claim of self-defense, he did claim that the circumstances of his relationship with the victim mitigated the nature of his conduct. The trial court rejected this argument for reasons amply set forth in its sentencing remarks. These extensive comments speak volumes about how the court assessed his character. In succinct terms, the court characterized Tye's actions as not caused by fear, but "by anger." Citing examples, the court went on to describe the disastrous consequences such a course of action could have in a community—a development that cannot be tolerated. Coupled with these observations, the court found that under the circumstances, it was unacceptable to keep a gun, noting that on a previous occasion Tye had used it to disburse a crowd. The court concluded that Tye had rationalized his conduct on the basis of an "unmeasured response" that could not be condoned. Stated otherwise, the lack of prudence could not be condoned.

¶36 Finally, Tye claims the trial court erred for failing to explain why the lengthy sentence of forty-five years with the twenty-years of initial confinement was appropriate. Even application of the reinvigorated dictates under ***Gallion*** (relying upon the ***McCleary*** standards) recognized:

> [T]hat the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more "magic words." Rather, the requirement of an on-the-record explanation will serve to fulfill the *McCleary* mandate that discretion of a sentencing judge be exercised on a "rational and explainable basis."

Gallion, 270 Wis. 2d 535, ¶49 (citation omitted).

¶37 This statement of the law of exercising sentencing discretion notwithstanding, we, in appellate review, are obligated to affirm a sentence if the facts of the record support the discretionary act of the trial court. The record reflects the State's clear intention to call for substantial prison time. Tye faced the maximum sentence for a Class B felony of forty years of confinement with twenty years of extended supervision. The presence of a dangerous weapon raised the maximum to a total of sixty-five years. The defense pre-sentence report, in a well-documented presentation, recommended a bifurcated sentence of fifteen years of initial confinement and fifteen years of extended supervision. One of the circumstances present in the record is the fact that Tye fled the scene. Instead of admitting that he made a tragic error in judgment, which he finally acknowledged at sentencing, he fled the state and was not apprehended for nearly a year. As we have seen, the trial court imposed a sentence of twenty years of initial confinement and twenty-five years of extended supervision. We conclude from the aggravated

facts of the record that the five-year variance for initial confinement as imposed by the trial court, from that recommended by Tye's own pre-sentence report, fits well within the rubric not requiring mathematical precision when it comes to balancing the relative importance of the nature of the offense, the character of the offender, and the need to protect the community. We therefore reject this last claim of error.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.