COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2703-CR **Cir. Ct. No. 2000CF558**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTROY T. MCGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Antroy McGee appeals from a judgment convicting him of being party to the crime of armed robbery and from an order denying his postconviction motion for plea withdrawal and sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 McGee was charged with being party to the crime of armed robbery based on allegations that he participated in the holdup of a gas station in 1999. McGee gave a statement to police in which he admitted his involvement but maintained that his partner had been the one with the gun. McGee eventually entered a guilty plea to the charge, and the court sentenced him to 126 months in prison under pre-truth-in-sentencing law.

¶3 Several years later, McGee filed a postconviction motion seeking to withdraw his plea based on ineffective assistance of trial counsel and an allegedly defective plea colloquy, or in the alternative, to reduce his sentence on the grounds that it was excessive. The trial court denied the motion without a hearing, and McGee appeals.

STANDARD OF REVIEW

¶4 A defendant who establishes that the procedures outlined in WIS. STAT. § 971.08 (2003-04)[1] or other court-mandated duties were not followed at the plea colloquy (*i.e.,* a *prima facie* ***Bangert*** violation), and further alleges that he did not understand the omitted information is ordinarily entitled to a hearing on his plea withdrawal motion. *See generally* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant who seeks to withdraw his plea on other grounds, such as ineffective assistance of counsel, is entitled to an evidentiary hearing when he

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

alleges facts which, if true, would constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If a hearing is sought under ***Bentley***, no hearing is required if a defendant presents only conclusionary allegations, or when the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We review de novo the circuit court's decision to deny a plea withdrawal motion without an evidentiary hearing, independently determining whether the facts alleged would establish the denial of a constitutional right sufficient to warrant the withdrawal of the plea as a matter of right. ***Bentley***, 201 Wis. 2d at 308.

¶5 A trial court may modify a sentence even if no new factor has been shown if it determines that the sentence was unduly harsh or excessive. ***State v. Ralph***, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990). A sentence may be considered unduly harsh or unconscionable only when it 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32. We review a trial court's determination that a sentence was not unduly harsh or unconscionable under the erroneous exercise of discretion standard. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

DISCUSSION

¶6 We first note that the only ground for relief asserted in McGee's postconviction motion was ineffective assistance of counsel. Because the motion referred to an attached memorandum, however, we will also consider the

additional issues of an allegedly defective plea colloquy and an allegedly excessive sentence, both of which were raised in the memorandum.

Ineffective Assistance of Counsel

¶7 McGee first claims that he was entitled to withdraw his plea based on ineffective assistance of counsel. His motion alleged that trial counsel failed to adequately investigate a potential alibi and met with him only three times prior to entry of the plea.[2] These allegations were conclusory, however, because they did not explain what facts further investigation might have revealed or what information additional meetings with counsel might have provided that would have had an effect on McGee's decision to enter a plea. In other words, even if true, the allegations fall far short of establishing that any manifest injustice occurred. Therefore, they were insufficient to warrant a hearing.

Plea Colloquy

¶8 McGee next claims that he is entitled to an evidentiary hearing on his plea withdrawal motion because the trial court failed to apprise him at the plea hearing of the nature and elements of armed robbery, and he did not in fact understand all of the elements of the crime. The record, however, does not support McGee's allegation that the plea colloquy was defective in this regard.

¶9 WISCONSIN STAT. § 971.08 (2003-04) requires the court to "determine that the plea is made voluntarily with understanding of the nature of

[2] McGee's appellate brief asserts several additional ways in which trial counsel's performance was allegedly inadequate, but we do not address arguments that were not included in his postconviction motion.

the charge and the potential punishment if convicted." This provision does not require the trial court to personally inform the defendant of all the elements of the crime, however. The court may instead refer to some other part of the record or communication between the defendant and counsel. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Here, the record includes a plea questionnaire signed by McGee which sets forth the elements of the offense and the maximum available prison sentence.

¶10 Contrary to McGee's contention on appeal, we are satisfied that the description of the elements of the offense on the plea questionnaire was accurate. The questionnaire states the elements as follows: "As party to crime / with intent to steal / by threat of use of dangerous weapon / took property from owner / threatening imminent use of force / didn't intend to return property." McGee told the court that he had gone over all the provisions on that form with his attorney, and also that he understood the elements of the offense and understood that the court could impose a prison sentence of up to forty years. It is true that neither the colloquy nor the plea questionnaire mentions the potential fine for armed robbery. McGee did not allege that he failed to understand that information, however. We therefore conclude that the allegations in McGee's motion regarding the plea colloquy were insufficient to establish a *prima facie* ***Bangert*** violation and did not warrant a hearing.

Sentence

¶11 McGee asserts that his ten-and-one-half-year sentence was unduly harsh in light of the information provided to the court by defense counsel at the original sentencing hearing and the fact that the State took no position regarding the length of McGee's sentence. The trial court was not limited to considering the

information provided by the defense, however. It also properly relied on information from the presentence investigation report (PSI). The PSI author emphasized that McGee's past violent behavior and his failure to take responsibility for the present offence presented a significant risk of recidivism and recommended ten to fifteen years in prison. The trial court stated that it agreed with that assessment. Furthermore, as the trial court pointed out, McGee was facing up to forty years in prison. Because the sentence was imposed under pre-truth-in-sentencing law, McGee would become eligible for parole after serving only twenty-five percent of the sentence, or thirty-one-and-one-half months. WIS. STAT. § 304.06(1)(b) (1999-2000). The sentence imposed was well within the maximum, and we cannot conclude that the trial court's determination that it was not excessive was clearly erroneous.

¶12 On appeal, McGee also argues that the trial court erroneously exercised its sentencing discretion at the original hearing by failing to adequately discuss all of the relevant sentencing factors. That issue is not properly before us, however, because it was not raised in his motion to the trial court.

By the Court.—Judgment and order affirmed.

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