COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2222 **Cir. Ct. No. 2002CF1828**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony M. Russell appeals *pro se* from a postconviction order. Pursuant to WIS. STAT. § 974.06 (2005-06), he moved to

withdraw his guilty plea to felony murder. The circuit court denied the motion and we affirm.

Background

¶2 In February 2003, Russell pled no contest to felony murder, party to a crime, with armed robbery as the underlying offense. *See* WIS. STAT. §§ 940.03, 939.05 (2003-04). In exchange for the plea, the State agreed to dismiss all other charges, including one count of first-degree intentional homicide and two counts of armed robbery charged in an amended information. The State further agreed to recommend prison without taking a position as to the period of incarceration. Russell confirmed his understanding of the State's concessions during the plea colloquy.

¶3 At sentencing, the court imposed a bifurcated term of thirty-five years of initial confinement and twelve years of extended supervision, rejecting Russell's request for a ten- to twelve-year term. It explained why it believed Russell had fired the fatal shots and distinguished Russell's position from that of his co-actors.

¶4 In January 2004, postconviction counsel filed a motion alleging ineffective assistance of trial counsel in preparing for sentencing, which the circuit court denied. Appellate counsel thereafter filed a no-merit report. Russell responded and the report was voluntarily dismissed to permit pursuit of arguably meritorious issues. The circuit court denied Russell's subsequent postconviction motion and this court affirmed. *See* ***State v. Russell***, No. 2005AP824, unpublished slip op. (WI App Nov. 30, 2005).

¶5 Russell instituted the instant litigation by filing a *pro se* postconviction motion. He claimed that his plea was involuntary, and that his trial and postconviction attorneys were ineffective. The circuit court denied the motion and this appeal followed.

Discussion

¶6 To withdraw a no contest plea after sentencing, Russell must satisfy two threshold requirements. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 141, 569 N.W.2d 577 (1997). First, he must make a *prima facie* showing that his plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 and other court-imposed mandatory duties. ***Van Camp***, 213 Wis. 2d at 141. Second, he must allege that he did not know or understand the information that should have been provided at the plea hearing. ***Id.***

¶7 Whether a plea is entered knowingly, voluntarily, and intelligently is a question of constitutional fact that we review independently. ***Id.*** at 140. However, we will not disturb a circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. ***Id.***

¶8 Russell first claims that his plea was involuntary because the circuit court failed to advise him that it was not bound by the plea agreement, in violation of the duty imposed by ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. ***Hampton*** requires that the circuit court engage the defendant in a colloquy to determine whether the defendant understands "that the court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement." ***Id.***, ¶42. ***Hampton*** does not require that the court recite "magic words" or follow "an inflexible script." ***Id.***, ¶43. Rather, the colloquy must "produce an exchange on the record that indicates that the

defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing." ***Id.***, ¶42.

¶9 Here, the court advised Russell that it would consider the "very general recommendation" from the State, any recommendation from the victim or the victim's family, and any recommendation from the defense. It concluded this explanation by stating, "I don't have to follow any particular recommendation. Do you understand that?" Russell replied, "[y]es sir."

¶10 The court satisfied the obligations set forth in ***Hampton***. It told Russell that it would consider sentencing recommendations, including the State's, but that it need not follow them. It confirmed that Russell understood. There is no deficiency.

¶11 Russell next contends that his plea was involuntary because his attorney erroneously advised him that the State was recommending imprisonment of ten to twelve years. The record fails to support his claim.

¶12 The circuit court found that counsel provided an opinion, a prediction as to the ultimate prison sentence. It rejected Russell's contention that his trial attorney provided inaccurate information. These factual determinations are not clearly erroneous.

¶13 According to Russell's affidavit, trial counsel told him that the State's request for "prison" was different from a request for "substantial prison" and counsel "put[] numbers to what the word prison represented." The affidavit further provides that "the state agreed for prison, but trial counsel placed emphasis on it by saying that I would only receive 10 to 12 years in prison."

¶14 During the plea hearing, Russell confirmed his understanding that the State was recommending "prison" rather than a term of years. He told the court that he was pleading guilty without reliance on any promises or assurances other than the State's agreement to accept his plea to a reduced charge and make a "certain general sentencing recommendation." Further, he signed a guilty plea questionnaire reflecting his understanding that the State was recommending "prison, length up to court."

¶15 The record supports the court's factual findings and we will not disturb them. Russell has demonstrated no more than counsel's prediction of a particular outcome that did not come to pass. "[D]isappointment in the eventual punishment imposed is no ground for withdrawal of a guilty plea." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶16 Russell next seeks relief on the grounds that his trial and postconviction attorneys were ineffective in pursuing his defense. To prove ineffective assistance of counsel, a defendant must prove both that his attorney's performance was deficient and that he was prejudiced by the performance. ***State v. Provo***, 2004 WI App 97, ¶7, 272 Wis. 2d 837, 681 N.W.2d 272. If the defendant fails to establish either component of the claim, this court need not address the other. ***Id.***

¶17 Both deficiency and prejudice involve mixed questions of law and fact. ***State v. Taylor***, 2004 WI App 81, ¶14, 272 Wis. 2d 642, 679 N.W.2d 893.

"We will not disturb the trial court's findings of fact unless they are clearly erroneous." ***Id.*** We review *de novo* the legal questions of whether trial counsel's performance was deficient and prejudiced the defendant. *See* ***id.***

¶18 Russell's claim that his trial attorney was ineffective by inaccurately describing the State's sentencing recommendation is defeated by the circuit court's factual determination that counsel provided only a prediction as to the likely sentence. Incorrect predictions and mistaken estimates of a likely sentence are insufficient bases for claiming ineffective assistance of counsel. ***Provo***, 272 Wis. 2d 837, ¶18. We reject Russell's claim that trial counsel was ineffective.[1]

¶19 Russell contends that his postconviction attorney was ineffective by failing to raise meritorious issues and focusing instead on issues without merit. We disagree.

¶20 Russell first asserts that postconviction counsel failed to raise the issue of trial counsel's deficient sentencing preparation. In fact, postconviction counsel did raise this issue, but did not pursue it on appeal. Counsel's failure to pursue an issue in the court of appeals must be challenged by a writ of *habeas corpus* in this court. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997), *criticized on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. ***Smalley*** does not "prescribe[] an optional procedure." *See* ***State ex rel. Santana v.***

[1] Russell's circuit court brief raised the additional claim that trial counsel was ineffective for failing to investigate the case. Although his appellate brief contains this allegation in its statement of issue number three, Russell makes no argument supporting this claim in either his brief-in-chief or his reply. We deem the issue abandoned. *See* ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999).

Endicott, 2006 WI App 13, ¶5, 288 Wis. 2d 707, 709 N.W.2d 515. We affirm the circuit court's dismissal of this claim on the ground that Russell has pursued it using the wrong procedural mechanism. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (circuit court order will be upheld if record supports result irrespective of the circuit court's rationale).

¶21 Russell next asserts that postconviction counsel should have challenged trial counsel's misleading advice regarding the definition of "prison," and the circuit court's failure to explain that it was not bound by the plea agreement. Russell did not show that either trial counsel or the circuit court committed any error in regard to these issues. Postconviction counsel was therefore not ineffective by foregoing these claims.

¶22 For the first time on appeal, Russell argues that postconviction counsel was ineffective by failing to argue that: (1) trial counsel misinformed Russell as to the sentence he would receive; (2) the State never filed an information amending the charge of first-degree intentional homicide to felony murder; and (3) the elements of party to a crime were never explained and were omitted from the complaint. Generally, we do not consider issues raised for the first time on appeal. ***Van Camp***, 213 Wis. 2d at 144. In this case, however, Russell filed a copy of his brief in response to the 2004 no-merit report as an attachment to his WIS. STAT. § 974.06 motion. That response identified as potentially meritorious the three issues he presses now. As these issues raise questions of law and the parties have briefed them on appeal, we have considered them. *See* ***State v. Bodoh***, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999). We determine that they do not warrant relief.

¶23 Russell's overarching contention is that postconviction counsel's performance was deficient because he did not raise the issues Russell wanted litigated. A defendant does not have the right to insist that his postconviction attorney raise particular issues. ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *criticized on other grounds by* ***Coleman***, 290 Wis. 2d 352. Counsel has the duty to determine the issues that have merit for appeal. ***Id.*** "Only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of [appellate] counsel be overcome." ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted). Russell has not demonstrated that his additional issues are "clearly stronger" than those pursued.

¶24 Sentencing predictions do not support claims of ineffective assistance of counsel. ***Provo***, 272 Wis. 2d 837, ¶18. Accordingly, postconviction counsel was not ineffective for failing to make such a claim.

¶25 As to Russell's claim that the information was never amended, the State's oral motion was sufficient. The circuit court granted the State's motions to withdraw the amended information charging Russell with first-degree intentional homicide and to reinstate the original information charging felony murder. The State may orally amend an information. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 343 n.17, 588 N.W.2d 606 (1999).

¶26 Russell's assertion that the elements of party to a crime were "never explained" is wholly undermined by the record. The circuit court reviewed "party to a crime" liability at length during the plea proceeding and trial counsel acknowledged discussing the matter with Russell. Russell's related claim that the complaint omits the elements of party to a crime is unsupported by any authority requiring more than the complaint contained.

> [A] defendant may be convicted as a party to a crime even though the information does not charge the defendant as a party under sec. 939.05, Stats. If a defendant is charged as a party to a crime, the specific subsection of sec. 939.05, Stats., (manner of participation) need not be specified. Likewise, the State need not elect its theory of participation before the case is submitted to the jury.

Jackson v. State, 92 Wis. 2d 1, 10, 284 N.W.2d 685 (Ct. App. 1979) (citations omitted).

¶27 Russell has not demonstrated that the issues he identified were "clearly stronger" than those pursued by his postconviction counsel. Counsel was therefore not ineffective in failing to raise them.

By the Court.—Order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).