COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2096-CR **Cir. Ct. No. 2004CF5647**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAJAIDO THARU SHOLAR, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH and DAVID A. HANSHER, Judges. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Majaido Tharu Sholar, Jr., appeals a judgment entered on his guilty plea to first-degree reckless homicide, *see* WIS. STAT. § 940.02(1), and orders denying his motion for postconviction relief and

supplemental motion for postconviction relief. On appeal, Sholar argues that his trial attorney was ineffective; that he did not knowingly, voluntarily and intelligently plead guilty; and that the circuit court erroneously exercised its sentencing discretion. We affirm.[1]

BACKGROUND

¶2 On October 5, 2004, Keith Porter was shot and killed by Sholar in the culmination of an ongoing dispute between the two young men. The criminal complaint alleged that Equanes Griffin provided Sholar with the gun used to kill Porter. The criminal complaint included summaries of inculpatory statements by both Griffin and Sholar in which they admitted to providing the gun and shooting Porter, respectively. Sholar was charged with first-degree reckless homicide, while armed, and Griffin was charged with possession of a firearm by a felon. Sholar entered a guilty plea to an amended charge of first-degree reckless homicide. As part of a plea bargain, the State agreed to dismiss and read in the "while armed" penalty enhancer. *See* WIS. STAT. § 939.63(1) (the maximum term of imprisonment may be increased if a person commits a crime while possessing, using or threatening to use a dangerous weapon). The court sentenced Sholar to a bifurcated sentence of forty years, comprised of thirty years of initial confinement and ten years of extended supervision.

[1] The judgment of conviction recites that Sholar pled guilty to, and was convicted of, first-degree reckless homicide, while armed. It is clear from the Record, however, that the "while armed" enhancer was dismissed and read in as part of a plea bargain. Upon remittitur, the clerk of the circuit court shall enter an amended judgment of conviction, correctly setting forth the nature of Sholar's conviction. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 247–248, 618 N.W.2d 857, 860 (the trial court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction.

¶3 An attorney was appointed to represent Sholar in his appeal. After appellate counsel filed a no-merit report under ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, Sholar moved this court to dismiss the appeal so that he could represent himself. We granted the motion, the no-merit appeal was dismissed, and Sholar filed a motion for postconviction relief in the circuit court. In that postconviction motion, Sholar argued that his trial attorney was constitutionally ineffective in several respects and that he should be allowed to withdraw his guilty plea. The circuit court denied the motion without a hearing. Sholar appealed from that order, but then moved to dismiss the appeal so that he could file a supplemental motion for postconviction relief. We dismissed the appeal and Sholar filed a supplemental motion for postconviction relief. The circuit court denied that motion, again without holding a hearing. Sholar appeals.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

¶4 Sholar contends that he should be allowed to withdraw his guilty plea because his trial attorney was ineffective. After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 135, 624 N.W.2d 363, 368. The manifest-injustice test is satisfied if the defendant's plea was the result of the ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213–214, 500 N.W.2d 331, 335 (Ct. App. 1993).

¶5 In order to prove ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of

professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice in the context of a plea withdrawal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he or she would not have pled guilty, and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996).

¶6 When a defendant challenges the effectiveness of trial counsel in a postconviction motion, the circuit court must hold an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Ibid.*** If, however, "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Ibid.***

¶7 With those principles in mind, we turn to Sholar's contentions.

¶8 Sholar contends that his trial attorney did not review discovery materials with him prior to the plea. Sholar states when he later reviewed the materials, it was "clear" that his attorney either had not read the materials or had lied to him. Sholar points to his attorney's representation that the witness statements were consistent, but Sholar asserts there were "many" inconsistencies in the statements. Sholar does not, however, identify any specific inconsistency or explain why the claimed inconsistencies were pertinent or relevant to his decision

to plead guilty. Without that information, Sholar's motion is wholly conclusory.[2] *See* ***Washington***, 176 Wis. 2d 205, 215–216, 500 N.W.2d 331, 336 (Ct. App. 1993) (An assertion that the attorney did not completely review discovery material is not sufficient to justify an evidentiary hearing.).

¶9 Sholar also faults his attorney for not filing various pretrial motions, including a motion to suppress Griffin's statement and a motion to dismiss. Sholar does not, however, demonstrate that either motion would have been successful. Absent such a showing, Sholar's assertions are conclusory, and they were properly denied by the circuit court without an evidentiary hearing.[3]

¶10 Sholar alleges that his trial attorney falsified her time records that were submitted to the Office of the State Public Defender, both as to the frequency of jail visits and the amount of time spent conferring with Sholar's mother. To the extent such allegations may be true, they present issues for the Office of the State Public Defender and they do not, by themselves, constitute ineffective assistance of counsel.

¶11 Sholar complains that his attorney did not give him a "detailed showing" of the evidence, but rather only the "2-minute renditions of her opinion and interpretation of what the evidence included, and how much of that evidence

[2] In his supplemental postconviction motion, Sholar faulted his attorney for not filing a "motion for suppression" directed to allegedly inconsistent witness statements about his character. As noted by the trial court in its supplemental decision: "Courts do not entertain suppression motions for purposes of suppressing opinions witnesses may have verbalized about the character of a defendant …. [A]t most, it would have been a credibility issue for the jury had the defendant gone to trial." We agree.

[3] The plea questionnaire completed by Sholar included the standard "addendum" in which Sholar acknowledged that his guilty plea was giving up his rights to challenge the sufficiency of the criminal complaint and to file a suppression motion.

included support for a conviction of first-degree reckless homicide." Sholar also states that his trial attorney did not give him material in her file until he requested "additional records and information." Sholar complains that the information had not been turned over previously, and singles out an "Investigative Report" of an interview with Griffin in which Griffin stated that his statement was coerced.

¶12 Sholar must do more than merely state that a fact is true. For example, he must do more than say Griffin's statement was coerced. He must point to the evidence in the Record that supports his argument, and then cite to the legal authority that supports his conclusion that those facts show coercion. Lacking that, Sholar's assertions are conclusory and they do not warrant an evidentiary hearing. "Assertions that [a trial] attorney 'failed to keep [a defendant] fully apprised of the events,' 'failed to completely review all of the necessary discovery material' and 'failed to completely and fully investigate any and all matters' are simply not the type of allegations that raise a question of fact." ***Ibid.***

KNOWING, VOLUNTARY AND INTELLIGENT PLEA

¶13 In a related argument, Sholar contends that he should be allowed to withdraw his guilty plea because, he asserts, it was not knowingly, voluntarily, and intelligently entered. *See* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 53–54, 644 N.W.2d 891, 898 (manifest injustice where plea not knowingly, voluntarily, and intelligently entered). Specifically, Sholar argues that the circuit court did not ascertain that he understood the nature of the charged offense, the potential punishment, and that the guilty plea would waive various constitutional rights. Because of those failings, Sholar contends that his guilty plea was coerced.

The Record, which shows that the court conducted a very thorough plea colloquy, defeats Sholar's contention.

¶14 To ensure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being given up. ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986). The trial court can do this by: (1) colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charge and the rights he or she gives up; or (3) referring to a signed plea questionnaire and waiver-of-rights form. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

¶15 At the outset of the plea colloquy, Sholar's attorney informed the circuit court that she had reviewed the jury instructions with Sholar. She told the court that the only potential trial issue was "the mental element" that distinguished first-degree reckless homicide from second-degree reckless homicide.[4] The attorney continued:

> [U]pon review of all the witness statements, Mr. Sholar indicated that he wished to enter a guilty plea rather than go to trial, so —I think we pretty thoroughly reviewed that,

[4] *Compare* WIS. STAT. § 940.02(1) ("Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life" is guilty of first-degree reckless homicide.), *with* WIS. STAT. § 940.06(1) ("Whoever recklessly causes the death of another human being" is guilty of second-degree reckless homicide.).

> and I tried to make sure that I answered all of his questions in that regard, and he indicated that I had.

Sholar expressly agreed with his attorney's statement.[5] The circuit court ascertained that Sholar had reviewed the criminal complaint with his attorney. The attorney told the court that she had discussed the elements of first-degree reckless homicide with Sholar, including the element of utter disregard for human life. Sholar told the court that he understood what he was charged with and the elements of the crime.

¶16 The court explained to Sholar that a guilty plea would waive the constitutional rights to a jury trial and to require that the State proved the elements of the crime beyond a reasonable doubt. Sholar told the court that he understood. As noted above, the court explained to Sholar that his guilty plea would give up the right to challenge the constitutionality of the police stop, arrest, search and seizure, interrogation, and witness identification. The court further explained that the guilty plea would waive the right to challenge the sufficiency of the Criminal Complaint, and would give up defenses such as alibi, intoxication, self-defense, and insanity. Sholar told the court that he understood the effect of his guilty plea.

¶17 The court explained the potential sentence and told Sholar that it was not required to follow any sentencing recommendation and could impose the maximum sentence of sixty years. Sholar told the court that he understood. Sholar told the court that he was satisfied with his attorney's representation and

[5] The Record, therefore, defeats Sholar's self-serving assertion that his attorney lied when she told the court during the plea colloquy that she had reviewed the elements of first-degree reckless homicide with him.

that he had enough time to discuss the case with her. Sholar told the court that he did not have any questions about the decision to plead guilty.

¶18 A circuit court's duty to ensure that a defendant's plea is knowing, voluntary, and intelligent does not require "magic words or an inflexible script." ***State v. Hampton***, 2004 WI 107, ¶43, 274 Wis. 2d 379, 400, 683 N.W.2d 14, 24. A circuit court is required to do no more than ascertain that the defendant understands the essential elements of the crime. *See* ***Trochinski***, 2002 WI 56, ¶29, 253 Wis. 2d at 61, 644 N.W.2d at 902 ("a valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements"). As we have seen, the Record shows that Sholar understood the essential elements of first-degree reckless homicide and that his guilty plea would waive his constitutional rights and defenses to the charge. The trial court properly denied Sholar's motion to withdraw his plea.

SENTENCING

¶19 Sholar claims that the circuit court erroneously exercised its sentencing discretion because it did not: (1) explain the "enormous amount of initial confinement" imposed; (2) consider Sholar's "strong showing of support" at sentencing; (3) consider the sentencing memorandum submitted by the defense; and (4) consider the recommendation of the agent who prepared the presentence investigation report on behalf of the State. None of Sholar's arguments are persuasive.

¶20 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535,

569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). There is a strong public policy against interfering with the circuit court's discretion, and the circuit court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To get relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶21 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (citation omitted); *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is also within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶22 The circuit court considered the appropriate factors when it sentenced Sholar. The court first considered the nature of the offense, stating that "no matter if it was intentional or reckless, [Sholar] took someone's life." The court noted that Sholar "introduced the gun" into the confrontation with Porter and that Sholar "fired not one shot, two shots, but three shots" at Porter. The court expressed its opinion that Sholar had "caught a break" when the State charged him with first-degree reckless homicide rather than a more serious crime. The court considered the impact of the crime on both Porter's family and Sholar's family.

¶23 The circuit court considered Sholar's character. The court reviewed Sholar's juvenile record, noting that it showed an "escalating" pattern of behavior.[6] The court noted that the State's presentence investigation report described "frequent episodes of absconding type behavior, vandalism, disrespect[,] … threats to school staff and failure to comply with the court's order." The court noted that Sholar had been arrested twice since becoming an adult. The court considered Sholar's acknowledged drug use, noting that Sholar admitted "smoking numerous blunts every day" and trying "Ecstasy." The court stated that Sholar's "drug problem" needed to be addressed. The court noted that Sholar spent his time "basically hanging out with the boys, carrying a gun, and smoking marijuana." The court also considered Sholar's upbringing, family background, education, and lack of employment. The court credited Sholar with accepting responsibility for his actions by pleading guilty. The court expressly recognized that Sholar's family had appeared and "are willing to admit that what you did has

[6] Sholar had juvenile adjudications for battery and carrying a concealed weapon.

effected [sic] not only them but has effected [sic] the victim's family here. They see the good in you. They understand, I think, the bad."[7]

¶24 The court identified specific deterrence as one of its sentencing objectives—to tell Sholar that if he "take[s] a gun, introduce[s] it and kill[s] someone, [he] can go to prison for a long time." The court stated that a "long period of incarceration" was needed to protect the public.

¶25 The circuit court fully explained Sholar's sentence and the reasons for it. *See* ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 52, 710 N.W.2d 466, 476 (circuit court not required "to provide an explanation for the precise number of years chosen"). It did not erroneously exercise its sentencing discretion.

¶26 Lastly, Sholar's challenges to the court's use of the presentence investigation report is meritless. At the outset of the sentencing hearing, the court expressly noted that Sholar had submitted a sentencing memorandum and a psychological examination. Although the State's presentence investigation report typically includes a recommendation of the preparing agent, the recommendation may be omitted if the court states that a recommendation is not necessary. *See* ***State v. Greve***, 2004 WI 69, ¶11, 272 Wis. 2d 444, 455, 681 N.W.2d 479, 484 (discussing WIS. ADMIN. CODE § DOC 328.27). Sentencing recommendations in a presentence investigation report are not binding on the court. *See* ***State v. McQuay***, 154 Wis. 2d 116, 131, 452 N.W.2d 377, 383 (1990). The court expressly referred to the presentence investigation report in its consideration of Sholar's juvenile and adult record. We see no error in the court's use of either

[7] Thus, Sholar's contention that the court did not take into consideration his "support" fails.

Sholar's defense sentencing memorandum or the State's presentence investigation report.

By the Court.—Judgment and orders affirmed, cause remanded with directions.

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