COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1896 **Cir. Ct. No. 2001CF4717**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL SHACKELFORD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael Shackelford appeals from orders summarily denying his postconviction plea withdrawal and reconsideration

motions.[1] The issues are whether Shackelford's failure to respond to the no-merit report on direct appeal bars his current motion, and whether he alleged sufficient facts to entitle him to an evidentiary hearing on his plea withdrawal motion. The former issue is currently pending before the Wisconsin Supreme Court in ***State v. Allen***, Case No. 2007AP795.[2] We therefore decide this appeal on its merits, and conclude that, notwithstanding the defect in the guilty plea colloquy, Shackelford's failure to allege that absent that defect he would not have pled guilty defeats his plea withdrawal motion. Therefore, we affirm.

¶2 Shackelford pled guilty to first-degree reckless homicide as a party to the crime. The trial court imposed a forty-three-year sentence, comprised of thirty- and thirteen-year respective periods of initial confinement and extended supervision. Appellate counsel filed a no-merit report, addressing three potential issues: the voluntariness of Shackelford's statements to police in the absence of counsel, the validity of Shackelford's guilty plea, and the trial court's exercise of sentencing discretion. Shackelford elected not to respond to the no-merit report. This court affirmed the judgment of conviction. *See* ***State v. Shackelford***, No. 2003AP1207-CRNM, unpublished slip op. at 1 (WI App July 15, 2003).

¶3 Five years later, Shackelford moved to withdraw his guilty plea pursuant to WIS. STAT. § 974.06 (2007-08).[3] The trial court summarily denied that

[1] The postconviction and reconsideration motions were decided by the Honorable Patricia D. McMahon. The plea colloquy that underlies Shackelford's challenges was conducted by the Honorable John J. DiMotto.

[2] Instead of waiting for the decision in ***State v. Allen***, Case No. 2007AP795, to determine the applicability of a procedural bar, we decide this appeal on its merits.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motion and a related reconsideration motion as barred by ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Shackelford appeals, challenging the applicability of ***Tillman***'s procedural bar.

¶4 In the interim, the Wisconsin Supreme Court accepted a petition for review in ***Allen***, which raised the issue of whether a defendant-appellant's failure to respond to a no-merit report may constitute a waiver of subsequent claims of error. The plea withdrawal issue Shackelford raises however, allows us to decide this appeal on its merits without waiting for the ***Allen*** decision.

¶5 Shackelford sought plea withdrawal because: (1) his trial lawyer and the trial court "failed to inform him of the defense of mitigating circumstances," that trial counsel "could discover such a defense," and that by pleading guilty he would be waiving that defense; (2) Shackelford was unaware that he had a complete defense to the first-degree reckless homicide charge because of the absence of a showing of utter disregard for human life; and (3) his "mild case of depression" impaired his ability to "fully understand[]" the plea colloquy and the trial court's "perfunctory questioning," particularly on the element of "utter disregard for human life as he mentally disconnected himself from participating in his defense." Our review of the plea colloquy reveals that Shackelford's first claim, insofar as the trial court is concerned, is a defect; we therefore decline to apply ***Tillman***'s procedural bar. *See* ***id.***, 281 Wis. 2d 157,

¶20; *see also* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893.[4]

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 In a claim for plea withdrawal based on an inadequate plea colloquy,

> the defendant [must] make a *prima facie* showing that his plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea

[4] The above-referenced defect in the plea colloquy is less significant in the context of the entirety of the record, and could have been addressed in our opinion on direct appeal as a defect not warranting further proceedings. It is a defect nevertheless, and in the context of a no-merit appeal in which any arguably meritorious issue must be addressed as to the viability of further proceedings, we decline to apply ***Tillman***'s procedural bar. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶20, 27, 281 Wis. 2d 157, 696 N.W.2d 574.

> hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

State v. Bangert, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (citations omitted). We review the trial court's summary denial of Shackelford's plea withdrawal motion as a question of law. *See* ***State v. Howell***, 2007 WI 75, ¶¶30-31, 301 Wis. 2d 350, 734 N.W.2d 48.

¶8 ***Bangert*** requires the trial court during the plea colloquy, "[t]o alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused." ***Bangert***, 131 Wis. 2d at 262. The trial court did not specifically alert Shackelford to that possibility, thus Shackelford has shown that his plea colloquy was defective.[5] *See* ***id.*** at 274.

¶9 Before the burden shifts to the State however, Shackelford must also show that he did not understand the information that should have been provided at the plea hearing. *See* ***id.*** Shackelford claims that he would not have pled guilty had he been advised of potential defenses and mitigating circumstances by his trial lawyer and by the court. The defect in the plea colloquy was the trial court's failure to simply alert Shackelford to the possibility that his lawyer may discover defenses and mitigating circumstances that he himself as a layman may not discover. The trial court is not obliged to identify the particular defenses. *See* ***State v. Pohlhammer***, 82 Wis. 2d 1, 3, 260 N.W.2d 678 (1978), *on rehearing from*

[5] The trial court confirmed with defense counsel that he had "gone over all possible applicable defenses" with Shackelford. This is not the precise notice ***Bangert*** requires. *See* ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986).

78 Wis. 2d 516, 254 N.W.2d 478 (1977). Shackelford claims that had he known about the defenses and mitigating circumstances to first-degree reckless homicide as a party to the crime, he would not have pled guilty to the shooting death of the victim; he does not claim that the defect in the plea colloquy affected his decision on whether to plead guilty. Shackelford's own admissions however, show that he had no defense or mitigating circumstances to the element of "utter disregard for human life," the element that distinguishes first-degree from second-degree reckless homicide.[6] *See* WIS. STAT. § 940.02(1) and (2) (2001-02).

¶10 Shackelford told police that he was "very upset" with his mother's landlord who gave her family five days to vacate the premises for failing to timely pay rent. Shackelford said that about five days after they had been evicted, he armed himself with a seventeen-shot Taurus nine millimeter handgun, and he and his friends, who were also armed, would watch the house and "that the plan was when the landlord pulled up they would … let [each other] know that the landlord was there and then they would all open fire on the landlord or the house once the landlord went inside the house." Shackelford got cold waiting for the landlord so instead they decided "to shoot up the house." Although he now claims that he thought that the house was unoccupied, he admitted in the complaint that as he was firing toward the house, someone came out on the balcony and fired two shots. Shackelford admitted firing about twelve shots.

[6] Shackelford stipulated to the use of the complaint containing his admissions as a factual basis for his guilty plea, confirming that the information was "substantially true and correct." In our decision on direct appeal, we confirmed that challenging the voluntariness of his admissions made in the absence of counsel would lack arguable merit. *See* ***State v. Shackelford***, No. 2003AP1207-CRNM, unpublished slip op. at 2 (WI App July 15, 2003).

¶11 In his postconviction motion, Shackelford now claims that "[w]e were not trying to kill anyone. We thought the house was empty. We had been around it, watching it, for 2 hours. We never saw anyone going in or out and figured there was no one there." In that same postconviction motion, Shackelford also attaches correspondence from his trial lawyer that defeats the substantive basis for his plea withdrawal motion, trial counsel's alleged failure to address potential defenses and mitigating circumstances. Trial counsel wrote Shackelford:

> First of all, I [trial counsel] tried to see if he [the prosecutor] would consider a reduced charge. He indicated that he cannot do that. He recognized that you did not plan to kill anyone but due to the fact that a person was killed while you were engaged in highly dangerous conduct, he felt that 1st Degree Reckless Homicide While Armed, Party to a Crime was the best charge he could give us. I have enclosed in this letter a copy of the jury instructions which outline the elements of the crime. Review this carefully.

¶12 This correspondence from trial counsel to Shackelford indicates consideration of potential defenses and mitigating circumstances. The facts, even according to Shackelford's most favorable admissions in his defense, constitute conduct that evinced an "utter disregard for human life." *See* WIS. STAT. § 940.02(1) (2001-02). Shackelford admits that he was aware of the elements of the offense. That understanding, his admissions, and the correspondence from his lawyer demonstrate consideration and unavailability of a reduced charge of second-degree reckless homicide because his conduct (directly or as a party to the crime) evinced an "utter disregard for human life." *See* § 940.02(1) and (2) (2001-02).

¶13 Shackelford has not made his *prima facie* showing to shift the burden to the State to establish the validity of his guilty plea. Here, the plea colloquy was defective, but that defect did not deprive Shackelford of the

information he claims he sought before pleading guilty. In fact, correspondence supporting his postconviction motion demonstrates that he was not deprived of that information. That correspondence and Shackelford's admissions, that have already been deemed valid, belie his potential defense and mitigating circumstances.

¶14 Shackelford also alleges that he was mildly depressed, preventing him from "fully" understanding the element of "utter disregard for human life."[7] Shackelford's allegation that he was "mild[ly] depress[ed]" when he pled guilty is conclusory, and he has not alleged in more than conclusory fashion how his mild depression affected his mental state to the extent that he was unable to understand the requisites for and the ramifications of his guilty plea.

¶15 We therefore affirm the trial court's postconviction and reconsideration orders. We affirm the orders on the substantive merit of Shackelford's motions, rather than on the basis of ***Tillman***'s procedural bar. It is therefore unnecessary to await the Wisconsin Supreme Court's decision in ***Allen***, which is no longer consequential to this appeal.

By the Court.—Orders affirmed.

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

[7] Shackelford further claims that his mild depression prevented him from "fully understanding the information provided to him prior to and during the plea colloquy." We reject that allegation as wholly conclusory.