COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2183-CR
2008AP2184-CR

Cir. Ct. Nos. 2003CF2610
2004CF387

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMARCO C. GRAVES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Demarco C. Graves appeals from two judgments of conviction for two counts of felony bail jumping and for resisting an officer, and from a consolidated postconviction order summarily denying his motions for

postsentencing plea withdrawal and for sentence modification. The issue is whether Graves was entitled to an evidentiary hearing on any of his three plea withdrawal claims, and whether the trial court erroneously exercised its sentencing discretion when it imposed the sentences consecutively to one another. We conclude that Graves was not entitled to an evidentiary hearing to develop his plea withdrawal claims because he either did not allege sufficient facts to entitle him to relief, or because the record conclusively demonstrated that he was not entitled to relief. Further, the record supports the trial court's imposition of consecutive sentences. Therefore, we affirm.

¶2 Graves entered guilty pleas to felony bail jumping and resisting an officer in Milwaukee County Circuit Court Case No. 2003CF2610. The trial court imposed nine- and six-month respective sentences to run concurrent to one another. In Milwaukee County Circuit Court Case No. 2004CF387, Graves entered an ***Alford*** plea to felony bail jumping.[1] The trial court imposed a thirty-nine-month sentence, comprised of fifteen- and twenty-four-month respective periods of initial confinement and extended supervision, to run consecutive to the nine-month aggregate sentence. He moved for postconviction relief, seeking to withdraw his guilty pleas in the bail jumping and resisting case, and alternatively, for a concurrent sentencing disposition in the other felony bail jumping case. The trial court summarily denied the motion. Graves appeals.

[1] An ***Alford*** plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970); *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

¶3 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.

¶4 Graves sought plea withdrawal on three bases: (1) an alleged breach of the plea bargain; (2) "new evidence" implicating the interest of justice; and (3) the alleged ineffective assistance of trial counsel for failing to file a suppression motion. Graves's postconviction motion must meet the criteria summarized in ***Allen*** to obtain an evidentiary hearing. Graves also sought to modify the sentencing structure from consecutive to concurrent if his plea withdrawal motion was unsuccessful.

¶5 Graves's first claim is that the prosecutor breached the plea bargain, namely that the bail jumping and resisting charges should have been dismissed and read-in for sentencing purposes. The sum total of the allegations in his motion on this issue are "that the prosecution breached a plea agreement with [Graves] to dismiss and read in the charges in this case as part of the global plea agreement in

these cases, such that said agreement should be specifically enforced with Defendant being resentenced to the remaining charges with 03 CF 2610 read in only." Attached to the motion is an affidavit from Graves's brother who averred that trial counsel "came [in] on the spur of the moment" and "did not know anything about Demarco's case, so she could not help Demarco." He further averred that "Demarco was confused about the issue, that if his gun case had been dismissed, why had the bail jumping charge not been dismissed also. Demarco also though[t] he was going to be released on paper after his sentencing."

> ¶6 A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained.

State v. Williams, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733 (footnotes omitted).

¶7 The prosecutor recited the terms of the proposed plea bargain. The trial court then asked, "[i]s that an accurate summary of the negotiations and the recommendation the State will make if the defendant enters pleas today?" Defense counsel responded affirmatively. The trial court then asked Graves personally if that was "[his] understanding as well," to which Graves responded that it was. The transcript of the plea hearing established that there was no breach of the plea bargain. Graves's allegations are not sufficiently specific to overcome

the record of proceedings to warrant an evidentiary hearing on his claim that the State breached the plea bargain.[2]

¶8 Graves's next claim is that "there is new evidence that the Defendant did not engage in the charged offense conduct," namely that there are witnesses who did not see Graves carrying a gun. Graves filed affidavits from three proposed witnesses. One averred that "[n]o gun was found." Another averred that she overheard Demarco say, "I didn't have a gun, it was a beer." The third proposed witness averred that "[t]he police searched the house and found guns in the basement, which Demarco was charged with, but these guns were found in the Woods' basement, and Demarco did not live there. Demarco did not have a gun on him, but was charged with a gun case."

¶9 To establish newly discovered evidence, the defendant must clearly and convincingly show that:

> (1) the evidence was discovered after trial;
>
> (2) the defendant was not negligent in seeking evidence;
>
> (3) the evidence is material to an issue;
>
> (4) the evidence is not merely cumulative to the evidence presented at trial; and
>
> (5) a reasonable probability exists of a different result in a new trial.[3]

[2] The State dismissed a different set of bail jumping and obstructing-an-officer charges in Milwaukee County Circuit Court Case No. 2004CF387, leaving only one bail jumping charge in that case.

[3] "The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62.

State v. Coogan, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) (footnote added).

¶10 Graves does not allege why he did not discover this information prior to entering his pleas. He also does not explain how a gun or its absence is consequential to the charges against him for bail jumping and resisting an officer.[4] These material defects alone are sufficient to defeat his entitlement to an evidentiary hearing on "new evidence."

¶11 Graves also contends that the interest of justice would be served by the introduction of this "new evidence" so the jury could consider these offenses without being distracted by the claim that he "illegally possessed the guns." First, we have explained why we rejected Graves's "new evidence" claim. Second, the bail jumping and resisting-an-officer charges that we are reviewing do not involve "illegally possess[ing] … guns." The interest of justice does not mandate consideration of a factor that is not material to the convictions we are reviewing.

¶12 Graves's remaining plea withdrawal claim is that his trial counsel was ineffective for failing to file a suppression motion. Graves alleged that "his rights against unreasonable search and seizure under [the federal and state constitutions], for the reason that his waiver of Constitutional challenges to the evidence against him as part of the guilty plea process in this case was obtained as the result of ineffective assistance by his trial counsel." He also alleges that his trial counsel

[4] Although Graves was charged with carrying a concealed weapon, that charge was dismissed.

> did not discuss waiver of his search and seizure motions as part of the guilty plea before he made his change of plea on these cases. Specifically, Defendant claims the weapon found in 03 CF 2610 was the result of an illegal search in that there was no warrant, no consent, no search incident to arrest and no plain view or other exception to the warrant requirement of the 4th Amendment prior to the search and seizure of the weapon.

¶13 First, Graves has not alleged specific facts; he has merely alleged his conclusions that the search was "illegal," and that, in his opinion, none of the exceptions to the warrant requirement applied here. Second, the transcript of the plea colloquy belies his claim that he was unaware of the fact that his pleas would waive his right to pursue any suppression challenge. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983) (by entering a plea other than not guilty, the defendant waives the right to challenge non-jurisdictional defects and defenses).[5]

¶14 In his postconviction motion, Graves also alleged two other bases for plea withdrawal: police misconduct, and that he was "bullied into pleading guilty." Although Graves reiterates some of the misconduct allegations in the Statement of the Case section of his brief-in-chief, he does not pursue this basis by identifying it as an appellate issue, or by arguing this claim on appeal. Consequently, we do not review this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed" for example, when "the arguments are supported by only

[5] The trial court explained to Graves that by entering pleas to these charges he would be giving up his rights to file motions to suppress evidence and to suppress his statements. Although we do not decide the issue on this basis, the allegations in the complaint implicate the hot-pursuit exception to the warrant requirement, as Graves was allegedly running away from the officers, giving rise to the resisting-an-officer charge to which Graves pled guilty.

general statements."). On appeal, Graves does not pursue his claim that he was "bullied into pleading." Likewise, we do not review this issue. *See* ***id.*** Both claims fail for lack of specificity and a general failure to pursue them on appeal. Each claim also relies on affidavits from proposed witnesses who are proffering "new evidence." We previously rejected this "new evidence," also undercutting the misconduct and "bull[ying]" claims.

¶15 Graves's final claim is that the trial court erroneously exercised its discretion by providing "insufficient reasons" for imposing the sentences consecutively rather than concurrently. We disagree.

¶16 "A trial judge has discretion to determine whether sentences imposed in cases of multiple convictions are to run concurrently or consecutively, using the same factors that apply in determining the length of a single sentence." ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court imposed the bail jumping and resisting-an-officer sentences concurrently; those two offenses arose out of the same incident. The trial court imposed the other bail jumping sentence to run consecutively to the other two concurrent sentences because it was a separate offense and, as the trial court explained, was "deserving of separate punishment."

¶17 We reject Graves's sentencing challenge. First, the trial court explained that it was imposing a separate (consecutive) punishment because the offense was separate from the others, having occurred eight months later than the other two offenses that occurred together. Second, the trial court's imposition of consecutive sentences was supported by its general remarks while imposing sentences in four different cases, only two of which are challenged in these appeals; it explained why it was imposing concurrent sentences in two of the cases

and consecutive sentences in the two others. The trial court considered the primary sentencing factors.[6] It considered the gravity of the offenses and was particularly concerned about the bail jumping because Graves repeatedly committed that offense. The trial court was mindful that Graves had "11 bench warrants and been arrested 30 times and [been subject to] 58 charges." It also considered "another factor that becomes more troublesome because [Graves is] out on bail and commit[s] yet another offense." The trial court did not misuse its discretion when it imposed consecutive sentences for separate instances of bail-jumping.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[6] The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987).