COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2305 **Cir. Ct. No. 2001CF1342**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYREES O. MURRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Tyrees Murray, pro se, appeals from an order denying postconviction relief. Murray argues he is entitled to withdraw his guilty plea based on an alleged misunderstanding of extended supervision. Murray also contends the plea colloquy was deficient because the circuit court did not ascertain

that he understood the elements of the offenses to which he pled guilty. We reject his arguments and affirm.

¶2 Murray pled guilty to first-degree intentional homicide and kidnapping. In exchange for the plea, the State agreed to recommend the dismissal of a weapon enhancer and also agreed not to pursue additional charges in connection with eighty-three rocks of crack cocaine found on Murray's person.[1]

¶3 The convictions arose from the murder of Maurice Washington in a Madison parking lot. Immediately after shooting Washington, Murray told fifteen-year-old T.T., who was in the car with Murray and Washington, and had witnessed the shooting, that she had to remain with him until he got safely out of Madison and that he was going to take her to Chicago with him. When she tried to flee, Murray told her that he would shoot her, but she was eventually able to escape and flag down police. The circuit court imposed life imprisonment and accepted a joint recommendation of eligibility for extended supervision after twenty-seven years and six months of confinement on the homicide conviction. The court imposed a concurrent sentence of eight years' initial confinement and two years' extended supervision on the kidnapping charge.

¶4 Murray filed four motions to withdraw his guilty pleas and the circuit court held two evidentiary hearings on those motions. He appeals the denial of the latest of those motions.

[1] The parties agreed the circuit court could consider the cocaine for purposes of a read-in at sentencing.

¶5 Murray filed his first motion on the grounds that he allegedly believed that the extended supervision eligibility date that the parties would recommend to the court was a "mandatory release, and that it was not optional or up to some board, that it would happen." Murray alleged that had he known that the court could not set an "absolute release date, a sure release date" he would not have entered the guilty pleas.

¶6 The circuit court held an evidentiary hearing at which Murray was represented by new counsel, R. Alan Bates. Murray testified that he understood that his sentence on the first-degree intentional homicide charge would be twenty-seven-and-one-half years, as jointly recommended by the parties. Murray's trial counsel, Daniel Dunn, testified that he discussed with Murray several times that "it wasn't an automatic thing that he was going to get released after 20 years or 35 years or whatever number of years it was that we ended up with."

¶7 The circuit court denied the motion, finding Murray's claim of confusion and misconception implausible, and applying the manifest injustice standard applicable to plea withdrawal motions made after sentencing. The court found Murray did not meet the standard because Murray was not credible in claiming that he was "confused and did not understand the nuances of a bifurcated sentence particularly as it pertained to extended supervision eligibility." The court further found that Murray "understood the consequences of his pleas and the distinction between extended supervision eligibility and mandatory release."

¶8 Murray's second plea withdrawal motion alleged his plea was not knowingly and intelligently entered because he did not understand that he would be sentenced to life and he believed that he would be sentenced to no more than twenty-seven-and-one-half years in prison. The motion further alleged that Dr.

Jonathan Lewis evaluated Murray and found him in the borderline to mildly retarded range, and that Murray had a "mild impairment in terms of understanding legal process," and that under stress, Murray would have even more difficulty understanding.

¶9 The circuit court held another evidentiary hearing at which Murray was represented by attorney Patricia FitzGerald. Murray and Dr. Lewis testified. The circuit court denied the second plea withdrawal motion. The court held Dr. Lewis' testimony did not demonstrate that Murray lacked the intellectual capacity to understand his guilty plea and that Murray had not met his burden of proving that his plea was not knowingly and intelligently entered.[2]

¶10 Murray's third motion alleged attorney Bates was ineffective for several reasons: (1) he "conceded that the standard for determining whether Mr. Murray should be allowed to withdraw his plea was whether there was a manifest injustice rather than … whether there was a fair and just reason to withdraw the plea"; (2) he failed to provide evidence that attorney Dunn "was not sure that Murray understood the consequences of his plea; and (3) he failed to present evidence that supported Murray's claim that he did not understand the written material provided to him prior to the plea. The parties agreed the court could resolve those claims without an evidentiary hearing, relying on the existing record supplemented by a new affidavit from attorney Dunn.

[2] Murray filed a notice of appeal and we granted a request to stay the appeal and remanded the matter to the circuit court to allow Murray to raise a claim of ineffective assistance of counsel.

¶11 The circuit court denied Murray's third motion, agreeing that the "fair and just reason" standard was the appropriate standard by which Murray's first motion should have been evaluated. However, the court held that Murray's attorney had not conceded the application of the higher standard. Applying the fair and just reason standard, the court found Murray's statements "lacking in both credibility and merit," and concluded that "Murray clearly understood the implications of entering his pleas."

¶12 We affirmed the judgment of conviction and the orders denying plea withdrawal in ***State v. Tyrees O. Murray***, Case No. 2004AP786-CR, unpublished slip op. (July 20, 2006). Applying the fair and just reason standard, we rejected Murray's claim that the circuit court should have allowed him to withdraw his guilty plea prior to sentencing. Our supreme court denied Murray's petition for review.

¶13 Murray, pro se, filed a fourth plea withdrawal motion under WIS. STAT. § 974.06 (2007-08).[3] Murray alleged that he should be allowed to withdraw his plea because "he was never informed of [the] extended supervision portion of [the] sentence, [and] therefore [was] not informed of direct consequences of [the] plea" and because he was "never informed of [the] elements of [the] first degree intentional homicide charge by counsel or the court." Murray also asserted that his sentence "was an abuse of discretion where he was sentence[d] to life in prison directly after plea then had his extended supervision extended on a later date."

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

Murray alleged that his reason for not asserting these claims in his direct appeal was that his postconviction/appellate counsel provided ineffective assistance.

¶14 The circuit court denied the motion under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court further held that even if Murray were not barred from challenging his pleas, "it would also find that Murray fails to present a *prima facie* case that his guilty plea was not knowingly, intelligently, and voluntarily entered." This appeal followed.

¶15 Murray first argues on appeal that his plea to the homicide charge was not knowingly, intelligently and voluntarily entered because he was erroneously informed that he was potentially eligible for parole release rather than for release on extended supervision.[4] We note at the outset that Murray's claim contradicts the allegations he made in his prior plea withdrawal motions and the testimony he gave at the hearings on those motions.

¶16 The basis for Murray's first plea withdrawal motion was his contention that he believed that he would be automatically released from prison after serving twenty-seven-and-one-half years. Murray alleged that he "believed that this was a mandatory release, and that it was not optional or up to some board, that it would happen." Yet, Murray now claims that he is entitled to withdraw his plea because "he believed that he would be eligible for parole" and that his release would be determined by the parole board. We will not countenance a litigant playing fast and loose with the judicial system.

[4] The State declines to address whether Murray's arguments are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), instead addressing the merits of Murray's arguments. We also choose to address Murray's arguments on the merits.

¶17 Regardless, Murray is not entitled to withdraw his guilty plea to the homicide charge based on an alleged misunderstanding of extended supervision. Because Murray's crime was committed after December 31, 1999, he is subject to the extended supervision provisions of WIS. STAT. § 973.014, rather than the statute's parole provisions. *See* WIS. STAT. §§ 973.014(1), (1g)(a). Moreover, the court was required during the plea colloquy to inform Murray "that it possesse[d] the authority to fix the [extended supervision] eligibility date," ***State v. Byrge***, 2000 WI 101, ¶¶54, 68, 237 Wis. 2d 197, 614 N.W.2d 477. Here, the court did just that.

¶18 Murray argues that because the court and his counsel sometimes referred to parole eligibility rather than extended supervision eligibility, he was not properly informed of, and did not understand, extended supervision before entering his plea. Murray notes the court stated at the plea hearing that "I will then set this on for a hearing for the purposes of sentencing as to Count 2 and then a determination of parole eligibility date as it relates to Count 1." However, the court made that statement after accepting Murray's plea, so it could not have had any effect on Murray's knowledge or understanding when he entered his plea.

¶19 Prior to Murray entering his plea, counsel referred to parole rather than extended supervision. The plea questionnaire and waiver of rights form stated that the mandatory minimum sentence Murray faced was "Life imprisonment with minimum parole @ 20 yrs." However, as the circuit court noted in its order denying Murray's latest motion, "even Murray acknowledges that under WIS. STAT. § 973.014, the court's determinations of either parole or ES eligibility are functionally indistinguishable." In either situation, the court is making a determination when a defendant who is being sentenced to life imprisonment will first be eligible for supervised release from prison.

¶20 Murray also focuses on his alleged lack of understanding of the procedure for seeking extended supervision release. Murray refers to the provisions set forth in WIS. STAT. § 302.114(5) governing petitions for release to extended supervision for felony offenders serving life sentences. *See* WIS. STAT. §§ 302.114(1), (5). There is no requirement, however, that a defendant be informed of those provisions at the time he enters a guilty plea. To the contrary, WIS. STAT. § 973.014(1g)(b) requires that information be provided at sentencing. That is what the court did at Murray's sentencing hearing.

¶21 Murray also argues that his diminished intellectual capacity impaired his ability to understand extended supervision. After an evidentiary hearing, at which the neuro-psychologist retained by Murray testified, the court found there was no evidence that Murray's ability to understand his lawyer's explanations of the plea agreement and its ramifications were impaired by Murray's intellectual capacities. The record fails to support Murray's claim that his ability to understand his potential sentence was impaired.

¶22 Murray next argues the plea colloquy was deficient because the court did not ascertain that he understood the elements of the offenses to which he pleaded guilty. Murray is incorrect. The transcript of the plea hearing demonstrates the court fulfilled its obligations to establish Murray's understanding of the nature of the charges. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶23 When it asked Murray for his pleas, the circuit court described the elements of the offenses in a manner consistent with the applicable jury instructions and confirmed that Murray understood those elements. Murray insists the court merely "recited the State's burden of proof rather than informing Murray

of the elements, explaining the elements or determine [sic] whether the elements were explained to Murray and he understands them." This is a distinction without a difference. When the court described to Murray what the State would have to prove, it was describing the elements of the offenses.

¶24 This is not a case where the court failed to inform a defendant of an essential element. *See, e.g.*, ***State v. Jipson***, 2003 WI App 222, ¶10, 267 Wis. 2d 467, 671 N.W.2d 18. The court stated all the elements of the offenses and ascertained from Murray that he understood them. The court also informed Murray of the constitutional rights he waived by pleading guilty and the potential penalties. Moreover, Murray acknowledged he understood the court was not a party to the plea negotiations and was free to impose whatever penalty it deemed appropriate regardless of the parties' joint recommendation. Murray was afforded an opportunity to ask questions or seek clarification regarding any matters that he did not fully understand or found confusing. His responses indicated comprehension of the plea process and the joint recommendation. The plea colloquy was not deficient.

¶25 Moreover, even if we could somehow assume the colloquy was inadequate, the record as a whole demonstrates that Murray understood the nature of the homicide and kidnapping charges to which he pled.[5] Among the issues covered at the evidentiary hearing on Murray's first motion to withdraw his pleas was whether Murray understood the elements of the offenses. Attorney Dunn

[5] Murray argues the circuit court "clearly acknowledged that the plea colloquy was deficient." We read the court's decision to say that even if the plea colloquy was deficient, the record would allow the State to meet its burden of proving that Murray understood the elements of the offenses. In any event, the adequacy of a plea colloquy is a question of law we decide independently. *See* ***State v. Brown***, 2006 WI 100, ¶21, 293 Wis. 2d 594, 716 N.W.2d 906.

testified that he had reviewed the elements of the offenses with Murray. The attorney's testimony went beyond a conclusory statement that he had reviewed the nature of the charges with Murray. Rather, he testified in detail about how he discussed the elements of the offenses with Murray prior to the entry of the pleas. The circuit court found that the attorney's testimony regarding the pre-plea discussions was "far more credible" than Murray's. The record amply demonstrates Murray's understanding of the elements of the offenses.

¶26 Finally, Murray argues that in light of his "mildly retarded condition," his counsel's discussions with him were inadequate to inform him of the nature of the charges. We decline to further address this contention, given our prior discussion of the lack of evidence that Murray's intellectual abilities impaired his ability to understand his plea.

By the Court.—Order affirmed.

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