COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2349 **Cir. Ct. No. 2001CF4716**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN M. HILLS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Glenn M. Hills appeals an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for relief. Hills sought to withdraw his guilty

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

plea to first-degree reckless homicide as party to a crime with use of a dangerous weapon. He alleged his plea was not voluntary and knowing because he did not understand the nature of the charges to which he pled and, alternatively, that there was no factual basis for his plea because he asserts that he did not fire his weapon and he attempted to stop his co-defendants from firing their weapons. Further, Hills claimed appellate and trial counsel were ineffective for failing to raise these claims. The court denied the motion as meritless. We agree with the circuit court and, further, hold that Hills' claims are procedurally barred. We therefore affirm the order.

BACKGROUND

¶2 In March 2001, Hills joined three others on a trip to a home on North 38th Street in Milwaukee. Co-defendant Michael Shackleford's mother had been evicted from the home, and Shackleford wanted to "shoot up" the house to scare the landlord. At the house, Hills and an individual known as "Rockett" went to the back, while Shackleford and Willie Henderson went to the front. Henderson called Rockett's cell phone, apparently to signal to begin shooting. Hills told police he took the phone and attempted to persuade Henderson not to shoot; Hills also claimed he told Rockett they ought not to participate. However, shortly after the phone call, the parties began shooting into the home. Hills claimed he shot either once before the gun jammed, or not at all. Efrain Diaz was inside the home and was killed by a bullet perforating his aorta. Hills drove himself, Rockett, and Henderson from the scene.

¶3 Hills, Henderson, and Shackleford were arrested and charged with one count of first-degree reckless homicide, as party to a crime, with use of a dangerous weapon. Pursuant to a plea agreement, Hills entered a guilty plea in

exchange for the State's recommendation of fifteen to twenty years' initial confinement, with the length of extended supervision left to the court. Hills' maximum exposure was sixty-five years' imprisonment. The court engaged Hills in a colloquy, then accepted the plea and sentenced him to seventeen years' initial confinement with thirteen years' extended supervision.

¶4 Hills moved for sentence modification. He asserted the court failed to consider all the mitigating factors, such as the fact that he had graduated from high school, was employed, did not use drugs or alcohol, and was only a follower in this crime. Hills argued that his sentence was unjust compared to Henderson's sentence of eighteen years' initial confinement and fifteen years' extended supervision, given that Henderson had fired more bullets than Hills and that Hills had attempted to call off the shooting. At that time, Hills also stated that there was no issue as to whether his plea was knowing and voluntary.

¶5 The court denied the motion.[2] It noted that it had considered the crime to be a "crime without conscience" and emphasized a need to protect the community from such random violence. It further noted that it had considered Hills' positive attributes, but was not required to give those more weight than the seriousness of the crime or the need to protect society. Accordingly, it denied the motion. Hills took direct appeal, challenging the sentence. This court summarily affirmed the judgment and order. *See* ***State v. Hills***, No. 2002AP2446-CR, unpublished slip op. (WI App May 6, 2003). We concluded that the court had appropriately exercised its sentencing discretion.

[2] As is often the case in Milwaukee County, a different judge ruled on the motion than had imposed sentence. Here, it is not necessary for us to identify the different judges.

¶6 Hills then petitioned for a writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992), and alleged, among other things, that trial and appellate counsel were ineffective for failing to seek plea withdrawal. We denied the petition, stating that Hills' claims of error were conclusory and failed to provide any facts supporting relief. We also denied Hills' *pro se* motion for reconsideration.

¶7 With private counsel, Hills moved to extend the time to file a postconviction motion to withdraw his plea, stating he wanted to challenge the factual basis for the plea. We denied the motion because it failed to provide sufficient explanation for his failure to raise the issue in his direct appeal and because he failed to appropriately raise the issue in his ***Knight*** petition.

¶8 With counsel, Hills then filed a WIS. STAT. § 974.06 motion in the circuit court seeking to withdraw his plea. He had been charged as a party to a crime under WIS. STAT. § 939.05. Under that statute, one way by which an individual is considered a party to a crime is if he "[i]ntentionally aids and abets the commission" of the crime. *See* WIS. STAT. § 939.05(2)(b). Hills alleged that his plea was not knowing, intelligent, and voluntary because he had repeatedly attempted to explain he did not intend to take part in the shooting. Hills also claimed his plea was invalid because there was no factual basis for the plea once he asserted that he did not actually fire any shots.

¶9 Hills' motion further alleged "he was denied effective appellate and trial counsel." He claimed ineffective assistance of appellate counsel is the reason the claims relating to his plea were not brought up on direct appeal. He sought an

evidentiary hearing to determine whether *postconviction* counsel was ineffective for failing to allege a WIS. STAT. § 971.08 violation[3] and for failing to consult with Hills about whether his trial attorney appropriately counseled his plea. The court denied the motion. It stated that the record refuted Hills' claim that his plea was unknowing and his claim that there was no factual basis. Therefore, even if postconviction or appellate counsel had timely raised the issues, Hills would not have prevailed on his meritless arguments. Hills now appeals.

DISCUSSION

¶10 Under WIS. STAT. § 974.06(4), all available grounds for relief must be raised in the "original, supplemental or amended motion. Any ground finally adjudicated or not so raised … may not be the basis for a subsequent motion." *See also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Here, Hills already had a prior postconviction motion as well as a direct appeal. He must therefore have a sufficient reason for not previously seeking plea withdrawal.

¶11 One possible reason for failing to raise an issue in a postconviction proceedings is the ineffective assistance of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, for ineffective assistance of postconviction counsel to sufficiently explain failure to raise an issue, thereby circumventing WIS. STAT. § 974.06 and ***Escalona***, a defendant must demonstrate that postconviction counsel actually was ineffective.

[3] WISCONSIN STAT. § 971.08 codifies certain obligations a circuit court must fulfill when accepting a plea.

¶12 Ineffective assistance of counsel requires the defendant to show that his or her attorney's performance was both deficient and prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Here, the court determined that even if postconviction counsel had timely raised Hills' claims, Hills would not have prevailed because the record conclusively demonstrated Hills understood what he was pleading to and the factual basis was adequate. In other words, the court implicitly concluded postconviction counsel's performance had not been prejudicial. An ineffective assistance claim fails if the defendant cannot show both prongs. *See* ***State v. Williams***, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719. If Hills cannot show postconviction counsel was ineffective, he does not have a sufficient reason for failing to seek plea withdrawal at a prior stage.[4]

¶13 Additionally, although Hills argues *postconviction* counsel was ineffective for failing to challenge his plea, he effectively raised this argument in his ***Knight*** petition and cannot relitigate it. The ***Knight*** petition alleged appellate counsel was ineffective for failing to challenge the plea. However, Hills had the same attorney for postconviction and appellate proceedings, so he was, in fact, challenging the same failure of the same attorney in his ***Knight*** petition as he now raises in his WIS. STAT. § 974.06 motion.

¶14 Even if this were not the case—had postconviction and appellate counsel been different attorneys—the ***Knight*** petition could have challenged not

[4] The State points out that Hills has not engaged, in his main brief, in any deficiency or prejudice analysis. Issues not briefed are deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981); *see also* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (we may decline to address issues inadequately briefed).

only appellate counsel's failure to challenge the plea but also appellate counsel's failure to make an issue of postconviction counsel's failure to likewise challenge the plea. In other words, Hills shows no sufficient reason why a challenge to the plea was not raised in a prior proceeding.

¶15 Even on the merits, though, Hills' claims of error fail: the record demonstrates he understood party-to-a-crime liability. The court read to him from the criminal complaint, specifically explaining party-to-a-crime liability. The court asked him if he understood, and Hills said he did.

¶16 When the court explained the elements of first-degree reckless homicide as party to a crime, and stated that Hills had to have intent to aid and abet Efrain Diaz's death, Hills took issue with intent element, explaining he had tried to stop the shooting. The court adjourned the hearing so that Hills could consult with his attorney and because "the court had some questions of Mr. Hills regarding … whether he was in fact a party to a crime[.]" Upon reconvening, the court explained that the element did not mean that Diaz's death was intentional, but that Hills was a party to a crime because he went with the others "for the purpose of kind of shooting up the house" and "with the knowledge that people were going to have guns, and people were going to fire at the house." In short, the court explained Hills was charged as a party to a crime "because he was intentionally aiding and abetting the people who were going over there to shoot" at the home. The court asked Hills if he understood this explanation, and he answered, "Yes, sir."

¶17 Further relating to the intent element, Hills complains he did not get a chance to tell his side of the story to the court. However, his attorney had prepared a written version of Hills' account, which the attorney then read to the

court. Hills agreed the account was accurate as read. Hills again personally emphasized to the court that he had tried to stop the shooting. The court asked if he nevertheless understood the elements of the crime charged, and Hills again indicated he did.

¶18 The record also demonstrates a factual basis for the guilty plea. Hills does not dispute that he was at the house, armed and ready to assist the others until the point that he claims to have changed his mind. Hills also does not dispute driving co-actors away from the scene.

¶19 Hills additionally complains that he was not advised he was giving up certain defenses and the court erred when it concluded he would not have been able to argue withdrawal as a defense. Although Hills was not specifically advised he was giving up all defenses, he was told he was surrendering his right to a trial, the right to call witnesses, and the right to make the State prove its case. Implicit in these admonitions is that there will be no opportunity to offer evidence of a defense.

¶20 Further, withdrawal is only a defense if the party-to-a-crime participation is by conspiracy. *See* WIS. STAT. § 939.05(2)(c). Withdrawal is not available when one is party to a crime by aiding and abetting the principal. Withdrawal is also not a defense just because a party loses his or her nerve at the last moment:

> "A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward because, as the result either of fear or even of a better motive, he concludes to run away at the very instant when the act in question is about to be committed and when the transaction which immediately begets it has actually been commenced."

See ***State v. Dyleski***, 154 Wis. 2d 306, 310, 452 N.W.2d 794 (Ct. App. 1990) (quoting ***Zelenka v. State***, 83 Wis. 2d 601, 621, 266 N.W.2d 279 (1978)). That is essentially what happened here: Hills did not attempt to withdraw until he was standing outside the victim's home, waiting for the signal to begin shooting. It was not error for the court to indicate this defense was unavailable.

¶21 Hills has failed to offer a sufficient reason for not challenging the validity of his plea in prior proceedings. Although he now attempts to claim postconviction counsel was ineffective for not raising such a challenge, his ***Knight*** petition alleged the same attorney was ineffective for the same reason. In addition, Hills does not show counsel actually was ineffective: the record demonstrates the plea was knowing, intelligent, and voluntary, entered with knowledge of the charges and the rights and defenses being surrendered, and supported by an adequate factual basis.

By the Court.—Order affirmed.

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