COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3104 **Cir. Ct. No. 2006CF5833**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA JAMES SCOLMAN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, Fine and Kessler, JJ.

¶1 PER CURIAM. Joshua James Scolman, *pro se*, appeals orders denying his postconviction motion for plea withdrawal and the motion for reconsideration that followed. Scolman claims that the circuit court erred when it

denied his postconviction motion without an evidentiary hearing. We disagree and affirm.

BACKGROUND

¶2 The historical and procedural facts underlying Scolman's conviction were set forth in previous appellate opinions, and we need not restate them here. *See* ***State v. Scolman***, No. 2007AP2682-CR, unpublished slip op. ¶¶2–4 (WI App Oct. 2, 2008) (***Scolman I***); ***State v. Scolman***, No. 2009AP1133-CR, unpublished slip op. ¶¶2–13 (WI App Dec. 15, 2009) (***Scolman II***). We will state additional facts when necessary to address Scolman's current arguments.

¶3 As relevant to this appeal, Scolman, *pro se*, filed a postconviction motion under WIS. STAT. § 974.06 (2009–10) and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677–678, 556 N.W.2d 136, 137 (Ct. App. 1996) (per curiam), arguing that he should be allowed to withdraw three no-contest pleas that he entered in 2007.[1] Scolman asserted that his postconviction lawyer gave him constitutionally deficient representation when he failed to challenge the plea colloquy and his trial lawyer's performance with regard to the plea.

¶4 The circuit court denied the motion, without a hearing, because the plea colloquy "unequivocally demonstrates that [Scolman] had knowledge of the

[1] In total, Scolman pled no-contest to three counts of homicide by intoxicated use of a motor vehicle; one count of injury by intoxicated use of a vehicle causing great bodily harm; one count of endangering safety by use of a dangerous weapon [count five]; one count of disorderly conduct while armed with a dangerous weapon [count six]; and one count of resisting an officer [count seven]. For purposes of this appeal, we are concerned with counts five, six, and seven.

All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

nature of these offenses as well as the elements of th[e]se offenses. Although he asserts that he did not understand the elements, he does not state what he did not understand about them." The circuit court concluded that Scolman's motion was "completely insufficient to obtain an evidentiary hearing." Scolman filed a motion for reconsideration of that decision, which the circuit court also denied.

DISCUSSION

¶5 At issue on appeal is whether the circuit court erred when it denied, without a hearing, Scolman's motion seeking to withdraw his no-contest pleas. Scolman's filing contained elements of both a ***Bangert*** motion, *see* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), which alleges defects in a plea colloquy, and a ***Nelson***/***Bentley*** motion, *see* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), which alleges factors extrinsic to the plea colloquy rendered a plea invalid. Our review of the circuit court's decision to deny Scolman's postconviction motion is the same under both lines of cases: *de novo*. *See* ***State v. Howell***, 2007 WI 75, ¶¶30, 78, 301 Wis. 2d 350, 369, 388, 734 N.W.2d 48, 57, 67.

A. *Bangert*

¶6 We first address Scolman's motion under ***Bangert***. During the course of a plea hearing, a circuit court must address the defendant personally and fulfill several duties under WIS. STAT. § 971.08 and judicial mandates to ensure that the plea of guilty is constitutionally sound. ***State v. Brown***, 2006 WI 100, ¶¶34–36, 293 Wis. 2d 594, 616–618, 716 N.W.2d 906, 916–918. This includes "[e]stablish[ing] the defendant's understanding of the nature of the crime with which he is charged" and "[a]scertain[ing] personally whether a factual basis exists to support the plea." ***Id.***, 2006 WI 100, ¶35, 293 Wis. 2d at 617, 716

N.W.2d at 917. If a plea colloquy is deficient and the defendant alleges that he or she did not understand an aspect of the plea because of the omission, the defendant is entitled to an evidentiary hearing. ***Id.***, 2006 WI 100, ¶36, 293 Wis. 2d at 618, 716 N.W.2d at 917–918.

¶7 As stated, Scolman pled no-contest to the following: endangering safety by use of a dangerous weapon [count five], *see* WIS. STAT. § 941.20(1)(a) (2005–06); disorderly conduct while armed with a dangerous weapon [count six], *see* WIS. STAT. §§ 947.01, 939.63 (2005–06); and resisting an officer [count seven], *see* WIS. STAT. § 946.41(1) (2005–06). Scolman claims the plea colloquy was deficient because the circuit court failed to ensure that he understood the elements of these crimes.

¶8 At the plea hearing, the circuit court asked Scolman, "You … understand the [S]tate would have to prove you guilty beyond a reasonable doubt as to each and every single element of the offenses and have you gone over the elements of the offenses with your lawyer and how they relate to the facts in the case?" Scolman responded, "Yes, I have, Your Honor."

¶9 Specific to the three counts that are the focus of this appeal, the following exchange took place:

> THE COURT: As to count five, you did endanger the safety of Donte Sims by the negligent operation of a dangerous weapon contrary to Wisconsin state statutes. That there was a pointing and discharge of a firearm?
>
> [Scolman]: Yes, Your Honor.
>
> THE COURT: And as to count six, you did at that same location in a public place while using a dangerous weapon did engage in otherwise disorderly conduct under circumstances

> which such conduct intended to cause or provoke a disturbance?
>
> [Scolman]: Yes, Your Honor.
>
> THE COURT: And at that time you not only resisted an officer while such officer was doing an act in an official capacity with the lawful authority contrary to Wisconsin state statutes?
>
> [Scolman]: Yes.

Afterward, the prosecutor elaborated on the factual bases for counts five through seven:

> As to the endangering safety by use of a dangerous weapon, Mr. Simms would testify that he observed the defendant point a gun in his direction. Mr. Simms got out of the car, ran and then subsequently heard some shots.
>
> As to the disorderly conduct, the defendant's actions certainly caused a disturbance…. Obviously … this is a busy intersection and the defendant's actions after the accident did cause a public disturbance. And the officer … would testify that when he apprehended the defendant the defendant fought with him.

The circuit court later inquired again, "So you understand those elements, sir, is that right, as to each and every one of those counts?" Scolman replied, "Yes, sir."

¶10 Scolman contends that the colloquy was defective because the circuit court did not employ any of the suggestions set forth in ***Howell*** for ascertaining a defendant's understanding of a charge or any other suitable method. *See* ***Howell***, 2007 WI 75, ¶51, 301 Wis. 2d at 375–376, 734 N.W.2d at 61 (providing a nonexhaustive list of methods for circuit courts to utilize when determining a defendant's understanding of a charge that includes "summariz[ing] the nature of the charge by reading the jury instructions, … ask[ing] defendant's counsel about [counsel's] explanation to the defendant and ask[ing] counsel or the defendant to

summarize the explanation, or … refer[ring] to the [R]ecord or other evidence of the defendant's understanding of the nature of the charge"). Scolman overlooks that the recommended methods set forth in ***Howell*** comprise a nonexhaustive list. *See* ***id.***, 2007 WI 75, ¶51 n.28, 301 Wis. 2d at 376 n.28, 734 N.W.2d at 61 n.28 ("These recommendations are not an exhaustive list of methods for circuit courts to ascertain a defendant's knowledge and understanding of the nature of the charge.").

¶11 Having reviewed the colloquy, we are satisfied that there is no merit to Scolman's claim that the circuit court failed to ensure that he understood the elements of these crimes. There is no basis under ***Bangert*** to justify an evidentiary hearing regarding plea withdrawal.

B. *Nelson*/*Bentley*

¶12 We now address Scolman's motion under ***Nelson***/***Bentley***. Pursuant to ***Nelson***/***Bentley***, Scolman must establish, by clear and convincing evidence, that withdrawal is necessary to remedy some manifest injustice. *See* ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). Scenarios presenting "manifest injustice" include, among other things, the ineffective assistance of counsel. *See* ***id.***, 213–214 & n.2, 500 N.W.2d at 335 & n. 2.

¶13 To successfully withdraw his plea based on ineffective assistance of counsel, Scolman must show that his trial lawyer's conduct or advice was objectively unreasonable and prejudicial—that, but for the trial lawyer's error, Scolman would not have entered the plea. *See* ***Bentley***, 201 Wis. 2d at 311–312, 548 N.W.2d at 54. A reviewing court need not consider both the deficient performance and prejudice prongs of the ineffective assistance of counsel test. *See*

Strickland v. Washington, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). Here, the prejudice prong is dispositive.

¶14 Scolman claims his trial lawyer performed deficiently when she failed to set forth the elements of counts five, six, and seven on the plea questionnaire and waiver of rights form he signed. He points out that no jury instructions were attached to the form and that his trial lawyer did not represent at the plea hearing that she had, in fact, explained the elements of those offenses to him. With his postconviction motion, Scolman attached an affidavit stating that he "was unaware of [the] essential elements constituting the[se] crime[s]" and that his trial lawyer "never discussed, explained[,] defined[,] or enumerated what the specific elements were on counts 5-7 off the [R]ecord prior to the plea hearing." In the affidavit, Scolman also submits: "My trial attorney pressured me to plead no[-]contest to counts 5-7 because of my guilt on counts 1-4," and "I never believed I was guilty of said charges, and that had I been informed of the elements I would not have pl[ed] no[-]contest."

¶15 As the State points out, Scolman does not address why, at his plea hearing, he responded affirmatively when the circuit court inquired whether his trial lawyer had addressed the elements of the offenses with him and how they related to the facts in the case. Moreover, Scolman does not explain what the jury instructions would have added in light of both the circuit court's and the prosecutor's explanations during the plea hearing of the charges and the factual bases supporting them or why being further informed of the elements would have prompted him to change his plea.

¶16 We conclude that Scolman's allegation that had his trial lawyer informed him of the elements of counts five through seven, he would not have entered no-contest pleas and would have gone to trial on those charges, without more, is insufficient to satisfy the prejudice prong of the ineffective assistance of counsel inquiry.[2] *See* ***Bentley***, 201 Wis. 2d at 316, 548 N.W.2d at 56 ("A 'bare-bones allegation' that a defendant would have pled differently 'is no more than a conclusory allegation and, under ***Nelson***, not sufficient to require the [circuit] court to direct that an evidentiary hearing be conducted.") (citation and one set of internal quotation marks omitted). Consequently, the circuit court properly exercised its discretion in denying Scolman's motion without a hearing.

By the Court.—Orders affirmed.

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

[2] On appeal, Scolman does not make further mention to the allegation that his trial lawyer pressured him into the pleas. Issues raised in the circuit court but not briefed or argued on appeal are deemed abandoned. *See* ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).