COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2412-CR **Cir. Ct. No. 2010CF3654**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD EMMANUEL BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and DAVID L. BOROWSKI, Judges. *Affirmed.*

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

¶1 PER CURIAM. Howard Emmanuel Brown appeals a judgment, entered upon his guilty plea, convicting him of first-degree reckless homicide as a party to a crime, contrary to WIS. STAT. §§ 940.02(1) and 939.05 (2009-10).[1] Brown also appeals the order denying his postconviction motion for plea withdrawal.[2] Brown argues he is entitled to withdraw his plea based on the ineffective assistance of his trial counsel. We reject Brown's argument and affirm the judgment and order.

BACKGROUND

¶2 Brown was originally charged with first-degree reckless homicide by use of a dangerous weapon and attempted armed robbery with the use of force, both as a party to a crime. The charges against Brown stem from an incident that occurred the evening of July 23, 2010. According to the complaint, on that night, Brown, his brother Travon Brown (Travon), and Chazz Loyd were looking for someone to rob when they spotted Andre Evans walking toward them on the street. In a statement to police, Brown said that he ran up to Evans from behind, held a gun within two to three inches of Evans' face, and said, "Give me the money." When Evans "moved his hands downward," Brown responded by shooting him once in the chest. Brown, Travon, and Loyd fled the scene. Evans died as a result of the shooting. Brown was seventeen years old at the time of the crime. If convicted, Brown faced a maximum sentence of sixty-five years on the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Jeffrey A. Conen accepted Brown's plea and imposed sentence. The Honorable David L. Borowski reviewed and denied Brown's postconviction motion.

reckless homicide charge and twenty-years on the attempted armed robbery charge.

¶3 Brown subsequently entered into a plea agreement with the State. He agreed to plead guilty to the charge of first-degree reckless homicide as a party to a crime. In exchange for the plea, the State dismissed the weapon enhancer, and it dismissed the attempted armed robbery charge, which was to be read-in at sentencing. The State further agreed to recommend at sentencing that Brown receive a "substantial" prison term. The circuit court accepted Brown's guilty plea after finding that it was knowingly, intelligently, and voluntarily entered into and sentenced Brown to twenty-two years of initial confinement and six years of extended supervision.

¶4 Postconviction, Brown argued that he was entitled to withdraw his guilty plea based on his trial counsel's ineffectiveness. Specifically, Brown claimed his trial counsel promised that if Brown pled guilty, the trial court would not sentence him to more than fifteen years of initial confinement. The circuit court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), and denied Brown's motion.

DISCUSSION

¶5 A defendant seeking to withdraw a guilty plea after sentencing "'carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a manifest injustice.'" ***State v. Cain***, 2012 WI 68, ¶25, ___ Wis. 2d ___, ___ N.W.2d ___ (one set of quotation marks and citations omitted). A manifest injustice occurs when the defendant's plea was the result of the ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500

N.W.2d 331 (Ct. App. 1993). To prevail on an ineffective assistance of counsel claim, the defendant must prove that counsel's representation was deficient and that the deficient performance resulted in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶6 Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** Its legal conclusions—whether counsel's performance was deficient and, if so, prejudicial—present questions of law we review *de novo*. ***Id.*** at 128.

¶7 Here, Brown argues his trial counsel materially misrepresented the consequences of the guilty plea. Brown claims his trial counsel unequivocally promised him that, if he pled guilty, the trial court would not give him more than fifteen years of initial confinement. He continues: "Making matters worse was the fact that trial counsel, in effect, intimidated [Brown] by stating that he would receive life in prison or the maximum sentence if he continued to trial. These promises were illegal and coercive."

¶8 At the ***Machner*** hearing, trial counsel testified he had "[p]robably" mentioned a sentence of fifteen years to Brown "as a goal" that counsel would "shoot for" at the sentencing hearing. Trial counsel denied promising Brown that he would receive a fifteen-year sentence. Trial counsel did, however, acknowledge advising Brown that counsel did not believe Brown would receive the maximum sentence of forty years of initial confinement. Trial counsel further acknowledged that he "may" have advised Brown that he faced life imprisonment

if he proceeded to trial and if the charges against him were amended to first-degree intentional homicide.

¶9 Brown testified that he told his trial counsel he wanted to go to trial because if he entered the plea his son would be twenty years old by the time he was released. Brown continued, "and then basically I really won't say as a promise, but I took … as a promise" trial counsel's statement that "[w]ith me on the case, you would do no more than 15 years." According to Brown, his trial counsel told him that if went to trial, he would face life in prison. Brown acknowledged that the circuit court advised him during his plea hearing that it did not have to follow anyone's recommendation and that Brown could be sentenced to forty years of initial confinement. Despite this warning, Brown testified that he thought his trial counsel "would have been able to pull some strings to get me the time that he said I'd get so I didn't really listen to what the judge was saying. I just agreed to everything to get it over with."

¶10 After listening to the testimony, the circuit court stated that it "d[id] not believe for one minute that [trial counsel] guaranteed that Mr. Brown would not get more than 15 years," and characterized Brown's testimony on that point as "an utter falsehood." The circuit court stated:

> I certainly believe [trial counsel]'s testimony is credible … in its entirety.… [Trial counsel] explains that the words 15 years may have come up, likely did come up and it was brought up with the defendant in the context of that would be a goal, that will be something to shoot for.
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> ….
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> In terms of Mr. Brown's testimony, I think he—[h]e testified largely truthfully, but also selectively…. I think this is a case of nothing more than buyer's remorse.
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> ….

> … Mr. Brown got more time than he thought he would get. Mr. Brown is upset. Mr. Brown doesn't like [the circuit court]'s decision. Too bad….
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> I do not believe for one minute that [trial counsel] guaranteed that Mr. Brown would not get more than 15 years….
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> ….
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> … I believe [trial counsel]'s testimony completely. I believe to the degree that Mr. Brown testified about that conversation, it was an utter falsehood….
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> ….
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> … To the degree that this is a credibility contest, I believe completely [trial counsel] and I believe Mr. Brown chose selectively to testify truthfully and at other times to obfuscate or frankly come close to a really bad memory or lying about what transpired between him and [trial] counsel.
>
> I do believe that [trial counsel] may have said something to the effect of, well, you're probably not going to get 40 years or there's no way the judge is going to max you out. Again, that's because [trial counsel] is experienced in the system.[3]

¶11 As the State points out, Brown did not argue that any of these findings were clearly erroneous; indeed, Brown does not even address the circuit court's findings in his brief-in-chief.[4] The circuit court, as fact finder, "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App

[3] Trial counsel testified that he had thirty-two years of experience in criminal law.

[4] In his reply brief, Brown argues for the first time that the circuit court's *decision* was clearly erroneous. To the extent this argument amounts to a challenge to the circuit court's *findings*, we will not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Having reviewed the postconviction testimony and the circuit court's factual findings, which are not clearly erroneous, we conclude Brown has not established that trial counsel was ineffective. As such, his motion seeking plea withdrawal was properly rejected.

By the Court.—Judgment and order affirmed.

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