COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2910-CR **Cir. Ct. No. 2010CF277**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARL D. MACKAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Karl D. MacKay appeals the judgment of conviction entered on his guilty plea to second-degree sexual assault of a child and the order denying his motion for postconviction relief seeking plea withdrawal and

sentence modification. MacKay contends that his plea was invalid because he may have become incompetent at some point after being found competent and the plea colloquy was defective. He also complains that his sentence was unduly harsh. We reject his arguments and affirm the judgment and order.

¶2 MacKay was charged with two counts of first-degree sexual assault of a child under thirteen and one count of second-degree sexual assault of a child under sixteen. Pursuant to his counsel's request at the initial appearance, the court commissioner ordered a competency evaluation. In May 2010, forensic psychiatrist John Pankiewicz, M.D., examined MacKay at the jail and reviewed the criminal complaint and MacKay's treatment records from the jail. Dr. Pankiewicz made a diagnosis of schizophrenia, and opined that MacKay was not then competent to stand trial but that MacKay could be restored to competency within the statutory time frame if committed with a mandatory treatment order. Based on Dr. Pankiewicz's report, the court found MacKay not competent to stand trial. MacKay was admitted to Mendota Mental Health Institute on a commitment order for treatment.

¶3 In July 2010, a second competency evaluation was done by forensic psychiatrist Erik Knudson, M.D. In addition to the criminal complaint and Dr. Pankiewicz's report, Dr. Knudson's evaluation and report were based on a series of psychiatric examinations and behavioral observations made while MacKay was in the forensic unit at Mendota; MacKay's medical records from Mendota; conferences with Mendota staff who had worked with MacKay; and MacKay's medical records from a Veteran's Administration medical center. The VA records indicated that MacKay tested positive for marijuana and cocaine on urine screens and admitted faking psychiatric symptoms in hopes of getting a new doctor who would prescribe narcotic pain medications previously discontinued

due to his addiction to and misuse of them. A psychological test administered at Mendota similarly indicated that MacKay intentionally fabricated some symptoms of mental illness and distorted his cognitive abilities. Dr. Knudson, too, questioned MacKay's self-reported psychotic symptoms and found that MacKay feigned confusion when it served him and believed him to be malingering. Dr. Knudson conceded that MacKay possibly had mental health problems that were controlled by medication, but "[did] not see any evidence to suggest that Mr. MacKay is currently suffering from an acute mental illness," and opined that he had substantial mental capacity to stand trial.

¶4 At the July 21, 2010 competency hearing, defense counsel advised the court that he had discussed Dr. Knudson's report with MacKay, that they were not contesting competency at that time but would raise it at a later time if it became an issue. The State agreed and, on July 28, 2010, the trial court found MacKay competent to stand trial.

¶5 In December 2010, MacKay pled guilty to the second-degree sexual assault and the two counts of first-degree sexual assault were read in for sentencing. Before the court accepted the plea, MacKay indicated that he was taking his medication and was able to understand the proceedings, think clearly and make good judgments. At his sentencing in March 2011, MacKay made appropriate, coherent remarks during his allocution.

¶6 Six months later, MacKay sought to withdraw his plea on the basis that "it is not certain" that he remained competent and it was "necessary" to determine that he was competent from the time he originally was deemed competent through sentencing. He also alleged a defective plea colloquy. As to the former, MacKay thought it suspect that just two months after Dr. Pankiewicz

found him incompetent to stand trial, Dr. Knudson determined that he was competent. MacKay conjectured that if he ever was off his medication, his mental health problems could have returned, and observed that a line he drew, about an inch long, on the portion of the plea questionnaire relating to read-in charges "could be indicative of confusion" regarding the plea. The court denied MacKay's postconviction motion to withdraw his plea and for sentence modification without an evidentiary hearing. MacKay appeals.

¶7 We consider de novo whether a postconviction motion on its face alleges material facts that, if true, would entitle the defendant to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, the court must hold an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. If it does not, however, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, it is within the trial court's discretion to grant or deny a hearing. *See* ***id.***, ¶¶9, 12. The motion should allege within its four corners "who, what, where, when, why, and how." *See* ***id.***, ¶23. We review a trial court's discretionary decisions under the erroneous exercise of discretion standard. *See* ***id.***, ¶9; *see also* ***Bentley***, 201 Wis. 2d at 311.

¶8 MacKay contends he should have been allowed to withdraw his plea, as it could not have been voluntarily entered if he was not competent. "Postconviction plea withdrawal is permitted only to correct a manifest injustice." ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A plea that is not knowingly, voluntarily or intelligently entered is a manifest injustice. ***Id.*** The defendant carries the "heavy burden" of showing the necessity for plea withdrawal by clear and convincing evidence. ***State v. Krieger***, 163 Wis. 2d 241,

249, 471 N.W.2d 599 (Ct. App. 1991). The motion is addressed to the trial court's sound discretion and we will reverse only for an improper exercise of discretion. ***Id.*** at 250.

¶9 We agree that MacKay's postconviction motion did not allege facts warranting an evidentiary hearing or relief. Defense counsel told the court at the competency hearing that he would raise competency if at any point it became an issue. He did not. MacKay's motion did not point to any certain evidence that would show that he became incompetent after being found competent. He did not claim that he ever stopped taking his medication. He cited no authority for his assertion that ongoing competency evaluations were necessary from when he was deemed competent until he was sentenced. These "facts" state mere possibilities and conclusory allegations. They fall well short of what ***Allen*** requires to warrant a hearing, let alone the remedy of plea withdrawal.

¶10 MacKay similarly failed to state sufficient facts to entitle him to an evidentiary hearing or relief regarding the allegedly defective plea colloquy. MacKay complained that the trial court did not ask him if he understood that he was "waiving his right to have the State convince every member of the jury of [his] guilt beyond a reasonable doubt."

¶11 When the basis for plea withdrawal is an allegedly inadequate plea colloquy, the defendant must make a prima facie showing both that the court failed to provide some required information *and* allege that he or she did not understand the omitted information. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (emphasis added). The burden then shifts to the State to show that the defendant actually understood the information which should have been provided, such that the plea was knowingly, voluntarily and intelligently entered. ***Id.***

¶12 The trial court did not expressly impart the information about jury unanimity and the burden of proof. Nonetheless, the court adequately ascertained on the record that MacKay was advised and understood that his guilty plea would waive his right to a unanimous jury verdict. The Plea Questionnaire and Waiver of Rights form states that the defendant understands that by entering a plea, he or she gives up various constitutional rights, including "[the] right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty" and "[the] right to make the State prove me guilty beyond a reasonable doubt." Each box was checked, both MacKay and his attorney signed the form, and the court determined that MacKay had reviewed these constitutional rights with his attorney and understood what he was waiving by entering a guilty plea.

¶13 Furthermore, MacKay did not allege in his postconviction motion that he did not know or understand the omitted information—or explain why he told the court that he understood the constitutional rights he was waiving if he did not. *See* ***id.*** Because he failed to meet this second threshold requirement, the trial court properly exercised its discretion in determining that MacKay was not entitled to an evidentiary hearing. In addition, while he claims on appeal that such information "would have changed his decision to enter a guilty plea," his motion did not. Besides that the facts supporting the requested relief must be alleged in the motion, MacKay does not tell us why that information would have caused him to insist on going to trial.

¶14 MacKay's postconviction motion also sought sentence modification. MacKay contended that his twenty-year sentence, ten years of which are in confinement, is unduly harsh because the court did not adequately consider that he has no prior record, is a high school graduate, was in the Marine Corps and took responsibility by pleading guilty.

¶15 We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***Giebel***, 198 Wis. 2d at 220. We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The sentencing court *must* consider three primary factors—the gravity of the offense, the character of the offender and the need to protect the public, ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984), and *may* consider a variety of other relevant factors, *see* ***State v. Jones***, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989). The weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984).

¶16 The trial court considered each of the primary factors and recognized the positives in MacKay's background. The court concluded that any mitigating factors did not outweigh the seriousness of the offenses and MacKay's documented history of other uncharged sexual assaults, and deemed the need to protect the public to be the overriding concern. The court imposed a sentence well below the forty years MacKay faced. His sentence is not unduly harsh and does not otherwise constitute an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

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