COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP201-CR **Cir. Ct. No. 2010CF2842**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD R. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward R. Lee appeals from a judgment of conviction and from an order denying his postconviction motion for plea withdrawal. He contends that the circuit court erroneously denied him a hearing on his claim that he did not understand the terms of his plea bargain. Because Lee

did not show why or how the alleged misunderstanding contributed to his decision to plead guilty, we affirm.

I.

¶2 The State charged Lee with one count of attempted first-degree intentional homicide while armed with a dangerous weapon and one count of possessing a firearm while a felon, both as a repeat offender. He faced an aggregate maximum period of seventy-nine years of imprisonment. The parties resolved the charges with a plea bargain. Lee agreed to plead guilty to first-degree reckless injury and possession of a firearm while a felon, both as a repeat offender. In exchange, the State agreed to recommend "substantial prison."

¶3 During the plea hearing, the parties stated the terms of the plea bargain on the Record, and Lee told the circuit court that he understood them. The circuit court then told Lee that it could impose maximum consecutive sentences if it deemed such sentences appropriate. The circuit court explained that Lee therefore faced the possibility of twenty-one years of initial confinement and ten years of extended supervision upon conviction for first-degree reckless injury as a repeat offender and an additional nine years of initial confinement and five years of extended supervision upon conviction for possessing a firearm while a felon as a repeat offender. Lee said that he understood. The circuit court accepted his guilty pleas.

¶4 At sentencing, Lee proposed a five-year term of initial confinement, and the State, as agreed, asked the circuit court to impose "a substantial prison sentence." The circuit court imposed an aggregate nineteen-year term of imprisonment, comprised of thirteen years of initial confinement and six years of extended supervision.

¶5 After sentencing, Lee filed a postconviction motion to withdraw his guilty pleas on the ground that he did not understand the terms of the plea bargain. According to Lee, his trial lawyer described the terms of the proposed plea bargain during a meeting in the jail on the night before he entered his pleas. Lee claimed he told his lawyer that he did not understand the meaning of the word "substantial," and his lawyer responded that the word meant "[n]o more than the max, no less than the minimum." Lee alleged that he "understood this definition to mean that the State was recommending a prison sentence of undefined length," and he alleged that he entered his guilty pleas with this understanding. He further alleged that his trial lawyer "materially misadvised him" because, according to an online dictionary that he later consulted, the word "substantial" means "considerable in quantity: significantly great." Lee argued that, because his lawyer did not give him this dictionary definition, his pleas were not knowing, intelligent, and voluntary. The circuit court rejected his claim without a hearing because Lee did not explain "how his current knowledge of the definition of 'substantial' would have affected his decision to enter guilty pleas to the charges." Lee appeals.

II.

¶6 Lee contends that the circuit court wrongly denied him a hearing to address his postconviction claim. Our standard of review is familiar. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 580, 682 N.W.2d 433, 439. Whether a motion alleges sufficient facts to necessitate a hearing is a question of law that we review *de novo*. *See* ***id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. If, however,

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the [R]ecord conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing.

State v. Bentley, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (citation omitted). We review a circuit court's discretionary decisions with deference. ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶7 Lee's goal is plea withdrawal. Because Lee first sought that relief after sentencing, he must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 611, 716 N.W.2d 906, 914. "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." ***Ibid.*** Lee hopes to satisfy this burden by proving at a hearing that his lawyer incorrectly defined the term "substantial" as it was used in the plea bargain, and therefore he did not understand the bargain he struck with the State.

¶8 Lee did not submit an affidavit or other supporting document with his motion. He observes that a postconviction motion need not include a sworn affidavit. *See* ***id.***, 2006 WI 100, ¶62, 293 Wis. 2d at 629, 716 N.W.2d at 923. A defendant seeking postconviction relief is required, however, to allege in the motion material facts that the defendant will prove and to offer explanations of how and why the facts alleged are significant in light of the issues presented. *See* ***Allen***, 2004 WI 106, ¶24, 274 Wis. 2d at 585–586, 682 N.W.2d at 441–442. '"To ask the court to examine facts outside the [R]ecord in an evidentiary hearing

requires a particularized motion with sufficient supporting facts to warrant the undertaking.'" ***Brown***, 2006 WI 100, ¶42, 293 Wis. 2d at 621, 716 N.W.2d at 919 (citation omitted). These principles required Lee to allege facts in his postconviction motion explaining why the definition of "substantial" was critical to his decision-making and why a more precise definition would have led him to plead differently. *See* ***Bentley***, 201 Wis. 2d at 313–314, 548 N.W.2d at 54–55.

¶9 Lee contends that he satisfied the pleading requirements and that his postconviction motion "explained why understanding the State's sentencing recommendation would have induced him to not plead guilty." He directs our attention to a portion of his motion where he alleged:

> [u]nderstanding th[e] sentencing recommendation was a critical factor in [] Lee's plea. The sentencing recommendation is one of the only elements of a plea agreement over which a defendant has any opportunity to bargain. This is one of the most critical factors for a defendant to consider when entering a plea. The State's recommendation is perhaps the most useful way for the defendant to gauge the State's opinion of the defendant's culpability and the possible punishment. However, [] Lee came away from this agreement without a full understanding of what he had bargained for.

These allegations are insufficient to earn an evidentiary hearing.

¶10 The first and last sentences of the quoted paragraph, although they are about Lee, are not reasons that the word "substantial" was significant to him in deciding how to plead. The first sentence is a conclusory assertion that Lee attached importance to a component of the plea bargain. The last sentence is a conclusory assertion that Lee did not understand the plea bargain. The remaining sentences are insufficient to earn a hearing because they are merely generalizations about plea bargaining and do not include allegations of "facts which, if true, would entitle [Lee] to withdraw his plea." *See* ***Bentley***, 201 Wis. 2d

at 318, 548 N.W.2d at 57. At most, Lee implies that the State's recommendation provided a window on the State's view of his culpability and the punishment he might receive. He does not explain how such an insight into the State's views affected his decision-making in the context of the plea bargain here. We are satisfied, as was the circuit court, that nothing in Lee's motion either permits a court to assess why a dictionary definition of the term "substantial" would have led him to reject the specific plea bargain in this case, or shows that a dictionary definition would have been particularly important to him in light of the charge concession he received. *See* ***id.***, 201 Wis. 2d at 316, 548 N.W.2d at 56 (defendant must allege facts to support allegation that he or she pled guilty only because of misinformation).

¶11 We note that Lee also directs our attention to a page of his postconviction reply brief as a source of allegations supporting his claim for plea withdrawal. That text does not assist him. First, it is outside the four corners of his postconviction motion. *See* ***Allen***, 2004 WI 106, ¶27, 274 Wis. 2d at 588, 682 N.W.2d at 443 (stating that a reviewing court examines only the allegations in the four corners of defendant's postconviction motion, not additional allegations in defendant's briefs). Second, the reply brief adds no relevant factual allegations to his contentions. In the reply brief, Lee sought to refute the State's contention that his postconviction motion was insufficient to support his claim, and he argued:

> Lee alleged that had he been properly advised of the definition of 'substantial,' he would not have plead [*sic*] guilty.[1] But [] Lee's assertions did not end there. [] Lee also alleged the plea agreement [*sic*][2] was of significant importance to him because it was one of the only elements of the plea agreement over which he could negotiate. []Lee also alleged that this element of the plea agreement was particularly important because the State's recommendation is a significant sign of how the State, and perhaps the court, will perceive his culpability. [] Lee also asserted that he had no other opportunity to learn what 'substantial' meant. Based on trial counsel's definition of 'substantial,' [] Lee believe that a minimal sentence was still possible. Specifically [] Lee believed that he could expect a total sentence in the range of six or seven years.

¶12 The foregoing argument seeks to expand the contentions in the postconviction motion from generalizations about plea bargaining to specifics about Lee. This effort fails to demonstrate the sufficiency of the motion itself. Moreover, save for the final two sentences, the argument does not offer information about why a dictionary definition of the word "substantial" would have had an impact on Lee's decision to plead guilty.

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[1] Neither the postconviction reply brief that Lee filed in circuit court nor the briefs that Lee filed in this court tell us with specificity where he alleged in his postconviction motion that he would have pled differently had his lawyer provided a better definition of the word "substantial." The allegation appears in Lee's circuit court reply brief but, because Lee seeks plea withdrawal based on erroneous advice from his lawyer, his motion itself should have included an allegation that he would have "insisted on going to trial had he been properly informed." *See* ***State v. Bentley***, 201 Wis. 2d 303, 315–316, 548 N.W.2d 50, 55–56 (1996). A defendant need not recite any specific language to satisfy this pleading requirement. *See* ***ibid.*** A defendant must, however, both include the allegation in the postconviction motion and support it with objective, factual assertions. *See* ***id.***, 201 Wis. 2d at 313, 548 N.W.2d at 54. We have carefully reviewed Lee's postconviction motion. We question whether it may fairly be construed as alleging that he would not have pled guilty had he received different advice from his lawyer. The State, however, does not discuss this apparent deficiency in Lee's motion, and we resolve the case on other grounds.

[2] We assume that Lee meant "sentencing recommendation," not "plea agreement."

¶13 As to the final two sentences of the argument, these suggest that Lee attached significance to his lawyer's definition of the word "substantial" because the definition led him to "expect a total sentence in the range of six or seven years." The circuit court, however, is not bound by the State's sentencing recommendation. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24. Nothing in Lee's postconviction motion alleges that his trial lawyer told him otherwise. To the extent Lee believed that the State's recommendation for "substantial prison" allowed him to "expect" a sentence of a particular length, Lee appears to have developed that expectation independent of any definitions, correct or incorrect, provided by his trial lawyer. Thus, his expectation is immaterial to his claim for relief. A defendant is not entitled to withdraw a guilty plea based on a misunderstanding derived from his or her own inaccurate interpretation of information. *See* ***State v. Rodriguez***, 221 Wis. 2d 487, 499, 585 N.W.2d 701, 706 (Ct. App. 1998).

¶14 Lee failed to substantiate his claim for plea withdrawal with allegations of sufficient material facts that, if true, would warrant relief. The decision to deny his claim without a hearing therefore rested in the circuit court's discretion. *See* ***Allen***, 2004 WI 106, ¶¶9, 34, 274 Wis. 2d at 576, 593, 682 N.W.2d at 437, 445. We review that decision solely to determine whether the circuit court erroneously exercised its discretion. ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 489, 673 N.W.2d 369, 379–380.

¶15 The circuit court here appropriately denied Lee relief without a hearing. He alleged that he did not understand the word "substantial," but he also alleged that his lawyer defined the phrase "substantial prison" as a period of incarceration that could be as long as the maximum sentences available. Further, the circuit court told him that he faced the possibility of thirty years of initial

confinement. He entered his pleas with that information in hand, and he did not allege material facts explaining why a dictionary definition of the word "substantial" would have led him to plead differently under the circumstances. His motion thus failed to show that he could prove facts at a hearing to support a claim for plea withdrawal.[3] Accordingly, we affirm the decision of the circuit court.

By the Court.—Judgment and order affirmed.

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

[3] Although Lee argues that he pled guilty because his trial lawyer gave him incorrect information, his postconviction and appellate arguments do not include an allegation that his lawyer gave him ineffective assistance. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984) (describing the analysis for resolving a claim of constitutionally ineffective assistance). A defendant who pleads guilty on the advice of his or her lawyer, however, may attack the plea as involuntary only by showing that the lawyer provided ineffective assistance pursuant to ***Strickland***. *See* ***Hill v. Lockhart***, 474 U.S. 52, 56–57 (1985); *see also* ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235, 247 (1987) (conclusion that lawyer was effective defeats claim that lawyer's alleged misrepresentation rendered defendant's guilty plea involuntary). Because we conclude that Lee failed to present sufficient material facts to support his allegation that misinformation affected his decision to plead guilty, we need not consider here whether Lee's failure to allege that his trial lawyer gave him constitutionally ineffective assistance independently bars him from obtaining relief. *See* ***State v. Hughes***, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 454, 799 N.W.2d 504, 509 (cases should be decided on narrowest possible ground).