COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2641 **Cir. Ct. No. 2002CF1570**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP D. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Phillip D. Jackson, *pro se*, appeals a circuit court order denying his claims for plea withdrawal and for production of transcripts and a copy of the circuit court record at public expense. We conclude that Jackson's

claims for plea withdrawal lack merit and that the circuit court properly exercised its discretion when denying his request for documents. We affirm.

BACKGROUND

¶2 In 2002, the State charged Jackson with one count of first-degree reckless homicide while armed with a dangerous weapon. According to the criminal complaint, Jackson and two companions were leaving a high school basketball game when they saw a group of people fighting. One of Jackson's companions told police that Jackson pulled out a gun and fired it into the crowd. Everyone scattered except a man who had been shot and killed. Pursuant to a plea bargain, Jackson pled guilty to an amended charge of first-degree reckless homicide. The circuit court imposed a twenty-seven year term of imprisonment. Jackson filed a notice of intent to pursue postconviction relief but took no further action to protect his direct appeal rights, and they expired. *See* WIS. STAT. RULE 809.30(2) (2001-02).[1]

¶3 In 2012, Jackson filed a postconviction motion pursuant to WIS. STAT. § 974.06, claiming that he entered his guilty plea involuntarily. He moved for plea withdrawal on the grounds that: (1) the circuit court allegedly conducted an inadequate guilty plea colloquy by failing to fulfill various duties required during a plea hearing; and (2) his trial counsel was constitutionally ineffective by allegedly failing to advise him properly about a defense to the charge. In addition to his motion for plea withdrawal, Jackson sought production of transcripts and a copy of the circuit court record at public expense, alleging that these documents

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

would support his substantive claims and "demonstrate a manifest injustice."[2] The circuit court denied any relief, and he appeals.

DISCUSSION

¶4 Jackson first seeks plea withdrawal on the ground that the circuit court conducted a defective guilty plea colloquy. A claim for plea withdrawal bottomed on alleged defects in the plea colloquy is governed by ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Howell***, 2007 WI 75, ¶¶26-27, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant moving for plea withdrawal pursuant to ***Bangert*** must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) "allege[] that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy." ***Howell***, 301 Wis. 2d 350, ¶27.

¶5 A claim for plea withdrawal pursuant to ***Bangert*** cannot be maintained in the context of a postconviction motion filed under WIS. STAT. § 974.06. *See* ***State v. Carter***, 131 Wis. 2d 69, 81-82, 389 N.W.2d 1 (1986). Motions filed under § 974.06 are limited to issues of constitutional or jurisdictional dimension. ***State v. Balliette***, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334. An allegation that the circuit court failed to follow the procedures of WIS. STAT. § 971.08 or other court-mandated duties is not an allegation of a constitutional violation. *See* ***Carter***, 131 Wis. 2d at 82-83.

[2] The record does not contain any transcripts, which are normally prepared during the direct appeal process. *See* WIS. STAT. RULE 809.30(2)(e)-(g) (describing procedures and deadlines for ordering and filing transcripts to further postconviction motion and direct appeal).

Therefore, Jackson cannot maintain a ***Bangert*** claim for plea withdrawal in this proceeding.

¶6 Jackson also suggests that his guilty plea was not voluntary because he lacked necessary information at the time of the plea hearing. "The constitution requires that a plea be voluntarily, knowingly and intelligently entered." ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). A plea may be challenged as constitutionally defective under WIS. STAT. § 974.06. *See* ***Carter***, 131 Wis. 2d at 82-83. Accordingly, we consider Jackson's constitutional challenge.

¶7 We analyze the sufficiency of a postconviction motion under WIS. STAT. § 974.06 using a familiar standard. The movant is entitled to an evidentiary hearing only if he or she alleges facts that, if true, would entitle the movant to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. This is a question of law for our independent review. *See* ***id.*** If, however:

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

Carter, 131 Wis. 2d at 78 (citation omitted). Moreover, the supreme court has made clear that '"an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" ***Balliette***, 336 Wis. 2d 358, ¶50 (citation omitted).

¶8 According to Jackson, his plea is infirm because he did not know or understand information that the circuit court should have provided at the plea

hearing, namely: (1) the nature of the charge and the potential punishment if convicted; (2) that the circuit court was not bound by the plea bargain, including any recommendation by the State; (3) that the circuit court must establish the factual basis for his guilty plea; and (4) that a lawyer may discover defenses or mitigating circumstances not readily apparent to a layman. Jackson fails to offer any facts to support these self-serving claims. A postconviction motion cannot be maintained on the basis of conclusory allegations. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Furthermore, the record refutes Jackson's contentions. On the day that Jackson pled guilty, he filed a guilty plea questionnaire and waiver of rights form. His signature on the form appears underneath his acknowledgment that he had reviewed the entire document and understood everything in it. The form establishes that Jackson knew and understood: (1) the elements of the crime and the maximum sentence he faced, all of which is included on the questionnaire; (2) that the circuit court is not bound by the plea bargain and may impose the maximum sentence; and (3) that if the circuit court accepted his guilty plea, the circuit court would find him guilty "based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court." Additionally, the record reveals that Jackson appeared by counsel throughout the criminal prosecution, conclusively demonstrating Jackson's knowledge that a lawyer might assist him in defending against the charge. Accordingly, the record shows that, at the time of Jackson's guilty plea, he was fully aware of the information he claims he required.

¶10 We turn to Jackson's claim for plea withdrawal on the ground that he allegedly received constitutionally ineffective assistance from his trial counsel. We assess claims of trial counsel's alleged ineffectiveness by applying the two-

prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A convicted defendant must thus establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Allen***, 274 Wis. 2d 568, ¶26. If a defendant fails to establish one prong of the ***Strickland*** test, we need not discuss the other prong. *See* ***id.***, 466 U.S. at 697.

¶11 To demonstrate deficiency, a defendant must show that trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. To demonstrate prejudice in a case resolved with a guilty plea, the defendant must allege facts sufficient "to show 'that there is a reasonable probability that, but for the counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1986) (citation omitted).

¶12 According to Jackson, his trial counsel was ineffective because Jackson "informed [trial counsel] that the homicide was incidental to an accident [but trial counsel] failed to recognize and explain to Jackson that an accidental factor mitigated, and therefore was a defense to, first-degree reckless homicide." Jackson further asserts that, had he received information from trial counsel that "accident" is a defense to first-degree reckless homicide, he would not have entered a guilty plea.

¶13 Jackson's conclusory and self-serving allegations do not support a claim for plea withdrawal. A defendant must do more to show prejudice than allege that he or she pled guilty only because trial counsel gave incorrect advice. *See* ***id.*** at 312-13. A defendant must also provide factual support for the allegation. *See* ***id.*** at 313. Here, Jackson does not demonstrate why information

that accident is a defense to reckless homicide would have affected his decision to plead guilty. *Cf.* ***id.*** at 314. He does not show, for example, that any evidence of an accident exists in this case. Because his allegations fail to explain why he would not have pled guilty if his trial counsel had performed differently, his contentions are insufficient to satisfy the prejudice prong of the ***Strickland*** analysis. *See* ***Bentley***, 201 Wis. 2d at 316.

¶14 We also note Jackson's assertion that, had trial counsel advised Jackson more effectively, "he would have insisted [on] continued negotiations of a plea deal inclusive of ... lesser offenses." This contention, however, does not aid him. A defendant who claims that trial counsel was ineffective by failing to take certain steps must show with specificity what the steps would have accomplished and how they would have affected the outcome of the proceeding. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272. Nothing in Jackson's submission supports a conclusion that, but for something trial counsel did or failed to do, the State would have engaged in further plea bargaining or that the State would have considered charging Jackson with any offense less serious than first-degree reckless homicide. Moreover, Jackson's allegation that, but for counsel's actions, he would have pursued additional plea bargaining undermines his claim that, but for those same actions, he "would have insisted on proceeding to trial."

¶15 Last, Jackson asserts that the circuit court erroneously denied his request for transcripts and a copy of the circuit court record at public expense. Jackson relies on WIS. STAT. § 973.08. The statute provides that, upon order of a court, transcripts shall be delivered to a prisoner within 120 days. *See* § 973.08(3). "Th[is] statute plainly contemplates an exercise of discretion." *See* ***State v. Wilson***, 170 Wis. 2d 720, 723, 490 N.W.2d 48 (Ct. App. 1992). A reviewing

court will sustain a circuit court's discretionary determination if "the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Sands v. Whitnall Sch. Dist.***, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439.

¶16 Here, the circuit court denied Jackson's request for documents upon a determination that Jackson failed to present an arguably meritorious claim for relief that would justify ordering the production of those documents at public expense. The record demonstrates that the circuit court's decision constitutes the exercise of discretion contemplated by ***Wilson***.

¶17 In ***Wilson***, the defendant, who had already pursued a direct appeal of his criminal conviction under WIS. STAT. RULE 809.30, moved for production of transcripts and records related to a John Doe investigation that had preceded his criminal prosecution. *See* ***Wilson***, 170 Wis. 2d at 721. The defendant, however, offered no reason for his request. *See* ***id.*** at 722. The circuit court denied the motion because the defendant failed to set forth an arguably meritorious claim that he would support with the requested materials. *See* ***id***. We affirmed, stating that "a logical extension of our conclusion that a court exercise its discretion is that [the court] be supplied with reasons upon which to base its determination." ***Id.*** at 723.

¶18 In this case, Jackson's claims for substantive postconviction relief are conclusory and lack the factual underpinnings necessary to earn further attention from a reviewing court. Because Jackson fails to show that he is in pursuit of any arguably meritorious claims, he demonstrates no need for the documents he seeks, and the circuit court therefore properly exercised its

discretion by denying Jackson's motion for the production of documents at public expense.

By the Court.—Order affirmed.

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