COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP426 **Cir. Ct. No. 2007CF1440**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIDNEY L. GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MARY K. WAGNER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Sidney L. Graham appeals from an order summarily denying his motion for postconviction relief. We agree that he is not entitled to an evidentiary hearing. We therefore affirm.

¶2 Graham shot a man in the upper leg. The bullet also wounded the man's scrotum and lodged in his hip. The State charged Graham with first-degree reckless endangerment and aggravated battery; each count included a penalty enhancer for using a dangerous weapon.

¶3 On March 11, 2008, Graham made a speedy trial demand. Over the next seven months, both parties requested and were granted adjournments. Graham withdrew his speedy trial demand, then later renewed it. Trial was set for October 20, 2008. Before the jury was sworn, the State requested its third adjournment due to the nonappearance of two key witnesses and to allow it to locate four recently discovered ones. Graham's counsel objected and moved to dismiss the case, alleging a speedy trial violation. The trial court denied the motion, granted the adjournment, and set the trial for December 15.

¶4 Graham fired his lawyer at the November 20 pretrial. New counsel, appointed two weeks later, asked for an adjournment to allow time to prepare for the imminent trial. Trial was rescheduled to February 23, 2009. Graham again moved to dismiss, asserting a speedy trial violation. The court denied the motion.

¶5 Pursuant to a plea agreement, Graham pled guilty to substantial battery with a dangerous weapon; the first-degree reckless endangerment charge was dismissed. The court imposed a seven-and-one-half-year sentence.

¶6 Graham moved for plea withdrawal under WIS. STAT. RULE 809.30 (2011-12)[1] on the basis that the court failed to accurately advise him at the plea hearing of the maximum penalty and that it did not need to abide by the plea

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

agreement or sentence recommendation. The court accepted the parties' proposed resolution: Graham withdrew his plea withdrawal motion, count 1 (first-degree reckless endangerment) was restored but without the penalty enhancer, Graham pled guilty to the reinstated charge, and count 2 (substantial battery) was dismissed. The court found Graham eligible for the Challenge Incarceration and Earned Release Programs. It adopted the parties' joint recommendation of six years divided as four years' initial confinement and two years' extended supervision consecutive to a sentence he currently was serving.

¶7 Twenty-three months later, Graham filed a petition for a writ of habeas corpus, alleging ineffective assistance of trial and postconviction counsel. The trial court construed the petition as a WIS. STAT. § 974.06 motion. The court denied the motion without a hearing and denied his motion for reconsideration.

¶8 On appeal, Graham again seeks to establish that his trial and postconviction counsel were ineffective with the aim of withdrawing his plea. A defendant may withdraw a guilty plea after sentencing "only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). Being denied the effective assistance of counsel constitutes a "manifest injustice." ***Id.***

¶9 A defendant is not automatically entitled to a hearing on a postconviction motion. ***Id.*** at 313. The court may deny the motion on its face if the defendant presents only conclusory allegations that fail to raise a question of fact or if the record conclusively demonstrates that he or she is not entitled to relief. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief is a legal issue we review de novo. ***Id.*** at 310. We review that denial solely to determine whether the court erroneously exercised its discretion. ***Id.*** at 311.

¶10 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Harvey***, 139 Wis. 2d 353, 375, 407 N.W.2d 235 (1987) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Proving deficient performance requires showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Harvey***, 139 Wis. 2d at 375. Proving prejudice requires a showing that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted). A reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687.

¶11 Graham first contends that trial counsel failed to object to the violation of his right to a speedy trial. To the contrary, his counsel objected and moved to dismiss twice. The court denied the motions. Moreover, the remedy for a violation of the statutory right to a speedy trial is release from custody. WIS. STAT. § 971.10(4). Graham either was on a probation hold or incarcerated before he entered a plea in this case, making release out of the question. He has not established deficient performance or prejudice.

¶12 Next, Graham contends his counsel "forced" him to waive his preliminary hearing by threatening to withdraw if he did not. The record reflects, however, that Graham told the court no one forced, threatened or coerced him to waive the hearing or made him any promises, but that he was doing so freely and voluntarily. Graham is not entitled to relief on this claim.

¶13 Graham also claims his attorney failed to ensure his presence at an evidentiary hearing where he "had a decision to make" about whether to enter a plea or go to trial. It actually was a hearing on his motion to dismiss for a speedy trial violation; no evidence was presented. His presence was not required. *See* WIS. STAT. § 971.04(1). Even so, his counsel objected to his absence. Graham has not sufficiently alleged deficient performance or prejudice.

¶14 Next, Graham asserts that counsel failed to object to the State's and the court's "plea badgering," which "clearly" forced him to accept the plea agreement. We would assume he refers to his second plea, as, having withdrawn his first, it is far too late to complain about perceived errors with the first. The portions of the record he cites to illustrate the "coercive measures employed," however, relate to the first plea. Besides being irrelevant now, the substance of those examples do not in any way support his claim.

¶15 On a similar note, Graham asserts that so as to induce him to plead, his counsel did not subpoena a particular detective for trial. It is true that the defense requested an adjournment on the day of trial because an unidentified witness was not subpoenaed due to a mix-up over that person's place of employment. Graham offers nothing to show that the failure to subpoena was deliberate or tactical. Furthermore, as the State also requested an adjournment that day and Graham voluntarily withdrew his speedy trial request, Graham has not demonstrated prejudice.

¶16 Graham next contends that counsel failed to object when the trial court granted the State's request for an adjournment after the jury had been sworn, implicating double jeopardy considerations. He is mistaken. First, counsel did object to the adjournment. Second, and more importantly, the "jury" had not been

sworn. Rather, the court only had sworn the pool of *potential* jurors before voir dire. The jury panel was not yet selected, let alone sworn.

¶17 Finally, Graham asserts that postconviction counsel also was ineffective for failing to raise the aforementioned claims of trial counsel ineffectiveness. He contends that if counsel had "properly litigated" the issues, his case would have been "complete[ly] dismiss[ed]." Instead, he asserts, counsel fell under the prosecutor's and the court's "plea negotiation spell." This claim fails because Graham presents only conclusory allegations that fail to raise a question of fact. *See* ***Bentley***, 201 Wis. 2d at 309-10. In addition, we already have determined that the allegations of trial counsel ineffectiveness are without merit. Counsel is not ineffective for ignoring arguments that would not succeed. *See* ***State v. Toliver***, 187 Wis. 2d 346, 359, 523 N.W.2d 113 (Ct. App. 1994).

¶18 The record conclusively demonstrates that Graham is not entitled to relief. The trial court properly denied his motion without a hearing.

By the Court.—Order affirmed.

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