COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP404-CR
2014AP405-CR

Cir. Ct. Nos. 2010CF5426
2013CF2102

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN ABLE ROMAN,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN and WILLIAM S. POCAN, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Juan Able Roman, *pro se*, appeals judgments of conviction, entered upon his guilty pleas, and orders denying his claims for postconviction relief from his sentences.[1] He asserts that his trial counsel was ineffective during the plea bargaining process. The circuit court rejected his claims, and we affirm.

BACKGROUND

¶2 On October 23, 2010, the State charged Roman with one count of possessing cocaine with intent to deliver it. He posted bail three months later and then failed to appear. The circuit court issued a warrant for his arrest. On January 22, 2013, police stopped Roman for a traffic violation and took him into custody.

¶3 Roman appeared in court on February 4, 2013, for a return on the warrant issued in the 2010 matter. At that time, the prosecuting attorney noted he had only just learned that Roman faced additional charges stemming from the January 22, 2013 arrest and requested substantial bail.[2] Roman subsequently posted the bail amount imposed and again failed to appear for his next court date. The circuit court issued a warrant for his arrest. On May 1, 2013, police took

[1] The Honorable Stephanie Rothstein accepted Roman's guilty pleas and sentenced Roman in these matters. The Honorable William S. Pocan presided over the postconviction proceedings and denied Roman postconviction relief.

[2] The transcript of the February 4, 2013 hearing includes the prosecutor's description of Roman's conduct during the January 22, 2013 traffic stop. According to the prosecutor, Roman twice offered police a false name, struggled with the officers, and tried to flee. At a subsequent hearing, the prosecutor advised the circuit court that, as a result of the January 22, 2013 incident, the State had charged Roman with obstructing an officer. The prosecutor explained that he did not know the status of the case, however, because he was not the lawyer handling the matter on the State's behalf.

Roman into custody and, on May 7, 2013, the State charged him with felony bail jumping and misdemeanor possession of tetrahydrocannabinols.

¶4 Roman subsequently accepted a plea bargain in which he agreed to plead guilty to the charges arising in both October 2010 and May 2013, and the State agreed to recommend a global disposition of "more than two years initial confinement and more than two years of extended supervision." At the outset of the plea hearing, the State explained that the plea bargain involved a longer sentencing recommendation than the State had originally offered to resolve the 2010 case, "recognizing [Roman's] subsequent conduct." Roman agreed that the State correctly described the negotiations and the plea bargain. The circuit court accepted his guilty pleas.

¶5 The matters proceeded immediately to sentencing. For the 2010 offense, the circuit court imposed an evenly bifurcated ten-year term of imprisonment. For the 2013 offenses, the circuit court imposed a concurrent, evenly bifurcated six-year term of imprisonment for bail jumping and a time-served disposition for possessing marijuana.

¶6 Roman sought postconviction relief in a motion filed without supporting documentation. In his moving papers, he alleged that on January 31, 2013, a trial attorney notified Roman that she had been appointed to represent him in the 2010 proceeding. Roman went on to allege:

> during [trial counsel's] representation of [Roman], an offer was made for two years initial confinement and two years extended supervision which offer was not accepted by her because of her expressed belief she could get a more favorable offer of one year initial confinement and one year extended supervision. [Trial counsel] told [Roman] not to "jump the gun" and take the two and two offer, and told Defendant she could get him a better offer.

Next, Roman alleged that the prosecutor wrote to trial counsel on February 4, 2013, advising that the State was modifying its offer and would "ask for something longer on the initial confinement." Further, Roman asserted that rejecting the original offer led to a harsher sentencing recommendation from the State and that, but for trial counsel's advice, he would have accepted the original offer and "likely [would] have received a less harsh sentence" than the circuit court imposed. Roman requested a hearing to explore his allegations. Finally, as an additional or alternative basis for relief, Roman alleged that his sentences were unduly harsh, and he sought sentence modification as a remedy.

¶7 The circuit court rejected the postconviction motion in written orders entered without a hearing.[3] Roman appeals, renewing only his claims that his trial counsel was ineffective and that he is entitled to a hearing on that issue.

DISCUSSION

¶8 To show ineffective assistance of counsel, a defendant must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice from alleged deficiencies in the plea bargaining process, the defendant must show that "the outcome of the plea process would have been different with competent advice." ***Lafler v. Cooper***, 132 S. Ct. 1376, 1384 (2012). Specifically, the defendant must show that:

[3] The circuit court entered the same order in both the 2010 and the 2013 circuit court cases.

> but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 1385.

¶9 Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶10 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23. Whether the motion contains sufficient allegations of material fact to earn a hearing presents an additional question of law for our independent review. *See* ***id.***, ¶9. If the petitioner does not allege sufficient material facts that, if true, entitle him or her to relief, if the

allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶11 We are satisfied that the circuit court did not err when it denied Roman's postconviction motion without an evidentiary hearing. Roman did not file any affidavits or other documents to support his claim that trial counsel was ineffective, and the assertions in his moving papers are insufficient to show any prejudice from the deficiency he alleges.

¶12 First, Roman does not demonstrate that, but for his trial counsel's advice, he would have accepted the State's offer to recommend an evenly bifurcated four-year term of imprisonment in exchange for his guilty plea to the 2010 charge. *See* ***Lafler***, 132 S. Ct. at 1384 (to show prejudice, defendant must show that he would have accepted the plea bargain offered). To be sure, Roman's motion includes a declaration that "had [trial counsel] not given him ... unprofessional advice, [Roman] would have accepted the offer of two-and-two," but, as our supreme court explained long ago, "a statement of ultimate facts ... is not sufficient for a petition for postconviction relief." *See* ***State v. Bentley***, 201 Wis. 2d 303, 317, 548 N.W.2d 50 (1996) (brackets omitted). A postconviction motion "must be supported by objective factual assertions." *See* ***id.*** at 313. In this case, Roman offers no objective facts showing that he would have accepted a recommendation for an evenly bifurcated four-year term of imprisonment absent his attorney's allegedly bad advice.

¶13 Second, Roman does not reveal when the State made the offer to resolve the 2010 charge by recommending a four-year term of imprisonment in

exchange for a guilty plea. The omission is significant, because "'a defendant has no right to call upon the prosecution to perform while the plea agreement is wholly executory.'" ***State v. Scott***, 230 Wis. 2d 643, 652, 602 N.W.2d 296 (Ct. App. 1999) (citation and brackets omitted). The State must carry out its side of a plea bargain only after the defendant has given up his or her bargaining chip by pleading guilty in reliance on the State's promise. *See* ***id.*** Here, the record reveals that a new crime came to the prosecutor's attention on February 4, 2013, and the record further shows that Roman committed two additional crimes in May 2013. Assuming that, but for counsel's advice, Roman would have agreed to plead guilty to the 2010 charge in exchange for the State's promise to recommend an evenly bifurcated four-year term of imprisonment, he fails both to show when he would have made that agreement and to explain why the State would not have withdrawn its offer before he pled guilty upon learning about one or more of the charges that arose in 2013. *See* ***Lafler***, 132 S. Ct. at 1385 (to show prejudice, defendant must demonstrate that the State would not have withdrawn the offer in light of intervening circumstances).

¶14 Instead, Roman asserts in his reply brief that "it is unclear on this record exactly when the offer was made, and this finding could be made on remand at a ***Machner*** hearing. Should the court find that the offer predated the conduct allege[d] by the State ... it is likely the motion would be granted." Roman misunderstands his obligations. The rule is long settled that a defendant cannot rely on conclusory assertions in a postconviction motion, hoping to supplement them at a later hearing. ***Bentley***, 201 Wis. 2d at 313. Thus, it was Roman's responsibility to reveal the date that he received the offer for a four-year term of imprisonment to resolve the 2010 charge and to allege the facts showing that he was prejudiced by his trial counsel's advice not to accept that offer.

¶15 Third, Roman does not explain how he reached the conclusion that, as stated in his appellate brief, had he agreed to the State's original offer, the circuit "court would have accepted [the plea bargain's] terms, and [he] would have had a less severe sentence." *See* ***Lafler***, 132 S. Ct. at 1385 (to show prejudice, defendant must show that sentencing court would have accepted the terms of the plea bargain). A Wisconsin circuit court is not bound by the terms of a plea bargain and is instead free to impose whatever sentence within the statutory maximum the circuit court believes is warranted. *See* ***State v. Williams***, 2000 WI 78, ¶2, 236 Wis. 2d 293, 613 N.W.2d 132. Roman's assertion that the circuit court would have accepted the terms of the original plea bargain had the State recommended them at sentencing is the epitome of a conclusory and unsupported proposition.

¶16 In sum, Roman's postconviction motion did not include sufficient allegations of material fact that, if proved, would show that Roman suffered any prejudice from trial counsel's allegedly deficient performance. The decision to deny his claim without a hearing therefore rested in the circuit court's discretion. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We review that decision solely to determine whether the circuit court erroneously exercised its discretion. *See* ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 673 N.W.2d 369. In light of our discussion, we are satisfied that the circuit court appropriately declined to permit Roman an opportunity for further exploration of a claim that he failed to show had merit. We affirm.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).