COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP2430-CR
2013AP2431-CR
2013AP2432-CR

Cir. Ct. Nos. 2011CF458
2011CF609
2011CF889

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYSHAUN D. ROBINSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Tyshaun Robinson appeals judgments of convictions for second-degree recklessly endangering safety, burglary, and armed

robbery. Robinson also appeals an order denying his postconviction motion. He argues that his motion to withdraw his guilty plea to armed robbery on the grounds of ineffective assistance of trial counsel and coercion should have been granted and that he was sentenced on the basis of inaccurate information. We affirm the judgments and order.

BACKGROUND

¶2 Robinson entered no-contest pleas in two of the underlying cases; second-degree reckless endangering safety; and burglary. The second-degree reckless endangering safety conviction results from Robinson shooting a man on the back of his leg outside a bar. Robinson was charged with first-degree reckless endangerment as a repeat offender and possession of a firearm by a felon. As part of the plea agreement, the charge was reduced and the firearm possession charge was dismissed as a read-in at sentencing. In the reckless endangering safety case, Robinson's brother Tahija was in the car that brought Robinson to the scene of the crime. Tahija was charged with resisting an officer and felony bail jumping.

¶3 The burglary conviction results from the forced entry into an apartment building with Bryan Poore and Terrance Robinson, Robinson's brother. Although the police arrived at the building and apprehended Poore and Terrance, Robinson walked away from the building after telling police he lived in one of the apartments and was on his way out. Poore and Tamara Robinson, Robinson's sister, told police that Robinson was the third individual seen breaking into the apartment building. Robinson was also charged with a possession of a dangerous weapon enhancer, possession of a firearm by a felon, and attempted armed robbery. Those additional charges were dismissed as read-ins at sentencing.

¶4 Robinson entered a guilty plea to the armed robbery conviction. The conviction results from the theft of stereo amplifiers while brandishing a gun. The victim had listed the amplifiers for sale on Craigslist and had agreed to meet a potential buyer. When the victim arrived at the location, a masked man got into the car and pointed a gun at the victim. A second man appeared and the amplifiers were removed from the back seat of the victim's car without his permission. Although the victim was not able to identify either man, Terrance reported to police that Robinson was the man who got into the victim's car and directed Terrance to remove the amplifiers from the car and leave. Police discovered that the victim was contacted by a cell phone number that had been used by Robinson. In his postconviction motion, Robinson moved to withdraw his plea to the armed robbery on the ground that his trial counsel performed deficiently in advising Robinson to enter a guilty plea because he had "no chance" of winning if he went to trial. He also claimed that he lost faith in his trial counsel but because he would not be appointed another attorney, could not afford to hire an attorney, and was not able to represent himself, he entered his plea under duress and coercion.

¶5 Robinson was sentenced to consecutive terms totaling seventeen years' initial confinement and fifteen years' extended supervision. In addressing Robinson's character at sentencing, the sentencing court indicated that it was troubled by Robinson's role as a leader and, not putting his leadership skills to good use. It noted that his brother Terrance was going down the wrong path and stated:

> I think you're the mastermind. You've got your brother Terrance involved, you've got your brother Tahij, who is another one at Ethan Allen, and I think you need to be setting an example for your brothers. What kind of an example is this for you to be getting them involved? Now Terrance is in prison. I had to send Terrance and [Bryan]

> Poore. And who knows what's going to happen to your young brother Tahij [who's] just turned into an adult. So I just feel like it's your responsibility to set a much better example, and instead you're pulling other people into the criminal activities.

In his postconviction motion, Robinson claimed that the statement that he was the mastermind of the crimes and got the others involved was inaccurate information.

DISCUSSION

I. Plea Withdrawal

¶6 To be entitled to withdraw a guilty plea after sentencing the defendant must show that the refusal to permit withdrawal would result in a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "A plea which is not made knowingly, voluntarily or intelligently entered is a manifest injustice." ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. Ineffective assistance of counsel also satisfies the manifest injustice test. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A claim of ineffective assistance of counsel requires the defendant to demonstrate both deficient performance and prejudice. ***Id.*** at 312. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶7 Robinson's postconviction motion was denied without a hearing. He argues that an evidentiary hearing was required, and if not required, the trial court erroneously exercised its discretion in not conducting a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 ("[T]he circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient."). "[A]n 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." ***State v. Howell***, 2007 WI 75, ¶77 n.51, 301 Wis. 2d 350, 734 N.W.2d 48. Thus, two standards of review potentially apply. We determine as a matter of law "whether a defendant's motion to withdraw a guilty plea 'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, ¶78 (citation and footnote omitted). When a circuit court has discretion to grant or deny a hearing because the defendant's motion fails to allege sufficient facts, presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief, we review whether the trial court erroneously exercised its discretion. ***Id.***, ¶79. For the reasons stated below, we conclude Robinson's motion did not allege facts sufficient to entitle him to relief and that the record conclusively demonstrates that Robinson is not entitled to plea withdrawal. Thus, an evidentiary hearing was not required and the circuit court did not erroneously exercise its discretion in denying a hearing.

¶8 Robinson's claim is that his trial counsel was deficient when he advised that Robinson had no chance of winning at trial on the armed robbery

charge. Robinson points out that before his former attorney withdrew from representation,[1] the attorney stated that Robinson had a strong case for trial. Viewing the evidence in a light most favorable to his defense, including his alibi defense and his belief that Bryan Poore committed the crime with Terrance, he suggests there were substantial problems with the prosecution's case and that he had a strong defense. We do not find it necessary to consider the comparison of the evidence offered by the parties. Robinson has not alleged facts that overcome the strong presumption that counsel acted reasonably within professional norms. *See* ***State v. Williams***, 2003 WI App 1, ¶6, 259 Wis. 2d 481, 655 N.W.2d 546 ("Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment.").

¶9 Counsel's exercise of professional judgment "must be based upon rationality founded on the facts and the law" and decisions made on such a basis, will not constitute ineffective assistance of counsel. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Robinson does not allege that his attorney's advice was made without knowledge of the facts and law. Counsel is not deficient simply because his assessment of the strength of the prosecution's case or viability of the alibi defense was different than that of other attorneys. Robinson has failed to assert any defect in the way counsel reached his decision to advise Robinson that he had no chance of winning at trial. "[A] lawyer has the right and duty to

[1] After Robinson's retained counsel was allowed to withdraw, attorney David Geier was appointed to represent Robinson by the state public defender. Attorney Geier moved to withdraw due to a conflict of interest. Attorney Thomas A. Nelson was then appointed to represent Robinson.

recommend a plea bargain if he or she feels it is in the best interests of the accused." ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272.

¶10 Robinson's assertion that he lost all faith in his attorney to take the case to trial is also not enough to establish deficient performance. Robinson does not allege that his attorney refused to take the case to trial or was not prepared for trial. Although Robinson asserted that he felt his attorney was not properly investigating the case or preparing his defense, he failed to give factually specific information about what investigation or preparation was missing and how it would have helped the defense. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. The claim that trial counsel was ineffective in advising Robinson fails and does not provide a basis for allowing Robinson to withdraw his plea.

¶11 Robinson claims that he was under duress when he entered his guilty plea to the armed robbery charge because he believed his attorney would not effectively represent him had he gone to trial and he could not get new counsel or represent himself. Robinson states he was not given a fair and reasonable alternative to choose from. *See* ***Rahhal v. State***, 52 Wis. 2d 144, 152, 187 N.W.2d 800 (1971) ("When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced."). We reject his contention that he did not have reasonable alternatives to choose from.

¶12 Robinson argues that his circumstances are like those in ***State v. Basley***, 2006 WI App 253, ¶6, 298 Wis. 2d 232, 726 N.W.2d 671, where the defendant asserted that although innocent of the charged crime, he entered a no-contest plea on the morning of a second trial because his attorney threatened to

withdraw if the defendant did not accept the plea agreement and his attorney stated it would likely take up to a year before a new attorney would be ready to take the case to trial. The defendant's motion for plea withdrawal was remanded for a hearing because it made allegations of specific statements by the attorney at specific times. ***Id.***, ¶10. The court concluded that an evidentiary hearing was necessary despite the defendant's acknowledgement during the plea colloquy that no threats or pressure had compelled his plea because the motion provided non-conclusory information that plausibly explained why the answers during the colloquy were false. ***Id.***, ¶14. As we have already observed, there is no allegation that Robinson's attorney indicated he would not represent Robinson had Robinson elected to go to trial or that Robinson's attorney was not prepared to do so. Robinson does not assert a factual basis for his impression that his attorney would not effectively represent him at trial. There was no coercive conduct or statements by counsel and this is not a case like ***Basley***. Thus, there is no reason to disregard Robinson's confirmation during the plea colloquy that there had not been any threats or promises to get him to enter his guilty plea and that he was satisfied with his attorney's representation.

¶13 Even where an attorney gives "forceful advice" to accept a plea offer, there is no coercion when the ultimate decision is the defendant's. ***State v. Rhodes***, 2008 WI App 32, ¶11, 307 Wis. 2d 350, 746 N.W.2d 599. Going to trial and testing the evidence and the effectiveness of counsel's representation was an option for Robinson. He had two alternatives. The entry of the guilty plea was not coerced and there is no basis to allow plea withdrawal.

II. Inaccurate Information at Sentencing.

¶14 A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***Id.***, ¶26. Robinson's claim is directed at the sentencing court's remark that he was the mastermind and got others involved in crime. However, there is a basis in the record to support the court's view of Robinson's role in the crime schemes.

By the Court.—Judgments and order affirmed.

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