COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2092 **Cir. Ct. No. 2008CF1171**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALI MURSAL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Ali Mursal, *pro se*, appeals from an order of the circuit court that denied without a hearing his motion to withdraw his guilty pleas. We affirm.

¶2 In 2008, an information charged Mursal with two counts of kidnapping and four counts of first-degree sexual assault. Pursuant to a plea agreement, Mursal pled guilty to one count of kidnapping and three amended charges of second-degree sexual assault. The remaining assault charge was also amended to second-degree, and it and the remaining kidnapping charge were dismissed and read in. Mursal was given consecutive and concurrent sentences totaling forty years' imprisonment and twenty years' extended supervision.

¶3 Mursal has filed three prior postconviction motions with the assistance of counsel. All three were denied. On appeal, this court affirmed Mursal's convictions. *See* ***State v. Mursal***, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173.

¶4 In May 2014, Mursal filed the WIS. STAT. § 974.06 (2013-14)[1] motion that underlies this appeal. He sought to withdraw his pleas, alleging that they were not knowing, intelligent, and voluntary because of a defect in the plea colloquy. As relevant to this appeal,[2] Mursal claimed that while the circuit court informed him that the maximum penalty for each of his charges was forty years' imprisonment, the circuit court neglected to inform him that the sentences could be set to run consecutively. Thus, Mursal says he believed he was facing a total of twenty-five years' initial confinement and fifteen years' extended supervision, not

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Mursal had also alleged that the circuit court failed to verify his understanding of the nature of the charges as relative to party-to-a-crime modifiers. The circuit court denied the motion on this ground as well, but Mursal does not revisit it on appeal. It is therefore deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

the one hundred years' initial confinement and sixty years' extended supervision possible with four consecutive, maximum sentences. To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Mursal also alleged in a single sentence that his motion was "made on the premise that Mursal's postconviction counsel was ineffective for failing to raise the issues presented herein."

¶5 The circuit court denied the motion in part and asked the State to respond regarding the plea colloquy and possible sentence. When briefing was complete, the circuit court denied the remainder of Mursal's motion. It explained that Mursal never claimed to have told any of his four postconviction attorneys that he did not understand he could receive consecutive sentences. Further, the circuit court explained, the record revealed Mursal understood he could be sentenced up to the maximum on each count. Mursal appeals.

¶6 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. ***Escalona***, 185 Wis. 2d at 185. Thus, a prisoner who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. ***Id.*** A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996).

¶7 A defendant is entitled to withdraw his guilty plea if refusal of the withdrawal would result in a manifest injustice; a guilty plea that is not knowing, intelligent, and voluntary is a manifest injustice. *See* ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794. A defendant who seeks to withdraw a guilty plea is entitled to an evidentiary hearing on the motion if he: (1) makes a *prima facie* showing that the circuit court's plea colloquy did not conform to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), WIS. STAT. § 971.08, or other mandatory duties, and (2) alleges that he did not know or understand the information that should have been provided during the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶¶1-2, 293 Wis. 2d 594, 716 N.W.2d 906.

¶8 When the defendant alleges that his plea was not knowing, intelligent, and involuntary because of factors extrinsic to the plea colloquy, he is making a ***Nelson/Bentley*** motion. *See* ***Hoppe***, 317 Wis. 2d 161, ¶3; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). A defendant is entitled to a hearing on a ***Nelson/Bentley*** motion if the motion alleges sufficient, nonconclusory, material facts that, if true, would entitle the defendant to relief, although the circuit court may deny a hearing if the record conclusively establishes that the defendant is not entitled to relief. *See* ***Hoppe***, 317 Wis. 2d 161, ¶59 n.36.

¶9 Here, the circuit court appears to have concluded that Mursal did not offer a sufficient reason for not raising his claim about consecutive sentences earlier because he never informed his postconviction attorneys that he did not understand he could receive more than forty years' imprisonment, even when he

was sentenced to sixty years' imprisonment.[3] Without that information, no postconviction counsel could have made a nonfrivolous motion, whether under ***Bangert*** or ***Nelson/Bentley***. "This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel." ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

¶10 Nevertheless, the circuit court also noted that the record revealed Mursal's "understanding that the maximum penalty could be imposed *on each count*." The guilty plea form specified forty years for each count, the circuit court taking the plea inquired whether Mursal understand he could be sentenced up to the maximum on each count, and at sentencing, the circuit court again noted without objection the maximum penalty that applied to each court. Thus, the circuit court concluded the record conclusively refuted Mursal's claimed lack of knowledge.

¶11 We agree with the circuit court's conclusions, though we additionally note as follows. There is no requirement that the circuit court advise a defendant that sentences may be imposed consecutively. While "the better practice is to advise a defendant of the cumulative maximum sentence," ***Brown***, 293 Wis. 2d 594, ¶78, the supreme court did not go so far as to elevate this practice to a duty of the circuit court during a plea colloquy. Thus, even if he had a sufficient reason for not raising it earlier, Mursal has no cognizable claim for

[3] Mursal's motion actually fails to engage in any analysis of the postconviction attorneys' performance beyond his single conclusory sentence that they were ineffective.

relief under ***Bangert*** because there is no duty that the circuit court failed to follow during the plea colloquy.

¶12 Even if we construe it as a ***Nelson/Bentley*** motion,[4] Mursal's WIS. STAT. § 974.06 motion still does not suffice because he does not allege *what* factors extrinsic to the plea colloquy led him to misunderstand that he could be given consecutive sentences or *how* those extrinsic factors caused the misunderstanding. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that a motion sufficient to satisfy ***Bentley*** will allege who, what, where, when, why, and how). Our review is limited to the allegations in the motion, not the appellate brief. *See* ***Allen***, 274 Wis. 2d 568, ¶27. As such, Mursal's motion failed to demonstrate any manifest injustice warranting plea withdrawal, so the circuit court properly denied his motion without a hearing.

By the Court.—Order affirmed.

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

[4] This would be a very liberal construction of a motion that identifies its sole issue as the "guilty pleas were not entered knowingly, intelligently, and voluntarily because the plea colloquy was deficient."