COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2939-CR **Cir. Ct. No. 1991CF911858A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN TOLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 KESSLER, J. Stephen Toliver appeals the judgment of conviction, entered upon guilty pleas, of one count of felony murder and one count of first-degree recklessly endangering safety. Toliver also appeals from the circuit court order denying his postconviction motion to withdraw his guilty pleas. We affirm.

BACKGROUND

Procedural History.

¶2 This case has a complicated procedural history. On May 28, 1991, Toliver and his brother were charged with first-degree intentional homicide, as parties to a crime, for the death of Tina Rodgers. The cases were tried separately. On January 31, 1992, a jury found Toliver guilty as charged. He was sentenced to life imprisonment on March 16, 1992, with parole eligibility in December 2045.

¶3 Toliver, *pro se*, filed a direct appeal, as well as a postconviction motion, pursuant to WIS. STAT. § 974.06 (1991-92).[1] Both were rejected. The Wisconsin Supreme Court also denied Toliver's petition for review.

¶4 On February 24, 1997, Toliver, represented by counsel, filed a collateral postconviction motion pursuant to WIS. STAT. § 974.06 (1997-98). Again, the circuit court rejected his motion. We affirmed the circuit court and again, the Wisconsin Supreme Court denied Toliver's petition for review.

¶5 In November 1999, acting on a new federal *habeas* petition, the United States District Court for the Eastern District of Wisconsin conditionally granted Toliver's petition on the ground that he was deprived of his right to counsel during his *pro se* direct criminal appeal in the Wisconsin state court. *See* ***Wisconsin ex rel. Toliver v. McCaughtry***, 72 F. Supp. 2d 960 (E.D. Wis. 1999). The district court ordered that Toliver be released or that the state court permit him to refile his direct appeal with the assistance of counsel. *See* ***id.*** at 979. The State permitted Toliver to refile his appeal.

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

¶6 In June 2000, Toliver, through counsel, then filed a new postconviction motion, pursuant to WIS. STAT. § 809.30 (1999-2000), arguing that his trial counsel was ineffective. The circuit court denied the petition. We affirmed the circuit court and the Wisconsin Supreme Court denied his petition for review.

¶7 Toliver then filed a federal *habeas corpus* petition asserting multiple claims, including ineffective assistance of counsel. The district court denied the petition. *See* ***Toliver v. McCaughtry***, No. 02-C-1123, unpublished slip op. (E.D. Wis. Jan. 31, 2006). However, the United States Court of Appeals for the Seventh Circuit reversed the district court, concluding that Toliver's trial counsel was ineffective for failing to call two witnesses and remanded to the district court for an evidentiary hearing. *See* ***Toliver v. McCaughtry***, 539 F.3d 766 (7th Cir. 2008). On remand, the district court granted Toliver's *habeas* petition, concluding that Toliver's trial counsel was ineffective. The district court ruled that Toliver must be released unless the State began proceedings for a new trial. The State then began proceedings for a new trial.

Resentencing and calculation of Toliver's sentencing credits.

¶8 On January 23, 2013, Toliver made an appearance in Milwaukee County Circuit Court for a bail hearing. Two days later, on January 25, 2013, the parties again appeared in circuit court. The State and Toliver entered a plea agreement, whereby the parties agreed that the original charge—first-degree intentional homicide, party to a crime—would be amended to one count of felony murder and one count of hiding a corpse. The State explained to the court that the maximum penalty for the offenses at the time they were committed was 35 years, with mandatory release after two-thirds of the sentence served. The State

calculated that Toliver's mandatory release "would come to about a year and half to two years from now." The State recommended the maximum sentence, stating that the time period before Toliver's mandatory release would "be a good transition period."

¶9 Both the State and Toliver's defense counsel calculated that Toliver had been incarcerated for 7917 days. Their calculation began from the date of Toliver's arrest on May 24, 1991, until January 25, 2013. The court sentenced Toliver to thirty years' incarceration with a sentencing credit of 7917 days for the felony murder charge, and five years' incarceration on the charge of hiding a corpse, consecutive.

¶10 On February 21, 2013, the circuit court issued an order vacating Toliver's original sentence, which took place on March 16, 1992. The court ordered the Department of Corrections to issue Toliver a pretrial credit of 297 days. The calculation stemmed from the date of Toliver's arrest (May 24, 1991) to the date of his original sentencing (March 16, 1992).

¶11 On April 3, 2013, the Department of Corrections sent a notice to the circuit court informing the court that, per the court's order, it applied a pretrial credit of 297 days; however, the notice also stated that the Department was applying the credit to Toliver's sentence from September 5, 1992, not March 16, 1992, because Toliver's original sentence was consecutive to a sentence he was already serving. In other words, Toliver did not actually begin serving his sentence in this case until September 5, 1992.

¶12 On May 3, 2013, the Department of Corrections again contacted the circuit court, this time to inform the court that hiding a corpse was not a crime recognized by statute in 1991. At a hearing on June 26, 2013, the State told the

court that it offered Toliver a plea deal, by which Toliver would plead guilty to an amended charge of first-degree recklessly endangering safety. Toliver would still plead guilty to felony murder. The State told the court that Toliver "would have to be mandatorily released in ten months under our agreement." The court agreed to give the parties time to contemplate the agreement.

¶13 At the sentencing hearing on June 27, 2013, Toliver's counsel explained to the circuit court that the State, Toliver and defense counsel had reached an agreement. The parties agreed that Toliver's original plea to the felony murder charge would remain. Thus, the court's sentence on that count would also remain. However, the charge of hiding a corpse would be vacated and instead, Toliver would plead guilty to first-degree reckless endangerment, contrary to WIS. STAT. § 941.30(1) (1991-92), which carried a maximum penalty of five years. The State would recommend that Toliver be sentenced to five years consecutive to the felony murder count, but concurrent to any other sentence.

¶14 Defense counsel also told the court that Toliver would still be entitled to pretrial incarceration credit from the date of his arrest (May 24, 1991) through the date of his original sentencing (March 16, 1992), for a total of 297 days. Counsel told the court that Toliver would also be entitled to credit for incarceration served from the date of his original sentence (March 16, 1992) to June 27, 2013, for a total of 7793 days. Toliver's total sentencing credit would amount to 8070 days. According to the State, Toliver's mandatory release would occur approximately ten months from the date of the hearing, in April 2014. The court accepted the parties' recommendations.

¶15 On August 29, 2013, the Department of Corrections sent the circuit court another notice, stating that "some of the credit on [the] amended judgment

appears to be excessive." The Department again informed the court that because Toliver's sentence began on September 5, 1992, not March 16, 1992, he was actually entitled to 7447 days of sentencing credit, plus the presentence credit, not 8070 days, as the court ordered on June 27, 2013.

¶16 On September 11, 2013, the circuit court issued an order "vacating sentence credit on count two." (Capitalization omitted.) The order stated that the court was not obligated to grant Toliver sentencing credit from March 16, 1992, but that the Department of Corrections was required by statute to credit Toliver with confinement from that date. The Department responded to the court's order, explaining its calculations and again, informing the court that it could not credit Toliver for time served before September 5, 1992. On December 20, 2013, the circuit court then issued another order, agreeing that Toliver's entitlement to credit began on September 5, 1992. The court also lowered Toliver's pretrial credit from 297 days to 67 days, pursuant to ***State v. Gavigan***, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984), stating that Toliver was not entitled to pretrial credit for time spent in custody on a separate charge. As a result of the correspondences between the circuit court and the Department of Corrections, the Department informed Toliver that his mandatory release date was March 18, 2016.

Motion to withdraw the guilty pleas.

¶17 On June 12, 2014, Toliver filed a postconviction motion for plea withdrawal, pursuant to WIS. STAT. § 809.30. The basis of all of Toliver's arguments was that he pled guilty to felony murder and first-degree reckless endangerment with the understanding that his mandatory release would be in April 2014. Toliver argued that: (1) his pleas were not entered knowingly, voluntarily

or intelligently; (2) that he was denied effective assistance of counsel; and (3) that the circuit court's colloquy was defective.

¶18 The State opposed the motion, but also acknowledged the miscalculation of Toliver's sentencing credit and petitioned the court to modify Toliver's sentence so that Toliver would be released immediately. Toliver opposed sentence modification, insisting instead that he be allowed to withdraw his pleas.

¶19 The circuit court held a hearing on the matter on October 31, 2014. Toliver testified that he only accepted the State's plea offer because he anticipated his release to be in April 2014. In a written decision issued on December 1, 2014, the circuit court denied the motion, stating that Toliver had not articulated any facts to show that his anticipated April 2014 release was crucial to his decision to accept the State's offer. However, the court modified the June 27, 2013 sentence to effectuate Toliver's immediate release. Toliver was released from prison on mandatory release supervision on December 3, 2014. This appeal follows.

DISCUSSION

¶20 Toliver raises four arguments on appeal. He argues that he is entitled to a plea withdrawal because: (1) his pleas were not knowingly, intelligently or voluntarily entered; (2) his plea agreements were premised on a legal impossibility; (3) the circuit court erroneously vacated his guilty plea to concealing a corpse without vacating his plea to felony murder; and (4) his trial counsel was ineffective.

I. Toliver has not shown that his pleas were not entered knowingly, intelligently and voluntarily.

¶21 Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous, but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *See* ***id.***

¶22 A defendant who moves to withdraw a plea after sentencing must establish by clear and convincing evidence that the circuit court should permit plea withdrawal to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The "'manifest injustice'" test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted).

¶23 Here, Toliver rests his assertion on the claim that he was misinformed about his mandatory release date. Specifically, he argues that he "entered his guilty pleas with an incorrect understanding of the consequences of his pleas, namely the effect a maximum sentence would have on his expected release date." The State and Toliver's defense counsel both acknowledged the mistaken credit calculation. Indeed, the State moved to remedy the mistake by petitioning the court to release Toliver immediately—a petition Toliver opposed in favor of withdrawing his pleas. That Toliver expected to be released at a particular time is insufficient to support his claim of manifest injustice. *See* ***State v. Roou***, 2007 WI App 193, ¶15, 305 Wis. 2d 164, 738 N.W.2d 173 (disappointment in a lengthier than expected sentence is insufficient to prove a

fundamental flaw in the integrity of the plea). Toliver's entire argument is based on his disappointment in the length of his sentence—he presents no facts which show that his anticipated release date was the basis of his plea. We conclude that Toliver's arguments are nothing more than conclusory statements that do nothing to support the claim of a manifest injustice.

¶24 Moreover, the circuit court appropriately modified Toliver's sentence in accordance with our holding in ***State v. Armstrong***, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860. In that case, a similar miscalculation of the defendant's sentencing credit occurred. At the time of the defendant's sentencing, the parties and the court believed the defendant was entitled to two years of sentencing credit. ***Id.***, ¶8. The defendant was really only entitled to eight months. ***Id.*** We concluded that the miscalculation constituted a new factor that allowed for the modification of the defendant's sentence and we remanded to the circuit court. *See* ***id.***, ¶9. Here, the circuit court appropriately applied the holding in ***Armstrong*** and modified Toliver's sentence so as to allow him immediate release in December 2014. Because Toliver has made only conclusory statements to support his argument for plea withdrawal, and because the circuit court appropriately modified Toliver' sentence, we conclude that Toliver has not met the burden of proving a manifest injustice warranting a plea withdrawal.[2]

[2] For the same reasons, we reject Toliver's argument that his plea agreements were premised on a legal impossibility. Toliver asserts that he "was lead to believe that he gained a material advantage of having his sentence run concurrent to his 1991 sentence [for a different crime that he was already serving]." Again, Toliver puts forth no facts to show that he would have rejected the plea agreement if he knew that his sentence would run consecutive, rather than concurrent, to his 1991 sentence. His argument is underdeveloped and we will not consider it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

II. The circuit court did not erroneously fail to vacate Toliver's felony murder plea.

¶25 On January 25, 2013, Toliver pled guilty to one count of felony murder and one count of hiding a corpse. Toliver was sentenced to thirty years on the felony murder charge, and five years on the hiding a corpse charge. In May 2013, the Department of Corrections notified the circuit court that the crime of hiding a corpse was not recognized by statute until May 1992—a year after Toliver's charged criminal conduct. On June 27, 2013, the parties advised the court to vacate the hiding a corpse charge and stated that the parties reached an agreement whereby Toliver would instead plead guilty to one count of first-degree reckless endangerment. The circuit court confirmed that Toliver understood that the felony murder plea was not being vacated, stating, "[s]o you understand, sir, Count 1 is not being vacated. We're vacating Count 2, and you're entering a plea apparently to the first-degree recklessly endangering safety." Toliver responded in the affirmative.

¶26 Toliver now contends that when he originally pled guilty to felony murder and hiding a corpse, "the plea agreement called for him to plead to a charge … that was non-existent at the time of the charged offense. For that reason, the entire agreement was void and improper." Toliver argues that because the circuit court lacked subject matter jurisdiction over the charge of hiding a corpse, it lacked subject matter jurisdiction over the entire agreement. Relying on ***State v. Briggs***, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), he contends that the entire plea agreement should have been voided because "[t]he original amendment of the count of Felony Murder was a part of a plea agreement that included a non-existent charge." Toliver is mistaken.

¶27 In ***Briggs***, the defendant was initially charged as a party to the crimes of attempted first-degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. ***Id.*** at 64. Eventually, Briggs reached an agreement with the State whereby he pled guilty to attempted felony murder and armed burglary, as a party to the crimes. ***Id.*** The circuit court accepted Briggs's plea and he was sentenced. ***Id.*** Following sentencing, Briggs filed a postconviction motion, seeking to vacate the attempted felony murder conviction on the ground that Wisconsin law did not recognize that crime. ***Id.*** We held that the circuit court did not have subject matter jurisdiction over the non-existent crime and we vacated both of Briggs's convictions so as to "place the defendant and the State in the same position they were in before they agreed to amend the information in exchange for Briggs's plea to armed burglary and the non-existent crime of attempted felony murder." ***Id.*** at 74.

¶28 Unlike the facts in ***Briggs***, Toliver's appeal does not stem from the conviction of a non-existent crime. Toliver was convicted of two crimes that are recognized by statute, based on a plea agreement he and the State negotiated. Toliver agreed that the felony murder plea would remain in tact, and he agreed to substitute a charge of first-degree reckless endangerment for the charge of hiding a corpse. The circuit court confirmed with Toliver that he understood which plea was being vacated. Toliver's claim that the circuit court lacked jurisdiction over Toliver's felony murder plea is thus without merit.

III. Toliver did not receive ineffective assistance of counsel.

¶29 Toliver contends that his counsel was ineffective for failing to properly calculate his sentencing credits, and in turn, his mandatory release date.

The miscalculation, Toliver contends, led him to accept a plea deal he otherwise would not have accepted. The record does not support this claim.

¶30 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was both deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, a defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, there must be 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.*** at 694. We need not address both aspects of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶31 To establish a reasonable probability that counsel's miscalculation of Toliver's sentencing credit affected the plea decision, Toliver must show that he would not have pled guilty had he known his mandatory release date would extend past April 2014. The record establishes that Toliver intended to go to trial as late as June 25, 2013, potentially on a charge of first-degree intentional homicide, but ultimately accepted the plea bargain with the encouragement of his family and defense counsel. Nothing in the record suggests that Toliver would have rejected the plea deal, or that his family and counsel would have insisted on trial, if Toliver's mandatory release date were later. Indeed, if Toliver had gone to trial and was found guilty, he faced a lifetime of imprisonment. Instead, Toliver was

released in December 2014—eight months after his anticipated release date. He has not put forth any facts which show that he was prejudiced by this eight month difference.

¶32 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.