COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP35-CR **Cir. Ct. No. 2014CF257**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. ROEHLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: JEFFERY ANDERSON, Judge. *Order reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Jeffrey Roehling appeals a judgment convicting him of one count of felony intimidation of a witness and an order denying his motion for postconviction relief. Roehling argues the circuit court erred by denying his

request to conduct a ***Machner***[1] hearing. We conclude Roehling's postconviction motion presented sufficient nonconclusory factual allegations that, if proven, would establish Roehling is entitled to relief. Therefore, we reverse the order and remand to the circuit court with directions to conduct a ***Machner*** hearing.

BACKGROUND

¶2 A criminal complaint in Polk County case No. 2014CF257 charged Roehling with one misdemeanor count of knowingly violating a domestic abuse temporary restraining order (TRO) and one count of felony intimidation of a witness, both as a repeat offender. Both charges stemmed from a July 15, 2014 telephone call Roehling made to K.C.

¶3 At the time of the phone conversation, Roehling had pending a domestic abuse TRO that K.C. had filed against him in Polk County case No. 2014CV242, with an injunction hearing scheduled for July 16, 2014, the day following the phone conversation. In addition, a preliminary hearing was scheduled for July 17, 2014, on felony intimidation charges against Roehling in Polk County case No. 2014CF235, a case in which Roehling was the alleged victim.

¶4 According to the complaint in the instant case No. 2014CF257, the TRO in case No. 2014CV242 was in effect until the scheduled date of the injunction hearing. The TRO required Roehling to avoid contacting K.C., including through use of a telephone. The complaint alleged Roehling called K.C.

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

on July 15, 2014, and near the end of the call, told K.C., "Don't show up, I promise," and "Please get the intimidation dropped the next day in Court. I promise it will be good." The complaint did not mention case No. 2014CF235.

¶5 Pursuant to a global plea agreement, Roehling pleaded guilty to the felony intimidation of a witness charge in the instant case, and various charges in case No. 2014CF235. All other charges in those two cases were dismissed and read-in for sentencing purposes. With regard to the felony intimidation of a witness conviction in this case, the circuit court imposed a sentence of eight years' initial confinement and four years' extended supervision.

¶6 Roehling subsequently filed a motion for postconviction relief in this case, asserting that he was entitled to withdraw his guilty plea on the felony intimidation of a witness charge. His motion alleged his defense counsel was constitutionally ineffective by failing to: (1) challenge the legal sufficiency of the felony intimidation of a witness charge in the criminal complaint; and (2) advise Roehling that there was an insufficient factual basis to support the charge.

¶7 Roehling requested a ***Machner*** hearing based on the factual allegations contained in his postconviction motion. The circuit court requested briefing from the parties on the issue of whether to conduct a ***Machner*** hearing and scheduled an oral ruling for November 20, 2015. The court also stated that if it ultimately granted Roehling's request, the hearing would be held within the first two weeks of January 2016.

¶8 Because a ***Machner*** hearing would potentially be held in January 2016, Roehling requested that this court extend the deadline for the circuit court to decide his postconviction motion until February 1, 2016. On September 24, 2015, we extended the time for the circuit court to decide Roehling's postconviction

motion to November 27, 2015.[2] On November 19, 2015, the circuit court cancelled the oral ruling scheduled for the next day and rescheduled the oral ruling to take place on January 7, 2016. Neither party had requested an adjournment of the oral ruling scheduled for November 20, 2015.

¶9 In addition, neither party, nor the circuit court, requested that we further extend the November 27, 2015 deadline for the court to decide Roehling's postconviction motion. On December 7, 2015, Roehling asked the clerk of courts to enter an order denying his postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(i) (2015-16),[3] because the court did not timely decide the motion. The clerk of courts entered an order on December 11, 2015, denying Roehling's motion for postconviction relief. Roehling now appeals.

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[2] In our order, we noted that if the circuit court ultimately granted Roehling's request for a ***Machner*** hearing at the oral ruling scheduled for November 20, 2015, he could move for another extension of the deadline for the circuit court to decide his postconviction motion.

[3] WISCONSIN STAT. RULE 809.30(2)(i) provides:

> *Order determining postconviction or postdisposition motion.* Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the person's motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

I. Forfeiture

¶10 The State argues Roehling forfeited his argument that the circuit court erred by denying his request to conduct a ***Machner*** hearing because Roehling purportedly moved the circuit court to deny his motion under WIS. STAT. RULE 809.30(2)(i), instead of moving this court for an extension of the November 27, 2015 deadline to decide his motion. We disagree.

¶11 Two things are clear under WIS. STAT. RULE 809.30(2)(i). First, the statute mandates that if a circuit court does not determine a postconviction motion within sixty days after filing of the motion, the motion is "deemed denied." Second, the statute requires that if the court does not determine the motion within sixty days, the clerk of circuit court must enter an order denying the motion. Contrary to the State's argument, Roehling did not move the court to deny his postconviction motion. Rather, the motion had already been denied by operation of law after the November 27, 2015 deadline passed without a decision by the circuit court. *See* ***id.*** Roehling simply requested that the clerk of circuit court enter a written order denying his postconviction motion, as the clerk was required to do under RULE 809.30(2)(i). Such an order was necessary for Roehling to file an appeal.

¶12 The State cites no legal authority for its apparent position that Roehling was required to seek an extension of the deadline for the circuit court to decide his postconviction motion to avoid forfeiture of the legal arguments underlying that motion. WISCONSIN STAT. RULE 809.30(2)(i) clearly indicates a postconviction motion is denied if not timely decided, but does not address this forfeiture issue.

¶13 Due to the apparent ambiguity, we look to the legislative purpose of the combined "deemed denied" and mandatory denial order provisions in WIS. STAT. RULE 809.30(2)(i). *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110. A rule's purpose may be readily apparent from its plain language, its context or the structure of the rule as a coherent whole. *See* ***id.***, ¶49. We conclude one purpose of these provisions is to protect convicted defendants from undue delay in the resolution of their postconviction motions. That protection occurs from a relatively speedy, sixty-day determination of the motion by the circuit court, or—lacking such speedy determination—from mandated entry of a denial order so that the defendant can file an appeal.

¶13 Further, the rule specifies that "a party or the circuit court" may request an extension of the deadline. WIS. STAT. RULE 809.30(2)(i). Thus, it is apparent from the plain language of the rule that the onus to request an extension does not fall to the defendant alone. Finally, a defendant may be unaware the court will not issue a decision within the time set by statute or extension. In that event, it would be unreasonable to conclude a defendant forfeits the right to appeal the denial of a motion based upon the court's failure to timely issue a decision and order.

¶14 We therefore conclude a defendant does not forfeit the right to have his or her arguments heard on appeal by failing to request an extension pursuant to WIS. STAT. RULE 809.30(2)(i). Accordingly, we reject the State's arguments that by failing to request that this court grant an extension of the November 27, 2015 deadline for the circuit court to decide the postconviction motion, or that by requesting the clerk enter the denial order, Roehling forfeited his argument that the circuit court erred by denying his request to conduct a ***Machner*** hearing.

II. ***Machner*** *hearing*

¶15 A defendant may withdraw his or her guilty plea after sentencing if he or she demonstrates by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. James***, 176 Wis. 2d 230, 236-37, 500 N.W.2d 345 (Ct. App. 1993). This test is satisfied if the defendant's plea was the result of constitutionally ineffective assistance of counsel. ***State v. Hudson***, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147 (citation omitted).

¶16 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's conduct constituted deficient performance; and (2) the defendant was prejudiced as a result of counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must demonstrate that counsel's actions or inactions were outside the wide range of professionally competent assistance. ***Id.*** at 690. To establish prejudice, the defendant must demonstrate 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. In the context of entering a guilty plea and forgoing a trial, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶17 If a defendant's postconviction motion raises sufficient nonconclusory factual allegations that, if true, would establish the defendant is entitled to relief, the circuit court must conduct an evidentiary hearing unless the

record conclusively demonstrates the defendant is not entitled to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶¶42-50, 336 Wis. 2d 358, 805 N.W.2d 334. In the context of a claim of ineffective assistance of counsel, the defendant must allege specific facts which constitute both deficient performance and prejudice. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312-18, 548 N.W.2d 50 (1996). Whether a motion alleges sufficient facts on its face that would entitle the defendant to relief is a question of law we review de novo. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶18 Roehling argues the circuit court erred by denying his request for a ***Machner*** hearing. He contends his postconviction motion contained sufficient nonconclusory factual allegations to show his counsel was ineffective in failing to challenge the legal sufficiency of the felony intimidation of a witness charge in the criminal complaint and advise Roehling that there was an insufficient factual basis to support that charge which, if true, would entitle him to withdraw his guilty plea. To address Roehling's argument, we must first review the factual allegations contained in his postconviction motion.

¶19 Roehling attached various exhibits to his postconviction motion, including: (1) a police report dated July 16, 2014; and (2) an audio recording of the July 15, 2014 phone conversation between Roehling and K.C. In regards to the July 15 telephone conversation between Roehling and K.C., the police report stated: "Towards the end of the call, while talking about a hearing on 7/16/14, the inmate [Roehling] says 'Don't show up, I promise', and 'Please get the intimidation dropped the next day in court. I promise it will be good.'" Roehling alleges the audio recording of the phone conversation confirms that he and K.C. were talking about the restraining order hearing set for "tomorrow." It was only after K.C. stated, "I don't even know if I can go tomorrow. I can't see him," that

Roehling said, "Don't show up. I promise, I promise, and please get the intimidation dropped the next day in court. Come to court the next day and tell them." Roehling contended this evidence showed he was actually encouraging K.C. to appear at the preliminary hearing in the felony case, rather than telling her not to come to court.

¶20 In addition, Roehling attached an email exchange between his postconviction counsel and defense counsel in which defense counsel wrote in reference to the felony intimidation charge:

> It was something I discussed with Mr. Roehling. I believe that was something he brought up ... claiming he was only talking about the restraining order. Have you listened to the tape? I don't think that's what he said. My recollection was that he said "You've got to get the intimidation charge dismissed" in the context of whether she was going to show up for court.

(Ellipsis in original.) Roehling's postconviction motion argued this email demonstrated that he raised the issue with his defense attorney and that his attorney either did not review the discovery materials or misunderstood the contents.

¶21 Roehling argues that attempting to dissuade a witness from attending a TRO hearing is a misdemeanor under WIS. STAT. § 940.42 and could not be a basis for felony intimidation under WIS. STAT. § 940.43(7). A charge of felony witness intimidation requires the State to prove that: (1) the victim was a witness; (2) the defendant prevented or dissuaded or attempted to prevent or dissuade the victim from attending or giving testimony at a proceeding authorized by law; (3) the defendant acted knowingly and maliciously, which requires that the defendant knew the victim was a witness; and (4) the act was committed by a person who is charged with a felony in connection with a trial, proceeding, or

inquiry for that felony. *See* WIS. STAT. §§ 940.42, 940.43(7); WIS JI—CRIMINAL 1292. As Roehling contended in his postconviction motion, the complaint only mentions a TRO hearing, and it never asserts Roehling attempted to dissuade K.C. from attending a hearing related to any felony. Roehling's ineffective assistance of counsel claims all stem from this insufficiency in the complaint.

¶22 We conclude Roehling's motion states sufficient facts that, if true, would establish that he is entitled to relief. First, the complaint in the present case does not identify any prior felony—by case number, date or facts—much less allege that Roehling attempted to dissuade K.C. from attending a hearing in a felony case. Second, Roehling's motion states that a fair reading of the complaint was that he was being charged with attempting to dissuade K.C. from attending the TRO hearing. *See* ***State v. Smaxwell***, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756 ("The test for determining the sufficiency of a complaint is common sense."). Finally, as mentioned, Roehling's motion states that his defense attorney failed to challenge the felony witness intimidation charge, and the attorney failed to advise Roehling there were insufficient facts to support the felony intimidation charge and conviction.

¶23 An understanding of the elements required for a criminal charge or conviction is a basic requirement of competence in an attorney. *See* ***Strickland***, 466 U.S. at 688. It follows that a criminal defendant's counsel must employ such knowledge in advising the defendant, including on issues related to entering a plea. The State does not dispute that, if Roehling's allegations are true, his defense attorney performed deficiently by failing to challenge the felony witness intimidation charge in this case and failing to advise Roehling of this possible challenge. Unrefuted arguments are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App.

1979). We therefore conclude Roehling has stated sufficient facts which, if true, would show his attorney's representation was "outside the wide range of professionally competent assistance," and therefore deficient. *See* ***Strickland***, 466 U.S. at 690.

¶24 In ***Bentley***, our supreme court held that:

> In order to satisfy the prejudice prong of the ***Strickland*** test, the defendant seeking to withdraw his or her plea must allege facts to show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Bentley, 201 Wis. 2d at 312. Further, a postconviction motion must allege factual assertions which would allow a court to meaningfully assess the defendant's claim of prejudice. ***Id.*** at 316.

¶25 In his postconviction motion, Roehling asserted his defense attorney never advised him that there were insufficient facts to support the felony intimidation charge and did not advise him that the criminal complaint should be challenged for that reason. In addition, Roehling maintained his innocence to this charge and asserted that he pleaded guilty based only upon the deficient advice of counsel. The email exchange between Roehling's postconviction counsel and his defense counsel supports his assertions that he raised the factual sufficiency issue with his attorney, and that his attorney failed to recognize it or properly advise him. Quite simply, if Roehling's factual allegations are true, he would not have been *able* to plead guilty to the charge had his defense counsel challenged the sufficiency of the complaint. We agree that pleading guilty to a felony for which a defendant could not have been charged or convicted constitutes prejudice. Roehling has provided sufficient factual support to allow a court to meaningfully assess his claim of prejudice.

¶26 We therefore reverse the order denying Roehling's postconviction motion and remand to the circuit court with directions to conduct a ***Machner*** hearing.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.