COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1794-CR
2016AP1795-CR

Cir. Ct. Nos. 2013CF1230
2015CF227

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROLAND GARZA, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. In these consolidated cases, Roland Garza, Jr., appeals from judgments of conviction and an order denying his postconviction motion. He contends that he is entitled to either plea withdrawal or sentence modification. We disagree and affirm.

¶2 Garza was convicted following pleas to substantial battery and first-degree reckless homicide by use of a dangerous weapon.[1] The charges stemmed from two separate cases that were resolved together via an agreement with the State.

¶3 In the first case, Garza was accused of beating his then-girlfriend outside of a Halloween party. The victim suffered a broken nose and a broken eye socket.

¶4 In the second case, Garza was accused of fatally shooting a man with whom he had been drinking alcohol and smoking marijuana. Garza tried to make the scene look like a suicide and initially told police that the man had shot himself. However, he later admitted to shooting the man by accident. At the time of the incident, Garza was out on bond in the first case.

¶5 For his actions, the circuit court imposed an aggregate sentence of twenty years of initial confinement followed by five years of extended supervision. Garza subsequently filed a postconviction motion seeking either plea withdrawal or sentence modification. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

[1] Garza entered a plea of no contest to the battery charge and a plea of guilty to the homicide charge.

¶6 On appeal, Garza first contends that he is entitled to plea withdrawal. He asserts that his pleas were involuntarily entered, as he did not realize until immediately before the plea hearing that he had agreed to plead to first-degree reckless homicide instead of second-degree reckless homicide. He further asserts that his trial counsel was ineffective for erroneously advising him at that time that it was too late to back out of the agreement.

¶7 A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to show a manifest injustice is to demonstrate that the plea was not voluntarily entered. ***Id.*** A manifest justice also occurs if the defendant received ineffective assistance of counsel. ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. This requires the defendant to demonstrate both that trial counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Id.***, ¶85.

¶8 Whether a plea was voluntarily entered and whether the defendant received ineffective assistance of counsel are questions of constitutional fact. ***Id.***, ¶86; ***Brown***, 293 Wis. 2d 594, ¶19. When reviewing questions of constitutional fact, we accept the circuit court's findings of historical fact unless clearly erroneous, but independently apply constitutional principles to those facts. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. We may review the entire record when applying the manifest injustice test. *See* ***State v. Cain***, 2012 WI 68, ¶¶29-31, 342 Wis. 2d 1, 816 N.W.2d 177.

¶9 At the postconviction motion hearing, Garza's trial counsel testified that Garza "would have had to" have seen the first page of the plea

questionnaire/waiver of rights form, which was signed by Garza the day before the plea hearing and listed both the charge of first-degree reckless homicide and its maximum penalty. Counsel further testified that he discussed second-degree reckless homicide with Garza only to address Garza's chances of obtaining a verdict on that charge at trial. (Counsel advised that his chances were not good.) Counsel did not recall Garza having any questions about pleading to first-degree reckless homicide.

¶10 Given trial counsel's testimony, which the circuit court implicitly accepted as credible, we cannot say that Garza's pleas were involuntarily entered or that he received ineffective assistance of counsel. Such claims are further undermined by Garza's statements at the plea hearing. There, he affirmed his understanding that he was pleading to first-degree reckless homicide with the use of a dangerous weapon enhancer. He also affirmed that he had adequate time to discuss his pleas with counsel, that he was satisfied with counsel's representation, and that he was not "confused about anything." For these reasons, we conclude that Garza has not met his burden of showing that plea withdrawal is necessary to avoid a manifest injustice.

¶11 Garza next contends that he is entitled to sentence modification. Specifically, Garza complains that the sentence imposed was unduly harsh. He notes that the shooting was accidental, that he took responsibility for his crimes, and that the presentence investigation report (PSI) recommended a lesser sentence.[2]

[2] The PSI recommended an aggregate sentence of ten to twelve years of initial confinement followed by four to five years of extended supervision.

¶12 When a defendant argues that a sentence is unduly harsh, we will deem it an erroneous exercise of discretion only where it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶32 (citation omitted).

¶13 Here, Garza faced a maximum aggregate sentence of forty-six and one-half years of initial confinement followed by twenty-two years of extended supervision. *See* WIS. STAT. §§ 940.19(2) (substantial battery), 940.02(1) (first-degree reckless homicide), 939.63(1)(b) (use a dangerous weapon enhancer), and 973.01 (bifurcation of sentences).[3] The circuit court imposed an aggregate sentence of twenty years of initial confinement followed by five years of extended supervision, which is less than half of the time available. In light of this fact, as well as the aggravating factors cited in the circuit court's decision,[4] we do not view the sentence imposed as unduly harsh. The circuit court was well within its right to exceed the recommendation of the PSI. *See* ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41 (court not bound by PSI recommendation).

[3] All references to the Wisconsin Statutes are to the 2015-16 version.

[4] The aggravating factors included: (1) the significant violence that Garza inflicted upon the victim of the battery case; (2) Garza's disregard of bond conditions leading up to the shooting; (3) the fact that Garza had previously fired another person's gun inside an occupied house; and (4) the fact that Garza had initially tried to make the shooting look like a suicide. Garza's counsel neglects to mention any of these factors in the appellant's brief. We admonish counsel to be more forthright in the future when describing the facts of a case.

By the Court.—Judgments and order affirmed.

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