COURT OF APPEALS DECISION DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1400-CR

Cir. Ct. No. 1992CF924577

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUSTIN CURRY ROSS,

DEFENDANT-APPELLANT.

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

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

¶1 BRENNAN, J. Austin Curry Ross appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion. Ross raises seven claims:

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(1) he was entitled to a competency hearing; (2) he should have been resentenced based on his competency claim; (3) he should be allowed to withdraw his guilty plea; (4) he was denied due process because of the overlooked competency factor; (5) trial counsel provided ineffective assistance by failing to request a competency hearing and to raise the issues he raises in this appeal; and (6) the trial court erred in summarily denying his claim of ineffective assistance without conducting a ***Machner*** hearing.[2] Because we resolve each claim in favor of upholding the trial court's order, we affirm.

BACKGROUND

¶2 In June 1993, Ross was convicted following his guilty pleas on four counts in three separate burglary incidents. On October 26, 1992, he entered Kathleen Stroinski's home without her permission, told her he had a pistol and demanded all her money. He took the money she had and left. He was charged with and convicted of armed robbery and burglary based on this incident. On November 16, 1992, he entered the home of Manfred Loomis without his permission, struck Loomis and took his television set. He was charged with and convicted of burglary (battery committed within enclosure) as a result of this incident. A second charge of battery (high probability of great bodily harm) was dismissed. On November 29, 1992, Ross entered the home of Minnie Beck without her permission, ransacked it and stole items before being chased out. Ross was charged with and convicted of burglary as a result of this incident. His conviction also carried the penalty enhancer of habitual criminality as he had been convicted of robbery in 1990.

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

¶3 Ross did not file a direct appeal. Fifteen years later, on April 23, 2008, Ross filed a *pro se* motion with the circuit court seeking resentencing based on a new factor. He asserted that he should be resentenced because all parties overlooked his "mental and emotional condition" "which raises questions of whether he was responsible for his actions during the crimes." He further contended that his plea was involuntary based on his incompetence and his trial counsel was ineffective for failing to request a competency evaluation. He alleged that the trial court erred in failing to order a competency hearing. The trial court denied his motion. Ross now appeals.

DISCUSSION

I. General Competency Law

¶4 Because most of Ross's issues involve whether there was reason to doubt his competency at the time he entered his pleas, we set forth briefly the law pertinent to competency. A defendant must be competent to stand trial. *See* ***State v. Byrge***, 2000 WI 101, ¶26, 237 Wis. 2d 197, 614 N.W.2d 477. A defendant is considered competent if he can rationally consult with his attorney and can understand the proceedings. ***Id.***, ¶27. A "defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***Id.*** WISCONSIN STAT. § 971.13(1) provides that: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." If there is a reason to doubt a defendant's competency, the court must order a competency examination. WIS. STAT. § 971.14(1) & (2). "A reason to doubt competency can arise from the defendant's demeanor in the

courtroom, colloquies with the court, or by a motion from either party." ***Byrge***, 237 Wis. 2d 197, ¶29.

II. Was Ross Entitled to a Competency Hearing?

¶5 Ross's first contention is that he was entitled to a competency evaluation based on his "mental and emotional condition." In support, he points to medical records showing he was taking a psychotropic drug, to the fact that he had attempted to commit suicide, to his family's testimony that he was exhibiting irrational behavior and to the fact that he suffered from chronic drug and alcohol abuse. In essence, he is asking us to conclude that he is entitled to a retrospective hearing as to whether he was competent to stand trial in 1993. *See* ***State v. Johnson***, 133 Wis. 2d 207, 224-27, 395 N.W.2d 176 (1986). The State responds that Ross's claim is non-meritorious because the trial court found that there was no reason to doubt Ross's competency. The trial court ruled:

> The defendant entered a guilty plea in this case, and the court perceived no problem with the defendant's ability to understand the nature of the proceedings. Moreover, there is nothing in the record to demonstrate that counsel should have been put on notice that the defendant was unable to understand the proceedings, and there is nothing in the two pages of medical records from the jail that would have put anyone on notice about any particular mental condition which would cause the court or counsel to question his competency at the time of these proceedings.

On appeal, the State analyzes whether we should review this issue under the clearly erroneous standard of review, or under the erroneous exercise of discretion standard of review. The State points out that our supreme court in ***State v. Garfoot***, 207 Wis. 2d 214, 558 N.W.2d 626 (1997) adopted the clearly erroneous standard for determining whether a defendant was competent:

> The trial court is in the best position to make decisions that require conflicting evidence to be weighed. Although the

> court must ultimately apply a legal test, its determination is functionally a factual one: either the state has convinced the court that the defendant has the skills and abilities to be considered "competent," or it has not.
>
> The trial court's superior ability to observe the defendant and the other evidence presented requires deference to the trial court's decision that a defendant is or is not competent to stand trial. Only the trial court has the opportunity to view the defendant. Only the trial court can judge the credibility of witnesses who testify at the competency hearing. Thus, only the trial court can accurately determine whether the state presented evidence that was sufficiently convincing to meet its burden of proving that the defendant is competent to stand trial.

Id. at 223 (footnotes omitted). The supreme court, in discussing the standard to apply to whether there was reason to doubt a defendant's competency, went on to say "[i]t only makes sense to apply the same standard of review to a trial court's determinations of competency." ***Id.*** at 224. The State points out that this is dicta and the supreme court never clearly articulated whether the clearly erroneous standard or the erroneous exercise of discretion standard applied to whether there is reason to doubt competency determinations. It is not necessary for us to resolve the standard of review issue. We hold that under either standard, based on the record before us, there was no reason to doubt Ross's competency. Ross has failed to convince us that a retrospective hearing on his competency is required, because the existing record demonstrates that there was no reason to doubt his competency.

¶6 Ross was coherent at the ***Miranda-Goodchild***[3] hearing in this case. The police detective who interviewed Ross before the complaint was filed testified

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[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

at the hearing that Ross interacted appropriately, spoke coherently, acted normally and knew what he was doing. Ross testified at the hearing as well. We have reviewed his testimony. He answered all questions appropriately and coherently. Ross's position at the ***Miranda-Goodchild*** hearing was that at the time the police took his statement, he was distraught, depressed and suicidal and therefore his statement was not voluntary. Clearly at the time of the ***Miranda-Goodchild*** hearing, he was no longer depressed and distraught. Rather, he was articulate, coherent and clearly able to understand what was going on and to assist in his defense. At the conclusion of the hearing, the trial court found that his statement was admissible.

¶7 After the trial court denied Ross's motion to suppress, Ross plead guilty. At the plea hearing, Ross was asked whether he had ever been treated for mental disease. He said he had not. He answered affirmatively when asked whether he understood what was going on at the plea hearing. He indicated that he was not under the influence of drugs, alcohol or medication. Defense counsel noted that the only counseling Ross ever had was after his suicide attempt. Ross said he understood all the rights he was giving up by pleading guilty. Based on our review of the transcript, there was nothing to raise concern about Ross's competency.

¶8 We reach the same conclusion after reviewing the presentence investigation report and the sentencing hearing. The PSI author described Ross as cooperative and stated that she had no difficulty communicating with him. Although she noted he had some longstanding psychological issues, including anger issues, ongoing depression and suicide attempts, there was nothing to suggest that he lacked the ability to understand what was going on or that he could not meaningfully participate and assist counsel at trial.

¶9 At the sentencing hearing, Ross's mental health was referenced again. His anger issues, drug use, suicide attempts and trouble with the criminal justice system were discussed. However, there was no indication that any of Ross's issues adversely affected his cognitive abilities or precluded him from understanding his crimes and participating in his defense. Ross spoke coherently at the sentencing hearing indicating that he wanted to accept responsibility for what he did and did not want to make any excuses. His statements clearly reflected there was no reason to doubt his competency.

¶10 Ross argues that the two pages of his medical records documenting that he was taking a medication for depression should have been an indicator that there were competency issues. We disagree. Being on prescription medication to treat a medical condition does not make a person legally incompetent. *See* ***Byrge***, 237 Wis. 2d 197, ¶31. Moreover, as the trial court noted, neither the court nor trial counsel would have had access to Ross's medical records unless he signed a release authorizing them to review them.

¶11 We reach the same conclusion regarding Ross's claims that his suicide attempts and drug/alcohol use should have raised competency issues. The court knew about both, but at the time of the plea, Ross indicated that he was not under the influence and his actions did not indicate he was still suicidal. Ross's testimony, his coherency and ability to assist in his defense, and the factors Ross relies on do not create a reason to doubt competency.

¶12 Finally, Ross points to his family's testimony that he was engaging in irrational behavior. Although irrational behavior may be an indicator of incompetency, it may also arise from the use of drugs and alcohol. During the proceedings in this case, while Ross was incarcerated, there was no indication that

he was engaging in irrational behavior. Rather, he appeared cooperative, conversed appropriately and assisted in his defense. Accordingly, we conclude that the trial court did not erroneously exercise its discretion in holding that there was no reason to doubt Ross's competency and therefore the directive under WIS. STAT. § 971.14 requiring a competency hearing was never triggered.

III. Resentencing

¶13 Ross next contends that he is entitled to resentencing based on a new factor—namely, the two pages of medical records and the information about his mental health. We are not convinced.

¶14 Sentence modification involves a two-step process. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, a defendant must show the existence of a new factor to justify the motion to modify sentence. ***Id.*** Then, if the defendant has demonstrated the existence of a new factor, the trial court must decide whether the new factor warrants sentence modification. ***Id.***

¶15 A new factor is

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Ralph, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citations omitted). The mere discovery of a fact which the sentencing court could have considered at sentencing, but did not, does not satisfy this standard. *See* ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Rather, a new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the

sentencing–something which strikes at the very purpose for the sentence selected by the trial court." ***Id.*** The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Franklin***, 148 Wis. 2d at 8-9. Whether a fact or a set of facts constitutes a new factor is a question of law decided by this court without deference to the trial court. ***Id.*** at 8. Whether a new factor, once established, warrants sentence modification is a discretionary determination made by the trial court. *See* ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶16 Ross fails to satisfy the standards set forth above. The two pages of medical records he refers to consist of a list of prescription medications. The only way these records are pertinent is if they establish a reason to doubt Ross's competence. Based on our earlier conclusion that the record from 1993 does not suggest issues of Ross's competence, together with the fact that evidence of prescription medication does not render a defendant incompetent, we reject Ross's assertion that the medical records are a new factor.

¶17 Likewise, the other two factors he points to—his mental health in general and his family's comment about his irrational behavior are not new. Both were known and discussed at the sentencing. Accordingly, Ross has failed to prove a new factor exists and therefore, the trial court did not err in denying Ross's request for resentencing.

IV. Plea Withdrawal

¶18 Ross next argues he should be allowed to withdraw his plea because he was not competent to enter a knowing, voluntary and intelligent plea. He also argues that the plea questionnaire and waiver of rights form did not conform to proper procedures.

¶19 In response to Ross's claims related to plea withdrawal, the State points out that most of his plea withdrawal issues were not raised in the trial court, that Ross fails to allege sufficient facts pertinent to this claim to warrant an evidentiary hearing and all of Ross's claims are contradicted by the record. The State submits that Ross's claims are all conclusory and the record clearly shows that Ross entered a knowing, voluntary and intelligent plea. The trial court's order denying Ross's postconviction motion points out that: "The defendant stated on the record that he understood everything that was going on at the time he entered his plea and that he was not under the influence of any medication." Accordingly, we reject Ross's claims.

¶20 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶21 Wisconsin courts consider six factual scenarios that could constitute "manifest injustice":

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and,

> (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶22 Here Ross contends his plea could not be voluntary because he was not competent. We have already rejected that contention, ruling that there was no evidence from which we could conclude there was reason to doubt his competence. We also agree with the State's assessment. Ross's claims are all conclusory and are contradicted by the record in this case. Accordingly, we summarily reject Ross's claim that he should be allowed to withdraw his plea.

V. Due Process

¶23 Ross argues that his due process rights were violated because his competency was not considered at sentencing and because some of his medical records were lost so he could not prove what medications he was taking. The State responds that Ross waived these claims. We reject Ross's claims.

¶24 We first reject his due process claim regarding his competence not being considered at sentencing because we have concluded his competence was not in issue. Second, we reject his due process preservation of evidence claim because he did not make this argument to the circuit court, he fails to specifically identify the medical records he is referring to and as the State argues:

> He does not specify the medical records his claim involves, explain why those medical records were apparently exculpatory when they were destroyed (years after he was convicted and years before he filed his post-conviction motion), or articulate why all of [the] information about his mental health history before 1993 that was in the PSI and discussed at [the] sentencing hearing is not comparable to the information in the medical records.

¶25 Further, Ross failed to file a reply brief to refute any of the arguments made by the State in its response brief. Accordingly, his failure to reply results in a concession to the State's position. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure in a reply brief to refute a proposition asserted in a response brief).

VI. Ineffective Assistance/*Machner* Hearing

¶26 Ross argues he received ineffective assistance of trial counsel because his counsel failed to request a competency hearing, failed to request his medical records and failed to accurately inform Ross as to sentencing issues. The trial court rejected Ross's ineffective assistance claims, ruling:

> The defendant also asserts that counsel should have requested a competency evaluation with respect to the condition of his mind at the time he committed the offenses…. He asserts that an issue should have been raised with respect to whether or not he was responsible for his actions when he committed those crimes. The claim is wholly conclusory. Nothing from a medical standpoint has been submitted in support of these assertions…. Simply because the defendant attempted to cut his wrist at the time the police came to arrest him does not provide factual support for the defendant's state of mind at the time the crimes were committed.

¶27 We agree with the trial court's assessment. In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can

show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] defendant must show 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶28 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶29 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 309-10. To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be

reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶30 With respect to Ross's specific allegations of ineffective assistance, none have merit. Ross argues his counsel should have requested a competency evaluation based on the fact that he had twice attempted to commit suicide. This contention is wholly conclusory, contains no reference to authority and is dependent upon a fact that simply did not exist—Ross was competent during the proceedings in this case.

¶31 As to Ross's specific contention that trial counsel should have obtained copies of his medical records to see the medications he was taking, there is no merit to this allegation. Trial counsel had no reason to believe that Ross was incompetent and therefore had no reason to request medical records.

¶32 Ross's remaining allegations of ineffectiveness relate to sentencing: that counsel did not properly review the sentencing matrix with him and did not advise him of the actual amount of prison time he was facing and might receive. The record clearly refutes this allegation. All of this information was provided to Ross during the plea hearing, and although the prosecutor erroneously stated that the maximum was ninety-two years rather than 102 years, the correct information was provided to Ross on several other occasions.

¶33 Based on the foregoing, we conclude that the trial court did not err in denying Ross's request for a ***Machner*** hearing because Ross failed to allege any specific factual allegations, which, if true would entitle him to a hearing. All of

his allegations were either conclusory, contradicted by the record or failed to allege that he suffered any prejudice. Accordingly, we summarily reject his claim of ineffective assistance and affirm the trial court.

¶34 We also note that Ross's ineffective assistance claim of postconviction counsel for failure to file a direct appeal is barred on procedural grounds. Claims alleging ineffective assistance of appellate counsel must be raised in the trial court pursuant to procedures set forth in ***State v. Knight***, 168 Wis. 2d 509, 519-20, 484 N.W.2d 540 (1992). Failure to do so is fatal to his claim. *See* ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶¶1, 4, 288 Wis. 2d 707, 709 N.W.2d 515.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.