



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/IV

September 1, 2015

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
730 Wisconsin Avenue
Racine, WI 53403

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Attn: Samuel Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Derek W. Shaw 578534
Black River Corr. Cntr
W6898 E. Staffon Rd.
Black River Falls, WI 54615-0433

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

You are hereby notified that the Court has entered the following opinion and order:

2014AP2204-CR

State of Wisconsin v. Derek W. Shaw (L.C. # 2010CF1645)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Derek Shaw appeals his judgment of conviction and a circuit court order denying his postconviction motion. He argues on appeal that the court failed to ascertain that his no-contest plea was entered knowingly, intelligently, and voluntarily, and that the court erred when it denied his motion for sentence modification without a hearing. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.¹ We summarily affirm.

Shaw was convicted, after entry of a no-contest plea, of burglary as a party to a crime. *See* WIS. STAT. §§ 943.10(1m)(a), 939.05. The circuit court withheld sentence and placed Shaw on three years of probation. Just over two years after his burglary conviction, Shaw was charged with possession of THC with intent to deliver as a repeater, in violation of the terms of his probation. After a revocation hearing, the court entered judgment and sentenced Shaw to three years of confinement and one year of extended supervision. The court later amended the judgment of conviction to provide 419 days of sentence credit. Shaw then filed a pro se postconviction motion arguing that the plea colloquy was deficient and that he was entitled to sentence modification. The circuit court denied the motion without a hearing, and Shaw now appeals.

Shaw argues that he should be permitted to withdraw his no-contest plea because the circuit court did not comply with the plea colloquy requirements of WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906. Specifically, Shaw argues that the court did not notify him of the direct consequences of his plea. *See id.*, ¶34. Shaw does not dispute that the court confirmed on the record that he understood it could sentence him up to the maximum of twelve and one-half years in prison and a \$25,000 fine. Rather, Shaw asserts that the plea colloquy was deficient in this respect because the court failed to explain to him that his

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

time on probation would not be counted as credit toward his sentence, should his probation be revoked.

We agree with the State that nothing in WIS. STAT. § 971.08 or *Brown* requires that a court explain to a defendant that, should the defendant be placed on probation and later have his probation revoked, time served on probation will not be counted against his sentence after revocation. Shaw has not cited any applicable statutory or case law that imposes such a requirement, and we are not aware of any such requirement. Therefore, we reject Shaw's argument that he is entitled to plea withdrawal based on a deficient colloquy.

Next, Shaw argues that the circuit court erred when it denied his postconviction motion without a hearing. He asserts that he is entitled to a hearing because he has demonstrated a prima facie violation of the court's mandatory duties with respect to the plea colloquy. *See State v. Hampton*, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14 (defendant is entitled to an evidentiary hearing when he has made a pointed showing that the plea was accepted without the trial court's conformity with WIS. STAT. § 971.08 or other mandatory procedures and that he did not understand the information that should have been provided). However, as discussed above, Shaw has not met his burden of showing that the court's plea colloquy was deficient. No evidentiary hearing is required where, as here, the defendant presents only conclusory allegations. *See Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

Shaw also argues that his trial counsel was ineffective for failing to properly advise him that, should he be placed on probation and later have his probation revoked, his time on probation would not be credited to his revocation sentence. The State correctly asserts that this argument was not raised in Shaw's postconviction motion. We cannot conclude that the circuit

court erred in failing to grant Shaw an evidentiary hearing on the basis of ineffective assistance of counsel when he never requested a hearing on that basis.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals