COURT OF APPEALS DECISION DATED AND FILED

April 4, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2974-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLENE CORTES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Charlene Cortes appeals from a judgment of conviction for disorderly conduct, as a repeat offender, and from the order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

her postconviction motion to withdraw her no contest plea without an evidentiary hearing. Cortes argues that the trial court was obligated to hold an evidentiary hearing so long as her postconviction motion contained sufficient facts to allege relief. We disagree and affirm the judgment and the order.

FACTS

¶2 On March 17, 2000, Cortes was convicted of disorderly conduct, as a repeat offender, contrary to WIS. STAT. §§ 947.01 and 939.62. The trial court sentenced Cortes to three years in prison, but then stayed the sentence and placed her on probation for two years. The probation was imposed consecutive to a prison sentence Cortes is currently serving.

¶3 On August 28, 2000, Cortes filed a motion for postconviction relief seeking to withdraw her plea. She alleged that her plea to the disorderly conduct charge was not knowingly, voluntarily and intelligently entered. Cortes claimed that prior to coming to court, she had overdosed on Prozac and consequently was not thinking clearly when she entered her plea. In addition, Cortes argued that if she did in fact understand the terms of the plea agreement, she was denied effective assistance of counsel because her attorney failed to object when the State misstated the plea agreement. Cortes asked that she be provided an evidentiary hearing so she could testify regarding her ability to comprehend the proceedings and her understanding of the plea agreement.

¶4 On October 5, 2000, a hearing was held on this postconviction motion. The trial court denied the motion without Cortes's testimony after reviewing the transcript of the plea hearing. Cortes appeals this order and her judgment of conviction.

DISCUSSION

¶5 Our standard of review is dictated in ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In ***Bentley***, the Wisconsin Supreme Court concluded that ***Nelson*** set forth a two-part test that requires a mixed standard of review. ***Bentley***, 201 Wis. 2d at 310. If the motion alleges facts that entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. ***Id.***; *see also* ***Nelson***, 54 Wis. 2d at 497. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review de novo. ***Bentley***, 201 Wis. 2d at 310.

¶6 However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the trial court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10. When reviewing a court's discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. ***Id***. at 310-11.

¶7 Cortes argues that the trial court erred in summarily denying her motion without taking evidence; she argues that so long as her motion to withdraw her guilty plea contains sufficient facts to allege relief, the trial court must hold an evidentiary hearing. This argument ignores the specific language of both ***Nelson*** and ***Bentley***.

¶8 In ***Bentley***, the Wisconsin Supreme Court stated:

> [I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *However*, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or *if the record conclusively demonstrates that the defendant is not entitled to relief, the*

> *trial court may in the exercise of its legal discretion deny the motion without a hearing.*

Bentley, 201 Wis. 2d at 309-10 (citing ***Nelson***, 54 Wis. 2d at 497-98) (emphasis added). Thus, according to ***Bentley*** and ***Nelson***, if the record indisputably establishes that Cortes is not entitled to relief, the trial court may deny her motion without a hearing, notwithstanding the allegations in her motion.

¶9 In her motion to withdraw her plea, Cortes alleges that she was "given a double dose of Prozac medication prior to coming into court and entering her plea" and therefore she "was not thinking clearly at the time she entered her plea …." In the alternative, Cortes argues that if she did understand the terms of the plea agreement, her attorney provided ineffective assistance by failing to object when the State breached the plea agreement. However, the record sufficiently refutes these allegations.

¶10 At sentencing, the following exchange occurred between the trial court and Cortes:

> Q: Are you satisfied you have had sufficient time to discuss this matter with your attorney before entering your plea today?
>
> A: Yes, sir.
>
> Q: Are you satisfied you understand what you are doing today?
>
> A: Yes, sir.
>
> Q: Are you presently taking any medication prescribed by a doctor?
>
> A: Yes, sir.
>
> Q: What are you taking?
>
> A: I'm taking depakote for seizure disorder, diphenhydramine for sleeping disorder, and prozac for antidepression.
>
> Q: Have you taken all of that medication as it has been prescribed for you?

> A: No. Because the jail doesn't have half of my medications.
>
> Q: Given the fact that you have not taken your medication, does that interfere with your ability to think clearly this morning, or has it?
>
> A: No.
>
> Q: Are you satisfied you are thinking clearly?
>
> A: Yes, sir.

At the time of the plea and sentencing, Cortes unequivocally stated that she had not taken all her medication but that she was thinking clearly. This stands in direct contrast to her assertions now.

¶11 The trial court further inquired into Cortes's state of mind:

> Q: Have you consumed any alcohol or other controlled substances within the last 24 hours?
>
> A: No, sir.
>
> Q: Are you satisfied that you are thinking clearly this morning?
>
> A: Yes, sir.

The record reflects that Cortes was not affected by any alleged overdose of prescription medication. The trial court did not misuse its discretion in denying her motion for an evidentiary hearing on this issue.

¶12 Cortes further argues that she was entitled to an evidentiary hearing to determine if she was provided ineffective assistance of counsel because her attorney failed to enforce a term of the plea agreement limiting the State to recommending not more than eighteen months of probation.

¶13 At the beginning of the sentencing hearing, the trial court provided all parties with its understanding of the plea agreement, with Assistant District Attorney Susan Karaskiewicz affirming the court's understanding:

> THE COURT: … The complaint charges one count of disorderly conduct, one count of battery, both charged as repeaters. Apparently there has been an agreement here in return for a plea to disorderly conduct as a repeater the battery would be dismissed. The State would be recommending a period of probation consecutive to the time [Cortes is] spending in the Wisconsin State Prison system, is that correct?
>
> Ms. Karaskiewicz: Yes.

In addition, the trial court asked Cortes if she understood the maximum penalties:

> Q: Do you understand that the State has alleged that you were convicted for a felony of unlawful possession of a firearm by a felon on September 26th, 1998, 94-CF-388, that you were sentenced to prison on November 23, 1994, that that conviction remains of record and un-reversed? Do you acknowledge the fact that you were convicted as I have indicate [sic]?
>
> A: Yes, sir.
>
> Q: Do you understand that because of this conviction you are charged as a repeater, that the Court could impose a fine of up to a $1,000 and/or 3 years in prison?
>
> A: Yes, sir.

¶14 At the postconviction hearing, the trial court noted that it had specifically discussed all of the terms of the Cortes plea at sentencing. Furthermore, at the postconviction hearing, the State disputed Cortes's assertion that the parties had ever reached an agreement as to the length of the term of probation:

> Ms. Karaskiewicz: I consulted my file. There's absolutely no basis in fact for that conclusion to be drawn. The original offer from [Cortes's first trial counsel] was offer to plead to one, read in the other, free hand; and then [Cortes's second trial counsel] on February 18th, 2000 recorded plea to either count, recommend consecutive probation. Apparently that was on the record at the plea hearing, so there's no basis in fact for that assertion.

There is no evidence in the record of any agreement between Cortes and the State that the State's probation recommendation was to be capped at no more than

eighteen months. Consequently, the trial court exercised sound discretion in denying Cortes an evidentiary hearing on this issue.

CONCLUSION

¶15 Despite the allegations in the motion, the record conclusively demonstrates that Cortes is not entitled to relief, and thus the trial court properly exercised its discretion in denying her motion without an evidentiary hearing. The judgment and the order of the trial court are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.