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DISTRICT IV

November 22, 2023

To:

Hon. Craig R. Day
Circuit Court Judge
Electronic Notice

Tina McDonald
Clerk of Circuit Court
Grant County Courthouse
Electronic Notice

Anne Christenson Murphy
Electronic Notice

Jeffrey Ocwieja
Electronic Notice

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

2022AP1445-CR State of Wisconsin v. Brandon Allen Loken (L.C. # 2020CF54)

Before Kloppenburg, P.J., Blanchard, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brandon Loken appeals a judgment of conviction and orders denying his postconviction motions. 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 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Loken pled no contest to, and was convicted of, one count of delivery of a controlled substance and one count of felony bail jumping. He filed two postconviction motions seeking to withdraw his pleas, which were denied.

On appeal, Loken first argues that he should be allowed to withdraw his pleas because they were not knowingly, voluntarily, and intelligently entered. He contends that, at the plea colloquy, fear prevented him from informing the court that the State, in reciting the plea agreement, added a term that Loken had not previously believed was part of the agreement. More specifically, the plea quesionnaire stated: "State will stay silent in regards to sentencing recommendation." When the State recited the agreement in court, it said in relevant part: "The State will remain silent with regard to a sentencing recommendation. The State will go over his record." The court then asked Loken if this was his understanding of the agreement, and he said it was.

Loken asserts that he had not understood before then that the State was not agreeing to be entirely silent on the subject of sentencing, but instead would discuss his record. Loken asserts that he falsely stated that this was part of his understanding of the agreement because he was afraid. Loken testified that he was afraid to speak up due to a "fear of not getting what I was wanting to get as far as a sentencing," which was a concurrent sentence. However, he did not ask to speak to his attorney about it.

We first observe that Loken is not claiming that, when he entered his pleas moments later, he did not understand that the State would be allowed to discuss his record at sentencing. Instead, his argument is that, in practical effect, he agreed to what he perceived as an additional term of the agreement at the hearing, but he did so only out of fear.

As legal support for the proposition that agreement to a plea agreement based on fear is a ground to withdraw a plea, he cites only one line from case law. There, the court stated, as a general legal proposition, that to decide if there was a manifest injustice justifying plea withdrawal, "we must determine 'whether the plea of guilty was voluntarily, advisedly, intentionally and understandingly entered or whether it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake.'" ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992) (emphasis and quoted source omitted).

Fear caused by certain sources, such as coercion from threats by a person outside the plea process, is recognized as a basis for plea withdrawal. However, without further authority, we see no basis to conclude that fear of an unfavorable outcome, by itself, is a legal basis to withdraw a plea. That form of fear may be a normal part of the choice that many defendants make to accept plea agreements over going to trial.

Loken does not describe any state of mind that would support a conclusion that his plea was not knowingly, voluntarily, and intelligently entered. He does not, for example, claim that he froze, experienced panic, or had some other mental state that rendered him incapable of making a rational decision about whether to proceed with entry of his pleas based on the agreement as described by the State. Instead, Loken appears to be describing a rational process in which he decided not to push for the State to be silent about his record, because he was afraid of adverse results, specifically, not receiving a desirable sentencing outcome. In other words, it appears that Loken chose to "bite his tongue" in service of what he saw as a larger goal, obtaining a concurrent sentence. We conclude that Loken has not established a basis to withdraw his plea.

Separately, Loken argues that the circuit court erred by denying his claim that his trial counsel was ineffective by not interviewing a confidential informant. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the 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. ***Id.*** at 694. This claim was properly denied because Loken did not prove, or attempt to prove, that the confidential informant would have said anything specific that could have been helpful to Loken's defense.

IT IS ORDERED that the judgment and orders appealed from are summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals