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DISTRICT II

May 29, 2024

To:

Hon. Frank M. Gagliardi
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Anna Ganz
Electronic Notice

Kathilynne Grotelueschen
Electronic Notice

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

2023AP1392-CR	State of Wisconsin v. Mark A. Weiss (L.C. #2017CF1155)
2023AP1393-CR	State of Wisconsin v. Mark A. Weiss (L.C. #2016CF1249)

Before Gundrum, P.J., Neubauer and Grogan, 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).

In these consolidated appeals, Mark A. Weiss appeals from judgments of conviction and from orders denying his postconviction motions for plea withdrawal. Weiss contends that he was unaware that he could object to participating in the plea hearing by a Zoom videoconference during the COVID-19 pandemic.[1] 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] The World Health Organization declared a global pandemic of Coronavirus Disease 2019 (COVID-19) on March 11, 2020, due to widespread human infection worldwide.

(2021-22).[2] Assuming without deciding that it was error for the circuit court to conduct the plea hearing by Zoom videoconference and that Weiss did not waive that error, we conclude that error was harmless. We affirm.

Weiss was charged with arson, burglary, first-degree recklessly endangering safety, and intentionally contacting a victim after a court order, all as a repeater. In December 2020, the circuit court accepted Weiss's guilty pleas during a plea hearing held over Zoom.[3] Weiss did not object to the hearing being held over Zoom.[4] The hearing was live-streamed on YouTube, and the courtroom was open. Weiss appeared by Zoom from the Wisconsin Resource Center, and his attorney also appeared by Zoom. The court detailed the plea agreement, and the parties agreed that Weiss was competent. Weiss himself stated that he was competent to proceed, affirmed the charges to which he was pleading guilty, and stated that he understood the plea agreement. Through a lengthy and comprehensive colloquy with the court, Weiss and his attorney affirmed there was no reason for the court to reject the plea. Weiss agreed to plead guilty to one count of arson and one count of violating a no contact order in exchange for the State dismissing the remaining charges and recommending concurrent prison terms. The court found that Weiss was "acting freely, voluntarily, intelligently understanding the nature and consequences of his

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

[3] The Honorable Bruce E. Schroeder presided at the plea hearing and at the subsequent hearing on Weiss's motion to withdraw his guilty pleas.

[4] In light of the pandemic, the Wisconsin Supreme Court issued orders directing circuit courts to "prepare … operational plan[s] for the safe resumption of in-person proceedings." The Circuit Court for Kenosha County adopted an operational plan providing that remote hearings would be the default and that objections to videoconference hearings would governed by WIS. STAT. § 885.50 *et seq.* WISCONSIN. STAT. § 885.60(2)(d) provides that if a defendant objects to the use of videoconferencing technology in a proceeding where he is entitled to be physically present, the court shall sustain the objection.

actions." The court accepted the plea and found Weiss guilty of the two offenses. In a subsequent proceeding, the court sentenced Weiss to seven years of initial confinement followed by four years of extended supervision on the arson charge and withheld sentence on the no contact order violation, imposing a two-year term of probation consecutive to the sentence on the arson charge.

Over a year after sentencing, Weiss moved to withdraw his guilty pleas, arguing that the circuit court did not explicitly notify Weiss of his right under WIS. STAT. § 971.04(1)(g) to be physically present during the plea hearing at which judgment was pronounced and did not engage in a colloquy with Weiss to ensure that he waived that right. He contended that he did not knowingly, intelligently, or voluntarily give up his right to be present at the plea hearing. Weiss did not set forth any information as to how either his plea or the proceeding was impacted by the videoconferencing format. The State responded that supreme court orders and the circuit court's operational plan, implemented in light of the pandemic, required Weiss to object, and, in any event, Weiss waived the constitutional right to be present. The court denied the motion without a hearing. Weiss appeals.

We will assume without deciding that it was error for the circuit court to conduct the plea hearing by Zoom and that Weiss did not waive his statutory right to be physically present. However, a violation of a right to be present under WIS. STAT. § 971.04(1) is subject to harmless error analysis.[5] ***State v. Harris***, 229 Wis. 2d 832, 839-40, 601 N.W.2d 682 (Ct. App. 1999);

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[5] *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

State v. Peterson, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998) (concluding that violations of § 971.04, like violations of a defendant's constitutional right to be present, are subject to harmless error analysis). "[A]n error is harmless if it does not [a]ffect the substantial rights of the [defendant]." ***Harris***, 229 Wis. 2d at 840 (second alteration in original; citation omitted). "For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.*** We therefore examine the record to determine if Weiss's appearance at the plea hearing by Zoom rather than in person violated a substantial right.

As set forth in ***State v. Anderson***, 2017 WI App 17, ¶¶53-55, 374 Wis. 2d 372, 896 N.W.2d 364, assuming an error in the plea colloquy, the State must show that Weiss's plea was knowing, intelligent, and voluntary, consistent with the requirements of WIS. STAT. § 971.08. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The plea hearing satisfied each of those requirements, and there is no indication that the proceeding would have been different had Weiss appeared in person.

Weiss filled out his plea questionnaire and waiver before the plea hearing. The transcript of the plea hearing does not contain any statements or other indications of technological problems or that Weiss was unable to see or hear anything. The circuit court engaged in an extensive colloquy with Weiss, and he responded appropriately throughout, adding comments as they went along. Because the hearing was by videoconference, Weiss, the attorneys, and the judge could see one another, discern nonverbal cues, and identify any problems with the audio.

Weiss confirmed that he had had time to talk to his attorney, was acting of his own free will, believed that he was doing the "best thing under all the circumstances," and had not "been rushed into this at all." Weiss explicitly stated that he had no questions for his attorney or the court.

The record also shows that the circuit court assessed Weiss's education level and confirmed that he was not under the influence of any substances that could impact his ability to participate in the hearing. Weiss affirmed that his "mind [was] clear," and that he felt "really good." Weiss stated that he felt he could make "the right decisions." Weiss affirmed that he was satisfied with the legal services he received in the case. He confirmed that no promises or threats were made in connection with the plea. Weiss also confirmed his understanding of the plea agreement and the charges to which he was pleading guilty. Weiss confirmed he understood the potential sentence and that the court was not bound by the terms of the agreement. The court explained Weiss's constitutional rights that he would be giving up by entering a plea, which Weiss stated he understood. He confirmed that not only was the plea "the best thing under all the circumstances," it was the "honest" thing to do. Nothing about the comprehensive hearing suggests that if the court had brought up Weiss's right to be physically present, the hearing or proceeding would have played out differently.

Nor do Weiss's subsequent communications with the circuit court indicate that the proceeding would have been different. During the sentencing hearing, Weiss stated that "[w]hat happened [on] the night of [his] crime was a huge mistake" and that "pleading guilty [was] the best outcome in the situation." As he had before the plea hearing, Weiss sent many pro se filings to the court after his plea hearing, raising various issues such as discovery and sentence credit.

Weiss did not raise the plea hearing or contend that the format of the hearing affected his plea. While Weiss sought plea withdrawal four months after sentencing, he did so based on his contention that his attorney failed to use exculpatory evidence, not on any challenge related to the videoconference format.

No aspect of the record suggests that Weiss would not have pled guilty if he had attended the plea hearing in person. Nor does Weiss contend that there was a legitimate basis for him to proceed to trial, as opposed to receiving the benefit of the plea agreement. In his postconviction motion, Weiss did not contend, much less identify any way his plea was unknowing, involuntary, or otherwise adversely affected by having appeared remotely. While he contends on appeal that documents in the record prior to his plea show reluctance on his part to entering a plea, the plea transcript does not indicate any hesitation; to the contrary, Weiss affirmed that he understood the plea, pled guilty, and that he had no questions for his attorney or the court. Weiss's postplea regret does not establish an unknowing, unintelligent, or involuntary plea resulting from the videoconferenced plea hearing. In sum, the record shows that Weiss's plea was knowing, intelligent, and voluntary, and there is nothing to show that, had the hearing been in person, Weiss would not have pled guilty and would have proceeded to trial.

Therefore,

IT IS ORDERED that the judgments and orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals