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DISTRICT II

June 12, 2024

To:

Hon. Sandra Jo Giernoth
Circuit Court Judge
Electronic Notice

Rex Anderegg
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Sarah Burgundy
Electronic Notice

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

2023AP186	State of Wisconsin v. Benjamin R. Stibbe (L.C. #2006CF171)
2023AP187	State of Wisconsin v. Benjamin R. Stibbe (L.C. #2005CF295)

Before Gundrum, P.J., Neubauer and Lazar, 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, Benjamin R. Stibbe appeals from a circuit court order denying his WIS. STAT. § 974.06 (2021-22)¹ motion after 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. We affirm.

In Ozaukee County case 2005CF295, Stibbe was convicted on June 1, 2006, of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(2)(a), following his entry of a

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

no-contest plea. In Ozaukee County case 2006CF171, Stibbe was convicted of three additional counts of first-degree reckless homicide, all contrary to WIS. STAT. § 940.02(2)(a), following his entry of no-contest pleas on June 1, 2007. Between the two cases, the circuit court imposed an aggregate sentence of twenty-five years of initial confinement followed by fifteen years of extended supervision.

Stibbe pursued postconviction motions in both these cases. In the first reckless homicide case, Stibbe was represented by his first postconviction attorney on appeal. Counsel filed a no-merit report, to which Stibbe did not respond, and this court affirmed the judgment of conviction. *State v. Stibbe*, No. 2007AP001505, unpublished slip op. (WI App Mar. 26, 2008). In the subsequent case, Stibbe initially was represented by the same postconviction attorney in his appeal. Counsel filed a motion for resentencing, alleging that the State breached the plea agreement at sentencing, and Stibbe's trial counsel was ineffective for failing to object. The postconviction court denied that motion. Thereafter, Stibbe proceeded pro se and pursued a motion for sentence credit, which was partially granted.

Stibbe did not file any further postconviction motions until 2021, when he filed multiple postconviction motions in these now-consolidated cases. Relevant to this appeal, Stibbe filed a motion seeking plea withdrawal in both underlying cases, claiming manifest injustice because both of the pleas were coerced and the products of ineffective assistance of counsel. Specifically, Stibbe alleged that he was threatened with federal charges involving the death penalty if he did not take the plea offers and otherwise cooperate with state and federal authorities.

Stibbe's latest postconviction motions resulted in two evidentiary hearings at which Stibbe testified, as did the Ozaukee County district attorney who originally prosecuted Stibbe and Stibbe's trial counsel in both the state and federal prosecutions. The postconviction court denied the plea-withdrawal motion in a written decision and order. The court made detailed findings and denied the motion on the following three grounds: (1) it was barred under *Escalona-Naranjo*;² (2) Stibbe failed to show that the pleas were coerced; and (3) Stibbe failed to show that the pleas were the product of counsel's ineffectiveness. The postconviction court determined that Stibbe's testimony was not credible to the extent that he claimed that threat of the death penalty was his sole reason for pleading guilty and for remaining silent about that threat until over a decade after his convictions. Stibbe appeals.

We begin our analysis with the applicable standards of review. Whether Stibbe can overcome the *Escalona-Naranjo* procedural bar on WIS. STAT. § 974.06 motions is a question of law that we review de novo. See *State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574. Whether Stibbe established a manifest injustice warranting plea withdrawal is a discretionary matter for the circuit court to which this court defers under the erroneous-exercise-of-discretion standard. See *State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

We first turn to the question of whether Stibbe's latest postconviction motions establish a sufficient reason for his failure, in his earlier postconviction motions, to raise the issues brought in these motions. When, as here, a defendant seeks relief under WIS. STAT. § 974.06 following a

² *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

prior postconviction motion and appeal, the § 974.06 motion must establish a “sufficient reason” for failing to previously raise any issues that could have been raised in the earlier proceedings. See *Escalona-Naranjo*, 185 Wis. 2d at 185. A claim of ineffective assistance of postconviction counsel may present a “sufficient reason” to overcome the procedural bar. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To establish that postconviction counsel was ineffective, the motion must show that the claims now asserted are clearly stronger than the issues that postconviction counsel chose to pursue. *State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668. We are bound by the postconviction court’s factual findings about counsel’s representation unless they are clearly erroneous, and we do not substitute our own credibility determinations for those made by the circuit court. *State v. Pote*, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82.

As he did with the postconviction court, Stibbe argues on appeal that ineffective assistance of his original postconviction counsel was a “sufficient reason” and his claims based on his alleged fear of the death penalty were “clearly stronger” than those raised and considered in his previous appeals. We disagree.

The postconviction court found Stibbe’s testimony incredible to the extent that he claimed a “sincere belief [that] he continued to face the death penalty, combined with [h]is overall ignorance of the law,” as a clearly stronger and sufficient reason to overcome the *Escalona-Naranjo* bar. It based those credibility findings on observing Stibbe’s testimony, and on testimony by Stibbe’s state trial counsel that the topic of the death penalty did not come up, that such a concern would have been important to discuss, and that he would not permit a client to plead guilty if trial counsel or the client had “any reservations” about the voluntary nature of the plea. Because the postconviction court did not believe Stibbe’s claims that his fear of the

death penalty drove his pleas, that trial counsel ignored his fear, or that Stibbe did not understand the legal significance of that fear until recently, Stibbe’s proposed reason is neither “sufficient” nor “clearly stronger” than the issues raised in his direct appeals.

As previously stated, this court defers to credibility assessments by the postconviction court because that court has a “superior opportunity ... to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” See *State v. Searcy*, 2006 WI App 8, ¶35, 288 Wis. 2d 804, 709 N.W.2d 497 (citation omitted). Accordingly, that court “is the sole arbiter of credibility issues” and its credibility determinations “will be sustained if facts in the record support” them. *State v. Sloan*, 2007 WI App 146, ¶21, 303 Wis. 2d 438, 736 N.W.2d 189.

Stibbe argues that the postconviction court’s credibility findings were clearly erroneous. Stibbe argues that the Record clearly reflects that he did raise the death penalty concerns with trial counsel and that he did not raise them with any of his postconviction counsel until years after his sentencing and prior postconviction motions. Stibbe mischaracterizes the court’s credibility findings. Specifically, the court found that Stibbe’s credibility was undercut by the facts that: (1) he twice told the circuit court, in entering his pleas, that they were not the products of threats; (2) Stibbe’s explanation that he was worried about execution but remained silent despite having access to multiple attorneys and procedural safeguards was implausible; and (3) that Stibbe’s credibility was also “hampered by inconsistencies in his recollection of the tone and tenor and words used” during pre-plea meetings. Given the postconviction court’s explicit and implicit credibility findings, there is no basis for us to reverse its decision. We therefore affirm the postconviction court’s decision that Stibbe’s motion is barred by *Escalona-Naranjo* and *Romero-Georgana*.

Although we could end our analysis based on our conclusion that Stibbe was procedurally barred from raising the issues in his recent postconviction motions, we further conclude that even if they had not been procedurally barred, Stibbe’s claims for plea withdrawal would still fail. Stibbe argues on appeal, as at the evidentiary hearing, that: (1) the threat of potentially facing the death penalty coerced his pleas; and (2) his counsel was ineffective in addressing the death-penalty threat with him. Thus, he asserts that it would result in manifest injustice if he is not allowed to withdraw his pleas.

A defendant seeking post-sentencing plea withdrawal must prove by clear and convincing evidence that a refusal to allow them to withdraw their pleas would result in “manifest injustice.” *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Whether the defendant has met that burden is a discretionary decision for the postconviction court, and that court’s assessment of witness credibility and the weight of the evidence heavily drives the determination of whether the defendant has satisfied the burden of showing manifest injustice. *State v. Jenkins*, 2007 WI 96, ¶34, 303 Wis. 2d 157, 736 N.W.2d 24.

We conclude that the postconviction court soundly exercised its discretion and found Stibbe incredible, and the other witnesses credible, when determining that Stibbe failed to establish manifest injustice under either basis. “To the extent the circuit court’s conclusions are rooted in the witnesses’ credibility, we will accept those determinations.” *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844 (citation omitted). The credibility findings discussed above were based on the court’s personal observations of the testifying witnesses, including Stibbe and his attorneys, and this court is not in a position to second guess such findings. We affirm the postconviction court’s finding that Stibbe is not entitled to plea

withdrawal because he failed to establish by clear and convincing evidence that his pleas were either coerced or the result of ineffective assistance of counsel. Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed. *See* 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