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DISTRICT II

December 4, 2013

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

2012AP1080 State of Wisconsin v. Augustus E. Dillon (L.C. # 1997CF19)
2012AP1081 State of Wisconsin v. Augustus E. Dillon (L.C. # 1999CF251)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated cases, Augustus E. Dillon appeals from a circuit court order denying his motion for resentencing. 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 (2011-12).[1] We reverse the order of the circuit court and remand with directions.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

In June 1999, Dillon was sentenced on seven drug-related felonies in two different criminal cases, Waukesha county case nos. 1997CF19 and 1999CF251. The circuit court sentenced Dillon to a total of ten years in prison on three of the four counts in Waukesha county case no. 1997CF19. It then withheld sentence on the remaining count in that case, as well as all three counts in Waukesha county case no. 1999CF251. As to those four counts, the court placed Dillon on probation for ten years following the completion of his prison sentence.

Dillon's postconviction attorney filed a motion for resentencing in both cases, alleging that the State had breached its plea agreement at sentencing and that Dillon's trial counsel had been ineffective in failing to object to the breach. Ultimately, the State acknowledged that it had breached the plea agreement at sentencing and that the appropriate remedy was resentencing.

In an effort to resolve the matter, the State and Dillon's attorney negotiated an agreement which called for Dillon's ten-year prison term to be reduced to seven years. Because Dillon was in custody out of state, his attorney had him sign a written stipulation regarding the proposed agreement, which he submitted to the court in lieu of Dillon's appearance. The stipulation did not address the probationary dispositions that Dillon had received on four of his seven convictions.

Following a hearing on the matter, the circuit court accepted the parties' written stipulation and amended the judgment of conviction in Waukesha county case No. 1997CF19 to reflect a total prison term of seven years. For unknown reasons, the ten-year probation term for the remaining count in that case also was amended to seven years. The court did not change the length of Dillon's probationary dispositions in Waukesha County case No. 1999CF251.

Sometime after Dillon completed his prison sentence, the department of corrections revoked his probation for both Waukesha County case Nos. 1997CF19 and 1999CF251. Prior to his sentencing in those cases, Dillon asserted that his postconviction attorney had advised him that his written stipulation would result in the dismissal of the counts for which he remained on probation. Despite his claim, Dillon received a total of eight years in prison in both cases.

Dillon subsequently filed a motion for resentencing, arguing that the hearing at which the circuit court approved the written stipulation was in violation of his right to be present for sentencing. The circuit court denied Dillon's motion, concluding that the stipulation was essentially a motion for sentence modification that did not require Dillon's presence. This appeal follows.

As noted by the State, the validity of the circuit court's decision to deny Dillon's motion for resentencing depends upon how this court construes the written stipulation and related court hearing at which Dillon did not appear or participate. If, as Dillon asserts, the court resentenced him back when it accepted the stipulation, then he was entitled to be present under the law. *See, e.g.*, WIS. STAT. § 971.04(1)(g) (providing that a defendant shall be present at the imposition of sentence); ***Williams v. State***, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968) (an accused has a right to be present whenever any substantive step is taken in his or her case). However, if, as the circuit court concluded, the stipulation was a motion for sentence modification, then Dillon did not have the right to appear at the hearing where the court approved it. We review the circuit court's conclusion of law de novo. ***State v. Wood***, 2007 WI App 190, ¶4, 305 Wis. 2d 133, 738 N.W.2d 81. Whether a motion states a request for resentencing or sentence modification is a legal determination. ***Id.***

Upon review of the record, we are satisfied that the written stipulation and related court hearing was for resentencing and not sentence modification. Because Dillon was not present at the hearing and could not waive his right to be present via his stipulation, *see* ***State v. Koopmans***, 210 Wis. 2d 670, 673, 563 N.W.2d 528 (1997), the next question becomes whether his nonappearance was nonetheless harmless. *See* ***State v. Carter***, 2010 WI App 37, ¶22, 324 Wis. 2d 208, 781 N.W.2d 527 ("When a violation of a defendant's constitutional or statutory right to be present at any portion of his trial proceedings is alleged, the State, as beneficiary of any error, has the burden of proving that the error was harmless.").

The question of harmless error depends largely upon whether Dillon's allegations about his postconviction counsel are true (*i.e.*, his allegations that counsel misinformed him of the terms of the written stipulation and misled him to believe that the charges underlying his probationary dispositions would be dismissed). If they are, then Dillon presumably would have been able to address the misunderstandings had he participated in the resentencing hearing. If they are not, then a finding of harmless error might be possible. The record is currently insufficient to permit a proper determination either way. Accordingly, we reverse and remand the cause with directions that the circuit court hold a ***Machner***[2] hearing on Dillon's allegations.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause remanded with directions, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).