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DISTRICT IV

December 2, 2013

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

2012AP78-CR

State of Wisconsin v. Rick D. Freeman (L.C. # 2007CF3577)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Rick Freeman, pro se, appeals an order denying his postconviction motion to withdraw his plea after sentencing. 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 summarily reverse.

Freeman pled guilty to possession of cocaine with intent to deliver as part of a global plea agreement involving this case and related Rock County case numbers 2007CF3575,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

2007CF3576, and 2008CM2263. Pursuant to the plea agreement: (1) Freeman pled guilty to the cocaine charge in this case and another charge was dismissed; (2) Freeman pled guilty to three charges of second-degree reckless endangerment and a fourth charge was dismissed in case number 2007CF3575; and (3) the court dismissed cases 2007CF3576 (one charge of fleeing and three charges of causing injury by operating under the influence) and 2008CM2263 (one charge of intimidation). The dismissed charges were read-in for sentencing purposes.

After sentencing, Freeman filed a pro se motion to withdraw his guilty pleas. Freeman argued that: (1) the plea colloquy was deficient because the circuit court failed to establish Freeman's understanding of the constitutional rights he would waive by entering his pleas and that the circuit court was not bound by the plea agreement, and also that Freeman did not possess that knowledge; and (2) that Freeman's trial counsel was ineffective by failing to explain to Freeman his constitutional rights and the elements of the offenses.

The circuit court held an evidentiary hearing on Freeman's postconviction motion. The court determined that the plea colloquy was sufficient as to the cocaine charge, but deficient as to the reckless endangerment charges. The court allowed Freeman to withdraw his pleas to reckless endangerment in case number 2007CF3575 and reinstated the charges in that case and case number 2007CF3576. The court stated: "I think the plea agreement is done now. He's backed out of the plea agreement, and, in fact, I'm reinstating those, the fleeing and the causing injury by operation of a motor vehicle while under the influence of an intoxicant. So those two will be reinstated."

Freeman then filed a pro se motion for reconsideration. Freeman argued that the circuit court erred by denying Freeman's motion to withdraw his plea in this case while allowing

Freeman to withdraw his pleas in another case because all of the pleas were entered pursuant to a global plea agreement. See *State v. Briggs*, 218 Wis. 2d 61, 69-73, 579 N.W.2d 783 (Ct. App. 1998). The circuit court held another motion hearing, and then denied the motion.

Freeman argues in his brief-in-chief that he is entitled to plea withdrawal because his plea was not knowingly, intelligently and voluntarily entered. Freeman argues that: (1) the circuit court did not ensure that Freeman understood the constitutional rights he waived by entering his plea or the elements of the offense, and Freeman did not possess that information; and (2) Freeman's trial counsel was ineffective by failing to provide that information to Freeman. The State argued that Freeman had failed to obtain the transcripts of the two circuit court hearings on Freeman's postconviction motion, and that we must assume the transcripts would support the circuit court decision.

We issued an order for supplemental briefing. We explained that the record in this appeal contains a cover sheet for the transcript of the first postconviction motion hearing and indicates that the full transcript is contained in a related appeal. We also noted that we had allowed Freeman to supplement the record with the transcript of the second hearing after the State filed its brief. Accordingly, we now have the transcripts in the record.

Additionally, we stated that our review of the record revealed that the circuit court may have erred by denying Freeman's motion to withdraw his plea in this case while allowing Freeman to withdraw his pleas in another case when the pleas were all part of the same global plea deal. We noted that while Freeman raised the issue in his second pro se motion to the circuit court, the issue was not addressed at the motion hearing and was not addressed in the briefs on appeal. We ordered the parties to address that issue in their supplemental briefs.

We have now received the parties' supplemental briefs. The State concedes that, under *Briggs*, the circuit court erred by denying Freeman's motion to withdraw his plea to the cocaine charge while allowing Freeman to withdraw other pleas that were entered pursuant to the same global plea deal. The State also concedes that, ordinarily, the court's decision to allow Freeman to withdraw his pleas to some of the charges resolved by the global plea agreement would result in all of the cases being returned to their pre-plea status, with all of the original charges restored. See *State v. Lange*, 2003 WI App 2, ¶32, 259 Wis. 2d 774, 656 N.W.2d 480.

The State asserts, however, that Freeman is judicially estopped from arguing that he is entitled to withdraw his plea to the cocaine charge because Freeman agreed to resolution of case numbers 2007CF3575 and 2007CF3576 through a new plea agreement. See *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (explaining that judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position" (citation omitted)). The State asserts that Freeman actively sought to enter new pleas in his other cases, and thus he cannot be returned to a pre-plea position as contemplated under *Briggs*. According to the State, this conduct is inconsistent with Freeman's argument that he is entitled to withdraw his plea in this case following repudiation of the global plea agreement. We are not persuaded.

As the State concedes, the global plea agreement has been repudiated, and thus the parties should have been restored to their pre-plea status. Freeman was restored to his pre-plea status as to his other cases. We do not agree with the State that Freeman is still bound by the repudiated plea agreement based on subsequently resolving his other cases through new plea agreements. Because it is undisputed that Freeman is entitled to plea withdrawal under *Briggs*, and the State has not set forth any persuasive reason to avoid that result in this case, we reverse.

Therefore,

IT IS ORDERED that the order is summarily reversed pursuant to WIS. STAT. RULE
809.21.

Diane M. Fremgen
Clerk of Court of Appeals