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June 3, 2014

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

2012AP1490
2012AP1491

State of Wisconsin v. Jeffrey T. Ziegler (L.C. # 2003CF2548, 2003CM3691)

Before Lundsten, Sherman and Kloppenburg, JJ.

Jeffrey Ziegler, pro se, appeals the circuit court's order denying Ziegler's 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 (2011-12).[1] We summarily affirm.

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

Ziegler was convicted, after pleading no contest, to invasion of privacy, stalking, and bail jumping. Ziegler appealed the judgments of conviction and the order denying his postconviction claim of ineffective assistance of counsel. We determined that the circuit court properly denied the postconviction motion without a hearing, and summarily affirmed the judgments and order.

Ziegler then filed the postconviction motions underlying this appeal. Ziegler argued that his pleas were invalid based on ineffective assistance of counsel and a defective plea colloquy. Ziegler also argued that the charges against him were multiplicitous, violating the double jeopardy clause, and that he was entitled to sentence credit for time he was on a bail monitoring program.[2] The circuit court denied all of Ziegler's motions without a hearing.

Ziegler argues that he alleged sufficient facts in his motions to warrant an evidentiary hearing.[3] *See* ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972) ("[I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the [circuit] court must hold an evidentiary hearing."). The State disagrees, and contends that the allegations in Ziegler's motions were insufficient to require the court to hold a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that the circuit court may deny a postconviction motion without a hearing if the facts alleged, if true, would not entitle the movant to relief; "if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not

[2] Ziegler filed a total of nine motions. This opinion is limited to the issues Ziegler has pursued on appeal.

[3] At the outset, the parties dispute whether Ziegler is procedurally barred from raising the arguments in his current motions. We decline to address the procedural bar. Rather, we determine that Ziegler's claims fail on the merits.

entitled to relief"). We agree with the State that the circuit court was not required to hold a hearing because the allegations in Ziegler's motions were insufficient.

Ziegler claims that he is entitled to withdraw his no contest pleas to stalking and invasion of privacy based on ineffective assistance of counsel and because he lacked necessary information at the time of the plea hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (explaining that "[a] defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence" and "that the 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel"); ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998) ("The constitution requires that a plea be voluntarily, knowingly and intelligently entered and a manifest injustice occurs when it is not.").[4]

The problem with Ziegler's arguments for plea withdrawal are that they are premised on his faulty assertion that the criminal complaints were insufficient to allege the crimes of stalking and invasion of privacy. Ziegler argues that trial counsel was ineffective by failing to move to dismiss the charges based on the failure of any facts to support the required intent elements, and

[4] While Ziegler frames part of his argument for plea withdrawal as based on a defective plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), a defendant cannot raise a ***Bangert*** claim in a WIS. STAT. § 974.06 motion. *See* ***State v. Carter***, 131 Wis. 2d 69, 81-82, 389 N.W.2d 1 (1986). Motions filed under § 974.06 are limited to issues of constitutional or jurisdictional dimension. ***State v. Balliette***, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334. Because a claim that the circuit court failed to follow the plea colloquy requirements under WIS. STAT. § 971.08 does not raise a constitutional claim, it is not cognizable under § 974.06. *See* ***Carter***, 131 Wis. 2d at 82-83. However, Ziegler also contends that his pleas were invalid because he lacked necessary information at the time of the plea hearing. "The constitution requires that a plea be voluntarily, knowingly and intelligently entered ...." ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). We consider whether Ziegler's postconviction motions sufficiently allege that Ziegler's pleas were invalid because they were not knowing, intelligent, and voluntary.

by failing to explain to Ziegler that the charges lacked a sufficient factual basis as to intent. Ziegler also asserts that, if he had known that the criminal complaints were insufficient to establish the intent elements for the charges, he would not have pled no contest and instead would have insisted on going to trial.[5] These arguments fail, however, because the criminal complaints contain sufficient allegations as to the charges.

Ziegler argues that the complaint charging him with stalking did not set forth allegations that would support the required intent element—that is, that Ziegler acted with intent to cause fear of bodily injury or death. *See* WIS. STAT. § 940.32(2) (2001-02). He also argues that the complaint charging him with invasion of privacy did not set forth any allegation to support the required intent element of that crime—that is, that Ziegler acted for the purpose of sexual gratification. *See* WIS. STAT. § 942.08(2)(d) (2003-04).

The essence of Ziegler's argument is that the facts in the complaints would not support a reasonable inference of the intent elements of the charges, and thus Ziegler pled no contest without realizing that his conduct did not fall within the charges. *See* ***State v. Lackershire***, 2007 WI 74, ¶¶33-35, 301 Wis. 2d 418, 734 N.W.2d 23. However, a "factual basis for a plea exists if an inculpatory inference can be drawn from the complaint … even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. Here, the stalking complaint alleged that Ziegler placed a ladder against the home

[5] To the extent Ziegler asserts other claims of ineffective assistance of counsel or any other basis to support plea withdrawal in his postconviction motions and on appeal, those assertions are conclusory and insufficiently developed to warrant a response.

of the victim around 11:00 p.m. and climbed onto her porch roof, and made thumping noises that caused the victim to look out the window and see Ziegler crouching on her roof. The invasion of privacy complaint alleged that the victim observed Ziegler looking into her window around 4:00 a.m. A reasonable inference from the stalking complaint is that Ziegler intended to cause the victim to fear bodily injury or death, and a reasonable inference from the invasion of privacy complaint is that Ziegler acted for the purpose of sexual gratification. While those are not the only reasonable inferences, they are reasonable inferences. Accordingly, Ziegler's arguments for plea withdrawal based on the lack of any allegations to support the intent elements of the crimes are unavailing.

Ziegler also argues that he was entitled to sentence credit for time he was on the bail monitoring program after his arrest and prior to his conviction. Ziegler argues that he was in "custody" for purposes of sentence credit under WIS. STAT. § 973.155(1) because the conditions of the bail monitoring program amounted to a seizure under the Fourth Amendment. However, the test for "custody" for sentence credit purposes is not whether the defendant was "seized" under the Fourth Amendment; the test for "custody" in this context is whether the defendant would be subject to an escape charge for leaving that status. *See* ***State v. Magnuson***, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536. Ziegler acknowledges the rule set forth in ***Magnuson*** and does not dispute that he would not have been subject to an escape charge for leaving the bail monitoring program, but argues that ***Magnuson*** does not apply because Ziegler has argued a constitutional claim. We are not persuaded that there is any basis to disregard the bright-line rule set forth in ***Magnuson*** in this case.

Finally, Ziegler contends that the complaint charging him with both disorderly conduct and invasion of privacy based on the same event violated double jeopardy. However, Ziegler

was convicted of invasion of privacy and the disorderly conduct charge was dismissed. Assuming without deciding that the charges were multiplicitous, Ziegler's double jeopardy argument still fails; there is no double jeopardy violation when a defendant is convicted of only one of the multiplicitous charges. *See* ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

Therefore,

IT IS ORDERED that the order denying Ziegler's postconviction motions is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals