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DISTRICT II

June 18, 2014

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

2013AP1449 State of Wisconsin v. Emilio Padilla (L.C. #1995CF285)

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

Emilio Padilla appeals pro se from an order denying his WIS. STAT. § 974.06 postconviction motion alleging that he was denied the effective assistance of trial counsel because counsel failed to file a motion to suppress statements he made to his probation officer. 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 affirm the order.

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

In 1995 Padilla entered a guilty plea to two counts of first-degree sexual assault of a child as a habitual offender. In December 2012, Padilla filed a motion under WIS. STAT. § 974.06 for plea withdrawal and a new trial in the interests of justice. He claimed that statements he made to his probation officer were used against him in the investigation and prosecution in violation of his Fifth Amendment rights and that his trial counsel was ineffective for not challenging the admissibility of the statements.

On appeal Padilla argues that he is entitled to a new evidentiary hearing on his motion because the circuit court failed to appoint counsel to represent him under WIS. STAT. § 974.06(3)(b), and the circuit court erred in ruling that motion was barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Padilla's appellate arguments ignore that the circuit court indicated it would review the record before deciding if a ***Machner***[2] hearing was necessary and ultimately concluded that the record demonstrates Padilla is not entitled to relief. We review de novo whether Padilla's motion alleged sufficient material facts that, if true, would entitle him to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We need not address Padilla's issues because they have no significance to our de novo review. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide a case on the narrowest possible grounds); ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not decide an issue if the resolution of another issue is dispositive).

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The record establishes that Padilla waived his right to challenge the admissibility of the statements he made to his probation officer. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (waiver is the intentional relinquishment or abandonment of a known right). At the plea hearing the circuit court asked Padilla whether he had confessed to police. The court was made aware that Padilla had made statements to his probation officer. Padilla's attorney then informed the court that he had discussed with Padilla the possibility of challenging the statements made to the probation officer and the likelihood of being successful with such a challenge. The attorney indicated that Padilla wanted to go ahead with the guilty plea without challenging the statements. The district attorney added that usually such statements are not admissible. The court then addressed Padilla regarding his right to contest the statements, his right to have a hearing to determine whether they were admissible, and his understanding that most often such statements are found inadmissible. Padilla confirmed his understanding of what the court told him, and he indicated he wanted to give up his right to have a hearing on the admissibility of the statements.

Padilla waived his right to challenge the admissibility of the statements. Trial counsel is not ineffective for not pursuing an issue waived by the defendant. *See* ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996) (a defendant cannot complain that the attorney was ineffective for complying with the ethical obligation to follow the defendant's decision). Although Padilla asserts on appeal that he has a limited mental capacity, nothing during the plea hearing or in his motion supports an assertion that a limited mental capacity affected the knowing and intelligent nature of his guilty plea. At the plea hearing, the circuit court ascertained that Padilla had a GED, had completed one year in college, and was not suffering from any mental or physical impairments. Further, Padilla's motion fails to

demonstrate how his statements to his probation officer formed a basis for the investigation that began on witness statements the day before his statements or that suppression of those statements would have resulted in the dismissal of the prosecution.

Because the record conclusively demonstrates that Padilla is not entitled to postconviction relief, we affirm the order denying the motion.[3]

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals

[3] Padilla asks this court to grant a discretionary reversal under WIS. STAT. § 752.35, and we decline to do so. We exercise our discretionary power infrequently and judiciously and only when there was a probable miscarriage of justice. *See* ***State v. Ray***, 166 Wis. 2d 855, 874-75, 481 N.W.2d 288 (Ct. App. 1992). We are not convinced that Padilla's guilty plea was the result of a miscarriage of justice.