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DISTRICT II

October 8, 2014

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

2013AP920-CR	State of Wisconsin v. Raymond L. Nieves (L.C. #2004CF583)
2013AP921-CR	State of Wisconsin v. Raymond L. Nieves (L.C. #2005CF510)
2013AP922-CR	State of Wisconsin v. Raymond L. Nieves (L.C. #2008CF562)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

In these consolidated appeals, Raymond L. Nieves appeals from judgments of conviction and an order denying his motion for postconviction relief. Nieves contends that the circuit court erred in denying his request to withdraw his pleas or, alternatively, modify his sentence. Based on our review of the briefs and record, we conclude at conference that these cases are appropriate

for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgments and order of the circuit court.

Nieves was convicted following pleas of guilty or no contest to one count of fleeing a traffic officer, as a repeater, one count of homicide by intoxicated use of a vehicle, as a repeater, and four counts of bail jumping. The charges stemmed from three separate cases that were resolved together in the circuit court.

For his crimes, the circuit court sentenced Nieves to an aggregate sentence of twenty-two years of initial confinement followed by ten years of extended supervision. Nieves filed a motion for postconviction relief seeking to withdraw his pleas or, alternatively, modify his sentence. The court denied the motion. These appeals follow.

On appeal, Nieves first contends that the circuit court erred in denying his request to withdraw his pleas. He argues that he did not enter his pleas knowingly, voluntarily, and intelligently because his trial counsel misinformed him that the circuit court had decided and denied his motions to dismiss, which were based on the State's alleged failure to comply with the Interstate Detainer Act. Although such motions were raised and briefed, the circuit court never ruled on them.

A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant can meet this

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

burden by showing that the plea was involuntary or that he or she received ineffective assistance of counsel. *See State v. Daley*, 2006 WI App 81, ¶20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146.

When reviewing a decision on a motion to withdraw a plea, this court accepts the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. *Brown*, 293 Wis. 2d 594, ¶19. However, whether a plea was knowingly, voluntarily, and intelligently entered or whether counsel was ineffective are questions of constitutional fact that this court reviews independently. *Id.*; *State v. Byrge*, 2000 WI 101, ¶37 n.8, 237 Wis. 2d 197, 614 N.W.2d 477.

Here, the record conclusively refutes Nieves' assertion that he misunderstood the status of his motions to dismiss at the time that he entered his pleas. As noted by the circuit court and the State, Nieves was present for several hearings where his attorney asked the court to withhold ruling on the motions because of ongoing plea negotiations. In addition, when Nieves entered his pleas, the court addressed the pending motions and explicitly asked whether he understood that he was "giving up [his] right to pursue any relief under the interstate detainer." Nieves answered in the affirmative and indicated that he did not have any questions about that or the motions themselves. Finally, toward the end of the plea hearing, Nieves' attorney explained how the decision to forego ruling on the motions factored into Nieves' plea agreement with the State:

Mr. Nieves is aware of the fact that he's giving that issue up in some consideration for both the State's position in regards to the plea issues and our request later at sentencing regarding what the Court's going to do, and that was factored in and was part of the consideration in taking the offer.

Nieves confirmed that his attorney's statement was correct. In light of the foregoing, we are satisfied that the circuit court properly denied Nieves' request to withdraw his pleas.

Nieves next contends that the circuit court erred in denying his alternative request to modify his sentence. In particular, he complains that his sentence was unduly harsh.

A circuit court's exercise of its sentencing discretion is presumptively reasonable and our review is limited to determining whether a court erroneously exercised its discretion. *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. At sentencing, a court must consider “the gravity of the offense, the character of the defendant, and the need to protect the public.” *Id.*, ¶28. The weight a court gives to each of these factors is left to its discretion. *Id.*

A defendant challenging a sentence as an erroneous exercise of discretion on the ground that it was unduly harsh must show that the sentence was “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Upon review of the record, we are not persuaded that the circuit court erroneously exercised its discretion and imposed a sentence that was unduly harsh. Here, the court properly considered the gravity of the offenses, Nieves' character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Given the fact that Nieves killed someone while driving drunk, the aggregate sentence, which was within the maximum, cannot be described as unduly harsh. Accordingly, the circuit court properly exercised its discretion in sentencing Nieves and denying his request to modify his sentence.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals