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October 16, 2014

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

2013AP2433-CR State of Wisconsin v. Stephen LeMere (L. C. #2011CF333)

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

Stephen LeMere appeals a judgment of conviction for first-degree sexual assault-sexual contact with a child under the age of thirteen, and an order denying his post-sentencing plea withdrawal motion. LeMere claims his counsel was ineffective for failing to advise him that he could face lifetime commitment as a sexually violent person under WIS. STAT. ch. 980.[1] Based

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

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21.

A criminal complaint charged first-degree sexual assault-contact with a child under the age of thirteen; second-degree reckless endangerment; and strangulation and suffocation. LeMere pled guilty to count one and the remaining charges were dismissed and read in, together with charges in another case involving battery by prisoner and aggravated battery. The circuit court imposed a sentence of thirty years' initial confinement and fifteen years' extended supervision. LeMere sought postconviction relief based upon his claim that his attorney never told him that he could face lifetime commitment as a sexually violent person.[2] LeMere asserted that had he known prior to pleading guilty that he may be subject to a lifetime WIS. STAT. ch. 980 commitment in the future, he would not have pled guilty. The circuit court denied the motion and LeMere now appeals.

This case is controlled by ***State v. Myers***, 199 Wis. 2d 391, 544 N.W.2d 609 (Ct. App. 1996). In that case, we held that a potential WIS. STAT. ch. 980 commitment at some time in the future is merely a "collateral consequence" of a guilty plea. ***Id.*** at 394. We stated that although trial courts must inform defendants of the direct consequences of their pleas, no manifest injustice occurs when a defendant is not apprised of consequences that are collateral to the plea. *See* ***id.***

[2] LeMere concedes the circuit court "did raise the topic of commitment," but insists "he did not know what the court was talking about." The record belies his claim. In fact, the circuit court in its Order Denying Motion For Post-Conviction Relief, quotes from the plea hearing during which LeMere was specifically advised of the potential for WIS. STAT. ch. 980 commitment and LeMere acknowledged his understanding.

LeMere insists ***Myers*** is "no longer sound precedent in the era following the United States Supreme Court decision in ***Padilla v. Kentucky***, [559 U.S. 356 (2010).]" In ***Padilla***, the Court found trial counsel ineffective when he failed to tell the defendant that conviction of the drug offense to which he was pleading guilty made him subject to automatic deportation from the United States. ***Padilla***, 559 U.S. at 359-60. Moreover, trial counsel affirmatively misinformed Padilla about the deportation consequences of his plea by erroneously advising him that "he 'did not have to worry about immigration status since he had been in the country so long.'" ***Id.*** at 359 (quoted source omitted).

LeMere does not claim ***Padilla*** is directly controlling, but argues we should extend the logic of ***Padilla*** to cover the collateral consequence of a potential WIS. STAT. ch. 980 commitment, thereby overruling ***Myers***. However, we do not have the power to overrule, modify, or withdraw language from a previously published decision of the court of appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997).

Moreover, the Supreme Court recently explained that ***Padilla*** did not hold that the traditional distinction between direct and collateral consequences is invalid. *See* ***Chaidez v. United States***, 133 S. Ct. 1103, 1110-12 (2013). The Court emphasized in ***Chaidez*** that deportation was unique, intimately related to the criminal process, and nearly automatic in flowing from a conviction for specified crimes. *See* ***id.*** at 1110.

Unlike deportation, a WIS. STAT. ch. 980 commitment is not a nearly automatic result of a conviction. The potential for a future ch. 980 commitment will not occur unless the State initiates a separate proceeding and meets its burden of proving specific facts beyond the fact of conviction. As we explained in ***Myers***:

> A future ch. 980, STATS., commitment will not automatically flow from Myers' conviction for first-degree sexual assault of a child. Although such a commitment will require a prior predicate offense, Myers' offense, by itself, will not trigger a commitment. Rather, a commitment will depend on Myers' condition at the time of the ch. 980 proceeding and the evidence that the State will then present on his condition. If the State were to initiate such commitment proceedings, Myers will have the full benefit of the ch. 980 procedures, due process, and an independent trial, including the right to offer evidence to refute the State's charges.

Myers, 199 Wis. 2d at 394-95.

Accordingly, we reject LeMere's contention that "[i]t is time to take another look at ***Myers*** in light of ***Padilla*** and ***Chaidez***." Trial counsel's alleged failure to advise LeMere, prior to his guilty plea, of the collateral consequence of potential lifetime commitment as a sexually violent person under WIS. STAT. ch. 980 did not constitute ineffective assistance of counsel.[3]

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] LeMere also argues that this court allowed a defendant to withdraw his plea because he was unaware he could be subject to a WIS. STAT. ch. 980 commitment as a sexually violent person. *See* ***State v. Nelson***, 2005 WI App 113, ¶15, 282 Wis. 2d 502, 701 N.W.2d 32. However, LeMere acknowledges the request in ***Nelson*** was made prior to sentencing. Thus, the request was subject to a different and less stringent test than the manifest injustice standard applicable in LeMere's post-sentencing plea withdrawal motion.