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DISTRICT II

November 19, 2014

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

2014AP4-CR State of Wisconsin v. Fairly W. Earls (L.C. # 2005CF419)

Before Brown, C.J., Reilly and Gundrum, JJ.

Fairly Earls appeals pro se from a judgment convicting him, after a jury trial, of ten counts of felony bail jumping and from a circuit court order denying his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

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

The bail jumping charges arose after Earls violated the conditions of his bond on a charge of first-degree sexual assault of a child. Earls's nephew posted the $25,000 cash bond, which was forfeited when Earls violated his bond conditions. The information alleged numerous counts of bail jumping based on the following bond condition violations: failing to notify the clerk of circuit court of an address change, failing to appear for court dates, and multiple instances of contact with a child under the age of eighteen outside the presence of another adult.[2] The jury convicted Earls of all but one count of bail jumping.

Postconviction, Earls discharged his appointed appellate counsel and filed a pro se postconviction motion. The circuit court denied Earls's postconviction motion on two grounds. First, Earls did not present the testimony of his trial counsel in order to preserve his ineffective assistance of trial counsel claim. Second, Earls's postconviction motion was not otherwise sufficient to warrant a hearing.

We affirm the circuit court's denial of Earls's ineffective assistance of trial counsel claim. Earls did not timely subpoena his trial counsel to appear at the postconviction motion hearing, and trial counsel did not appear at the hearing. On November 6, 2013, the circuit court gave notice of the December 18, 2013 postconviction motion hearing. The circuit court found that Earls did not request a subpoena for his trial counsel until two days before the scheduled postconviction motion hearing, despite having been specifically informed by the circuit court at the October 24, 2013 hearing on his counsel's motion to withdraw that as a pro se litigant, Earls would be responsible for arranging for the appearance of witnesses at subsequent hearings.

[2] The amended criminal complaint alleged that on multiple occasions, Earls had romantic (continued)

An ineffective assistance claim must be supported by trial counsel's testimony. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In the absence of trial counsel's testimony, an ineffective assistance claim cannot succeed. ***State v. Mosley***, 201 Wis. 2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996). Because Earls did not present the testimony of his trial counsel, the court did not err in denying his ineffective assistance claim.

We turn to the other claims raised in Earls's postconviction motion. When a circuit court denies a postconviction motion without a hearing, we will affirm if the court properly exercised its discretion in doing so. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). We determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. ***Id.*** at 309-10. If the motion does not raise facts sufficient to entitle the defendant to relief "or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court has the discretion to deny a hearing. ***Id.*** (citation omitted). We agree with the circuit court that Earls's postconviction motion did not require a hearing.

Postconviction, Earls challenged the sufficiency of the evidence that he intentionally violated his bond[3] because the bond did not contain the no-contact provision that formed the basis for multiple bail jumping counts. In support of his contention that the bond did not contain the no-contact provision, Earls offered a copy of the Fond du Lac county bond which was used in a federal prosecution and which did not include the no-contact provision. Earls argued that there

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assignations, outside the presence of other adults, with a seventeen-year-old girl.

[3] The elements of felony bail jumping are: the defendant was charged with a felony, the defendant was released from custody for the felony charge on bond, and the defendant intentionally failed to comply with the terms of the bond, i.e., the defendant knew the terms of the bond and knew that his conduct did not comply with the terms of the bond. WIS JI—CRIMINAL 1795.

were two inconsistent copies of the bond, and he could not have intentionally violated the conditions of the bond because he did not know what those bond conditions were.

The prosecutor explained to the court that the federal prosecutor had used a computer program to redact his copy of the February 7, 2005 bond form to delete the no-contact provision because the parties had agreed to avoid any reference to child sexual assault, which was an inference that could be made from the no-contact provision. The circuit court observed that the redacted document bore federal case identifying information and an exhibit mark.

Earls was prosecuted in Fond du Lac county for violating the conditions of his February 7, 2005 bond. That bond was appended to the amended criminal complaint charging bail jumping. The bond, which was exhibit three in the trial from which this appeal is taken, bore Earls's signature and set out conditions of his release: appear on all court dates, give written notice of an address change, and "[n]o contact with any children under 18 yrs of age unless adult present."

The court found that for purposes of Earls's Fond du Lac county prosecution, only one bond form was at issue, the bond dated February 7, 2005, which contained Earls's signature and the no-contact provision. The court found that the February 7, 2005 bond form was redacted for the federal prosecution and Earls was being untruthful when he claimed there were two, inconsistent bond forms. Because there was no bail jumping defense available to Earls arising from the redacted bond document, the postconviction motion did not state a basis for relief such that a hearing was warranted on this claim. We agree with the circuit court, and we reject any claim premised on the existence of two bond forms.

Postconviction, Earls complained that the circuit court declined to let him subpoena a circuit court clerk to testify about the content of hearing notices mailed to him. At a July 31, 2012 hearing, the court found that the documents in the record speak for themselves, and the circuit court clerk could not add anything via her testimony. We discern no error. The circuit court did not err in rejecting this claim without a hearing.

Earls next argued that forfeiting the bail posted by his relative was the extent of the available consequences for violating his bond conditions, and he could not be prosecuted for bail jumping. This argument lacks merit. The forfeiture of the bond is a civil, not a criminal matter. ***State v. Wickstrom***, 134 Wis. 2d 158, 162-63, 396 N.W.2d 188 (1986). Intentionally violating bond conditions is a crime. WIS. STAT. § 946.49(1). The evidence at trial satisfied the elements of the crime. There is no double jeopardy claim arising out of this issue, and the circuit court did not err in denying this claim without a hearing.

Earls argues that the circuit court did not give him notice of the penalties he faced if he violated his bond. As the State points out, the transcript of the 2005 bail hearing is not found in the record on appeal. The appellant has the burden to provide us with the record necessary to review the issues raised. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). "When an appeal is brought upon an incomplete record, this court will assume that every fact essential to sustain the trial court's decision is supported by the record." ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Therefore, we must assume that the circuit court alerted Earls to the consequences of failing to abide by his bond conditions. Moreover, alleged ignorance of the law is no defense. ***State v. Neumann***, 2013 WI 58, ¶50 n.29, 348 Wis. 2d 455, 832 N.W.2d 560, *cert. denied*, ___ U.S. ___, 134 S. Ct. 544 (2013).

Finally, Earls challenged his sixty-year sentence as exceeding the maximum allowed by law because he could not be charged and convicted of multiple bail jumping counts. This argument lacks merit. Each bail jumping count required separate proof, and therefore, the counts were not multiplicitous. ***State v. Eaglefeathers***, 2009 WI App 2, ¶¶13-14, 316 Wis. 2d 152, 762 N.W.2d 690. The legislature intended multiple punishments for multiple violations of bond conditions on the same bond. ***State v. Anderson***, 219 Wis. 2d 739, 756-57, 580 N.W.2d 329 (1998).

The circuit court did not err in denying Earls's postconviction motion without a hearing.[4]

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").