OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 25, 2015

To:

Hon. Terence T. Bourke
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Melody Lorge
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Joseph R. DeCecco
District Attorney
615 N. 6th St.
Sheboygan, WI 53081

Nicholas J. Rifelj
P.O. Box 867
Madison, WI 53701-0867

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2014AP1535 State of Wisconsin v. Frank Hvizdak (L.C. #2010CF498)

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

Frank Hvizdak appeals from an order denying his motion to withdraw his guilty plea to second-degree reckless homicide, imperfect self-defense.[1] He contends his plea was not knowingly, voluntarily and intelligently entered because defense counsel ineffectively failed to inform him of realistic possible sentences and to correct the unrealistic sentencing expectations

[1] Hvizdak indicated that his motion for postconviction relief was brought pursuant to WIS. STAT. RULE 809.30 (2013-14). As the motion was not timely under that rule and also raised a collateral challenge, we construe it as having been brought pursuant to WIS. STAT. § 974.06. *See* § 974.06(1).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

he held. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Hvizdak was charged with first-degree intentional homicide in the shooting death of Jason TenPas at a bar. Neither man knew the other. After a brief exchange of words, Hvizdak shot the unarmed TenPas three times in the chest and shoulder and once in the back of the head. A fifth shot misfired. The contact burn on the head wound suggested that the gun was against TenPas's head when Hvizdak fired. Hvizdak insisted he acted in self-defense.

On the morning of trial, Hvizdak—sixty-four years old and in compromised health—pled guilty to second-degree reckless homicide, imperfect self-defense. The amended charge was punishable by up to sixty years' imprisonment. The PSI recommended a thirty-year sentence; the State recommended forty-five years. Rather than urging a definite figure, defense counsel, Attorney Richard Hart, requested a sentence that was sufficiently punitive yet would offer Hvizdak the hope of life beyond prison. The defense PSI also asked for a nonspecific sentence ("shorter rather than longer") due to Hvizdak's age and fragility. The court sentenced him to twenty-five years' initial confinement followed by ten years' extended supervision.

Hvizdak moved to withdraw his plea on grounds of ineffective assistance of counsel. He argued that Hart pressured him to plead by not providing a realistic range of possible sentences or disabusing him of the notion that he could "get out on time served or no more than five years." Hvizdak contended that if he knew he likely faced even ten years' of initial confinement, he

would have taken his chances at trial. The court denied the motion after a ***Machner***[2] hearing. Hvizdak appeals.

"A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). Ineffective assistance of counsel satisfies the manifest injustice test. ***Id.*** To show ineffectiveness, a defendant must prove both deficient performance and prejudice—*i.e.*, that counsel "made errors so serious that counsel was not functioning as the 'counsel'" the Sixth Amendment guarantees and that there exists "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

As initially charged, Hvizdak faced a mandatory minimum term of twenty years' initial confinement. Hart testified at the ***Machner*** hearing that he believed pleading was in Hvizdak's best interest because (1) the amended charge had no associated mandatory minimum sentence and (2) despite Hvizdak's persistent claim of self-defense, he deemed Hvizdak's chance of success at trial to be "infinitesimal." Hart testified that he advised Hvizdak accordingly and informed him of the penalty range for second-degree reckless homicide; that pleading was his best opportunity to outlive his prison sentence; and that his expectations of either prevailing at trial or receiving the hoped-for sentence of time served or no more than five years were unrealistic. "[A] lawyer has the right and duty to recommend a plea bargain if he or she feels it

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

is in the best interests of the accused." ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272. Hart also testified that Hvizdak did not ask for, and Hart did not offer, an opinion as to a likely sentence. In contrast, Hvizdak testified that Hart never told him his sentence expectations were unrealistic or that the defense "game plan" was to obtain a sentence that would result in his being released from prison before he died.

The court found Hart's testimony to be the more credible. We are bound by the court's factual findings regarding what Hart did or did not do, unless they are clearly erroneous. *See* ***State v. Pote***, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82. We accept them here because they are largely based on credibility determinations, and we may not substitute our own credibility determinations for those the trial court made. ***Id.*** Further, the court advised Hvizdak at the plea hearing that, while both sides would be free to argue sentence, he nonetheless could be confined for up to forty years and on extended supervision for up to twenty years. The plea questionnaire Hvizdak signed acknowledged his understanding that the court was not bound by any sentencing recommendation.

Even if Hart did suggest to Hvizdak that the court might be convinced to impose a more lenient sentence in light of his age and frailty, by pleading, Hvizdak accepted the risk that Hart's good-faith evaluation could turn out to be mistaken. *See* ***McMann v. Richardson***, 397 U.S. 759, 770 (1970). Counsel's incorrect prediction or mistaken estimate of a likely sentence does not form the basis of an ineffective assistance of counsel claim. ***Provo***, 272 Wis. 2d 837, ¶18. We reject Hvizdak's contention that his plea was not voluntary due to pressure from Hart. "[A] coercion allegation based on 'defense counsel's enthusiasm for the negotiated plea bargain' is insufficient" to support a claim of plea coercion. ***State v. Goyette***, 2006 WI App 178, ¶26, 296

Wis. 2d 359, 722 N.W.2d 731 (citation omitted). Hvizdak has not demonstrated that plea withdrawal is necessary to avoid a manifest injustice.

We agree with the court's conclusion that Hart did not perform deficiently.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals