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DISTRICT II

March 25, 2015

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

2014AP1236-CR State of Wisconsin v. Andrew A. MacGillis (L.C. # 2011CF503)

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

Andrew MacGillis appeals from a judgment convicting him on his guilty plea of operating while intoxicated (7th offense) and from a postconviction order denying his motion to withdraw his plea due to ineffective assistance of trial counsel in relation to a plea offer. 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 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

MacGillis entered a guilty plea to operating while intoxicated (7th offense). Postconviction, he moved the circuit court to withdraw his plea because his trial counsel was ineffective in relation to a plea offer. MacGillis alleged that his trial counsel did not convey to him a written plea offer dated September 19, 2011, he was deprived of an opportunity to respond to the offer or negotiate a better offer, and had he been aware of the written offer, he would not have pled guilty without receiving any concession on the sentence recommendation from the State.² The circuit court sentenced MacGillis to a nine-year term (four years of confinement and five years of extended supervision), one year less than the maximum penalty.

At the postconviction motion hearing, MacGillis offered to testify, but his trial counsel was not present to offer testimony. The circuit court declined MacGillis's offer to testify in support of his ineffective assistance claim. The State objected to the motion because MacGillis did not intend to offer the testimony of his trial counsel in support of his claim. MacGillis countered that his trial counsel's testimony was not required if MacGillis himself testified. The court denied the motion on several grounds including that MacGillis had failed to present the testimony of his trial counsel.

² At the plea hearing, the State advised that it would recommend the maximum possible incarceration term. The circuit court observed that a guilty plea with a recommended maximum sentence did not appear to be a "plea agreement." MacGillis affirmed that he wanted to plead guilty under these circumstances.

The September 19, 2011 written plea offer, which MacGillis alleges his trial counsel did not share with him, contained one item not stated on the record by the State at the plea hearing: if MacGillis "participates successfully in the WCS pretrial Intoxicated Driver Intervention Program for a minimum of 4 months, including participation in appropriate AODA treatment, without any violation reports, the State would consider reducing its recommendation to substantial prison" from the maximum period of incarceration.

On appeal, MacGillis argues the merits of his plea withdrawal motion due to ineffective assistance of trial counsel. He further argues that trial counsel's testimony was not necessary to support his ineffective assistance claim. MacGillis is wrong.

MacGillis contends that trial counsel did not convey a plea offer. Whether counsel conveyed a plea offer is a factual question requiring an evidentiary hearing and the testimony of trial counsel. *State v. Curtis*, 218 Wis. 2d 550, 554-55 & n.3, 582 N.W.2d 409 (Ct. App. 1998). MacGillis did not meet his burden to present evidence in support of his ineffective assistance of trial counsel claim. *Id.* at 554; *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court properly denied MacGillis's motion to withdraw his plea.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals