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DISTRICT II

April 1, 2015

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

2014AP1782 State of Wisconsin v. Augustus E. Dillon (L.C. # 1997CF19)
2014AP1783 State of Wisconsin v. Augustus E. Dillon (L.C. # 1999CF251)

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

In these consolidated cases, Augustus E. Dillon appeals from a circuit court order denying his motion for resentencing after proceedings on remand from this court. 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 the order of the circuit court.

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

The background to this appeal is discussed in ***State v. Dillon***, Nos. 2012AP1080 and 2012P1081, unpublished op. and order (WI App Dec. 4, 2013) (***Dillon I***).

> In June 1999, Dillon was sentenced on seven drug-related felonies in two different criminal cases, Waukesha county case nos. 1997CF19 and 1999CF251. The circuit court sentenced Dillon to a total of ten years in prison on three of the four counts in Waukesha county case no. 1997CF19. It then withheld sentence on the remaining count in that case, as well as all three counts in Waukesha county case no. 1999CF251. As to those four counts, the court placed Dillon on probation for ten years following the completion of his prison sentence.

Id. at 2.

Postconviction, the State conceded that it breached the plea agreement at sentencing and that the appropriate remedy was resentencing. ***Id.***

> In an effort to resolve the matter, the State and Dillon's attorney negotiated an agreement which called for Dillon's ten-year prison term to be reduced to seven years. Because Dillon was in custody out of state, his attorney had him sign a written stipulation regarding the proposed agreement, which he submitted to the court in lieu of Dillon's appearance. The stipulation did not address the probationary dispositions that Dillon had received on four of his seven convictions.
>
> Following a[n April 2000] hearing on the matter, the circuit court accepted the parties' written stipulation and amended the judgment of conviction in Waukesha county case No. 1997CF19 to reflect a total prison term of seven years. For unknown reasons, the ten-year probation term for the remaining count in that case also was amended to seven years. The court did not change the length of Dillon's probationary dispositions in Waukesha County case No. 1999CF251.
>
> Sometime after Dillon completed his prison sentence, the department of corrections revoked his probation for both Waukesha County case Nos. 1997CF19 and 1999CF251. Prior to his sentencing in those cases, Dillon asserted that his postconviction attorney had advised him that his written stipulation would result in the dismissal of the counts for which he remained on probation. Despite his claim, Dillon received a total of eight years in prison in both cases.

Id. at 2-3.

Thereafter, Dillon sought resentencing, arguing that the hearing at which the circuit court approved the written stipulation was held in violation of his right to be present for sentencing. The circuit court denied Dillon's motion, concluding that the stipulation was essentially a motion for sentence modification that did not require Dillon's presence. ***Id.*** at 3.

In ***Dillon I*** we reversed the circuit court's order, holding that "the written stipulation and related court hearing was for resentencing and not sentence modification." ***Id.*** at 4. We further held:

> Because Dillon was not present at the hearing and could not waive his right to be present via his stipulation, *see* ***State v. Koopmans***, 210 Wis. 2d 670, 673, 563 N.W.2d 528 (1997), the next question becomes whether his nonappearance was nonetheless harmless. *See* ***State v. Carter***, 2010 WI App 37, ¶22, 324 Wis. 2d 208, 781 N.W.2d 527 ("When a violation of a defendant's constitutional or statutory right to be present at any portion of his trial proceedings is alleged, the State, as beneficiary of any error, has the burden of proving that the error was harmless.").
>
> The question of harmless error depends largely upon whether Dillon's allegations about his postconviction counsel are true (*i.e.*, his allegations that counsel misinformed him of the terms of the written stipulation and misled him to believe that the charges underlying his probationary dispositions would be dismissed). If they are, then Dillon presumably would have been able to address the misunderstandings had he participated in the resentencing hearing. If they are not, then a finding of harmless error might be possible. The record is currently insufficient to permit a proper determination either way.

Dillon I, Nos. 2012AP1080 and 2012P1081, unpublished op. at 4.

We remanded to the circuit court with directions to hold a ***Machner***[2] hearing on Dillon's claim that counsel misinformed or misled him in 2000 vis-à-vis the probation counts. ***Dillon I***, Nos. 2012AP1080 and 2012P1081, unpublished op. at 4.

On remand, the circuit court held the required ***Machner*** hearing. At that hearing, Dillon's postconviction counsel testified; Dillon did not testify. The circuit court found that counsel's testimony was credible about what he and Dillon were trying to achieve with the April 2000 stipulation and hearing. Counsel testified that the counts on which Dillon received probation were not a focus of their efforts, and there is no indication that counsel and Dillon ever discussed the probation counts as part of that process. The court found that Dillon's claims to have been misinformed or misled were not true, and Dillon was not prejudiced by his absence from the April 2000 hearing. Therefore, the court concluded, any error arising from Dillon's absence from the April 2000 hearing was harmless because there was no evidence that counsel misled or misinformed Dillon about what would happen in April 2000 with regard to the counts for which he received probation. Dillon appeals.

On appeal, Dillon argues that he had a right to appear at the April 2000 resentencing hearing, counsel was ineffective, and the error arising from Dillon's absence was not harmless. Dillon does not dispute the circuit court's findings of fact regarding counsel's representation in connection with the April 2000 hearing.

To establish ineffective assistance of counsel, "a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance."

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

State v. Kimbrough, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, ¶27. Whether trial counsel's performance was deficient and prejudicial presents a question of law that we review independently. ***Id.*** The circuit court, as the finder of fact at the postconviction motion hearing, was charged with assessing the credibility of the witnesses at that hearing. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

The circuit court's findings about counsel's representation and that Dillon was neither misled nor misinformed in April 2000 are supported in the record of the postconviction motion hearing. As we noted in ***Dillon I***, if Dillon could not establish on remand that his counsel misled or misinformed him about what would happen at the April 2000 hearing, Dillon's absence from that hearing was likely harmless because there would have been nothing for Dillon to correct had he been present. ***Dillon I***, Nos. 2012AP1080 and 2012AP1081, unpublished op. at 4. We affirm the circuit court's order denying resentencing because trial counsel was effective and any error arising from Dillon's absence from the April 2000 hearing was harmless. ***Carter***, 324 Wis. 2d 208, ¶22.

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