



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](http://www.wicourts.gov)

**DISTRICT II/IV**

April 1, 2015

To:

Hon. Michael O. Bohren  
Circuit Court Judge  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Hon. William Domina  
Circuit Court Judge  
521 W. Riverview, Room JC 103  
Waukesha, WI 53188-3636

Kathleen A. Madden  
Clerk of Circuit Court  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Patrick Flanagan  
Flanagan Law Office, LLC  
759 N. Milwaukee St., #215  
Milwaukee, WI 53202-3714

William L. Gansner  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Susan Lee Opper  
Assistant District Attorney  
515 W. Moreland Blvd. Rm. G-72  
Waukesha, WI 53188-2486

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

---

2014AP830-CR

State of Wisconsin v. Jason C. Coben (L.C. # 2012CF815)

Before Lundsten, Higginbotham and Sherman, JJ.

Jason Coben appeals a judgment convicting him of delivering less than three grams of heroin, second or subsequent offense. He also appeals an order denying his postconviction motion to withdraw his no-contest plea.<sup>1</sup> Coben argues that he should be allowed to withdraw his plea because his trial counsel led him to believe that despite entering a no-contest plea, he

---

<sup>1</sup> Judge William Domina conducted the plea hearing and entered the judgment of conviction. Judge Michael Bohren conducted the postconviction hearing and entered the order denying the postconviction motion.

would still be able to appeal a pretrial order denying his motion to disclose the identity of the confidential informant. Upon our review of the parties' briefs and the record, we conclude at conference that the judgment and order should be summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).<sup>2</sup>

The complaint charged Coben with eight drug-related offenses including three counts of selling cocaine and two counts of selling heroin. After the court denied Coben's motion to compel disclosure of the confidential informant, the parties reached a plea agreement resulting in four counts being dismissed and read in for sentencing purposes, and three counts dismissed outright in return for Coben's no-contest plea to delivering less than three grams of heroin, second or subsequent offense. The court imposed a sentence of five years' initial confinement and five years' extended supervision, concurrent with Coben's other sentence.

Nine months later, Coben filed a motion to withdraw his no-contest plea, asserting that he would not have entered the plea agreement had he known he was waiving his right to appeal the pretrial order. Coben's trial counsel testified that Coben was initially interested in appealing the pretrial order, but after the State agreed to dismiss the charges that depended on the informant's testimony, "Mr. Coben noted it no longer really mattered to him because that was gone." The circuit court found counsel's failure to refer Coben to an appellate attorney for an answer constituted deficient performance, but denied the motion to withdraw the plea because Coben did not establish that he was prejudiced by his counsel's performance.

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

When a defendant moves to withdraw a guilty or no-contest plea based on misinformation from his attorney, he must establish both deficient performance and prejudice. *Hill v Lockhart*, 474 U.S. 52, 58 (1985). To establish prejudice, he must show a reasonable probability that, but for counsel's errors, he would not have pleaded no contest and would have insisted on going to trial. *Id.* at 59. In deciding whether to allow a defendant to withdraw a plea, the trial court may assess the credibility of the proffered explanation for the plea withdrawal request. *State v. Kivioja*, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Here, the circuit court found incredible Coben's testimony that he would have rejected the plea agreement in order to preserve his right to appeal the pretrial order. The plea agreement reduced Coben's potential prison exposure by sixty-five years. It would not be reasonable for Coben to reject a very favorable plea agreement on the mere chance that he could prevail on his motion and that there might be something helpful to his defense on the dismissed charges if the informant's identity were disclosed. As the circuit court found, it "doesn't make any sense." Coben does not provide a persuasive reason to conclude that this finding is clearly erroneous.

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*