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May 22, 2015

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

2014AP1361 State of Wisconsin v. Steven N. Loomis (L.C. # 2011CF884)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Steven Loomis appeals an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2013-14).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Loomis was charged with two counts of repeated sexual assault of the same child. At the plea hearing, his attorney stated that Loomis would plead to Count 2 and Count 1 would be

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

dismissed. The plea questionnaire showed that the terms of the plea agreement were that Count 1 would be dismissed and the State would recommend five years of initial confinement and five years of extended supervision. However, at the plea hearing, neither attorney stated any plea agreement terms related to sentencing, and the court did not ask Loomis whether he understood the plea agreement or what he believed its terms were.

Near the end of the plea hearing, the court asked: "On motion of the State, Count 1 is to be dismissed but may be considered for read-in purposes?" The State replied in the affirmative, after which the court stated: "That's the understanding." The court did not ask the defense whether the count would be read in, and the defense did not object.

Loomis filed a postconviction motion under WIS. STAT. § 974.06. He alleged several claims that we describe further below. The circuit court denied the motion.

Loomis argues that the State breached the plea agreement by eventually recommending a sentence of five years of initial confinement, but *ten to fifteen* years of extended supervision, contrary to the agreement stated on the plea questionnaire. We reject this argument because the defense did not object at sentencing, and therefore the issue was forfeited and can be framed only as ineffective assistance of counsel. *See* ***State v. Liukonen***, 2004 WI App 157, ¶18, 276 Wis. 2d 64, 686 N.W.2d 689.

Loomis next argues that his trial counsel was ineffective by not objecting to the State's alleged breach of the plea agreement at sentencing. In response to Loomis's postconviction motion, the circuit court scheduled a hearing. We do not have a transcript of that proceeding, but the circuit court's decision states that it offered Loomis a chance to present evidence, and Loomis said he would rely on only his motion.

Loomis's claim can properly be denied because he failed to present evidence in support of it. His motion is not evidence. Evidence is submitted at an evidentiary hearing. The attachments to the motion, such as the plea questionnaire, likely could have been introduced as evidence, but were not. Moreover, the evidence for such a claim would probably also need to include Loomis's testimony about his understanding of the plea agreement at the time of the plea, thereby subjecting Loomis to cross-examination by the State. Similarly, the testimony of trial counsel would also be required for Loomis to meet his burden. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

However, the circuit court did not deny the motion on that basis, and therefore we continue the analysis. The circuit court made findings based on the existing material before it. This included an e-mail message from Loomis's trial counsel, responding to a query by postconviction counsel who was earlier appointed for purposes of seeking relief under WIS. STAT. RULE 809.30. Trial counsel stated that, in reviewing his file, he could find no written plea offer from the State, and that the main goal of the negotiation was to minimize initial confinement time. Counsel concluded: "Bottom line is I cannot say there was any agreement as to the length of the ES the state would be recommending. I believe I may have written it wrong on the Plea form." In addition, the State asserted by letter that it did not make any promises regarding extended supervision.

Based on this material, the circuit court held that Loomis presented insufficient evidence to prove that the terms of the plea agreement included a cap on the State's extended supervision argument. On appeal, Loomis appears to believe that the plea questionnaire leaves only one reasonable interpretation, which is that such a cap was agreed to. However, in light of the statement from trial counsel, it is also reasonable to interpret the plea questionnaire as being

mistaken with respect to any agreement regarding extended supervision. Therefore, the circuit court's finding against Loomis was not clearly erroneous, and the claim was properly denied.

Loomis next argues that the circuit court erred by "changing" the dismissed count from a straight dismissal to a read-in. Again, no defense objection was made at the time, and therefore the issue was forfeited and can be raised only as ineffective assistance of counsel.

Loomis next argues that his trial counsel was ineffective by not objecting to the read-in status of the dismissed count. Here, unlike the issue discussed above, the plea questionnaire is merely ambiguous in that it does not say whether the count would be dismissed and read in or dismissed and *not* read in. As we have discussed, Loomis did not present other evidence. Therefore, the ineffective assistance claim was properly denied.

Finally, Loomis argues that his trial counsel made a misrepresentation in the plea questionnaire that induced Loomis to enter into the plea agreement and that, if the questionnaire had stated that the State would not cap its recommendation at five years of extended supervision and that the dismissed count could be read in, Loomis would not have accepted the plea deal. Therefore, Loomis argues, his plea was involuntary.

The State's brief does not respond to this argument. However, our review of Loomis's postconviction motion shows that he did not argue in the circuit court that his plea was involuntary, and did not ask to withdraw his plea, which would be the remedy if he were to prevail on that theory. Instead, he asked only for enforcement of the plea agreement that he argues existed. This argument is made for the first time on appeal, and we normally do not address issues that are raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433,

443-44, 287 N.W.2d 140 (1980). We see no reason to deviate from our normal practice in this case.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals