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**DISTRICT I/IV**

June 8, 2015

To:

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

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2014AP655

State of Wisconsin v. Kenneth Debrell Cooks (L.C. # 2005CF2654)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Kenneth Cooks appeals an order denying his postconviction motion to withdraw his guilty plea to felony murder. He argues: (1) the plea was not knowingly, intelligently and voluntarily entered because he did not shoot the victim and was not charged as a party to a crime, and his trial attorney was ineffective for misleading him into believing he was a party to a crime; (2) the plea colloquy was inadequate and there was insufficient factual basis for the plea because the plea was based on liability as a party to a crime; and (3) the sentence of seventeen years' initial confinement and thirteen years' extended supervision breached the plea agreement for a twenty-year sentence, and Cooks' trial counsel was ineffective for telling him he faced a

maximum sentence of twenty years. Upon our review of the parties' briefs and the record, we conclude at conference that the order should be summarily affirmed.

In 2005, Cooks was charged with felony murder for causing the death of LaRoyce Frier by shooting him during an armed robbery. Two days after the robbery and killing, Cooks told police that Frier "grabbed his gun and that the gun went off" and "after firing the two shots [Cooks] ran north on 43rd Street." Cooks entered a guilty plea to the felony murder charge in return for the State's agreement to recommend twenty years' initial confinement and leave the amount of extended supervision up to the court. In November 2013, Cooks filed the present motion under WIS. STAT. § 974.06 (2013-14)<sup>1</sup> challenging the validity of the guilty plea. The circuit court denied the motion without a hearing.

A defendant who seeks to withdraw a guilty plea after sentencing must show that a manifest injustice would result if withdrawal were not permitted. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary and unintelligently entered." *State v. Denk*, 2008 WI 130, ¶71, 315 Wis. 2d 5, 758 N.W.2d 775. The circuit court's decision on a motion to withdraw a guilty plea is a matter of discretion subject to the erroneous exercise of discretion standard of review. *State v. Thomas*, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. The court can properly deny a postconviction motion without a hearing if the "record conclusively demonstrates that the defendant is not entitled to relief." *Bentley*, 201 Wis. 2d 309-10 (quoted source omitted). Here, the record conclusively

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

demonstrates that Cooks is not entitled to relief and the circuit court properly exercised its discretion in denying Cooks' motion without a hearing.

First, the record does not support Cooks' assertion that he was misled into believing he was pleading guilty to felony murder as a party to a crime. However, the complaint and information did not charge him as a party to a crime. The plea questionnaire form indicated that he was a party to a crime, and his attorney at the plea hearing stated he was charged as a party to a crime despite the fact that "it's not charged in the complaint." The court immediately responded by noting that there was no party to a crime charge, and defense counsel went on to explain that what she meant was that "it was clear under any view of the evidence that [Cooks] was a party to a crime of the underlying predicate offense of armed robbery and felony murder then resulted from the armed robbery."<sup>2</sup> The prosecutor then made clear that Cooks was charged with felony murder as the principal who fired the gun. That assertion was supported by an eye witness as well as Cooks' incriminatory statement to police. Cooks' counsel then clarified that she was not saying Cooks could or should be charged as a party to the crime of felony murder, but rather that he was acting as a party to the crime in the uncharged armed robbery. Therefore, the record does not support Cooks' assertion that, at the time he entered a guilty plea, he was misinformed about the charge.

Second, the record also contradicts Cooks' argument that there was an insufficient factual basis for the plea unless he was charged as a party to a crime. Although, at the plea hearing,

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<sup>2</sup> Under WIS. STAT. § 935.05(2), a person is a party to a crime if he directly commits the crime, aids and abets or conspires with another person to commit the crime. Counsel's assertion that Cooks was a party to the armed robbery that led to the felony murder is unquestionably correct.

Cooks denied being the shooter, the parties stipulated to the facts in the complaint and Cooks' statement to police as the factual basis for the plea. The facts in the complaint and Cooks' inculpatory statement provide sufficient factual basis for the plea regardless of whether the crime was charged as a party to a crime.

Finally, there was no breach of the plea agreement and no ineffectiveness by defense counsel by failing to object to the alleged breach. The plea questionnaire and the agreement as recited at the plea hearing called for the State to recommend no more than twenty years' initial confinement. The State recommended twenty years' initial confinement. Nothing in the record supports Cooks' assertion that his attorney assured him that his total sentence would not exceed twenty years. At the plea hearing, Cooks stated that he understood that the court could impose the maximum sentence regardless of the parties' recommendations, and that no other promises had been made to induce his plea.

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

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