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November 6, 2015

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

2014AP2070-CR

State of Wisconsin v. Thomas Bart Kropp (L.C. # 2012CF1246)

Before Higginbotham, Sherman and Blanchard, JJ.

Thomas Kropp appeals an order that denied his postconviction motion without holding an evidentiary hearing. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ For the reasons explained below, we reverse the postconviction order and remand for further proceedings in the circuit court.

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

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. *State v. Allen*, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Non-conclusory allegations should present the “who, what, where, when, why, and how” with sufficient particularity for the court to meaningfully assess the claim. *Allen*, 274 Wis. 2d 568, ¶23.

Kropp alleged that his trial attorney neglected to convey to him two plea offers, either one of which he would have accepted if he had been timely informed about them. The first plea offer, which was withdrawn a day after it was issued on the grounds that it had been offered by mistake, proposed reducing the charge against Kropp from a Class E felony (aggravated battery with intent to cause great bodily harm) to a Class I felony (substantial battery) in exchange for a plea. In its place, the prosecutor made a second, corrected offer to reduce the charge to a Class H felony (a lower level of aggravated battery) in exchange for a plea. The second offer was withdrawn six days later after the State obtained information that Kropp had attempted to prevent the victim from coming to court. Counsel then informed Kropp that the State would not be making any plea offers (without stating that it had already made and withdrawn two offers). However, on the morning of trial, the State renewed its second offer to reduce the charge to a Class H felony.

Meanwhile, Kropp further alleged that trial counsel ignored multiple requests Kropp made between the preliminary hearing and the final pretrial hearing for information about discovery materials. Just prior to the last pretrial hearing, counsel told Kropp that the State did

not have and would not be offering as evidence any of the victim's medical records or photos of his injuries—despite the fact that the State had notified counsel that the records were available for inspection in the district attorney's office. On the morning of trial, *after* Kropp had already rejected the renewed plea offer, the State handed trial counsel the medical records and defense counsel persuaded Kropp to waive his statutory right to have 40 days notice of the records to review them, without discussing the possibility of moving to suppress the records or requesting an adjournment to review them. Trial counsel also refused Kropp's request to review the medical records for himself before or during the trial, and never informed him that the State had recorded Kropp's statement to police—which Kropp alleged that he learned only during trial when the State introduced the recorded statement.

When a second attorney serving as postconviction counsel ultimately provided Kropp with the discovery materials, Kropp discovered multiple inconsistencies between the victim's trial testimony and statements he had made to medical providers. Kropp now contends that his first attorney's failure to timely advise him of the first two plea offers, to obtain and review the medical records prior to trial, to advise Kropp about the photos of the victim's injuries as well as his recorded statement in relation to his decision whether to enter a plea, and to either attempt to suppress the medical records and photos or alternatively obtain a continuance and use the inconsistencies in the medical records to attempt to impeach the victim, all constituted ineffective assistance.

The State first argues that Kropp's allegations about counsel's actions, even if true and sufficient to demonstrate deficient performance, are insufficient to demonstrate prejudice because neither the use of the medical records for potential impeachment nor the exclusion of the medical records altogether would have changed the outcome of the trial and counsel's failure to

timely relay the first two plea offers was cured by the renewed plea offer on the morning of trial. For the purpose of this opinion, we will assume both of those propositions to be true, although we are not entirely convinced that the record contains sufficient information to draw those conclusions without an evidentiary hearing. However, neither of these arguments addresses Kropp's central claim of prejudice—namely that he would have accepted the renewed plea offer on the morning of trial if he had known at that time that the State was going to produce not only the medical records, but also photos of the victim's injuries, and a recording of Kropp's statement to police.

The State further suggests that it is implausible that Kropp lacked knowledge of the medical records, or that such a lack of knowledge would have affected Kropp's decision to proceed to trial. In addition to requiring a credibility determination that cannot be made without an evidentiary hearing, the State's suggestion fails to address Kropp's additional allegation that counsel also failed to advise him that the State would be able to offer photos of the victim's injuries and Kropp's own recorded statement into evidence and completely ignores the allegations Kropp presented in his postconviction motion about the multiple efforts he had made to obtain access to the discovery materials prior to trial—which were supported by documentation of contacts Kropp had made with the State Public Defender's office seeking assistance in obtaining information from trial counsel.

It is well established that counsel's failure to provide accurate information and advice to a defendant about his case in the context of a plea agreement can create prejudice if it leads to the rejection of a plea offer and a more severe sentence than would have been available on the reduced charge. See *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399 (2012); *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d

436. We are satisfied that Kropp's allegations of multiple failures on trial counsel's part and the effects that counsel's actions had on Kropp's decision to proceed to trial were sufficient to warrant an evidentiary hearing. Accordingly, we reverse the order denying Kropp's postconviction motion and remand with directions that the circuit court hold an evidentiary hearing.

IT IS ORDERED that the circuit court's order is summarily reversed pursuant to WIS. STAT. RULE 809.21(1), and the cause is remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals