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December 2, 2015

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

2015AP523-CR State of Wisconsin v. Curtis Lionel Stones (L.C. # 2013CF1334)

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

Curtis Stones appeals a judgment of conviction and an order denying without a hearing his postconviction motion to withdraw his plea.[1] He argues that the circuit court failed to engage in an adequate plea colloquy because it did not explore Stones' capacity to make informed decisions after being made aware that Stones was being treated for mental illness. He also argues that it was ineffective assistance of counsel for his trial counsel to tell him that Stones'

[1] Sentence was imposed by the Honorable David L. Borowski; the postconviction motion was denied by the Honorable Daniel L. Konkol.

witness, his girlfriend A.W., had not been subpoenaed and was unavailable; he says this information was false and caused him to plead guilty rather than go to trial. On both of these issues, Stones argues that he has raised sufficient concerns about whether his plea was knowing, intelligent, and voluntary to entitle him to an evidentiary hearing on his motion. 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 (2013-14).[2] We affirm the judgment and order of the circuit court.

Stones was charged with first-degree sexual assault of a child under the age of thirteen. A four-year-old girl who had spent the night at A.W.'s home while Stones was present told her mother the next day that she did not like Stones. When asked why, she described sexual contact with him. In a videotaped interview with a police officer, she gave further details. Stones told police he had touched the girl's genitals, masturbated, and ejaculated. The case was set for trial on June 17, 2013.

On June 17, 2013, the circuit court noted that the case was set for trial but that a plea questionnaire / waiver of rights form was in the file. During the plea colloquy, the circuit court addressed Stones, saying, "This form indicates that you are currently receiving treatment or seeing someone for a mental illness or disorder. It says you have not used any drugs, alcohol or medications in the last 24 hours; is that correct?" The circuit court then asked counsel to make a record of Stones' current status in treatment, and counsel stated that Stones had seen a psychologist or psychiatrist a few days before and that "there is a prescription apparently written

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

for him or referred for him, but he's not been given those medications yet." The circuit court asked Stones if he understood "everything that's going on today," and he answered "Yes, Your Honor." Stones' trial counsel answered "Yes," when asked if he believed Stones' plea was free, voluntary, and intelligent.

Stones states in an affidavit in support of his postconviction motion, "I expected my witness, [A.W.] would be at my trial. When I learned that my witness was not available for trial, I became despondent and simply followed my attorney's instructions." A defense investigator interviewed A.W. and reported that A.W. said she had received a subpoena and on June 17, 2013, she had gone to court, spoken to a man outside the courtroom, waited a minute, and then left. A.W. was on the witness list submitted by the defense and the State. Stones' defense investigator interviewed A.W. and prepared a report, which stated, "She doesn't know if Curtis did this to [the child] or not. [A.W.] repeatedly stated she doesn't know what happened, she was asleep."

To withdraw a guilty plea after sentencing, a defendant must prove that refusing to allow plea withdrawal would result in manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant can do so by showing that the plea was not knowingly, intelligently, and voluntarily made because the plea colloquy was flawed or because trial counsel was constitutionally ineffective. ***State v. Howell***, 2007 WI 75, ¶¶70, 74, 301 Wis. 2d 350, 734 N.W.2d 48. A plea withdrawal claim alleging that a plea colloquy is deficient is governed by ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Where the defendant has shown a prima facie violation of WIS. STAT. § 971.08(1)(a) or other mandatory duties, and alleges that the defendant in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by

clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance. ***Bangert***, 131 Wis. 2d at 274. A plea withdrawal claim based on alleged ineffective assistance of counsel is governed by ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). In order to merit an evidentiary hearing on the ineffective assistance of counsel, a motion on its face must allege facts which would entitle the defendant to relief; if it does so, the circuit court must hold an evidentiary hearing. ***Id.*** "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***

To establish that the circuit court failed to conform with a mandatory procedure, Stones cites the circuit court's obligation under ***Bangert*** to "explore the defendant's capacity to make informed decisions." *See* ***Brown***, 293 Wis. 2d 594, ¶30. Stones argues that he "clearly had a mental health issue affecting his ability to make decisions," and he argues that the circuit court failed to explore it. The record shows that the circuit court directly addressed the issue of treatment for mental illness based on what was indicated in the plea questionnaire and specifically ascertained that Stones had the ability to understand what was going on. During the plea colloquy, Stones spoke to the circuit court and confirmed his ability to understand what was happening and his desire to enter a plea. At the end of the plea colloquy, the circuit court stated, "It appears to me, Mr. Stones completely understands what he's doing, understands his plea, understands the potential consequences." In the order denying the postconviction motion, the circuit court stated, "Everything in the record shows that the defendant understood and responded properly to the court's questions during the plea colloquy." This finding is not clearly erroneous. Absent any indication that Stones' mental health treatment was affecting his decision-making to the extent that it would render his plea unknowing or involuntary, the circuit

court had no basis for investigating further. Stones has not made a prima facie showing that the circuit court failed to conform to mandatory procedures or failed to recognize signs of mental health issues that might render the plea unknowing, involuntary, or not intelligent, and he is therefore not entitled to an evidentiary hearing on his claim that the plea colloquy was inadequate.

Stones also argues that he is entitled to an evidentiary hearing on whether trial counsel was ineffective for purportedly incorrectly informing Stones that A.W. had not been subpoenaed and was unavailable to testify when she was purportedly available to testify. A defendant claiming ineffective assistance of counsel must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Under the ***Strickland*** test, we may reverse the order of the two tests and, if the defendant has failed to show prejudice, omit the inquiry into whether counsel's performance was deficient." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

Stones alleges that due to counsel's deficient performance, he believed he could not have A.W. testify in his defense, and he alleges that for that reason, he gave up the right to a trial and the possibility of acquittal. Counsel's alleged deficient performance concerned the testimony of a defense witness who told the investigator she does not know what happened because she was asleep. Stones has not explained how a witness who says she did not know what happened could have affected the outcome of his trial. In this case, the State's evidence included a videotaped interview of the victim and Stones' videotaped confession to police. We conclude that Stones has not alleged facts that, if true, would show that he was prejudiced by counsel's performance,

even if it was deficient. He has not shown that he is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals