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DISTRICT IV

December 14, 2015

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

2014AP1518-CR

State of Wisconsin v. Koalton P. Peterson (L.C. # 2012CF2251)

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

Koalton Peterson appeals a judgment of conviction and an order denying his motion for postconviction relief. 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).¹
We affirm.

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

Peterson pled guilty to second-degree reckless homicide and aggravated battery. Before sentencing, his attorney wrote to the court to ask that a video not be played at sentencing. According to the letter, the video was created by a funeral home, and would “serve only to inflame the passions and turn a legal hearing into an ad hoc memorial service.” The letter asserted that information contained in the presentence reports, along with statements and letters from family members, were sufficient for sentencing. The court appears to have responded with a handwritten note on the original letter stating: “Agreed. Video will not be played.”

After sentencing, Peterson filed a postconviction motion. The motion alleged two claims. The first was that “the court was biased in its sentencing of the defendant by its viewing and consideration of a memorial video.” Peterson’s brief in support of the motion makes it clear that he was claiming both subjective bias and objective bias. The second claim was that his trial counsel was ineffective by not objecting to the court’s viewing and consideration of the video, or by moving for recusal of the judge after learning that the court had viewed the video. The circuit court denied the motion without an evidentiary hearing.

On appeal, Peterson appears to combine these separate theories into a single, analytically incoherent, argument. We separate them for analysis.

Peterson states that he “accepts the [circuit] court’s statement that it was not biased.” Therefore, we need not discuss subjective bias further.

Peterson argues that the circuit court erred by not holding an evidentiary hearing on his claim of objective bias. However, Peterson’s postconviction motion did not allege any facts to support objective bias that were not already in the record. His claim regarding the appearance of bias was based entirely on statements that the court made during sentencing, and other material

in the record. Therefore, an evidentiary hearing would have served no purpose, and was not required.

Peterson argues that the judge was objectively biased. The test for objective bias is whether the judge's impartiality can reasonably be questioned. *State v. Gudgeon*, 2006 WI App 143, ¶21, 295 Wis. 2d 189, 720 N.W.2d 114. Peterson argues that the judge's impartiality can reasonably be questioned because, after viewing the memorial video, the court made several statements during sentencing. These included a statement that from the video it was "very, very clear" that the victim "was a special person." Peterson also noted that the court offered its "sincere condolences" to specifically named members of the victim's family.

Peterson argues that these statements, when prompted by the judge's viewing of the video, show an appearance that the video inflamed the judge's passions. We do not agree that a reasonable person would question the judge's impartiality in this situation. A judge can properly express an appreciation for the victim's life and sympathy for a victim's family without becoming or appearing biased. The judge's comments do not indicate improper passion or bias.

Finally, Peterson argues that the court erred by not holding an evidentiary hearing on his claim that his trial counsel was ineffective by not objecting to the court's viewing and consideration of the video, or moving for recusal of the judge after learning that the court had viewed the video. A claim of ineffective assistance implicates facts outside the record, namely, counsel's reasons for not taking the above actions. Because no evidentiary hearing was held, the question is whether the motion alleged facts which, if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

It appears that the only prejudice Peterson identifies is that he was sentenced by a judge who was objectively biased, that is, by a judge who lacked the appearance of impartiality. The argument is based on the same facts we have already described. Above we concluded that the judge was not objectively biased. Therefore, Peterson did not suffer prejudice from counsel's lack of action. Because Peterson fails to show or even sufficiently allege prejudice, his ineffective assistance claim falls on that prong of the test.

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

Diane M. Fremgen
Clerk of Court of Appeals