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

2014AP2257-CR State of Wisconsin v. Rudy R. Barlow (L.C. # 2013CF758)

Before Lundsten, Higginbotham and Blanchard, JJ.

Rudy R. Barlow appeals a judgment convicting him of armed robbery, party to a crime, as a repeater. He also appeals the order denying his postconviction 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).[1] We affirm.

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

Barlow pled no contest to armed robbery, party to a crime, as a repeater. The circuit court sentenced him to eighteen years of imprisonment, comprised of eight years of initial confinement and ten years of extended supervision. Barlow's postconviction motion to withdraw his plea was denied without an evidentiary hearing.

Facts

Barlow was charged with two counts of armed robbery, one count of first-degree recklessly endangering safety, one count of taking and driving a vehicle without the owner's consent, all as party to a crime, and one count of misdemeanor battery. Barlow reached a plea agreement with the State, under which he agreed to plead no contest to one count of armed robbery, party to a crime, as a repeater. The State agreed to dismiss and read in the second armed robbery count, and the recklessly endangering safety and taking and driving a vehicle without the owner's consent counts. The misdemeanor battery charge was dismissed.

Barlow did not move to withdraw his plea before sentencing. Postconviction, however, Barlow filed a motion in which he alleged that, within days of entering his plea, he told his trial attorney that he wanted to withdraw his plea but his attorney refused to file a motion, telling Barlow that he had no grounds to withdraw the plea and that such a motion would be a bad idea. Barlow claimed that his attorney was, therefore, ineffective. Barlow asserted that he entered his plea "hastily," and that, after discussing his plea with his family, he "realized … he had not fully understood the implications of his plea," namely, "the repeater enhancer, or the need for a presentence report, or the possibility that further negotiation might have resulted in a cap for the state's sentence recommendation." Using a form order, the circuit court denied Barlow's motion without a hearing.

Discussion

We first address Barlow's procedural challenge to the circuit court's postconviction order. He argues that the court's use of a pre-printed form order is error. We disagree. While undeniably terse, the circuit court's order identified the basis for Barlow's motion, namely, "alleged ineffective assistance of counsel." The order also identified the reasons for the denial of the motion, namely, that "[a]n insufficient factual basis … supporting the requested relief" had been shown and that "[t]he law does not permit the court to grant the requested relief." The order informs Barlow and a reviewing court of the reasons for the order. While more elaboration is common, it is not required.

We next consider which standard applies for assessing a motion to withdraw a plea. In his motion and on appeal, Barlow cites to the more lenient pre-sentencing standard, despite the fact that his motion was not filed until after sentencing and entry of the judgment of conviction. *Cf.* ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999) (pre-sentencing plea withdrawal requires a "'fair and just reason'" (quoted source omitted)), *with* ***State v. Hampton***, 2004 WI 107, ¶60, 274 Wis. 2d 379, 683 N.W.2d 14 (post-sentencing plea withdrawal motion must show "'manifest injustice by clear and convincing evidence'" (quoted source omitted)).[2] The State does not comment on this question. Because Barlow's motion alleges that trial counsel was ineffective when she refused to file a plea withdrawal motion *before* sentencing, we will apply the pre-sentencing standard. Even under that more lenient standard, however, permission

[2] Barlow does not argue that the plea colloquy was deficient. Therefore, we do not engage in an analysis under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Negrete***, 2012 WI 92, ¶¶19-20, 343 Wis. 2d 1, 819 N.W.2d 749.

to withdraw a plea need not be granted "automatically," and, in order to show that there is a "fair and just reason" for withdrawal, Barlow must show more than "the desire to have a trial." *See* ***State v. Canedy***, 161 Wis. 2d 565, 582-84, 469 N.W.2d 163 (1991).

As noted, the circuit court denied Barlow's motion without an evidentiary hearing. We review the circuit court's decision not to hold an evidentiary hearing on a motion to withdraw a plea using a mixed standard of review. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether the motion alleges facts which, if true, would entitle the defendant to relief is a question of law that we review de novo. ***Id.*** If the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing. ***Id.*** at 310-11. If the motion alleges sufficient facts, the court must conduct an evidentiary hearing.

No hearing is required when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. *See* ***State v. Allen***, 2004 WI 106, ¶¶23, 36, 274 Wis. 2d 568, 682 N.W.2d 433.

We now examine Barlow's motion to determine whether it contains sufficient non-conclusory allegations.

Barlow alleged that he entered his plea "hastily without really understanding the implications of his plea." He further stated that his attorney "spent only one half hour explaining the plea deal, the charge to which he would plead, the repeater enhancer, and the implications of the presentence report." Barlow did not explain, however, why thirty minutes with his attorney

was inadequate. A blanket assertion suggesting that thirty minutes is inadequate does not permit a court to meaningfully assess his claim.

Barlow alleged that he did not understand "the repeater enhancer." He does not explain, however, what he did not understand about the repeater enhancer or why that lack of understanding affected his decision to plead no contest. Barlow also alleged that he did not understand "the need for a presentence report," but again, he does not explain what aspect of the presentence report process he did not understand or why the preparation of a presentence report was relevant to his decision to plead no contest.

Barlow also alleged that he did not understand "the possibility that further negotiation might have resulted in a cap for the state's sentence recommendation." That assertion offers nothing more than speculation that further negotiations might have led to a better offer from the State—speculation that we note would exist in virtually every case resolved by a plea agreement.

Barlow's motion contained no material factual assertions that would support a motion to withdraw his plea. The motion did not contain the "who, what, where, when, why, and how" needed for a court to meaningfully assess Barlow's claim that counsel was ineffective for not filing a pre-sentencing motion for plea withdrawal. *See* ***Allen***, 274 Wis. 2d 568, ¶23. The motion contained nothing more than conclusory allegations and Barlow's belief that his motion to withdraw his plea arose from a "fair and just reason" and was more than "the desire to have a trial." *See* ***Canedy***, 161 Wis. 2d at 582-84. Therefore, the circuit court did not erroneously exercise its discretion when it denied Barlow's motion without a hearing.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals