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DISTRICT II

March 9, 2016

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

2015AP598-CR

State of Wisconsin v. Jordan D. Pipping (L.C. # 2012CF212)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Jordan D. Pipping appeals from an order denying his WIS. STAT. § 974.06 (2013-14)¹ postconviction motion for plea withdrawal. 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. We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. Because Pipping's motion was not filed pursuant to the timelines and procedures in WIS. STAT. RULE 809.30, we construe it as a WIS. STAT. § 974.06 postconviction motion.

Upon Pipping's no-contest plea, the trial court found him guilty of second-degree sexual assault of a child, and a sentencing hearing was scheduled for April 16, 2013. One or two days before sentencing, the trial court was informed that Pipping wished to fire trial counsel and retain a new attorney, who requested that sentencing be adjourned so he could substitute in as counsel and pursue a plea withdrawal motion on Pipping's behalf. On April 15, 2013, the trial court denied the motion to adjourn but stated in the event Pipping filed a motion to withdraw his plea, the court would apply the presentencing plea withdrawal standard.² The trial court imposed the jointly-recommended sentence of seven years of initial confinement followed by fifteen years of extended supervision.

Pipping filed a plea withdrawal motion alleging that at the time of its entry, he did not understand his no-contest plea could subject him to a WIS. STAT. ch. 980 civil commitment. Pipping's motion alleged that trial counsel provided ineffective assistance by failing to inform him of this possible consequence, and that "[b]ut for the deficiencies in representation, the defendant would not have entered a plea of no contest but would have proceeded to trial." Apparently recognizing that the plea-taking court specifically addressed this collateral consequence, Pipping averred, "Despite being asked about the ramifications of Chapter 980 as a consequence of this conviction, I had no idea what that meant and was not informed by my attorney."

² Though there is no transcript of the April 15, 2013 status hearing in the record, the record as a whole indicates that the trial court agreed to apply the less stringent "fair and just reason" standard to any postconviction plea withdrawal motion.

As requested in Pipping's motion, the court conducted a *Machner*³ hearing. Trial counsel testified that prior to the plea hearing, he and Pipping discussed the WIS. STAT. ch. 980 consequences of his plea, stating, "I clearly remember having a conversation with him about it because it was something that he needed answered." Counsel testified that he told Pipping his conviction subjected him to a ch. 980 commitment and that they also discussed counsel's opinion as to whether or not Pipping was likely to be committed as a sexually violent person. Pipping did not testify. The court concluded that trial counsel was not ineffective, finding that counsel told Pipping his plea could subject him to a ch. 980 commitment and in fact "went beyond what he was constitutionally required to do." After considering the record of the plea hearing along with counsel's postconviction testimony, the trial court denied Pipping's motion.

A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. *State v. Jenkins*, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). The decision to grant or deny a presentence motion for plea withdrawal is committed to the trial court's discretion. *Jenkins*, 303 Wis. 2d 157, ¶30.

The trial court properly exercised its discretion in denying Pipping's motion. It applied the correct legal standard and identified the central issue as whether at the time he entered his plea, Pipping was aware of and understood the WIS. STAT. ch. 980 consequences. In reaching its

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

decision, the court first considered the record of the plea hearing, pointing out that the plea-taking court specifically told Pipping he “was subject to Chapter 980 based on the nature of the conviction,” and invited Pipping to seek further clarification if he had not already discussed this consequence with his attorney. Pipping indicated he understood and trial counsel verified they had discussed ch. 980 consequences.

Observing that the record of the plea hearing did not support Pipping’s plea withdrawal claim, the trial court turned to Pipping’s allegation that counsel never informed him “about the ramifications of WIS. STAT. ch. 980 as a consequence of this conviction.” *See Jenkins*, 303 Wis. 2d 157, ¶62 (when a plea colloquy is sufficient, the defendant should “be able to show why it is fair and just to disregard the solemn answers the defendant gave in the colloquy.”). The trial court’s finding that trial counsel informed Pipping that his no-contest plea subjected him to the possibility of a ch. 980 commitment is supported by the record and not clearly erroneous. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (the trial court, as fact finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous). While Pipping’s affidavit averring that counsel never informed him about ch. 980 might have been sufficient to warrant a hearing, Pipping, who had the burden of proof, did not testify at the postconviction hearing and presented no evidence supporting his claim. The trial court examined the relevant facts, applied a proper standard of law, and reached a demonstrably reasonable decision. *Jenkins*, 303 Wis. 2d 157, ¶30 (citation omitted).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals