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DISTRICT IV

June 14, 2016

To:

Hon. Kenneth W. Forbeck
Circuit Court Judge
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

Hon. Mark A. Frankel
Reserve Judge

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

2015AP989-CR State of Wisconsin v. Christopher Alan Kimps (L.C. # 2013CF144)

Before Lundsten, Sherman and Blanchard, JJ.

Christopher Alan Kimps appeals a judgment convicting him of armed robbery, theft of movable property, operating a vehicle without the owners consent, possession of a firearm by a felon, all as a repeat offender, and eluding an officer. He also appeals an order denying his postconviction motion to withdraw his guilty pleas or for resentencing.[1] Kimps argues: (1) he should be allowed to withdraw his guilty pleas because his trial counsel was ineffective for failing to advise him after the pleas and before the sentencing of the more lenient standard for

[1] Judge Kenneth Forbeck conducted the plea hearing and sentenced Kimps. Judge Mark Frankel heard the postconviction motion.

plea withdrawal before sentencing; (2) the circuit court failed to properly exercise its sentencing discretion; and (3) the sentences were unduly harsh. Upon our review of the parties' briefs and the record, we conclude that the judgment and order should be summarily affirmed.

The complaint alleged numerous crimes arising out of a home invasion in which armed and masked men entered the victims' home, bound them with duct tape, injured one of the victims with a knife, kicked one of the victims in the face, stole guns, jewelry and the victims' truck, and eluded an officer attempting to stop the truck. Pursuant to a plea agreement, in return for Kimps guilty pleas, the State dismissed and read in charges of burglary while armed with a dangerous weapon, false imprisonment, misdemeanor battery, and driving a vehicle without the owner's consent. The court imposed consecutive and concurrent sentences totaling thirty-three years' initial confinement and twenty-three years' extended supervision.

Kimps argues that he should be allowed to withdraw his guilty pleas based on ineffective assistance of trial counsel. He alleges that this counsel failed to inform him that before sentencing he could withdraw his guilty pleas by showing a "fair and just reason," rather than the "manifest injustice" standard for withdrawing a plea after sentencing. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999).

To establish ineffective assistance of counsel, Kimps must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In a plea withdrawal context, he must establish that if his counsel had not performed deficiently, he would not have entered the guilty pleas and would have gone to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Kimps has established neither deficient performance nor prejudice. Kimps contends that he would have attempted to withdraw his pleas before sentencing if he had known of the lower standard for presentence plea withdrawal because discovery documents he reviewed between the plea hearing and sentencing hearing made him want to withdraw the pleas. However, at the postconviction hearing, Kimps' trial counsel testified that Kimps never told him he wanted to withdraw his pleas. Kimps admitted that he did not inform his attorney that he wanted to withdraw his pleas. The reasonableness of counsel's actions may be determined by the defendant's own statements or actions. ***Strickland***, 466 U.S. at 691. Counsel cannot be faulted for failing to pursue plea withdrawal that his client never requested. Counsel is under no obligation to inform his client of every possible legal standard that might apply to his case. Kimps also fails to establish prejudice because he offers no reason why a presentence plea withdrawal motion would have been successful. Even with the more lenient presentencing standard, plea withdrawal is not automatic. ***State v. Leitner***, 2001 WI App 172, ¶24, 247 Wis. 2d 195, 633 N.W.2d 207. Kimps does not identify any specific information he acquired from the discovery that would justify plea withdrawal.

Kimps argues that the sentencing court failed to adequately explain how the sentences it imposed related to its sentencing objectives as required by ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. We disagree. The court appropriately considered the gravity of the offenses, Kimps' character including a substantial prior record, and the need to protect the public. *See* ***State v. Mosley***, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996). The court rejected the prospect of rehabilitation because Kimps, at age twenty-five, had been in the system since he was eleven years old, and none of the previous efforts had resulted in rehabilitation. The court also considered deterrence and punishment as appropriate factors. As required by

Gallion, the court adequately stated its sentencing objectives and imposed sentences designed to meet those objectives.

Finally, the sentences are not so excessive as to shock public sentiment and violate the judgment of reasonable people. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is a strong public policy against interference with the sentencing court's discretion. ***State v. Davis***, 2005 WI App 98, ¶12, 281 Wis. 2d 118, 698 N.W.2d 823. The seriousness of these offenses, the need to protect the public, and Kimps' obvious failure to have been rehabilitated during his prior incarcerations constitute sufficient bases for the sentences the court imposed.

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals