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DISTRICT IV

June 15, 2016

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

2015AP469 State of Wisconsin v. William R. Grender (L.C. # 2010CF976)

Before Lundsten, Higginbotham and Sherman, JJ.

William Grender appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2013-14).[1] 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.

Grender argues that his postconviction counsel was ineffective by not alleging several claims of ineffectiveness by trial counsel. To establish ineffective assistance of counsel, a

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

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 defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, "[t]he 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.*** Because the circuit court did not hold an evidentiary hearing, the question before us is whether Grender was entitled to an evidentiary hearing because he alleged facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

Grender first argues that his trial counsel was ineffective by failing to object to what Grender argues was the prosecutor's breach of the plea agreement as to sentencing. The agreement was for the prosecutor to recommend no more than ten years initial confinement and ten years extended supervision on each of the two armed robbery counts, concurrent with each other. The prosecutor made this recommendation as promised. In addition, the prosecutor argued that these sentences should be consecutive with the remainder of Grender's prior sentence, which Grender was serving on extended supervision.

Grender argues that the prosecutor breached the plea agreement by arguing for the consecutive aspect of the sentences, because after Grender finishes the ten-year initial confinement in these robbery cases, he will serve two years of extended supervision from the earlier case, in addition to the ten years of supervision imposed as part of the current cases. Thus, as framed by Grender, the prosecutor breached the agreement by recommending a total of twelve years of extended supervision, rather than ten.

We reject this argument because the plea agreement did not contain any provision about the relationship between these concurrent armed robbery sentences and the sentence Grender was already serving. Grender received the benefit of his bargain when the prosecutor recommended ten years of extended supervision on the armed robbery counts.

While it is true that the practical effect of making the robbery sentences consecutive to the existing sentence will increase the total amount of extended supervision that Grender serves, that is a function of the way sentences are counted and served, with all periods of extended supervision following all periods of confinement. Here, there was no agreement as to Grender's *total* time on extended supervision, but only as to his time on the armed robbery counts. Therefore, because there was no breach of the plea agreement that counsel should have objected to, Grender has not alleged facts, which, if true, would entitle him to relief.

Grender next argues that his trial counsel was ineffective by not objecting when the circuit court stated the name of one victim twice when describing the armed robbery charges at the plea hearing. When describing the second count, the court stated the name of the victim in the first count. This argument fails because the facts Grender alleges, if true, do not establish prejudice. Grender gives us no reason to believe that, if his counsel had pointed out the error to the circuit court, the outcome would have been any different. The court would most likely have corrected its error, and the hearing would have continued as it did.

Grender next argues that his trial counsel was ineffective by not objecting to the author of the presentence investigation (PSI) report. He argues that this author was biased against him because, in her capacity as his supervision agent, she had worked with police to identify him as a person involved in these robberies.

We assume, for purposes of this issue, that this was a legal basis to remove this PSI author, and that Grender's trial counsel was deficient by not seeking her removal. However, Grender's argument fails on the prejudice prong. Grender has not identified anything in this PSI report that can reasonably be understood as indicating bias, nor has he pointed to anything the court said that showed reliance on something improper in the PSI report. Although the report recommended a longer sentence than the State had agreed to recommend, the court did not exceed the State's agreed-to recommendation.

Grender next argues that he was sentenced on the basis of inaccurate information. However, Grender does not clearly explain what information was inaccurate.

Finally, Grender argues that he is entitled to additional sentence credit. His argument appears to be that he should be given credit in these cases for time during which he was being held in connection with both a supervision hold on the earlier case and these armed robbery counts. However, case law provides that when a defendant is in custody on two cases, and the eventual sentences are consecutive, the defendant receives credit in only one of the cases. ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). If the defendant receives credit in both, his total confinement would be reduced by twice as much time as he was actually held in custody before sentencing.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals