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**DISTRICT I**

March 31, 2017

*To:*

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

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2016AP573-CR

State of Wisconsin v. Darryn Javil Hamilton (L.C. # 2014CF333)

Before Kessler, Brash and Dugan, JJ.

Darryn Javil Hamilton appeals the circuit court's judgment convicting him of fleeing an officer resulting in the death of another and hit and run resulting in death. Hamilton also appeals an order denying his postconviction motion. Hamilton argues that: (1) he received ineffective assistance of trial counsel; and (2) he was sentenced on the basis of inaccurate information.

After reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup> We affirm.

Hamilton pled no-contest to the charges pursuant to a plea agreement that called for a presentence investigation report without a sentencing recommendation. However, neither Hamilton’s lawyer nor the State reminded the circuit court at the end of the plea hearing to order the presentence investigation report without a recommendation. The report recommended ten to twenty years of initial confinement on both counts combined. The circuit court sentenced Hamilton to eight years of initial confinement and five years of extended supervision on each count, to be served consecutively.

Hamilton first argues that he received constitutionally ineffective assistance from his trial lawyer because his lawyer did not inform him that the circuit court could order a presentence investigation report with a sentencing recommendation. Hamilton contends that he would not have entered a no contest plea if he knew that this was possible because he believed that if the presentence investigation report recommended a certain number of years, the circuit court would follow that recommendation.

A defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “To prove deficient performance, a defendant must show specific acts or omissions of counsel that were ‘outside the wide range of professionally competent assistance.’” *State v. Nielsen*, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

325 (citation omitted). To demonstrate prejudice, a “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.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If a court concludes that the defendant has not proven one prong of the *Strickland* test, it need not address the other prong. *Id.* at 697. Based on the facts found by the circuit court, whether a lawyer’s actions are deficient and whether the defendant was prejudiced by his lawyer’s deficient actions are questions of law. *Nielsen*, 247 Wis. 2d 466, ¶14.

Hamilton’s claim is unavailing because he cannot show that he was prejudiced. The circuit court explained in its order denying postconviction relief that although it “would have ordered the presentence report without a recommendation had it been reminded of the parties’ agreement,” it “did not rely on the presentence writer’s recommendation.” The court said it “formulated its own sentence based on the nature of the offense, the defendant’s character and background, his impact on the victims, and the need to protect the community, all in accordance with *McCleary v. State*, 49 Wis. 2d 263 (1971).” The circuit court elaborated:

The defendant was facing almost 80 years in prison for these offenses prior to entering his pleas. His exposure was reduced to 40 years pursuant to plea negotiations. The defendant advocated for a very low sentence, and given the circumstances surrounding the offenses in this case, the court would never have followed it even if the presentence writer had not made a recommendation. The court was not swayed by the presentence writer’s recommendation either with its top end recommendation of 25 years of initial confinement time as evidenced by the court’s more lenient finding of 16 years.

Because the court based Hamilton's sentence on the facts of the case rather than the writer's recommendation, Hamilton was not prejudiced by his counsel's omission concerning the presentence report.

Hamilton next argues that he was sentenced on the basis of inaccurate information. He contends that the circuit court relied on the presentence investigation writer's incorrect assertion that he was not eligible for two early release programs—the Challenge Incarceration Program and the Wisconsin Substance Abuse Program.

“A defendant has a due process right to be sentenced based on accurate information.” *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted). However, the defendant must show both that the information is inaccurate *and that the circuit court relied upon it. Id.*

The circuit court explained in its order denying postconviction relief that it did not rely on the information provided by the presentence investigation report in deciding that Hamilton was not eligible for the early release programs. The court clarified that it recognized that Hamilton was statutorily eligible for the programs, but said that it would not give him permission to participate in either early release program due to the extreme seriousness of the offenses. The court further explained that it “intended the defendant to serve each and every day of the confinement time for his behavior in this case.” Because the circuit court did not rely on inaccurate information in sentencing Hamilton, we reject Hamilton's claim that he was sentenced based on inaccurate information.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

*See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen  
Clerk of Court of Appeals*