OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 13, 2017

To:

Hon. Mark J. McGinnis
Circuit Court Judge
Outagamie County Justice Center
320 S. Walnut St
Appleton, WI 54911

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Leonard D. Kachinsky
Kachinsky Law Offices
832 Neff Crt.
Neenah, WI 54956-0310

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Terrance R. Mineau, 131055
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2016AP760-CR State of Wisconsin v. Terrance R. Mineau
(L. C. No. 2012CF773)

Before Stark, P.J., Hruz and Seidl, JJ.

Terrance Mineau appeals a judgment, entered upon his guilty plea, convicting him of battery or threat to a judge, as a repeater. Mineau also appeals the order denying his postconviction motion to vacate the judgment of conviction. Mineau argues the circuit court erred by denying his request for substitution of judge and all proceedings following the wrongful denial of his substitution request should be invalidated. Mineau alternatively asserts his trial counsel was ineffective by failing to present evidence showing that Mineau's substitution request had been timely filed. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. We reject Mineau's arguments, and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State charged Mineau with two counts of battery or threat to a judge, one count of resisting an officer, and one count of disorderly conduct, all as a repeater. The charges related to events occurring during and after Mineau's sentencing by a Brown County Circuit Court judge. The State alleged that Mineau made multiple threats to kill the presiding judge, made threats to the life of the judge's son, and exhibited disruptive and violent behavior. The case was initially assigned to Brown County Circuit Court Judge Marc A. Hammer. In a pro se letter dated June 1, 2013, and directed to the Eighth District's Chief Judge, Mineau stated: "I am exercising my right for a substitution of Judge." Mineau also requested a judge and jury from outside of Brown County, claiming other Brown County judges would have a conflict of interest.

Mineau's request was forwarded to Judge Hammer, who responded that although he believed he was able to discharge his duties as presiding judge without prejudice and/or undue influence, he was satisfied that having a Brown County judge preside over an action involving a threat to the physical safety of another Brown County judge and/or his family member "creates the appearance of conflict." Judge Hammer therefore "recus[ed]" himself and recommended the matter be transferred to a judge outside of the county. Brown County's presiding judge replied that he had "reviewed the substitution request by the defendant" and Judge Hammer's response, and had determined "the case needs out-of-county assignment." On July 15, 2013, Outagamie County Circuit Court Judge Mark J. McGinnis was assigned to the case.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In a pro se[2] letter received by the circuit court on August 19, Mineau sought "a change of judge as soon as possible," indicating he "might have a conflict with" Judge McGinnis, and claiming the judge "has a history for being outspoken and given to questionable judgments." Because a criminal defendant has the right to only one substitution of judge (except when a new trial is ordered after an appeal), *see* WIS. STAT. § 971.20(2), Mineau further asserted that his previous request for a judge outside of Brown County should not constitute a substitution request because Brown County judges could not have been impartial.

Judge McGinnis denied the request under WIS. STAT. § 971.20(5), which requires a written request for substitution to be made "within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney." Because the record reflected that the order assigning Judge McGinnis was sent to the parties on July 15, 2013, Mineau's August 19 request was deemed untimely. Subsequent pro se requests for substitution and for recusal of Judge McGinnis, as well as venue change requests, were denied. Defense counsel's motion for recusal and motion for a venue change were also denied.

Mineau ultimately entered a guilty plea to one count of battery or threat to a judge, as a repeater. In exchange for his plea, the State agreed to dismiss and read in the remaining counts and cap its sentence recommendation at three years' initial confinement and two years' extended supervision. Out of a maximum possible ten-year sentence, the circuit court imposed an eight-year term consisting of five years' initial confinement and three years' extended supervision, to

[2] Attorney Timothy Hogan withdrew as Mineau's counsel on August 27, 2013, and Attorney Raj Kumar was appointed to replace him. Attorney Kumar subsequently withdrew from representation on November 25, 2013, and Attorney Heather Richmond was appointed as replacement counsel.

run consecutively to any sentence Mineau was then serving. Mineau filed postconviction motions to vacate the judgment of conviction.

At a postconviction hearing, a former deputy circuit court clerk who was responsible for sending out judicial reassignments in 2013 testified she was "sure" that, as was her "regularly conducted" routine, she sent the order assigning Judge McGinnis to both defense counsel and the District Attorney's office on July 15, 2013. Attorney Timothy Hogan, who was defense counsel at that time, testified he never received the order, but he discovered Judge McGinnis's assignment via the circuit court's electronic docket (CCAP) "sometime in August." Mineau testified he did not learn of Judge McGinnis's assignment until August 13, 2013. The circuit court ultimately denied the motions, and this appeal follows.

Mineau contends that all proceedings after the wrongful denial of his substitution request should be "invalidated," and the matter remanded "for a trial and further proceedings." Mineau alternatively asserts that, at a minimum, he would need to be resentenced because the court's authority to act under WIS. STAT. § 971.20 did not extend to sentencing. WISCONSIN STAT. § 971.20(9) provides: "Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail." Even were we to assume that Mineau's August 19, 2013 substitution request was both timely and his first such request, Mineau, by entry of his valid guilty plea, waived his right to seek relief on grounds the circuit court lacked authority over the proceedings.

"A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea."[3] ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Relevant to Mineau's argument, WIS. STAT. § 971.20(9) concerns the judge's competency to proceed, not the judge's jurisdiction. *See* ***State v. Damaske***, 212 Wis. 2d 169, 188-89, 567 N.W.2d 905 (Ct. App. 1997). Thus, a defendant's statutory right of substitution may be waived by a valid guilty plea. Mineau does not contest the validity of his plea; therefore, his challenge to the circuit court's authority to proceed is deemed waived.

Mineau nevertheless argues he could not waive his right to substitution and the denial of his substitution request was not harmless error, citing ***State v. Harrison***, 2015 WI 5, 360 Wis. 2d 246, 858 N.W.2d 372. ***Harrison***, however, is materially distinguishable on its facts. There, after a circuit court judge was properly substituted and a new judge appointed, the original judge returned to the defendant's case to preside over the trial, sentencing, and postconviction motions. ***Id.***, ¶6. Our supreme court held that under those circumstances, the circuit court erred and the defendant did not forfeit his statutory right to peremptory substitution of the judge. ***Id.***, ¶8. The court further determined that harmless error analysis does not apply when the circuit court presides over a defendant's trial, sentencing, and postconviction motions after a timely and proper substitution request was granted and a new judge appointed. ***Id.***, ¶9. In the instant case,

[3] The recognized exceptions to the guilty-plea waiver rule do not apply to the facts of this case. *See* WIS. STAT. § 971.31(1) (statutory exception for orders denying suppression motions); *see also* ***State v. Kelty***, 2006 WI 101, ¶38, 294 Wis. 2d 62, 716 N.W.2d 886 (recognized exception for double jeopardy claims that can be resolved based on record as it existed at the time defendant pled).

Judge McGinnis did not preside over the case after a request for substitution was granted and another judge appointed. Mineau's reliance on ***Harrison*** is therefore misplaced.

Mineau alternatively contends his replacement trial counsel was ineffective by failing to present evidence that neither Attorney Hogan nor Mineau had notice of Judge McGinnis's assignment until August 2013, thus establishing the timeliness of Mineau's substitution request. To establish ineffective assistance of counsel, Mineau must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Mineau must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

In a pro se motion for substitution, filed November 15, 2013, Mineau indicated that he could produce Attorney Hogan "as witness, that I was not given notice of reassignment." In denying the substitution request, the circuit court reiterated the original substitution request was untimely under WIS. STAT. § 971.20(5), based on the date notice of the judge's assignment was sent to the attorneys of record. At the postconviction motion hearing, Attorney Heather Richmond, Mineau's last appointed trial counsel, testified that further requests for substitution of Judge McGinnis on the same basis that Mineau had already asserted would have been "frivolous" because the court had repeatedly ruled against Mineau. Counsel is not deficient for failing to raise a meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Even assuming trial counsel was somehow deficient by failing to present evidence relevant to the timeliness of Mineau's August 19 substitution request, Mineau fails to demonstrate a reasonable probability that, but for counsel's errors, he would have foregone the plea agreement in favor of trial. Pursuant to the plea agreement, Mineau received the benefit of having three counts against him dismissed. To the extent Mineau contends he was prejudiced at sentencing, a defendant who complains that he was not allowed to substitute a judge who sentenced him must show that, regardless whether a new judge might have imposed a more lenient sentence, the sentence imposed by the original judge was unfair. *See* ***Damaske***, 212 Wis. 2d at 199-200. Mineau fails to make such a showing as the sentence imposed was well within the maximum permitted by law. Any claim that he would have received a more lenient sentence from a different judge is mere speculation. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation is insufficient to satisfy the prejudice prong of ***Strickland***). Mineau has not established that he was prejudiced by any claimed deficiency on the part of trial counsel and we reject his ineffective assistance claim.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals