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DISTRICT I/II

August 2, 2017

To:

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

2016AP1359-CR	State of Wisconsin v. James D. Marshall (L.C. # 2015CF1552)
2016AP1360-CR	State of Wisconsin v. James D. Marshall (L.C. # 2015CF426)
2016AP1361-CR	State of Wisconsin v. James D. Marshall (L.C. # 2014CF5700)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated appeals, James Marshall appeals from judgments convicting him on his guilty pleas of physical abuse of a child, intimidation of a witness, and two counts of

misdemeanor battery. He also appeals from circuit court orders denying his motion to withdraw his guilty pleas.¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).² We affirm because the circuit court properly exercised its discretion when it concluded that the postconviction motion did not warrant a hearing.

At his plea hearing, Marshall agreed that the criminal complaints provided a factual basis for his guilty pleas. Marshall admitted that he physically abused a child as alleged, his conduct satisfied the elements of the crime, he engaged in conduct that constituted two counts of battery, and he intentionally engaged in conduct with the goal of intimidating a witness (the victim).

At sentencing, defense counsel stated that Marshall had just reviewed material that counsel characterized as a recantation by the victim.³ During the hearing, counsel conferred with Marshall and stated on the record that Marshall wanted to continue with sentencing. Defense counsel asserted that Marshall took responsibility for his conduct. During allocution, Marshall took responsibility for some aspects of his conduct. The circuit court found that Marshall had minimized his conduct, and he was completely responsible for his conduct and its effect on the victim and related persons.

¹ The Honorable Lindsey Canonie Grady entered the judgments of conviction. The Honorable Jeffrey A. Kremers entered the postconviction orders.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

³ The record suggests that this material, dated January 2015, existed several months before Marshall's June 2015 plea hearing. Marshall contends that he did not learn about this material until his July 2015 sentencing hearing.

Postconviction, Marshall moved to withdraw his guilty pleas because the material he reviewed with counsel at the time of sentencing constituted recantation by the victim. Marshall alleged “that he was not advised that he could attempt at this time to withdraw his pleas and that at the time of his plea it was not knowing or voluntary.” Marshall wanted to withdraw his pleas because he proceeded “to sentencing without being properly advised of his right to withdraw his pleas.”

Applying the manifest injustice standard to Marshall’s postsentencing plea withdrawal motion, the circuit court denied the motion without a hearing. The circuit court assumed that trial counsel was deficient for failing to advise Marshall about his plea withdrawal options. However, the court concluded that the postconviction motion was insufficient because Marshall neither explained how the victim’s statement would have affected his decision to accept a beneficial plea agreement (dismissal of seven of ten charges against him) nor alleged that he would have pursued a plea withdrawal motion based on the victim’s statement. The court concluded that the motion did not make the necessary allegations to support the prejudice prong of Marshall’s ineffective assistance of counsel claim. Because the motion was insufficient, the circuit court denied it without a hearing. Marshall appeals.

A circuit court has discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).⁴

Ineffective assistance of trial counsel is a basis for plea withdrawal. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). An ineffective assistance of trial counsel claim has two prongs: counsel provided deficient performance and the defendant was prejudiced by that performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required on such a postconviction claim when the defendant presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶12. A proper motion should present the “who, what, where, when, why, and how” with sufficient particularity for the court to meaningfully assess the claim. *Id.*, ¶23.

On appeal, Marshall argues that his postconviction motion established grounds for a hearing on his plea withdrawal request because his trial counsel did not advise him that the late-received alleged recantation could be a basis for seeking plea withdrawal.

The State counters that Marshall had to allege more in his postconviction motion, i.e., that had he reviewed the victim’s statement before he entered his pleas, he would have proceeded to trial. *State v. Dillard*, 2014 WI 123, ¶¶95-96, 358 Wis. 2d 543, 859 N.W.2d 44. We agree with the State that Marshall’s postconviction motion was insufficient for this reason. In addition, the motion did not allege any other facts supporting the prejudice prong of the ineffective

⁴ Because the postconviction motion was legally insufficient, we do not address Marshall’s argument that he should have been held to the fair and just reason standard for plea withdrawal because the error—allegedly being deprived of the victim’s recantation—occurred before he entered his guilty pleas.

assistance of trial counsel claim. For example, the motion does not allege that Marshall would have withdrawn his pleas had he been advised that such relief was available to him in light of the late-provided victim statement. Marshall only alleges that he did not know he had the plea withdrawal option. This allegation is not sufficient to warrant a hearing.

The circuit court properly exercised its discretion when it denied Marshall's postconviction motion without a hearing because the motion failed to allege facts relating to the prejudice prong of ineffective assistance of trial counsel that would, if true, entitle him to relief. *State v. Howell*, 2007 WI 75, ¶¶75-76, 301 Wis. 2d 350, 734 N.W.2d 48.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition will not be published.

Diane M. Fremgen
Clerk of Court of Appeals