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**DISTRICT IV**

August 3, 2017

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

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2015AP2205-CR State of Wisconsin v. Patrick X. Cooper (L.C. # 2014CF51)

Before Sherman, Blanchard and Kloppenburg, 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).**

Patrick Cooper, pro se, appeals an order that denied Cooper's motion to be relieved of sex offender registry requirements. Cooper contends that he was denied the right to the effective assistance of counsel at the time he pled guilty to soliciting a child for prostitution because his counsel advised him that he would be subject to a fifteen-year mandatory sex offender registration upon conviction. Cooper contends that, contrary to his counsel's advice, Cooper was not, in fact, subject to a mandatory fifteen-year sex offender registry requirement. Cooper argues

that he is entitled to withdraw his plea based on the ineffective assistance of his trial counsel. 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 (2015-16).[1] We summarily affirm.

In April 2014, Cooper pled guilty to soliciting a child for prostitution. He was sentenced to four years of initial confinement and four years of extended supervision. In January 2015, the circuit court held a hearing on Cooper's request to be removed from the sex offender registry and issued an oral ruling denying the request. In August 2015, Cooper moved the circuit court for a hearing to determine that Cooper is not required to comply with the sex offender registry requirements. *See* WIS. STAT. § 973.048(2m) (court shall order sex offender registration upon sentencing for specified offenses, including soliciting a child for prostitution, "unless the court determines, after a hearing on a motion made by the person, that the person is not required to comply under [WIS. STAT. §] 301.45(1m)." Cooper argued that he should not be subject to the sex offender registry requirement because the victim misrepresented her age and Cooper was unaware that his actions were unlawful. Cooper also asserted that he had no sex offender treatment needs. The circuit court held a hearing on the motion in September 2015, and denied the motion. In November 2015, the circuit court issued an order denying Cooper's motion to be relieved of the sex offender registry requirement.

On appeal, Cooper contends that he was denied the effective assistance of counsel when his counsel advised him that he would be subject to a mandatory fifteen years of sex offender

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

registration upon a conviction. He asserts that the information his counsel provided him was incorrect and caused him to plead guilty. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense). Cooper asserts that he was entitled to withdraw his plea or to a ***Machner***[2] hearing on his claim of ineffective assistance of counsel.

The problem with Cooper's argument, as a threshold matter, is that Cooper did not argue in the circuit court that Cooper was denied the effective assistance of counsel. Rather, Cooper's motion requested a hearing to determine that Cooper was not required to comply with the sex offender registration requirement pursuant to WIS. STAT. § 301.45(1m).[3] Nothing in the motion asserted that Cooper's counsel was ineffective. Moreover, the minutes of the motion hearings in the circuit court do not indicate that Cooper raised ineffective assistance of counsel, and the record contains no transcript of those hearings. Accordingly, Cooper did not properly preserve the issue for appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.")

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[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Cooper does not assert on appeal that he was not required to comply with the sex offender registry requirement pursuant to WIS. STAT. § 301.45(1m). Section 301.45(1m) provides an exception to the sex offender registry requirement for persons who were under nineteen years of age at the time of the underlying offense. That provision does not apply to Cooper.

Cooper asserts in his reply brief that he raised the issue of ineffective assistance of counsel at the hearing on his motion to be relieved of the sex offender registry requirement. Cooper contends that, at the hearing, he asserted that his trial counsel was mistaken in advising him that he would be subject to a mandatory fifteen-year sex offender registry requirement. Cooper asserts that he attempted to obtain a transcript but was unable to obtain the court reporter's name from the circuit court or this court.[4] Cooper asserts that a defendant's constitutional and statutory right to appeal a final order includes the right to receive a transcript necessary to pursue the appeal. Thus, Cooper asserts, he should not be faulted for his inability to obtain a transcript. We disagree.

Cooper does not cite any authority to support his claim that he cannot be faulted for his inability to obtain a transcript. To the contrary, our supreme court has explained that "[t]he party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court," even if the appeal is from a criminal conviction. ***Id.*** Moreover, we have held that the appellant has the burden to include any necessary transcripts in the record on appeal, and that if the appellant fails to include a necessary transcript, we will assume that the missing transcript supports the circuit court's decision. *See* ***Manke v. Physicians Ins. Co. of Wisconsin, Inc.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40.

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[4] We issued an order on December 28, 2015, that informed Cooper of the names of the court reporters as to the two motion hearings and extended the time for Cooper to file his brief to allow Cooper the opportunity to obtain any necessary transcripts. On February 24, 2016, we issued an order that granted Cooper's motion to extend the time to file the appellant's brief because Cooper was still attempting to obtain transcripts. We noted that Cooper indicated that he had not made arrangements for payment of the transcripts, and informed Cooper that the circuit court determines whether a defendant is entitled to waiver of transcript fees. We extended the time for filing the appellant's brief to allow Cooper the opportunity to seek a waiver of transcript fees and obtain transcripts.

Additionally, Cooper has not asserted on appeal that he actually made a prima facie showing in the circuit court that he was denied the effective assistance of counsel at the time he entered his plea. Rather, Cooper asserts only that he stated at the motion hearing that his trial counsel provided him with incorrect information that he would be subject to a fifteen-year mandatory sex offender registry requirement upon conviction. That is, Cooper does not assert that he stated at the motion hearing that he would not have entered a plea had his counsel provided him with different information. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) ("[T]o satisfy the prejudice prong of the ***Strickland*** test, the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" (quoted source omitted)). Cooper does not assert that he explained in the circuit court why he would have insisted on a trial had he received different information as to the sex offender registry requirements, nor does he provide such an explanation on appeal. *See* ***id.*** at 313 ("A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.").

Finally, in the reply brief, Cooper asks this court to review his ineffective assistance of counsel claim in the interest of justice. He cites ***Vollmer v. Luety***, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990), for the proposition that this court may reach unpreserved issues when justice has probably miscarried in a case. At the outset, we generally do not consider arguments raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). In any event, we decline to exercise our discretion to reverse in the interest of justice. We do so only under exceptional circumstances, which are not demonstrated here. *See* ***Vollmer***, 156 Wis. 2d at 11.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

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*Diane M. Fremgen*
*Clerk of Court of Appeals*