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August 23, 2017

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

2016AP1468-CR State of Wisconsin v. Dynzel E. Jones (L.C. #2013CF5381)

Before Reilly, P.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).

Dynzel Jones appeals his judgment of conviction and the denial of his motion for postconviction relief.[1] He seeks to withdraw his plea on the basis that his trial counsel provided

[1] The Honorable Timothy G. Dugan entered judgment and the Honorable Ellen R. Brostrom denied the motion for postconviction relief.

him ineffective assistance. Based on 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).[2] Because we conclude Jones' trial counsel did not perform ineffectively, we affirm.

Jones was charged with two counts of attempted first-degree intentional homicide while armed, felon in possession of a firearm as a repeater, and felony bail jumping. As a result of plea negotiations, Jones ultimately pled to two counts of first-degree recklessly endangering safety while armed and the felon in possession of a firearm charge. The bail jumping count was dismissed and read in. As part of the negotiations, the State agreed to recommend at sentencing a "lengthy term" but "not to name a specific number." Jones' counsel recommended a sentence of five to six years in prison concurrent with a prior sentence he was serving. The circuit court sentenced Jones to twenty years' initial confinement and fifteen years of extended supervision consecutive to the prior sentence. Jones moved for postconviction relief, arguing his trial counsel provided him ineffective assistance. The court held a ***Machner***[3] hearing, at which Jones, his trial counsel, a De Marco As-Saffat, and a Cedric Ford testified. The court denied Jones' postconviction motion and Jones appeals.

"To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice, that is, that there are 'serious questions affecting the fundamental integrity of the plea.'" ***State v. Dillard***, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44 (citation omitted).

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

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The "manifest injustice" test "is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To succeed on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and the deficiency prejudiced him/her. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). If the defendant fails to prove one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). We will uphold the factual findings of the trial court unless they are clearly erroneous, ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); however, whether counsel's performance was deficient or prejudicial is a question of law we review de novo. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

Jones first claims his trial counsel performed ineffectively because he "materially misrepresented the consequences of the guilty pleas" to Jones. Jones insists counsel "unequivocal[ly] promise[d]" him that "if he pled guilty the trial court would sentence him to seven years of initial confinement, suspended," and further states counsel told him that if he wanted this deal he would have to answer "yes" to the questions from the court. He asserts his counsel's "promise" "pushed [him] over the edge into a guilty plea." As support, Jones points to his own postconviction testimony and that of De Marco As-Saffat stating that trial counsel met with Jones in the "bullpen" and promised Jones "seven years." Jones also contends his "seven year" assertion is supported by a document counsel signed postsentencing. As introduced at the postconviction hearing, the document was titled "Affidavit" at the top and had words purporting to indicate that counsel told Jones that his sentence "wouldn't exceed 7 years."

At the ***Machner*** hearing, trial counsel testified that he never gave Jones any assurance that Jones would receive a sentence of seven years:

> I've been doing this for 33 years and I would never tell a client that his sentence wouldn't exceed seven years, because it's impossible, because the judge has the final discretion in any say-so. So I can't tell a client what a judge is going to do. That's ludicrous.
>
> ….
>
> [O]ur conversations were that I felt that seven years would be the least amount of time that he would get.

Counsel later reiterated the point:

> [State:] And did you tell Mr. Jones that you thought seven was a possibility?
>
> [Counsel:] Yes.
>
> [State:] Did you tell Mr. Jones that he would get a sentence of seven years?
>
> [Counsel:] Absolutely not. I told him seven, in my opinion, would be the minimum amount of time that he could receive. That's what I told him. I said anything outside of that, I just couldn't see it happening. Because he didn't want to hear the number ten. He was like, "No, no, no, no, I don't want to hear [the prosecutor] tell the judge ten. I don't want to hear that." So our option was free to argue, and I did the best I could.

With regard to the document signed by trial counsel postsentencing, counsel acknowledged signing the paper at issue but testified that when he signed it, it did not contain the word "Affidavit" on it and it had no reference in it to Jones receiving a sentence that did not exceed "seven years." Counsel implied that those portions of the document must have been added to it some time after counsel signed it.

Jones testified at the hearing that counsel repeatedly promised him he would not get a sentence in excess of seven years "stayed." He also testified that he drafted the "Affidavit" document and nothing was ever added to it after counsel signed the paper. As-Saffat testified that while awaiting trial on his own case, he was in the court's "bullpen" with Jones and Jones' counsel on June 23, 2014. As-Saffat stated he overheard counsel assure Jones that he secured

Jones a seven-year sentence, specifically that counsel indicated he had "made a deal with the judge for seven years."

Cedric Ford testified that he had a conversation with one of the State's witnesses in Jones' case at one prison and another conversation with another of the State's witnesses at another prison. Ford stated that the first witness told him that "even though he knew Mr. Jones had nothing to do with the situation," he "was going to fabricate a bunch of stories about Mr. Jones" and implicate Jones in the shooting in order to try and secure a better deal for himself in a federal criminal case he had pending. With regard to the second witness, Ford testified that the witness yelled to him from within the prison that he had already told "them people" that Jones had nothing to do with "it."

Jones' postconviction counsel, the same counsel representing him on appeal, acknowledged at the end of the postconviction hearing that if the postconviction court did not find credible the testimony of Jones and his witnesses but believed the testimony of Jones' trial counsel, then there was no issue. That is precisely what happened. After listening to all the witnesses over two days, the court concluded, "[T]his is a totally incredible story, I don't buy it"; the court believed the testimony of trial counsel and "not the testimony of [Jones] or the other two … witnesses."

The postconviction court found counsel's testimony to be credible and stated that it did not believe counsel would put his reputation and ability to practice law at risk by "by allegedly engaging in behavior that, frankly, I don't think any criminal defense attorney would engage in," and the court did not believe counsel had engaged in. The court added:

> [Counsel] knows Judge Dugan is a very strict sentencer. He knows he cannot tell the Defendant that he got a deal. That he can guarantee him what he's going to get. And, in fact, his assessment of the gravity of this case in light of the Defendant's prior convictions that a stayed sentence or probationary sentence was really ridiculous is absolutely accurate for the gravity of the offense and particularly with Judge Dugan.
>
> I don't know if there's any judge that would have granted probation under those circumstances, but anybody who knows Judge Dugan and … Toran certainly does and knows that and never would have promised that to the Defendant.

The court noted that it had read the sentencing transcript and that counsel had argued for five or six years concurrent "and then some stayed time after that. But he argued upfront for upfront prison." The court found that "there is no way that he ever promised him absolutely he would get an imposed and stayed sentence."

The postconviction court provided some additional reasons for why it found trial counsel's postconviction testimony to be credible and the story of Jones and his witnesses to be incredible. Because the court observed counsel to be "a very big man" who would have difficulty "getting up off the ground," it did not believe the testimony of both Jones and As-Saffat that counsel had sat cross-legged on the ground in the "bullpen" at the time he was allegedly assuring Jones of the "seven years stayed" deal he secured for Jones from "the judge." The court also noted that "[t]he first thing [witness As-Saffat] wanted to do was challenge me when I was trying to get him to swear or affirm to tell the truth, despite the fact that he was willing to swear in his affidavit." The court also observed that in his testimony Jones "couldn't hardly answer a question that [the State] asked him. He could not answer them in a straightforward manner." Finding incredible the testimony of Jones and his witnesses, the court denied Jones' postconviction motion.

We find no error in the postconviction court's rejection of Jones' postconviction motion. To begin, we note that the sentencing transcript shows that Jones was in court with counsel at sentencing when counsel asked the sentencing court to impose upfront prison time on Jones of five to six years. It stretches the imagination to believe that counsel induced Jones to plead by promising him a sentence of seven years stayed, and then argued at sentencing for upfront prison time of five to six years without Jones providing any indication at the time that something was awry.

Focusing more on the postconviction testimony, there was significant reason for the postconviction court not to believe the testimony of Jones, As-Saffat, and Ford. Jones had been sentenced to twenty years of initial confinement and fifteen years of extended supervision, and thus had significant incentive to say anything that might help him secure a new trial. Furthermore, he acknowledged having nine criminal convictions, providing the court with additional reason to doubt his truthfulness. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991) (noting that "the longstanding view in Wisconsin [is] that 'one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted'" (citation omitted)). Also, while Jones testified at the postconviction hearing that he only said "yes" to the circuit court's questions at his plea hearing because trial counsel told him to do so in order to secure a seven-year stayed sentence, this testimony amounted to an acknowledgement that Jones was willing to say to a court whatever was necessary in order to try to lessen his sentence, as opposed to answering questions truthfully. Relatedly, Jones' very position in his postconviction effort was that he lied when he answered "no" to the court at his plea hearing when the court asked him if any promises had been made to him in order to get him to plead to the charges before the court. Jones also admitted at the postconviction hearing to telling law enforcement in a debriefing prior to his plea that he committed the crime in this case; yet Jones testified at the hearing that he did not commit the crime but only told law enforcement that he did

in order to "get the sentence that I was promised." After being pressed in questioning by the State, Jones finally stated that he had told law enforcement "a lie," and further acknowledged telling law enforcement other lies about crimes implicating other individuals: "All of it was a lie."

With regard to the document signed by trial counsel postsentencing, Jones admitted in his testimony that the document was sent back to him after counsel signed it, thus confirming that Jones would have had the opportunity to alter it after counsel signed it. While Jones insisted in his postconviction testimony that "[e]verything that is on there now is the same thing that was on there" when counsel signed it, counsel definitively testified that it must have been altered after he signed it because at the time he signed it the document did not state "Affidavit" on it and also made no reference to "seven years." Counsel added that "[i]f it had had 'affidavit' on it, then I would have never … signed it because an affidavit has to be sworn to. So, I mean, I'm a notary. I mean, only a buffoon would sign an affidavit without a notary, and I'm far from a buffoon." The postconviction court was entitled to believe trial counsel's testimony over Jones'.

As-Saffat testified that he became reacquainted with Jones while they were incarcerated together at Columbia Correctional Institution, and they both received "lengthy" sentences from the same judge. He also provided the postconviction court with reason to question the veracity of his testimony. For example, when the judge herself attempted to swear As-Saffat in for his testimony, asking: "Do you solemnly swear or affirm that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?" As-Saffat responded with "Is God in the courtroom?" While As-Saffat subsequently went on to affirm that he would tell the truth, his initial response gave the court reason to question the seriousness with which he took the proceedings and the oath to tell the truth. Second, As-Saffat testified that he had been convicted of seven crimes in the past, providing the court with more reason to doubt his truthfulness. *See* ***Kuntz***, 160 Wis. 2d at 752.

Jones' second claim is that his trial counsel performed ineffectively because counsel did not investigate statements by Cedric Ford, which Jones asserts "would have impeached two of the State's key witnesses." Jones testified that prior to his plea he told trial counsel he spoke to Ford's cousin and mother and both told Jones that Ford was telling them that two of the State's witnesses were not being truthful regarding Jones' involvement. It would be appropriate for us to simply not consider this claim because it is significantly undeveloped. *See* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments."). Moreover, the State asserts that Jones "does not back up his assertion that he would not have pled guilty if his counsel had investigated Ford's statement beyond a merely conclusory allegation that he would have still intended to go to trial." The State is correct; Jones fails to develop an argument to demonstrate that he would have rejected the favorable plea deal he received (having the two most significant charges reduced from two counts of attempted first-degree intentional homicide while armed to two counts of recklessly endangering safety while armed) and instead insisted on going to trial if his counsel had communicated with Ford prior to the plea. *See* ***Bentley***, 201 Wis. 2d 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."). All that said, we ultimately resolve Jones' second claim on the basis that the postconviction court did not believe Jones' or Ford's testimony to be truthful.

We have already discussed various reasons the postconviction court had for disbelieving Jones' testimony. As for the credibility of Ford, Jones testified that he and Ford had grown up together and their families knew each other. Ford testified at the postconviction hearing that Jones was his friend and they even wrote letters to each other while both were incarcerated at different prisons. The relationship between Jones and Ford provided the postconviction court reason to believe Ford would testify untruthfully, to help his longtime friend. Ford also admitted to having three prior criminal convictions.

In the end, Jones simply wishes the postconviction court had believed his testimony and that of his witnesses rather than the testimony of his trial counsel. But after listening to their testimony, the court believed counsel and not Jones or his witnesses. When the trial judge serves as the fact finder, "the trial judge is the ultimate arbiter of the credibility of the witnesses." ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). While Jones claims the postconviction court erred in its credibility determinations, appellate courts "consistently accept[] circuit court evaluations of the credibility of evidence when they consider plea withdrawals." ***State v. Kivioja***, 225 Wis. 2d 271, 289, 592 N.W.2d 220 (1999). "Such deference to the [circuit] court's determination of the credibility of witnesses is justified ... because of '... the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.'" ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (citation omitted). Here, the postconviction court directly observed the witnesses and found that trial counsel's testimony was believable and the testimony of Jones and his witnesses was not, and the record provides us with no basis to conclude the court erred in this determination. With the testimony of Jones and his witnesses rejected and the testimony of trial counsel accepted by the postconviction court, no basis remains upon which we could find counsel may have performed ineffectively.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals