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DISTRICT IV

December 26, 2017

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

2016AP2405-CR State of Wisconsin v. Kyle R. Lutz (L.C. # 2012CF427)

Before Sherman, Blanchard, and Fitzpatrick, 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).

Kyle Lutz, pro se, appeals a judgment of conviction and an order denying his postconviction motion for resentencing. 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 reject Lutz's arguments and affirm.

This case involves separate federal and state prosecutions that were brought after Lutz was discovered hiding in the bedroom of a friend's fourteen-year old daughter. The details of Lutz's crimes are not relevant to any issue in this appeal. What is relevant is that Lutz ultimately pleaded guilty to federal charges relating to the production of child pornography and a state charge of second-degree sexual assault of a child. Federal sentencing occurred first, and Lutz was sentenced to thirty years, including a fifteen-year mandatory minimum term of confinement. The federal court ordered Lutz's federal sentence to be served concurrently to any future state sentence.

At sentencing on the state charge, the circuit court determined that additional prison time was necessary in light of the gravity of Lutz's offenses, the need to protect the public, and the importance of close rehabilitative control over Lutz. Based on these considerations, the court imposed a fifteen-year sentence, including seven years of initial confinement and eight years of extended supervision, to be served consecutively to the federal sentence.

Lutz appealed, and his court-appointed attorney filed a no-merit report as well as a supplemental report. Lutz asked to discharge his attorney so that Lutz could pursue an issue that the attorney had determined lacked merit, and we granted his request. Lutz then filed a pro se postconviction motion requesting resentencing. He argued that the State had breached the plea

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

agreement and that his trial attorney was ineffective for failing to raise the issue of the State's breach at sentencing.

During the hearing on the postconviction motion, the circuit court explained that the record controverted Lutz's claim that the State had breached the plea agreement. Instead, the record demonstrated that the State had consistently expressed its intent to recommend a consecutive sentence. Nonetheless, the court was open to considering whether Lutz's trial counsel may have misinformed him about the State's sentencing recommendation. However, during the hearing, Lutz did not present any testimony to indicate that he was misled about the State's plan to advocate for a consecutive sentence. Instead, Lutz testified that his attorney told him that the attorney would "fight" to have the circuit court follow the federal court's lead by imposing a concurrent sentence. Lutz also testified that he wanted a new sentencing hearing so that he could present testimony from his father and grandmother. The circuit court denied Lutz's motion, explaining that the sentence imposed was well within the maximum for his offense and represented a proper exercise of discretion. Lutz now appeals the denial of his postconviction motion.

Lutz raises three issues in his opening brief. First, he argues that the circuit court should have appointed counsel to represent him during the evidentiary hearing on his postconviction motion. This argument goes nowhere because Lutz chose to discharge his attorney. There are two options for an indigent defendant who disagrees with the issues that appointed counsel has identified for appeal: (1) discharge the attorney and proceed without representation or (2) proceed with representation and later seek relief for ineffective assistance of appellate counsel. *See* ***State v. Evans***, 2004 WI 84, ¶31, 273 Wis. 2d 192, 682 N.W.2d 784, abrogated on other grounds by ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714

N.W.2d 900. Lutz chose the first option. Moreover, in discharging his attorney, Lutz expressly stated that he knew that he would be responsible for filing a postconviction motion, presenting evidence and argument, and arranging for the appearance of witnesses. *See* ***State v. Thornton***, 2002 WI App 294, ¶¶22-24, 259 Wis. 2d 157, 656 N.W.2d 45 (written submissions from a defendant can establish that a waiver of appellate counsel is knowing, intelligent, and voluntary).

Lutz does not argue that we erred in allowing him to discharge his appellate attorney. Instead, he contends that the circuit court should nonetheless have appointed counsel for the hearing on Lutz's postconviction motion. We see no indication that Lutz ever asked the circuit court to appoint a new attorney. We generally avoid addressing issues that were not raised in the circuit court. *See* ***State v. Dowdy***, 2012 WI 12, ¶43, 338 Wis. 2d 565, 808 N.W.2d 691 (citation omitted). But regardless of whether Lutz raised the issue, the record establishes that Lutz had already waived his right to counsel when he opted to terminate appellate representation with the express knowledge that he would not be represented in postconviction proceedings.

The second issue identified by Lutz is the circuit court's decision to impose a sentence that was consecutive to his federal sentence, notwithstanding the federal court's intent that the sentences be concurrent. Lutz contends that federal law prohibits a state from imposing a consecutive sentence in these circumstances. *See* ***Setser v. United States***, 566 U.S. 231 (2012). Lutz is mistaken in his reading of ***Setser***. There, the United States Supreme Court considered whether a federal district court has authority to impose a sentence that will be served consecutively to an as-yet unimposed state sentence. ***Id.*** at 233. But nothing in ***Setser*** helps Lutz establish that a state court is bound by a federal court's determination regarding how a state sentence should be imposed. To the contrary, the decision underscores state courts' sovereign role in administering each state's criminal justice system. *See* ***id.*** at 241 ("In our American

system of dual sovereignty, each sovereign—whether the Federal Government or a State—is responsible for 'the administration of its own criminal justice system.'") (quoted source omitted). The circuit court therefore did not err in exercising its sentencing authority independent of the federal court.

Third, Lutz argues that the circuit court erroneously exercised its discretion because it did not permit him to call additional witnesses at the hearing on his postconviction motion. Lutz provides no record citations to support this argument. As best we can tell, Lutz attempted to call one witness at the hearing—his grandmother. Lutz called her to testify immediately after the court had sworn in Lutz to give his own testimony. The court responded that it would determine whether to allow additional witnesses after hearing Lutz's testimony. Lutz subsequently conceded that testimony from his family members was not relevant to the issue of whether his sentence should be concurrent or consecutive to the federal sentence.[2] We see no indication that Lutz made any further attempt to call witnesses. To the contrary, even when the circuit court gave Lutz an opportunity to raise any other issue for the record, Lutz declined to do so.

Lutz contends that his initial exchange with the circuit court discouraged him from attempting to call any additional witnesses, including his trial attorney. At the outset, we cannot conclude that the circuit court erroneously exercised its discretion when the court was never given the opportunity to exercise its discretion in the first place. But even if Lutz had made an attempt, we see no developed argument from Lutz that the court erroneously exercised its

[2] In his reply brief, Lutz argues that the circuit court should not have accepted this concession. He points to his written offer of proof submitted before the hearing, in which he contended that his father and grandmother would both offer testimony that the State had breached the plea agreement. Even if we (continued)

discretion in not allowing additional testimony. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review arguments lacking in legal reasoning and only supported by general statements).

In his reply brief, Lutz argues for the first time that he should be allowed to withdraw his guilty plea because it was premised on his belief that the circuit court would follow the federal court's intent that the sentences be concurrent. We do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Moreover, this argument is contradicted by Lutz's response to the circuit court during the postconviction hearing, when Lutz expressly confirmed that he was seeking a new sentencing hearing and not plea withdrawal. We decline to consider a form of relief that Lutz expressly disavowed. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

Upon the foregoing reasons,

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were to overlook Lutz's concession, nothing in this written offer of proof convinces us that the circuit court erred in denying Lutz's postconviction motion.

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.

Diane M. Fremgen
Clerk of Court of Appeals