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DISTRICT II

May 23, 2018

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Circuit Court Judge
Waukesha County Courthouse
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Waukesha, WI 53188

Hon. Michael P. Maxwell
Waukesha County Courthouse
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2017AP1553-CR State of Wisconsin v. Shawn T. Witt (L.C. #2014CF106)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

Shawn T. Witt appeals from a judgment of conviction and an order denying his postconviction motion alleging ineffective assistance of 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 affirm the denial of Witt's postconviction motion as Witt showed no prejudice from any alleged deficient performance. The circuit court did not erroneously exercise its discretion in denying an evidentiary hearing.

Witt lived with his father, J.W. On January 21, 2014, following an argument, Witt assaulted J.W. and was charged with battery and disorderly conduct. A restraining order was issued, prohibiting Witt from having contact with his father. Later that day, Witt went back to the house and shot J.W., killing him. Shortly afterwards, Witt withdrew money from his father's bank account and purchased heroin. The State charged Witt with eight additional counts, including first-degree intentional homicide, possession of narcotic drugs, theft, violating a restraining order, and bail jumping.

After defense motions to suppress evidence were denied and several other pretrial proceedings were held, the parties reached a plea agreement. Witt would plead no contest to second-degree intentional homicide, use of a dangerous weapon, as a domestic abuse repeater, and the State would recommend the maximum sentence. The State would also dismiss and read in the remaining seven counts, as well as the charges for battery and disorderly conduct.

Throughout most of the pretrial proceedings, Witt's appointed counsel was Attorney Donna Kuchler. However, Kuchler sent her law partner, Attorney Anthony Cotton, to handle the plea hearing.

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

At the plea hearing, the circuit court asked Witt whether he had any objection to Cotton representing him, to which Witt stated that he did not. The court inquired further, eliciting the following information. Witt met with Kuchler eight days before the hearing and they reviewed and signed the plea questionnaire and waiver of rights. During that meeting, Witt had sufficient time to discuss his case and the plea agreement with Kuchler, and she answered all of his questions. She told him that Cotton would handle the plea hearing. Witt was "very" satisfied with Kuchler's representation up to that point. Although Witt had met Cotton for the first time before the plea hearing, he had sufficient time to discuss his case with Cotton and was "very" satisfied with Cotton's representation up to that point as well.

The court proceeded to take Witt's plea. The court asked Cotton why Witt was entering a no contest plea. At first, Cotton stated that he did not know, but then expressed his belief that it was because of the potential for civil liability. Later in the plea colloquy, the court asked Witt whether he had any difficulty understanding the plea questionnaire, to which Witt responded, "No, I did not." Witt also denied having any trouble communicating with either Kuchler or Cotton. Because Witt was taking medications, the court asked him whether his medications affected his understanding of the proceedings, and Witt replied, "No, your honor" and also confirmed that he had been receiving his medications while in jail. Witt acknowledged that he understood what the maximum sentence was for the charge to which he planned to plead no contest, that the State planned to recommend the maximum, and that the court was not bound by the terms of the plea agreement, and Witt then stated that he wished to proceed. The court determined that Witt's no contest plea was knowing, intelligent, and voluntary and accepted it.

At the sentencing hearing, the State recommended the maximum, focusing on Witt's premeditation and lack of remorse. Kuchler represented Witt at this hearing. She indicated that

Witt suffered from symptoms of schizophrenia and that his deteriorating mental health was a substantial factor for his crime. She contended that Witt loved his father, was a caregiver for his father, suffered from a drug addiction, was employed for most of his life, and had a minimal criminal record. She also indicated that Witt was remorseful, noting that he had entered a guilty plea. When the court corrected her, she acknowledged that Witt had entered a no contest plea for civil liability reasons, but asserted that it was a "no contest knowing he would be found guilty." Kuchler recommended fifty years' imprisonment, consisting of twenty years' initial confinement and thirty years' extended supervision. After the court pointed out that it could not impose more than twenty years' extended supervision, Kuchler corrected her recommendation to forty years' imprisonment, consisting of twenty years each of initial confinement and extended supervision.

The court imposed the maximum sentence: sixty-seven years' imprisonment, consisting of forty-seven years' initial confinement and twenty years' extended supervision. The court heavily relied on Witt's lack of remorse—specifically, that he intentionally killed his father and then went about his life like nothing was wrong. The lack of remorse indicated to the court that Witt had a "poor character" and reflected a strong need to protect the public. The court considered Witt an "exceptionally dangerous person." The court determined that anything less than a maximum sentence would unduly depreciate the seriousness of the offense and place the public at risk.

Via a postconviction motion, Witt sought plea withdrawal or, alternatively, resentencing, based on claims of ineffective assistance of counsel. He argued that he received ineffective assistance at the plea hearing because Cotton met with Witt for the first time on the day of the hearing, and Cotton never discussed the plea questionnaire, the elements of the crime, the State's recommendation for a maximum sentence, and the rights that he would be giving up. He further

pointed out Cotton's hesitation when the court asked for the reasoning behind Witt's no contest plea. Witt claimed to be "deeply prejudiced" by Cotton's conduct.

Witt also contended that he received ineffective assistance of counsel at the sentencing hearing because Kuchler represented him despite having been absent from the plea hearing. He argued that Kuchler did not know "anything about the details of what had occurred at the plea hearing," she initially recommended an impermissible sentence, she did not know how old he would be once released from prison, and she did not discuss his mental health in greater detail. He again argued that he was "deeply prejudiced" by counsel's deficiencies.

The circuit court denied Witt's motion without an evidentiary hearing. The court determined that Witt failed to allege sufficient facts to demonstrate prejudice on either claim. It further reasoned that the record conclusively established that Witt was not prejudiced by any alleged deficiencies.[2] Witt appeals.

An evidentiary—or ***Machner***[3]—hearing is a prerequisite to a claim of ineffective assistance of counsel on appeal. ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). When no such hearing is held, we are precluded from reviewing counsel's performance. ***Id.*** Accordingly, we review the circuit court's decision to deny Witt's motion without a hearing. Whether a postconviction motion is sufficient to entitle a defendant to a hearing is a question of law which we review de novo. ***State v. Tucker***, 2012 WI App 67, ¶6,

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[2] The Honorable Michael O. Bohren presided over the pertinent proceedings until Witt's postconviction motion, at which point the Honorable Michael P. Maxwell was the presiding circuit court judge.

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

342 Wis. 2d 224, 816 N.W.2d 325. If the motion is insufficient, the circuit court has discretion to grant or deny a hearing. ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. A motion that contains only conclusory or speculative assertions unsupported by the record is insufficient, and no hearing is required. ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996); *see also* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

We agree with the circuit court that Witt's motion was insufficient in that it offered no showing of prejudice. Although complaining that Cotton first met with Witt on the day of the hearing and did not discuss with Witt details of the case or the rights Witt was giving up, Witt's motion does not explain how those alleged deficiencies adversely affected his cause. Similarly, while complaining that Kuchler did not know any of the plea hearing details and had initially recommended an impermissible sentence, Witt's motion fails to explain why those alleged deficiencies worked to his disadvantage.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that a defendant has not proved one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697. To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

Witt fails to present any nonconclusory allegations of prejudice. He asserts no specifics, for example, as to how or why Kuchler's or Cotton's performance prior to his plea prejudiced

him, such that absent their errors he would not have pled and instead insisted on going to trial. He fails to show how additional time with Cotton would have resulted in a better outcome at the plea hearing, especially after Witt acknowledged that Kuchler had already gone over all of the plea agreement details with him. Moreover, he fails to allege how or why his attorneys' representation prejudiced him given that he repeatedly affirmed to the court that he had sufficient time to discuss the case with his attorneys, received a sufficient explanation of the plea, had time to consider the terms, understood the terms, was satisfied with both attorneys' representation, and his decision was not impacted by any medications. Witt specifically stated that he had no issue with Cotton representing him. He makes no claim that his plea was not knowing, voluntary, and intelligent.

He likewise asserts no specifics as to how there is a reasonable probability that his sentence would have been less severe had Kuchler known about the plea hearing details or had not initially proposed an erroneous sentence recommendation, which she subsequently corrected. Witt also fails to address the circuit court's thorough and well-reasoned decision for the sentence imposed—a failure noted by the circuit court in denying the postconviction motion. Without any specifics or explanations, Witt's claims that the deficient performances of both counsel prejudiced him are mere unsupported conclusions. The circuit court properly exercised its discretion in denying the postconviction motion without an evidentiary hearing.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court denying Witt's postconviction motion

alleging ineffective assistance of trial counsel and the judgment of conviction are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals