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June 14, 2018

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

2017AP2509-CR State of Wisconsin v. Jose Miguel Correa, Jr. (L.C. # 2016CF4108)

Before Brennan, Brash and Dugan, 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).

Jose Miguel Correa, Jr., appeals from a judgment, entered upon his guilty pleas, convicting him on one count of possession of a firearm by a felon and one count of disorderly conduct. Correa also appeals from an order denying his postconviction motion to withdraw his pleas. 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] The judgment and order are summarily affirmed.

According to the criminal complaint, Correa and his live-in girlfriend, R.W., were arguing. Correa became increasingly angry, aggressive, and violent. At one point, Correa pushed R.W., then pulled out a revolver that he pointed at her head while saying, "I don't give two shits about it, I will kill you." Police were dispatched to the home. When they arrived, Correa admitted to yelling and being verbally aggressive. The gun was not recovered at the time; however, police located a loaded handgun concealed in a bag in the residence the next day, and R.W. identified it as the gun Correa had pointed at her.

Correa was charged with one count of possession of a firearm by a felon, one count of endangering safety by use of a dangerous weapon, and one count of disorderly conduct, with a habitual criminal enhancer on all three offenses and a domestic abuse modifier on the second and third counts. Correa ultimately pled guilty to possession of a firearm by a felon and disorderly conduct. The enhancers and the modifier were dismissed from those two counts, and the endangering safety charge was dismissed and read in. The circuit court sentenced Correa to ninety days in the House of Correction on the disorderly conduct, concurrent with six years of imprisonment for the firearm possession, consecutive to any other sentence.

Correa filed a postconviction motion seeking to withdraw his pleas, claiming ineffective assistance of trial counsel. Correa claimed "trial counsel gave him unreasonable advice," telling him he had no chance of winning, which caused Correa to enter his pleas "out of fear … rather

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

than in a knowing, voluntary and intelligent way." Correa also attacked the factual basis for his pleas, alleging certain facts that he thinks caused his case to "drip with reasonable doubt."

The circuit court denied the motion without a hearing. It noted that Correa's guilty pleas meant he had surrendered the right to put the State to its proof. It further determined that, under the circumstances, trial counsel's advice was not unreasonable. Correa appeals.[2]

A defendant seeking to withdraw a guilty plea after sentencing must prove, by clear and convincing evidence, that refusing to allow plea withdrawal will result in manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. "Ineffective assistance of counsel is one type of manifest injustice." ***State v. Ortiz-Mondragon***, 2015 WI 73, ¶28, 364 Wis. 2d 1, 866 N.W.2d 717.

The mere assertion of a claim of manifest injustice does not automatically require a hearing or entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Allen***, 274 Wis. 2d 568, ¶14. "[T]he facts supporting plea withdrawal must be alleged in the [motion] and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing." ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Whether the postconviction motion

[2] Correa also moved for sentence modification, seeking to have the sentences in this case run concurrent to any other sentence rather than consecutive and seeking eligibility for the challenge incarceration and substance abuse programs. The circuit court denied sentence modification, but Correa does not challenge that portion of the circuit court order on appeal.

alleges sufficient material facts within its four corners is a question of law that we review *de novo*. ***Allen***, 274 Wis. 2d 568, ¶¶9, 27.

A defendant alleging ineffective assistance must show both that counsel performed deficiently and that the deficiency was prejudicial. ***Id.***, ¶26. "[A]n attorney's performance is deficient if the attorney 'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" ***Id.*** (one set of quotation marks and citation omitted). If a defendant fails to show deficient performance, we need not consider prejudice. *See* ***Ortiz-Mondragon***, 364 Wis. 2d 1, ¶32.

In his postconviction motion, Correa claimed he never possessed the firearm in question and is "legally and factually innocent" of the charges originally filed. He alleged several facts he believes support his innocence: (1) no weapons were found on Correa at the time of his arrest; (2) although found in his house, the gun was found in a man's shoe belonging to someone else, as the shoe was a different size than Correa wears; (3) the weapon was found after he was already in jail; (4) he did not know the gun was in his home; and (5) neither his DNA nor his fingerprints were found on the gun. Based on these alleged facts, Correa alleged that "trial counsel gave him unreasonable advice … telling him he had no chance of winning and that he would end up with significant prison time," which caused him to enter guilty pleas.

Correa's claim of deficient performance by trial counsel is conclusory, self-serving, and refuted by the record. During the plea colloquy, Correa admitted that the criminal complaint provided a sufficient factual basis for his pleas, and the only part of the complaint he disputed was the threat attributed to him by R.W.; he did not dispute possessing the gun. At sentencing, Correa told the court he had the gun for protection. Though Correa averred he was "unable to

help" with his case because of post-traumatic stress disorder and schizophrenia, he does not allege that these disorders caused him to lie twice to the circuit court.

Further, as the circuit court noted in its order denying the postconviction motion, Correa had admitted to police that he was yelling and being verbally aggressive, leaving him with little or no defense to the disorderly conduct charge; the gun was found concealed in Correa's residence; R.W. identified the gun as the one Correa pointed at her head; and the lack of DNA or fingerprint evidence is not dispositive. In light of those facts, plus Correa's prior admissions to the circuit court, Correa's ability to point to some facts in this postconviction motion that may suggest his innocence does not, by itself, suffice to show that counsel was deficient for concluding Correa was unlikely to prevail at trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 689 (1984) ("There are countless ways to provide effective assistance in any given case."); *see also* ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272 ("[A] lawyer has the right and duty to recommend a plea bargain if he or she feels it is in the best interests of the accused.").

Indeed, our supreme court has suggested, as a guide to adequate pleading, that postconviction motions should allege "who, what, where, when, why, and how." *See* ***Allen***, 274 Wis. 2d 568, ¶23. Here, Correa has utterly failed to allege *why*: that is, why it was deficient for

trial counsel to conclude that he "had no chance of winning," particularly in light of Correa's admissions and the established facts of record.[3]

Because Correa's postconviction motion was conclusory and refuted by the record, the decision to grant or deny a hearing was a matter for the circuit court's discretion. *See* ***id.***, ¶9. We are satisfied discretion was properly exercised.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals

[3] The postconviction motion additionally fails to adequately allege prejudice—that is, while it contends that Correa's plea was not knowing, intelligent, and voluntary, the motion does not allege that there is a reasonable probability that, but for counsel's deficient performance, Correa would not have pled guilty and would have insisted on going to trial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).