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DISTRICT II

November 28, 2018

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

2018AP225-CR

State of Wisconsin v. Michael L. Hunter (L.C. #2014CF552)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Michael L. Hunter appeals from a judgment of conviction and an order denying his postconviction motion. He seeks to withdraw his no contest plea. 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.

Hunter went to trial on two counts of second-degree sexual assault of a child. In the middle of trial, he decided to enter a plea agreement. Accordingly, he pled no contest to the first count of second-degree sexual assault of a child, and the second count was dismissed and read in.

After sentencing, Hunter moved to withdraw his no contest plea. He maintained that his trial counsel had erroneously told him that his plea would not bar his ability to appeal several circuit court rulings.² Such advice would have been legally incorrect because a plea forfeits appellate review of nonjurisdictional claims of errors. *See State v. Kelty*, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

The circuit court held a hearing on the motion at which both trial counsel and Hunter testified. The court found credible trial counsel's testimony that he did not remember discussing with Hunter whether he could appeal the court's rulings if he entered a plea. By contrast, the court found not credible Hunter's testimony regarding the alleged misadvice. Accordingly, the court denied the motion. This appeal follows.

On appeal, Hunter renews his request to withdraw his no contest plea. A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that

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

² The rulings pertained to other acts evidence, Hunter's offer to take a polygraph test, rape shield evidence, and a motion for mistrial.

withdrawal is necessary to avoid a manifest injustice. See *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

One way to establish a manifest injustice is to demonstrate that the defendant received ineffective assistance of counsel. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. This requires the defendant to show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Id.*, ¶85.

Whether counsel's actions constitute ineffective assistance presents a mixed question of fact and law. *State v. Ortiz-Mondragon*, 2015 WI 73, ¶30, 364 Wis. 2d 1, 866 N.W.2d 717. We will uphold the circuit court's findings of fact and assessments of credibility unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel rendered constitutionally ineffective assistance is a question of law, which we review de novo. *Id.*

Here, we are not persuaded that Hunter has demonstrated that he received ineffective assistance of counsel. Again, to prove his claim, Hunter has to show that his trial counsel erroneously told him that his plea would not bar his ability to appeal several circuit court rulings. The circuit court found that no such conversation took place. That finding is not clearly erroneous. It is supported by trial counsel's testimony that he did not remember discussing the matter with Hunter. It is also supported by trial counsel's experience as a defense lawyer and familiarity with the plea forfeiture rule. As the court cogently explained, had trial counsel given Hunter this erroneous advice, it "would be at odds with his legal training and experience." In the end, the court reasonably found trial counsel more credible than Hunter and properly denied the motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court 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