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DISTRICT I

February 22, 2019

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

2017AP2077-CR State of Wisconsin v. Tudi Montejano (L.C. # 2014CF5219)

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).

Tudi Montejano, *pro se*, appeals the judgment, entered on his guilty pleas, convicting him of conspiring to deliver cocaine (more than forty grams) and heroin (more than fifty grams). *See* WIS. STAT. §§ 961.41(1)(cm)4., 961.41(1)(d)4., 939.31 (2013-14).[1] He also appeals the order

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

denying his postsentencing plea withdrawal motion.[2] Montejano's claims, which are based on the alleged ineffective assistance of his trial counsel, fail for a number of reasons: they consist of conclusory allegations; are contrary to the record; or do not constitute a basis for plea withdrawal. 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. We summarily affirm the judgment.

Background

A criminal complaint charged Montejano with three counts of conspiracy to deliver controlled substances: cocaine, heroin, and tetrahydrocannabinols. The complaint charging Montejano also charged five others with crimes. The charges stemmed from a long-term investigation of Wally Flores, who was identified as a large source of heroin and cocaine distribution in the Milwaukee area.

Montejano pled guilty to conspiring to deliver cocaine and heroin, and the remaining charge of possession with intent to deliver tetrahydrocannabinols was dismissed and read in for sentencing purposes. On the two charges, the circuit court sentenced Montejano to concurrent sentences of seven years and six months of initial confinement and seven years and six months of extended supervision.

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[2] The Honorable J.D. Watts presided over Montejano's plea and sentencing hearings and entered the judgment of conviction. The Honorable Janet C. Protasiewicz denied Montejano's motion for postconviction relief.

After sentencing, Montejano, *pro se*, sought plea withdrawal based on the alleged ineffective assistance of trial counsel. The postconviction court denied the motion without a hearing. Montejano now appeals.

Discussion

Postsentencing plea withdrawal lies within the discretion of the circuit court and "will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice." ***State v. Cross***, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64. Ineffective assistance of counsel constitutes a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482. To prove ineffective assistance, a defendant must prove that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

To prevail on an ineffective-assistance claim, the defendant must show that counsel's representation fell below an objective standard of reasonableness, ***id.*** at 688, and that a reasonable probability exists that, but for those 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.***

To be entitled to an evidentiary hearing, the defendant must, in the postconviction motion, "allege[] sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A circuit court may deny a hearing if the motion fails to allege sufficient facts to raise a question of fact, includes only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

On appeal we review ineffective assistance of counsel claims under a mixed standard of review. *See **State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. We uphold the circuit court's findings of facts unless they are clearly erroneous. *See **id.*** Whether trial counsel's performance was deficient and prejudicial to the defendant is a question of law we review *de novo*. *See **id.*** Whether the court properly denied an evidentiary hearing is reviewed for an erroneous exercise of discretion. *See **Allen***, 274 Wis. 2d 568, ¶34.

Montejano alleged that trial counsel was ineffective in seven ways: (1) she failed to share discovery with him and lied about its contents; (2) she failed to challenge his alleged statements to police on the basis that he was threatened by them to lie and say that he was selling drugs out of his grandparents' home; (3) against his wishes, she withdrew the motion she filed challenging his statements; (4) she failed to challenge the statements made against him by Flores, his co-defendant; (5) she, in conjunction with the police, repeatedly pressured him and threatened him to plead guilty; (6) she failed to challenge the sufficiency of the evidence; and (7) she failed to request a presentence investigation report (PSI). We will address each of Montejano's claims in turn.

(1) The record does not support Montejano's claim that trial counsel failed to share discovery and lied about its contents.

Montejano claims trial counsel did not provide him with a copy of discovery materials and deliberately lied to him about the information contained in police reports. He submits that trial counsel's alleged misrepresentation of material facts and withholding of information put pressure on him to plead guilty.

At the plea hearing, however, trial counsel told the circuit court she reviewed the discovery with Montejano multiple times, "pretty extensively," and Montejano confirmed that

this was accurate. When specifically asked if he reviewed the police reports with trial counsel, Montejano confirmed that he had done so.

According to Montejano, the evidence demonstrated that investigating police officers never personally observed him involved with selling drugs and that he was neither a suspect nor the target of the arrest warrant. Yet, he claims trial counsel lied to him by stating that the police reports and discovery material identified him as being a person in the house who was selling drugs. Montejano submits that he entered guilty pleas based on trial counsel's lies that police had evidence of him selling and delivering drugs.

Contrary to Montejano's representations to this court, the affidavit supporting the search warrant contained allegations that investigating police officers observed Montejano selling drugs to a confidential informant during two controlled buys. Additionally, Montejano was specifically identified as the occupant of the residence where the search warrant was executed. It was the execution of this search warrant that resulted in the charges against Montejano.

The postconviction court properly denied this claim because the record conclusively demonstrates that Montejano is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-10.

(2) Montejano's allegations that trial counsel was ineffective for failing to challenge his alleged statements to the police are conclusory and insufficient to warrant a hearing.

Montejano claims trial counsel was ineffective for not litigating the motion to suppress his statements on the ground that the police coerced him to admit to selling drugs by threatening to deport his grandparents. He claims he repeatedly told trial counsel about the threats and argues that she should have brought this information to the circuit court's attention.

Montejano claimed that police officers visited him multiple times before he entered his pleas and threatened to deport his grandparents if he did not accept responsibility for the drugs that were found during the search of his grandparents' residence. Montejano does not, however, provide any other details, such as when or where these visits occurred or who the officers were. These conclusory allegations are insufficient to warrant a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶29 ("Though replete with information, the motion contains conclusory allegations and lacks sufficient material facts that ***Bentley*** requires.").

(3) The record does not support Montejano's claim that trial counsel withdrew the motion she filed challenging Montejano's statements against his wishes.

Montejano claims trial counsel withdrew the motion challenging the admissibility of his statements "against [his] wishes." According to Montejano, if trial counsel had challenged his statements, they would have been suppressed.

On the date scheduled for the motion hearing, the following exchange took place:

> [Trial counsel]: … I discussed this matter with my client and, actually, with [the prosecutor] over the past couple of days and made the determination that we did not need to proceed forward with the motion. Primarily, because even if the [d]efense was successful—which I wouldn't have filed a motion if I didn't think that was a possibility, but even if we were successful, it really doesn't change the posture of this case. This case is not going to proceed forward to trial. We are engaged in ongoing negotiations with the State.
>
> THE COURT: Mr. Montejano, is it true that you wish to withdraw the motion to suppress your statement?
>
> THE DEFENDANT: That is correct.
>
> THE COURT: Very good. No one has made any threats, promises, or used any pressure to get you to make that decision, have they?
>
> THE DEFENDANT: Oh, no.

Additionally, during the plea hearing, Montejano acknowledged that he understood he would no longer be able to pursue the motion after entering his guilty pleas.

Again, the postconviction court properly denied this claim because the record conclusively demonstrates that Montejano is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-10.

(4) Montejano forfeited his right to claim that trial counsel was ineffective for failing to challenge the statements made against him by Flores.

Montejano claims trial counsel was ineffective for not challenging the statements made by Flores, his co-defendant. He asserts that trial counsel knew Flores was lying about Montejano's involvement but that trial counsel failed to use the discovery she had to point out the lies.

Montejano forfeited his right to make this argument. The credibility of Flores's statement was an issue to be explored at trial, and Montejano gave up his right to challenge this evidence by pleading guilty. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (explaining that a valid guilty plea forfeits all nonjurisdictional defects, including constitutional claims). Consequently, this is not a valid basis for plea withdrawal.

In connection with his postconviction motion, Montejano submitted an affidavit purportedly from Flores recanting his prior statement against Montejano. The postconviction court properly concluded the affidavit was of no consequence because it was not corroborated. *See* ***State v. McAlister***, 2018 WI 34, ¶33, 380 Wis. 2d 684, 911 N.W.2d 77 (requiring recantations to be corroborated).

(5) Montejano's claim that trial counsel, in conjunction with the police, repeatedly pressured him and threatened him to plead guilty fails because it is conclusory.

Next, Montejano submits that trial counsel "joined forces with the police and prosecutor to coerce … and induce him to enter[] a plea of guilty to selling drugs in order to prevent his grandparents from being deported back to Mexico." This allegation fails because it is conclusory. *See* ***Allen***, 274 Wis. 2d 568, ¶29. Montejano does not offer any facts, let alone sufficient material facts, that if true, would entitle him to relief on this basis. *See* ***id.***, ¶15. The postconviction court properly concluded that there was "absolutely no support for this allegation."

(6) Montejano forfeited his claim that trial counsel was ineffective for failing to challenge the sufficiency of the evidence.

Montejano claims trial counsel "failed to raise the obvious issue of [i]nsufficiency of [e]vidence." Montejano, however, forfeited a sufficiency-of-the-evidence claim by virtue of his guilty pleas. *See* ***Rafferty v. State***, 29 Wis. 2d 470, 479, 138 N.W.2d 741 (1966) (by entering a plea, a defendant "not only waive[s] any objection to the legality of the evidence, but also to the quantum of it").

(7) Montejano's claim that trial counsel was ineffective for not requesting a PSI is conclusory.

Lastly, Montejano claims that trial counsel was ineffective for not requesting a PSI. He does not explain what new information a PSI would have shown or why any such information would have been significant at sentencing; instead, he simply asserts that "[a] PSI writer may have made a better recommendation than prison[.]" Like a number of assertions before it, this one fails because it is conclusory. *See* ***Allen***, 274 Wis. 2d 568, ¶29.

For the forgoing reasons, the postconviction court properly denied Montejano's motion without a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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