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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 3, 2019

To:

Hon. Mark A. Sanders
Circuit Court Judge
821 W. State St., Rm. 620
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

Timothy T. Kay
Kay & Kay Law Firm
675 N. Brookfield Rd., Ste. 200
Brookfield, WI 53045

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Jennifer Renee Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP2068-CR State of Wisconsin v. Steven Michael Brooks (L.C. # 2017CF1238)
2018AP2069-CR State of Wisconsin v. Steven Michael Brooks (L.C. # 2017CF2468)

Before Brash, P.J., Kessler 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).

Steven Michael Brooks appeals from two judgments of conviction, one for first-degree reckless homicide by delivery of a controlled substance as a party to a crime and the other for fleeing or eluding a police officer.[1] *See* WIS. STAT. §§ 940.02(2)(a), 939.05 (2017-18), 346.04(3)

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[1] On the court's own motion, we previously concluded that these appeals should be consolidated.

(2015-16).[2] He also appeals a circuit court order denying his postconviction motion. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgments and order.

Background

Milwaukee County Case No. 2017CF1238

In the first of two criminal complaints filed against Brooks, the State charged him with the following: count one, first-degree reckless homicide by delivery of a controlled substance as a party to a crime, as a repeater; count two, manufacture/delivery of a controlled substance (heroin), three grams or less, second and subsequent offense, as a repeater; and count three, possession with intent to deliver a controlled substance (heroin), three grams or less, second and subsequent offense, as a repeater.

According to the complaint, on February 27, 2017, police officers responded to a 911 call from a business owner expressing concern for the occupants of a car that had been parked outside his business for over an hour. When the officers arrived they found two individuals passed out inside the parked car, which was still running. With the use of Narcan, emergency personnel revived one individual, S.A. The other individual, M.F., was pronounced dead at the scene.

[2] The first-degree reckless homicide conviction underlying Appeal No. 2018AP2068-CR was committed in February 2017. The fleeing or eluding an officer charge underlying Appeal No. 2018AP2069-CR was committed in November 2016.

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

Officers searched the car and found several prescription bottles and a baggie with suspected heroin. S.A. later told the officers that he received the heroin from "Pete," who was subsequently identified as Brooks. S.A. said that he and M.F. immediately snorted the heroin and drove away but M.F. soon pulled over because she did not feel well. M.F. and S.A. switched seats but S.A. did not drive away because he also felt sick. They remained parked until the officers found them.

Testing later revealed that M.F.'s cause of death was acute mixed drug intoxication (heroin, fentanyl, 4-ANPP, and acryl fentanyl[3]).

Officers proceeded to set up a controlled buy with Brooks, who sold a confidential informant a half gram of heroin. They then arrested Brooks and searched his car where they found heroin, two phones, and plastic bags in the trunk. Brooks had the money from the controlled buy in his pocket.

When police interviewed Brooks, he admitted that he sold heroin to S.A. the morning S.A. and M.F. overdosed. He told police that he began selling heroin when he was released from jail in 2016, and he estimated that he completed about twenty heroin drug deals a day.

Milwaukee County Case No. 2017CF2468

After issuing the charges in Case No. 2017CF1238, the State charged Brooks with the following: count one, possession with intent to deliver a controlled substance (heroin), three grams or less; and count two, fleeing or eluding an officer. The charges stemmed from a traffic

[3] At sentencing, the State described 4-ANPP as a marker of fentanyl.

stop that took place on November 2, 2016. According to the complaint, when a police officer attempted to stop Brooks' vehicle, he fled and lost control. When they approached the car, the officers smelled marijuana. A search of the car followed, and the officers found, among other things, heroin, cocaine, and plastic bags.

Pretrial, the State filed a motion for joinder, which the circuit court granted. Pursuant to plea negotiations, Brooks pled guilty to the first-degree reckless homicide charge in Case No. 2017CF1238, and he pled no contest to fleeing or eluding an officer in Case No. 2017CF2468. The State agreed to dismiss and read in the remaining charges at sentencing and additionally agreed to strike the penalty enhancers.

The circuit court accepted Brooks' pleas. Neither party requested a PSI, nor did the circuit court order one to be prepared. The circuit court sentenced Brooks in Case No. 2017CF1238 to fifteen years of initial confinement and ten years of extended supervision and in Case No. 2017CF2468, to a concurrent sentence of eighteen months of initial confinement and twenty-four months of extended supervision.

Brooks sought postconviction relief on two bases. He argued his trial counsel was ineffective for not requesting a presentence investigation report (PSI) and the circuit court erred when it joined his two cases. The circuit court denied the motion without a hearing. This appeal follows.

Discussion

A. PSI

Brooks argues that his trial counsel was ineffective because he did not request a PSI. He submits that a reasonable attorney would request a PSI in a felony case where substantial prison time is involved, and his trial counsel's failure to do so was prejudicial because "but for the inaction to order a PSI, Brooks could have received a more favorable sentence."

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. If, however, "the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,'" the circuit court may deny the motion without a hearing. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted).

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.

While conceding that trial counsel did not have a duty to request a PSI, Brooks nevertheless argues that "[a] reasonable attorney would have requested a PSI that would have yielded mitigating factors." However, "[a] presentence report is not required," and Brooks does not adequately explain how failing to request something that is not required amounts to ineffective assistance. *See* ***State v. Jackson***, 187 Wis. 2d 431, 439, 523 N.W.2d 126 (Ct. App. 1994). Brooks simply contends that his poor mental health, below average intelligence, and tumultuous upbringing are mitigating factors that courts rely on at sentencing, and were it not for trial counsel's failure to request a PSI, Brooks would have received a more favorable sentence.

When it denied Brooks' claim, the circuit court deemed his allegations conclusory and speculative, writing:

> These allegations are completely conclusory and do not warrant the requested relief…. He has told the court nothing more than what the court was previously apprised of at sentencing. The defendant's mental health issues, specifically schizophrenia, were repeatedly mentioned and discussed at sentencing by defense counsel and the court, including its impact on his upbringing. Defense counsel's sentencing comments with regard to the defendant's history and upbringing were extensive, covering nearly fifteen pages of the sentencing transcript. What more would have been presented? What more should the court have known about his upbringing, his cognitive abilities or mental health issues? It is unknown. Nothing has been presented which would have mitigated the seriousness of these crimes. The defendant's arguments are entirely speculative in this regard and do not warrant relief.

(Footnotes omitted.) We agree and adopt this reasoning as our own. *See* WIS. CT. APP. IOP VI.(5)(a) (Nov. 30, 2009) ("When the [circuit] court's decision was based upon a written opinion ... the panel may ... make reference thereto, and affirm on the basis of that opinion."); *see also* ***Allen***, 274 Wis. 2d 568, ¶23 (explaining that to warrant an evidentiary hearing, a defendant's motion must allege, within its four corners, *material* facts answering "the five 'w's' and one 'h'" test).

Because Brooks failed to sufficiently plead his claim, the circuit court properly denied his motion without a hearing.[4]

B. Joinder

Next, Brooks argues that the circuit court erred when it granted the State's joinder motion. We need not delve into the merits of the circuit court's joinder decision. By entering his guilty and no contest pleas, Brooks forfeited the right to appeal the circuit court's ruling on that issue. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 ("The general rule is that a guilty, no contest, or ***Alford*** plea 'waives all nonjurisdictional defects, including constitutional claims[.]'") (citation and footnote omitted). We refer to this as the guilty-plea-waiver rule, and its application is a question of law that we review *de novo*. *See* ***Kelty***, 294 Wis. 2d 62, ¶¶13, 18.

[4] The parties disagree over the remedy for receiving ineffective assistance from trial counsel at sentencing. The State argues that the remedy is resentencing. Brooks argues that his remedy is an evidentiary hearing and plea withdrawal. Because we conclude Brooks has not adequately pled ineffective assistance, we do not need to address remedies. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that only dispositive issues need be addressed).

As the State points out, we could choose to address the joinder issue despite the rule. Although the guilty-plea-waiver rule is widely followed, this court retains jurisdiction to consider Brooks' challenge. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123-24, 332 N.W.2d 744 (1983). The State, however, goes on to argue that this is not a situation that warrants deviating from the rule. We agree. *See, e.g.*, ***Mack v. State***, 93 Wis. 2d 287, 296-97, 286 N.W.2d 563 (1980) (departing from the waiver rule has been allowed where "there are no factual questions, the parties have fully briefed the issue and [the question posed is] of ... statewide importance"). In any event, Brooks conceded the State's argument by not addressing it in his reply brief.[5] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that a failure to refute an argument constitutes a concession).

Therefore,

IT IS ORDERED that the judgments 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

[5] We affirm on a different basis than the one relied on by the circuit court. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).