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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

May 19, 2020

To:

Hon. Carolina Stark
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

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

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kelly Duke 596932
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2018AP970

State of Wisconsin v. Kelly Duke (L.C. # 2012CF44)

Before Brash, P.J., Dugan and Donald, 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).

Kelly Duke, *pro se*, appeals orders denying his collateral attack on the judgment convicting him of two counts of homicide by intoxicated use of a vehicle, one count of hit-and-run involving death, and one count of knowingly operating a vehicle with a suspended license, causing great bodily harm. Duke argues that he should be allowed to withdraw his no-contest pleas because he

received ineffective assistance of trial counsel. We affirm. *See* WIS. STAT. RULE 809.21 (2017-18).¹

Duke was drunk and driving at a high rate of speed when he hit another car, tearing off the roof of the other car and instantly killing the occupants. He pled no-contest pursuant to a plea agreement that dismissed other charges against him. The trial court sentenced Duke to an aggregate term of thirty years of initial confinement and twelve years of extended supervision. On direct appeal, Duke's appointed appellate counsel filed a no-merit report. The appeal was subsequently dismissed because this court gave Duke permission to proceed *pro se* and allowed counsel to withdraw. However, Duke never filed a *pro se* direct appeal. Later, Duke brought this collateral attack on his conviction pursuant to WIS. STAT. § 974.06. The trial court rejected Duke's argument that he received ineffective assistance of counsel without a hearing.

A defendant seeking to withdraw a plea after sentencing must show by clear and convincing evidence that relief is necessary to correct a manifest injustice. *State v. Roou*, 2007 WI App 193, ¶15, 305 Wis. 2d 164, 738 N.W.2d 173. A manifest injustice is a serious flaw in the fundamental integrity of the plea, such as when a defendant receives ineffective assistance of trial counsel. *State v. Washington*, 176 Wis. 2d 205, 500 N.W.2d 214-15 (Ct. App. 1993). When a defendant alleges that he or she is entitled to post-sentencing plea withdrawal based on ineffective assistance of counsel, the defendant must show that he or she received constitutionally ineffective assistance from trial counsel and that but for counsel's deficient act or omission, the defendant

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

would not have entered the plea and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

“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.” *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433 (citation omitted). “Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*.” *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

Duke contends that he received constitutionally ineffective assistance because his trial counsel should have litigated several pre-trial motions before advising him to plead guilty. Trial counsel filed two motions to suppress statements Duke made to the police while he was in the back of an ambulance after the accident pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Trial counsel had also filed two motions for hearings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), one regarding the cause of the fatal accident and one regarding the validity of the test showing his blood alcohol concentration.

Duke’s arguments all fail for the same reason. He has not alleged facts that, if true, would have entitled him to relief. *See Bentley*, 201 Wis. 2d at 310. Duke has not explained *why* he would not have entered his no contest pleas and would have insisted on going to trial but for his counsel’s alleged error in failing to litigate the motions before advising him to plead guilty. Duke has not explained exactly *why* his counsel would have prevailed on the suppression motions and *why* success on the suppression motions would have caused him to proceed to trial rather than enter a plea given the strength of the evidence against him. Similarly, Duke has not explained *what* his counsel would have accomplished with the *Daubert* motions and *why* his counsel’s success with

those motions would have caused him to choose a trial over taking advantage of the plea agreement. Therefore, we reject Duke's argument that he should be allowed to withdraw his pleas because he received ineffective assistance of counsel.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court 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