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DISTRICT IV

November 5, 2020

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Janesville, WI 53545

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

2019AP564-CR

State of Wisconsin v. Floyd Lee Poe (L.C. # 2014CF1467)

Before Kloppenburg, Graham, and Nashold, 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).

Floyd Lee Poe, pro se, appeals his judgment of conviction and a circuit court order denying his motion for plea withdrawal. After reviewing the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

Background

Poe was charged with one count of first-degree recklessly endangering safety as a repeater and with use of a dangerous weapon. Pursuant to a negotiated plea agreement, Poe pled guilty to the crime as charged and, in exchange, the State agreed to recommend that the court withhold sentence and impose four years of probation.

During the plea colloquy, the circuit court stated as follows:

You're charged, Mr. Poe, with first degree reckless endangering safety, as a repeater. That leaves you exposed to a possible penalty of, let me see, 18 and-a-half years' imprisonment and/or a 25,000-dollar fine. Do you understand the nature of the charge, nature of the possible penalty?

Before Poe could answer, the assistant district attorney stated, "There's also a 'while-armed' enhancer that adds five." The circuit court and the assistant district attorney conferred briefly on the record regarding whether both the dangerous weapon enhancer and the repeater enhancer could be applied. The court then stated, "I'm going to worse-case-scenario this and add five years to the -- so 23 and-a-half years' imprisonment as a possible penalty." The court asked Poe if he understood the charge and possible penalty, and Poe confirmed that he understood. The court then asked Poe for his plea and Poe stated, "Four years' probation. Guilty."

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

After the plea hearing but before sentencing, Poe informed the circuit court by letter that he wanted to withdraw his plea. Poe's counsel, Lane Fitzgerald, withdrew as counsel based on a conflict of interest. Attorney Amber Lucsay was appointed as successor counsel. At the sentencing hearing, Lucsay informed the court that she had investigated whether there were grounds for plea withdrawal and had concluded that there were not. Lucsay also stated that she had discussed the issue with Poe and that he agreed to go forward with sentencing. The court withheld sentence and accepted the parties' joint recommendation with one modification—it placed Poe on probation for five years instead of the recommended four years. Poe's probation was revoked approximately one month after the sentencing hearing. He returned to court to be sentenced after revocation, and the court imposed ten years of initial confinement and five years of extended supervision.

Poe filed a motion to withdraw his plea after sentencing, alleging that he received ineffective assistance of counsel. Poe alleged that Attorney Fitzgerald told him that the two penalty enhancers would be dropped as a part of his plea agreement, and that he would not have entered his plea if he had known the enhancers would not be dismissed. Poe further alleged that he believed the maximum penalty he faced upon revocation was 12 years and 6 months.

The circuit court held a hearing on the motion, at which Attorney Fitzgerald testified that he advised Poe of the charges involved with the plea agreement, including the penalty enhancers. Fitzgerald further testified that Poe had never expressed an unwillingness to plead guilty to either enhancer.

Poe testified at the hearing that, at the time of the plea, he did not think that he was entering a plea with the weapons and the repeater enhancers, and that he would not have entered

his plea if he had known he faced those enhancers. He further testified that, based on what Attorney Fitzgerald told him, he believed he was facing a sentence of twelve and a half years. Poe acknowledged that the judge went over the penalties with him at the plea hearing and used the words “23 ½ years.” Poe testified that he was confused when he entered his plea.

Attorney Lucsay testified at the motion hearing that she recalled Poe wanting to withdraw his plea prior to the sentencing hearing and remembered him “saying that he thought he was going to get probation for sure and that that was his understanding.” Lucsay testified that she discussed with Poe the associated risks and benefits of plea withdrawal, as well as the law regarding plea withdrawal. Lucsay testified that Poe decided he was comfortable going forward with sentencing and agreed not to file a motion. The circuit court denied Poe’s motion for plea withdrawal at the end of the hearing, determining that Attorney Fitzgerald’s performance did not rise to the level of ineffective assistance of counsel. Poe appealed.

Discussion

On appeal, Poe argues that the circuit court erred in denying his motion for plea withdrawal. The State asserts that this court should affirm the circuit court’s decision because it was based on credibility findings that are not clearly erroneous and, thus, should not be overturned. We agree, and we affirm on that basis.²

² The State also asserts that Poe’s arguments on appeal are procedurally barred under *State v. Scaccio*, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449 (“A challenge to a post-revocation sentence does not bring the original judgment of conviction before the court.”) We need not decide the issue of whether Poe’s arguments are procedurally barred because we are deciding the appeal on another basis. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (an appellate court need not address all issues when deciding case on other grounds).

Poe's motion for plea withdrawal was filed after sentencing and, therefore, he was required to demonstrate by clear and convincing evidence that plea withdrawal was necessary to correct a "manifest injustice." See *State v. Nawrocke*, 193 Wis.2d 373, 378-79, 534 N.W.2d 624 (Ct. App. 1995). One way of demonstrating a manifest injustice is to establish that the plea was entered as the result of ineffective assistance of counsel. *State v. Howell*, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The record establishes that, in concluding that Poe failed to demonstrate a manifest injustice based on ineffective assistance of counsel, the circuit court relied heavily on credibility determinations. Generally, it is "not the province of the reviewing court to determine issues of credibility." *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). Here, the circuit court made detailed credibility determinations based on the testimony given at the motion hearing. The court stated, "Mr. Fitzgerald did testify that he did explain the maximum penalties possible to the defendant, and I find his testimony credible on that point." As support for its finding, the court referenced the discussion that occurred on the record at the plea hearing between the assistant district attorney and the judge about the applicability of the two charged penalty enhancers. The court stated, "I find that part of the reason that Mr. Fitzgerald's testimony was credible is that Mr. Poe didn't raise any objection at that point." The circuit court also referenced the fact that, when Poe pled guilty, the court concluded at that time that Poe understood his plea and the potential penalties. The court stated that, therefore, it did not believe Poe's testimony and found the testimony of attorneys Fitzgerald and Lucsay more credible.

“When required to make a finding of fact,” a circuit court “determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed on appeal where more than one inference may be drawn from the evidence.” *State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). Poe has not persuaded us that the circuit court’s credibility determinations should be disturbed in this instance. Accordingly, Poe cannot establish that his plea was the product of ineffective assistance of counsel, and the circuit court properly denied the motion for plea withdrawal.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals