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December 23, 2020

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

2020AP526-CR State of Wisconsin v. Stewart D. Brown (L.C. #2017CF531)

Before Reilly, P.J., Gundrum and Davis, 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).

Stewart D. Brown appeals from a judgment of conviction for first-degree reckless homicide, as a party to the crime, due to his role in the heroin overdose of the victim. Brown claims the circuit court erred in denying his postconviction motion to withdraw his guilty plea on the basis "that it was not voluntarily entered due to [his] perception that his trial counsel was unprepared to defend the case at trial." 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 (2017-18).[1] We affirm.

Our supreme court has stated,

> "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" One way the defendant can show manifest injustice is to prove that his plea was not entered … voluntarily.
>
> A plea not entered … voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. Whether a plea was entered … voluntarily is a question of constitutional fact that is reviewed independently. "In making this determination, this court accepts the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous."

State v. Taylor, 2013 WI 34, ¶¶24-25, 347 Wis. 2d 30, 829 N.W.2d 482 (citations omitted).

Brown claims his plea was not voluntarily entered because the only reason he entered it was due to his belief that his counsel was insufficiently prepared for the trial that was scheduled to begin three days after his plea. To clarify, the question before us on appeal is not whether counsel in fact was or was not sufficiently prepared for trial;[2] rather, the question is whether Brown has proven by clear and convincing evidence that his plea was not voluntarily entered because he only entered it due to *his belief* that counsel was insufficiently prepared for trial.

The same judge presided over Brown's plea, sentencing, and postconviction hearings. At the plea hearing, the circuit court asked Brown "[h]as anyone … made any promises or threats to

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

[2] In his brief-in-chief, Brown states that he does not allege that his trial counsel "was actually ineffective," because "[i]t did not appear that Brown could meet the prejudice prong of the ineffective assistance of counsel rubric."

you aside from the plea agreement to get you to plead no contest to this charge?" Instead of directly answering that question, as he did moments later, Brown initially responded by volunteering that "[t]he reason I plead, Thomas Holmes gave a statement against me." In response to Brown's "Thomas Holmes" answer, the court stated: "I understand what you are saying, that is evidence against you … but no one has made any threats or promises as you just said?" Brown responded: "Yes, Your Honor." During a discussion with the court about the meaning of "party to a crime," Brown responded in part, "I ain't arguing the issue, that I was wrong for being there, I'm not arguing that." Brown agreed to the use of the complaint for providing a factual basis for his plea, which complaint identified Brown's role in transferring the drugs to the victim. Counsel confirmed that he had "thoroughly discuss[ed] this case and the plea decision" with Brown and that he was "fully satisfied that [Brown] is making his no contest plea … voluntarily." Shortly thereafter, the court stated to Brown, "[Y]ou heard what your lawyer has just told me. Is there anything you wish to disagree with or ask questions about?" Brown responded: "Not at this point, Your Honor." The court then asked Brown: "Is there anything that I may have asked you that now upon reflection you wish to modify or change your answer to in any way?" Brown responded: "No, Your Honor." The court found inter alia that Brown was "voluntarily" entering his plea to first-degree reckless homicide as a party to the crime.

Brown's sentencing hearing was held approximately three weeks later. With Brown next to him, counsel told the court:

> Mr. Brown left in his Cadillac, picked up Munchie and … brought Munchie over with the drugs. He did transport the drug seller to Dorsey Johnson's so Munchie could sell the heroin to [the victim].… To quote Mr. Brown what he's told me several times during the course of my representation, I gave the man a ride. And he did. He was a middler, and he gave the man a ride….

> ….
>
> Mr. Brown was at Dorsey Johnson's home. He gave Dorsey Johnson the name Jamonte Childs … and he said he might be able to help you out and ultimately help[ed] [the victim] out. Help is a bad word in this case … [Brown] was able to provide the controlled substances where Dorsey was not. Mr. Brown was clearly the middleman. His involvement was the reason that [the victim] died but not the significant factor in why he died.

Before Brown spoke next at sentencing, the court invited him "to tell me anything you wish to tell me." Brown gave no hint that he only entered his plea because of a belief that counsel was unprepared for trial and instead stated in relevant part:

> Basically, Your Honor, I never thought I would be involved in something like this, to have someone lose their life by my helping an individual that put me on the front line and got me in trouble.… I had no intentions of ever taking someone's life or having a part in someone losing their life…. I pray to the Lord that I get forgiven for it ....

At the hearing on his postconviction motion, Brown presented a very different position than the one he presented at plea and sentencing.

> [Postconviction counsel:] The complaint alleged that you middled a heroin transaction that resulted in the death of [the victim], correct?
>
> [Brown:] Yes
>
> [Postconviction counsel:] Is that true?
>
> [Brown:] No.
>
> [Postconviction counsel:] What happened that day?
>
> [Brown:] I was at … Mr. Dorsey Johnson's residence and he asked to use my phone. And that is all I know about it. I never picked up Munchie, so-called Damonte Childs, at all.
>
> [Postconviction counsel:] You never delivered any heroin to anybody that evening?
>
> [Brown:] Never.

> ….
>
> [Postconviction counsel:] The State in the complaint also alleged that you used your car to go pick up Munchie who was the drug dealer; is that true?
>
> [Brown:] That's what they say. No.
>
> ….
>
> [Postconviction counsel:] That day did you see [Munchie]?
>
> [Brown:] No, I did not.

Brown also testified that he pled to the charge instead of taking the case to trial because he believed trial counsel was not sufficiently prepared for trial, giving various reasons why he believed that.

According to trial counsel's subsequent testimony at the postconviction hearing, Brown had represented to counsel since the start of counsel's representation that he (Brown) had not had any involvement in the delivery of the drugs that killed the victim in this case. Then, in conjunction with deciding to accept the State's pretrial offer, and just days before trial, Brown acknowledged to counsel that he *did* participate in delivering the drugs to the victim. According to counsel, at that point, Brown "confessed to [counsel] that he had been the one that had middled the deal." In his postconviction testimony, counsel also referred back to his comments from the sentencing hearing about the specific role Brown played in "middl[ing]" the drug deal and delivering the drugs to the victim and testified that when he was making these comments, "Mr. Brown never knocked me in the side and said don't say that or something." When the State asked, "So the defendant acknowledged to you that he did provide the transportation for the drug deal different than what he shared today and the testimony he gave to try and withdraw the plea; is that right?" Trial counsel responded, "Absolutely different than what he said under oath today."

In its ruling on the postconviction motion, the court thoroughly recounted details from the plea hearing. As part of that, the court stated:

> I specifically asked [Brown] … has anyone else made any promises or threats to you aside from the plea agreement to get you to plead no contest to this charge? And then [Brown] goes into the explanation of the reason I plead, Thomas Hombs gave a statement against me …. And I said, Okay, but has anyone made any promises or threats to you aside from the plea agreement here to get you to plead no contest to the charge? And the defendant answered, No, Your Honor. So [Brown] really emphasized this statement that Thomas Hombs gave as a reason he was entering the plea, which is really a recognition of the facts and the strength of the case against him. And then I said, I understand what you are saying, that is the evidence against you, but no one has made any threats or promises as you just said? And he said, Yes, Your Honor.

The court noted that during the plea colloquy Brown expressed his understanding, but disappointment, that he would not be eligible for an early release program based upon the particular offense to which he was pleading. The court pointed out, "then I asked him, even knowing that, do you want to go ahead with your plea?... [A]nd he says, Yes, sir." The court recounted how it asked counsel if he was "fully satisfied that your client is making his no contest plea … voluntarily," and counsel responded, "Yes," and that it thereafter asked Brown "you heard what all of the lawyers [sic] just told me, is there anything you wish to disagree with or to ask questions about," and Brown responded with "[n]ot at this point, Your Honor." The court then stated:

> And that would be the defendant not disagreeing with the attorney's indication that they have had sufficient opportunity to discuss this case and the plea decision and the attorney's satisfaction that Mr. Brown is making his no contest plea … voluntarily …. Nothing is said there at any time during this plea colloquy … about any deficiency of the attorney's performance. In fact, the plea colloquy really establishes just the opposite.
>
> I then ask him, is there anything that I may have asked you that now upon reflection you wish to modify or change your answer to in any way? And Mr. Brown says, No, Your Honor. So again I

> gave him a chance and nothing—he indicated there was nothing upon reflection that he wanted to modify or change. And then I asked him the ultimate question of, do you want the court to accept your no contest plea to first degree reckless homicide as a party to a crime at this time? And … the defendant's answer is, Yes, Your Honor.
>
> So the defendant had plenty of—well the transcript of this plea colloquy really shows no hesitation by the defendant about entering a plea at all and he clearly understood what a no contest plea means and that he's not contesting the State's ability to prove the elements.
>
> And then we get into the factual basis for the plea and …. I said, Mr. Brown, is that acceptable to you that I use[] the complaint to find there is a factual basis? And his response was, Yes, Your Honor.…
>
> So that plea colloquy really establishes no hesitation on behalf of Mr. Brown as far as entering his no contest plea. In fact … he actually indicates that he's doing it because Hombs gave a statement against me, so he is realizing the evidence against him.

The circuit court then turned to the testimony and arguments from the postconviction hearing. The court recalled observing both witnesses, Brown and trial counsel. The court noted counsel testified that before Brown's plea, Brown "had admitted to him that he was the driver" in connection with the delivery of heroin that led to the victim's death. The court expressed that this admission to counsel was "contradictory to what Mr. Brown had been telling [counsel] all along." The court recognized that Brown testified at the postconviction hearing that he never told counsel that, but it found Brown's testimony "not believable"/"untruthful" and found counsel's "version of what occurred leading up to the plea was truthful." Because the court found Brown to have been "untruthful in his testimony here," the court "[did not] believe his explanation that the only reason he entered the plea is because he felt his attorney was unprepared." The court concluded that it was "clear to this court that Mr. Brown knew exactly what he was doing. He had opportunities at the plea hearing to raise issues and I even asked

him, do you want the court to accept your plea? And nothing was said ….” The court denied Brown’s postconviction motion because he had not met his burden to show the denial of his request to withdraw his plea would create a manifest injustice.

On appeal, we will not upset a trial court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Further, “when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses.” ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

In the end, the postconviction court found Brown unbelievable and that, contrary to his postconviction position, he did not enter his plea only because he believed counsel to be unprepared for trial. The court’s findings are supported by the record and are not clearly erroneous. With the entire factual underpinning for Brown’s postconviction motion upended by the court’s credibility determinations and this ultimate finding, Brown failed to meet his burden to demonstrate a manifest injustice by clear and convincing evidence.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction 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