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DISTRICT IV

March 11, 2021

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

2019AP2188 State of Wisconsin v. Jamaica Wilson (L.C. # 2000CF152)

Before Fitzpatrick, P.J., 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).

Jamaica Wilson appeals an order denying his postconviction motion that was filed under WIS. STAT. § 974.06 (2019-20).[1] Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Wilson pled guilty to one count of first-degree intentional homicide as a party to a crime, in exchange for the dismissal of other counts related to the same robbery incident during which the homicide occurred. He pursued an unsuccessful postconviction motion and appeal under WIS. STAT. RULE 809.30. ***State v. Wilson***, No. 2006AP537-CR, unpublished slip op. (WI App Dec. 21, 2006). In 2018, he filed the motion currently before us under WIS. STAT. § 974.06. The circuit court denied the motion after an evidentiary hearing.

On appeal, Wilson's arguments focus on the fact that the State referred to the dismissed charges at sentencing. Under the plea agreement, those counts were dismissed, but not read in, and Wilson claimed in his postconviction motion that he thought the dismissed charges could not be used at sentencing. Wilson further alleged that, if he had known they could be used, he would have gone to trial instead of accepting the plea offer.

The State argues on appeal that we should not review these claims because they are barred by WIS. STAT. § 974.06(4), as interpreted by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). That opinion held that, when a defendant has already had a postconviction motion decided under WIS. STAT. RULE 809.30, § 974.06(4) bars a motion under §974.06 unless the defendant shows, in the words of the statute, a "sufficient reason" for not having raised the current motion's claims in the earlier postconviction motion. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

To show a sufficient reason why Wilson did not raise these claims in his first postconviction proceeding, he asserted in his current motion that his earlier postconviction

counsel was ineffective. The State argues that such an ineffectiveness argument requires the defendant to demonstrate that his current claims are "clearly stronger" than his earlier postconviction claims. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶4, 45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

The circuit court assumed, without deciding, that this bar did not apply and addressed the merits of Wilson's claims. The State asserts that we should not do that because Wilson's current claims are "without merit." In published cases applying the "clearly stronger" test, our supreme court appears to have evaluated whether the defendant's current claims were clearly stronger by reviewing the merits of the current claims. *See, e.g.*, ***id.***, ¶¶58-64; ***State v. Starks***, 2013 WI 69, ¶¶66-73, 349 Wis. 2d 274, 833 N.W.2d 146, *abrogated in part on other grounds by* ***State ex rel. Warren v. Meisner***, 2020 WI 55, 392 Wis. 2d 1, 944 N.W.2d 588. Thus, it appears that we must review the merits of Wilson's current claims, either to determine whether the bar applies, or to decide them directly. Therefore, we proceed directly to the merits.

The first argument in Wilson's brief commingles the concepts of plea withdrawal based on lack of a defendant's understanding, and breach of the plea agreement. We begin by focusing on the argument about Wilson's understanding.

As we stated, Wilson argues that he did not understand at the time of his plea that the plea agreement did not stop the State from discussing the dismissed counts at sentencing. In his postconviction motion, he framed the issue in terms of his trial counsel having been ineffective for not ensuring that Wilson understood this point.

In response, the introduction section of the State's brief on appeal asserts, without citation to the record, that "the circuit court determined that Wilson's trial attorney, Mark Frank,

completely and correctly ensured that Wilson understood that the State could discuss the dismissed charges at sentencing." However, in the argument itself, the State does not describe any court finding. Instead, it relies only on the "credible testimony of Attorney Frank," who it says "credibly testified" on this topic.

Later in its brief, the State describes Frank's testimony on this point and asserts that "the circuit court found Attorney Frank's testimony to be credible." However, the credibility finding that the State cites to is in the section of the court's decision that addresses a different issue Wilson raised in the current postconviction motion regarding his understanding of the aid and abet concept. In sum, the State appears to have recognized the lack of an express finding in its favor on this point, but then declines to acknowledge that absence or proceed with an argument that takes that absence into account.

Although we are unable to locate any express finding in the circuit court decision on this point, if the court does not make express findings on credibility, we may assume it made implicit findings to that effect when it ruled in favor of the party who relied on that witness. ***State v. Quarzenski***, 2007 WI App 212, ¶23, 305 Wis. 2d 525, 739 N.W.2d 844.

At the postconviction evidentiary hearing, Wilson's trial counsel for the plea hearing testified that he explained to Wilson that the dismissed charges could still be used at sentencing to assess his character, but not for the gravity of the offense. When Wilson testified on direct examination, he was not asked what his understanding was at the time of the plea. However, on cross-examination the State brought out Wilson's testimony that he did not understand how dismissed charges could be used. The court also questioned him on that point.

It is clear from the court's questioning, and from other statements the court made earlier in the hearing, that the court knew Wilson's understanding of this point was a key question. Although the court's decision did not make an express credibility finding on this point, the court did state that trial counsel's assistance "was not ineffective for Mr. Wilson with respect to the dismissed charges. It was not deficient in any manner asserted by Mr. Wilson."

Under the circumstances, we interpret the court's statement as implicitly crediting trial counsel's testimony rather than Wilson's, and therefore finding that Wilson understood that the dismissed charges could be discussed at sentencing. And, based on the record we described above, we conclude that the finding was not clearly erroneous.

As we stated, Wilson is also arguing that the State breached the plea agreement by discussing the dismissed counts at sentencing. This argument assumes that the agreement had the legal effect that Wilson claimed to have understood it to have, namely, that such discussion by the State was barred because the other counts were dismissed. However, as Wilson recognizes, a plea agreement under which charges are dismissed does not actually have that legal effect. *See* ***State v. Frey***, 2012 WI 99, ¶¶47-48, 343 Wis. 2d 358, 817 N.W.2d 436. Accordingly, the State did not breach the agreement.

Finally, Wilson argues on appeal that he should be allowed to withdraw his plea because the plea agreement was against public policy by barring the State from discussing the other counts at sentencing. Wilson does not dispute that he is raising this argument for the first time on appeal. However, the argument is easily disposed of on its substance. The argument fails because, as we discussed, the plea agreement did not bar the State from referring to the dismissed counts, and the State did so.

IT IS ORDERED that the order appealed from is summarily affirmed under 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