OFFICE OF THE CLERK
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 II

March 24, 2021

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Sonya Bice
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Michael D. Graveley
District Attorney
912 56th St.
Kenosha, WI 53140-3747

Mark S. Rosen
Rosen and Holzman
400 W. Moreland Blvd. Ste. C
Waukesha, WI 53188

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

2020AP1102-CR State of Wisconsin v. Reginaldo Etienne (L.C. #2018CF648)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Reginaldo Etienne was charged with ten criminal counts related to sexual assaults of two different women. He eventually pled guilty to two counts of second-degree sexual assault, and the other eight counts were dismissed. Etienne now appeals from the judgment of conviction and an order denying his motion for postconviction relief. He claims the circuit court erred in denying his presentencing and postconviction motions to withdraw his guilty pleas. 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]

Etienne first claims the circuit court erroneously exercised its discretion in denying his presentencing request to withdraw his pleas. We disagree.

To withdraw a plea prior to sentencing, a defendant needs to "proffer a fair and just reason for withdrawing his plea" that the circuit court believes "actually exists." ***State v. Jenkins***, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. The defendant also "must rebut evidence of substantial prejudice to the State." ***Id.***

At the evidentiary hearing on his presentencing plea withdrawal motion, Etienne testified that he entered his pleas because he became "scared" when, three days before trial, (1) counsel, who Etienne claims had been previously telling him he had a "50/50" chance to win at trial, started telling Etienne that "he basically didn't think I can win" and "I should take the plea"; and (2) counsel told him that if he went to trial and lost he would "be looking at the rest of my life in prison" but then effectively "promised" him that if he took the plea he would "do 10 to 16, 12 to 16 or so" that most likely would be concurrent. On cross-examination, Etienne admitted that during his plea colloquy he "lied" to the circuit court when he answered, "Yes, sir," after the court had asked him: (1) "[h]ave you been satisfied with the legal services that you have received in this case?"; (2) "[a]re you acting of your own free will?"; (3) "[h]ave you had enough time to discuss this matter with your lawyer?"; and (4) "[h]ave you had enough time to think about what you are doing?" He further acknowledged lying to the court in answering, "No, sir,"

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

when the court asked him: (1) "[h]ave you been rushed into this?"; (2) "[h]ave you any questions you want to ask Mr. Rose or me before I accept your plea?"; (3) "[h]as anybody threatened you or pressured you or forced you in any way to obtain your plea of guilty?"; and (4) "[h]as anybody promised you anything other than what has been stated out loud here in the court today?" Etienne also admitted to numerous prior criminal convictions, seven of which were based upon guilty pleas, and that he was represented by counsel and had gone through the plea process in each of those cases. Etienne also testified that in his meeting with counsel three days before trial, counsel only met with him for "10 to 15 minutes" or at the "[m]ax" thirty minutes.

Etienne's trial counsel also testified at the hearing. Counsel testified that he had been doing criminal defense work since 1968 and has done a significant number of criminal trials. Counsel stated that Etienne had "a lot of criminal justice experience" from his prior criminal cases. He confirmed that he had discussed with Etienne "the advantages and disadvantages [Etienne] would have in a trial[, including] trial strategies [and] discussions of what a trial would be like." Counsel testified that "many times," not just three days before trial, he and Etienne had "talked about that same plea bargain that [Etienne] ultimately accepted," adding that the plea deal "was not a last-minute proposal." Counsel expressed that he never told Etienne he had a fifty-fifty chance of prevailing at trial, adding, "I don't analyze cases in terms of 60/40 or 50/50" and that he never would have given him a percentage. Counsel stated that he never told Etienne that he would get a sentence of ten to sixteen years but did tell him that "he would be lucky to get anything under 20 years." Counsel also stated that he never told Etienne that his sentences on the two counts would run concurrent; counsel added that he "thought that they would be consecutive, and we were talking about 20 years … total here." Counsel testified that the

meeting with Etienne three days before trial was "at least an hour-and-a-half," as opposed to a "[m]ax" of thirty minutes. Counsel further expressed that before they entered the courtroom the morning of the scheduled trial, he asked Etienne "whether or not there was any desire to withdraw the plea that we were going to enter. There was none, and he was very, I felt, on board with accepting the plea bargain."

The circuit court found the testimony of counsel to be credible and that of Etienne to be incredible. The court noted that Etienne admitted that he had "repeatedly lied to the court, and when people lie, there is always a reason…. [A]nd he had a reason here. He is trying to avoid justice." The court further noted that the agent who wrote the presentence investigation report in the case observed, "[I]t appears overall the majority of what the defendant reported is a fabrication."

The factfinder, here the circuit court, is "the ultimate arbiter of the credibility of the witnesses" resolving any inconsistencies in the testimony and thus we largely defer to it on witness credibility. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979); ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Here, the court found Etienne incredible and did not believe he had a fair and just reason to withdraw his plea. The court's credibility determination is supported by the evidence. In the end, we do not doubt that Etienne was "scared" after he pled—scared that he was finally going to be held accountable by the justice system for his rapes of two innocent and unsuspecting women. But his desire to withdraw his plea on this basis amounts to nothing more than simply changing his mind after the plea because of a newfound desire to have a trial, and such a basis does not amount to a fair and just reason for plea withdrawal. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995) ("A fair and just reason is 'some adequate reason for defendant's

change of heart … other than the desire to have a trial.'" (citation omitted)). The burden was on Etienne to prove to the circuit court "a fair and just reason for withdrawal of the plea by a preponderance of the evidence," ***id.*** at 862, and is also on him to demonstrate to us on appeal how the circuit court erred, *see* ***Gaethke v. Pozder***, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381. He failed to meet either burden.

Etienne also claims his trial counsel provided him ineffective assistance with regard to his pleas.

A defendant claiming ineffective assistance has the burden to demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant must "show the performance was prejudicial, which is defined as 'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citation omitted). "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695). If the defendant fails to prove one prong, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

Etienne insists in his appellate briefing that at the evidentiary hearing on his presentencing motion for plea withdrawal, counsel "testified that he had essentially promised

[Etienne] a total of 20 years of confinement" if he were to plead, adding that counsel "promis[ed] [Etienne] a specific sentence." Not surprisingly, Etienne cites to no portion of the hearing transcript in support of these briefing comments; that can only be because there is no such support as counsel never promised Etienne that he would receive any particular sentence from the court.[2]

[2] The relevant testimony from that hearing is as follows:

> [State Counsel:] And Mr. Etienne indicated [in his earlier testimony at the hearing] that you told him on February 1st if he took a plea, he would get 10 to 16 years?
>
> [Trial Counsel:] No.
>
> [State Counsel:] What do you have to say about that?
>
> [Trial Counsel:] No. What I said was I thought he would be lucky to get anything under 20 years. That would be considered in my view a light sentence.
>
> ….
>
> [State Counsel:] And did you ever say to him the two separate and distinct sexual [assault] counts with different victims would be run concurrent by this court?
>
> [Trial Counsel:] No, I didn't. I thought that they would be consecutive, and we were talking about 20 years I was talking about total here.
>
> ….
>
> [Etienne's Counsel:] And did you indicate to [Etienne] on the 1st, February 1st, what you would be recommending?
>
> [Trial Counsel:] I told him I would recommend whatever he wanted me to recommend.
>
> [Etienne's Counsel:] And had he given you some numbers then on the 1st?

(continued)

Etienne further claims counsel performed ineffectively because he had "materially misrepresented the consequences of the plea." At the hearing on his postconviction motion, Etienne testified that prior to his plea, counsel led him to believe that he could plead "guilty" before the court—"to basically make [the plea] go through"—but he would really be pleading "no contest" and would not really be giving up his right to a trial, but instead the judge "would basically look at the evidence and see that I didn't do nothing and throw the case out." In his brief-in-chief on appeal, he asserts that counsel

> had represented to defendant that he would be entering no contest pleas. Further, counsel had represented to the Defendant that such no contest pleas were neither an admission nor a denial of guilt. Instead, counsel had represented that with a no contest plea, defendant would simply be leaving the matter of guilt up to the judge and that the judge would decide if the Defendant was guilty or not guilty. Based upon these representations, Defendant had reasonably believed that he was not giving up his right to a trial. Further, he had been informed that he would not be giving up such right. He thought that he would be entering no contest pleas, and that the trial court would decide his guilt ….
>
> Also, on the date of the eventual plea hearing, counsel had told him that he would have to say guilty or not guilty. Otherwise, the trial court would not accept his no contest pleas. This, even though the plea was a no contest plea. Thus, trial counsel's material misrepresentations had provided great motivation for the Defendant to enter his pleas.… Clearly, these representations were illegal and coercive. These representations were material misstatements of the actual plea negotiations and the actual consequences of Defendant's plea.

The problem with Etienne's reliance on his own self-serving testimony at the postconviction and preplea withdrawal evidentiary hearings is that the circuit court found his

---

> [Trial Counsel:] I told him that I thought that 20 years or less would be a good sentence from his perspective, but we didn't talk about 10 to 16. That is the only thing I said, and I further said that if he went to trial and was found guilty, he would get much more time. That was my perspective.

testimony at both hearings to be completely unbelievable. And with good reason. Etienne had been convicted of multiple prior criminal offenses and "[a] prior conviction of any crime is relevant to the credibility of a witness's testimony." *See* ***State v. Smith***, 203 Wis. 2d 288, 294-95, 553 N.W.2d 824 (Ct. App. 1996) (citation omitted) ("[WISCONSIN STAT. §] 906.09 'reflects the longstanding view in Wisconsin that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted.'" (citation omitted)). Furthermore, as previously noted, the court was well aware that Etienne had stated at his presentencing withdrawal motion hearing that he had repeatedly "lied" at his plea hearing, meaning he unquestionably lied to the court either at his plea hearing or the presentencing withdrawal motion hearing. Additionally, even on the cold record of just the transcript, Etienne's story of what counsel told him related to a "guilty" versus "no contest" plea sounds like a fabrication. The court, however, had the benefit of something we do not have—the opportunity to observe Etienne's manner and demeanor when testifying, which is why we largely defer to the court's credibility determinations. The court's finding that Etienne's testimony was not credible is strongly supported by the evidence. We further note that Etienne fails to develop any legal argument to show that even if what he claims was true, that it amounts to deficient performance. Furthermore, he does not even attempt to develop an argument to show that he was prejudiced.

Etienne has failed to demonstrate that his counsel performed ineffectively.

IT IS ORDERED that the judgment and order are summarily affirmed, pursuant to 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