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DISTRICT II

May 12, 2021

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

2019AP1722-CR State of Wisconsin v. Danny D. Funchest (L.C. #2017CF1371)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Danny D. Funchest appeals from a judgment of conviction and an order denying his postconviction motion seeking plea withdrawal based on the ineffective assistance of counsel. 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 (2019-20).¹ Because counsel did not provide ineffective assistance, we affirm.

Funchest robbed a bank at gunpoint. He was charged with two counts: robbery of a financial institution by use of a dangerous weapon, as a repeater; and possessing a firearm as a felon. As part of a plea agreement, Funchest pled guilty to the robbery count without the weapon and repeater enhancers, and the charge of possessing a firearm was dismissed. The State agreed to cap its initial-confinement recommendation at fifteen years. The circuit court imposed a bifurcated sentence totaling thirty-five years, with twenty years of initial confinement followed by fifteen years of extended supervision.

Postconviction, Funchest moved to withdraw his guilty plea. He asserted that trial counsel was ineffective for erroneously advising him that the State had agreed to recommend a total sentence of fifteen years, rather than a fifteen-year term of initial confinement. Funchest alleged that counsel's mistaken advice caused him to plead guilty, and had he known that the State's fifteen-year recommendation covered initial confinement only, he would have proceeded to trial.

As requested in Funchest's motion, the circuit court conducted an evidentiary *Machner*² hearing. Trial counsel testified that she went over the plea questionnaire form with Funchest

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

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

during their May 3, 2018 plea discussions and explained to him the difference between initial confinement and extended supervision. She testified that she discussed the State's plea offer with Funchest and "explained to him that would mean a recommendation of 15 years in the prison followed by a term of supervision after and that the State was free to argue the length and conditions" of extended supervision. Trial counsel testified that she gave Funchest the opportunity to ask questions if he appeared confused and stated, "He did not seem confused to me."

Funchest also testified at the *Machner* hearing. He denied trial counsel's version of events and stated that she never told him the difference between initial confinement and extended supervision. The circuit court denied Funchest's plea withdrawal motion, finding that trial counsel was credible and Funchest was not. Funchest appeals.

A defendant seeking to withdraw his or her plea after sentencing must prove by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *State v. Dillard*, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44. "One way to demonstrate manifest injustice is to establish that the defendant received the ineffective assistance of counsel." *Id.*, ¶84. The defendant must prove both that counsel's conduct was deficient, or, outside the wide range of professionally competent assistance, and that counsel's errors were prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice in a plea withdrawal case like the one at bar, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to

trial. *Dillard*, 358 Wis. 2d 543, ¶¶95-96. We need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

We conclude that Funchest is not entitled to plea withdrawal because he has not shown that trial counsel misinformed him about the terms of the plea agreement. The circuit court credited counsel's *Machner* hearing testimony confirming that she explained to Funchest that the State would agree to recommend fifteen years of initial confinement, not a fifteen-year total sentence. The court's credibility findings are not clearly erroneous and we must accept them. *State v. Domke*, 2011 WI 95, ¶58, 337 Wis. 2d 268, 805 N.W.2d 364.

In addition to the *Machner* hearing testimony, the record of the plea hearing supports the circuit court's factual findings and our conclusion that trial counsel did not perform deficiently. The plea questionnaire signed by Funchest and filed with the court unequivocally states that the prosecutor will recommend "15 years' initial confinement" but remains "free to argue length and conditions of extended supervision." The plea-taking court personally ascertained that Funchest understood as the parties' plea agreement that "[t]he State will be recommending 15 years of initial confinement, free to argue length and conditions of extended supervision." Additionally, the plea-taking court confirmed that Funchest understood he could receive up to twenty-five years of "initial confinement" and up to forty years of "total time." This further supports the court's finding that Funchest knew the difference between initial confinement and total sentence time.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court 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