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DISTRICT IV

May 20, 2021

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

2020AP530-CR State of Wisconsin v. Koalton Paul Peterson (L.C. # 2012CF2251)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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).

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

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

Peterson pleaded guilty to second-degree reckless homicide and aggravated battery. The circuit court imposed consecutive sentences.

Peterson first argues that his trial counsel was ineffective because counsel told Peterson and several family members that Peterson would receive only a seven- to ten-year prison sentence, which is substantially less than the sentence that he actually received.

The State argues on appeal that we should not review this claim because it is 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 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 his or her earlier postconviction motion. ***Escalona-Naranjo***, 184 Wis. 2d at 173.

On appeal, Peterson argues that he had a sufficient reason for not raising these claims earlier because his earlier postconviction counsel was ineffective. In response, the State argues that Peterson did not adequately allege ineffectiveness of postconviction counsel. Specifically, it argues that Peterson did not allege that he told his postconviction counsel about the alleged sentencing promise by his trial counsel. A lawyer is not ineffective for not pursuing something the defendant knew, but did not reveal. ***State v. Eison***, 2011 WI App 52, ¶21, 332 Wis. 2d 331, 797 N.W.2d 890.

We agree with the State's argument. Although Peterson's brief on appeal asserts that he explained this promise to his postconviction counsel, we have not been able to locate such an allegation in the postconviction motion itself. Peterson's reply brief does not address the point.

This alleged promise by trial counsel is not something that would be evident to postconviction counsel from the record, and not necessarily something that postconviction counsel could be expected to ask Peterson about specifically. And here, a defendant's lack of legal knowledge is not a significant obstacle to informing postconviction counsel of the fact of the alleged promise because a defendant would not have to have any amount of specific legal knowledge to notice and be bothered when he or she receives a sentence that is considerably longer than a promised sentence, and to then express that concern to postconviction counsel. Accordingly, we regard this as a type of claim for which postconviction counsel's performance cannot reasonably be considered deficient for not raising it, unless the defendant first told postconviction counsel about the alleged promise.

Therefore, we conclude that Peterson failed to allege sufficiently that his postconviction counsel was ineffective as to this issue. Therefore, this claim is barred by WIS. STAT. § 974.06(4) because Peterson did not allege a sufficient reason for not having raised this claim in his first postconviction motion.

Peterson's second claim on appeal is that his trial counsel was ineffective by not objecting at sentencing when the circuit court imposed consecutive sentences. Peterson argues that counsel should have objected at that point on double jeopardy grounds, specifically, that consecutive sentences made the charges multiplicitous.

As a claim for ineffective assistance at sentencing, this fails because multiplicity, if it exists, is not a sentencing error; it is a problem that lies in the underlying charges and convictions. Peterson does not cite authority establishing that consecutive sentences, as opposed

to concurrent sentences on the same charges, can be regarded as a double jeopardy violation when the underlying charges and convictions do not violate double jeopardy.

Instead, as we understand Peterson's argument, double jeopardy would not be a proper objection to make at sentencing, but is instead a basis for plea withdrawal. *See, e.g.*, ***State v. Kelty***, 2006 WI 101, ¶1, 294 Wis. 2d 62, 716 N.W.2d 886. Here, as to sentencing, with Peterson having pled guilty to the two counts, the court was free to impose consecutive sentences, and therefore counsel's performance at sentencing was not deficient.

As to the pleas to the charges, Peterson has not alleged deficient performance at that stage of the proceedings in which there was a plea agreement to amend the charge from one count of first-degree reckless homicide to the two charges Peterson pled guilty to. It is also not clear that Peterson has alleged that he would have rejected the plea agreement and gone to trial on the original charge if he had understood that he was pleading guilty to charges that were allegedly multiplicitous. Therefore, we need not address double jeopardy further and Peterson's double jeopardy argument fails.

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 will not be published.

Sheila T. Reiff
Clerk of Court of Appeals