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DISTRICT II

September 1, 2021

To:

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Circuit Court Judge
Electronic Notice

Hon. Emily S. Mueller
Circuit Court Judge
Electronic Notice

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

2019AP808-CR State of Wisconsin v. Thomas J. Eickner (L.C. #2015CF52)

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

Thomas J. Eickner appeals from a judgment convicting him of repeated sexual assault of the same child and from an order denying his postconviction motion seeking to withdraw his no contest plea. 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] We agree

[1] All references to the Wisconsin Statutes are to the 2019-20.

with the circuit court that Eickner did not establish a fair and just reason in support of his motion to withdraw his no contest plea prior to sentencing. We affirm.

Before he was sentenced, Eickner obtained successor counsel who filed a motion to withdraw his no contest plea. The circuit court denied the motion and sentenced Eickner to twenty-five years (fifteen years of initial confinement and ten years of extended supervision). Postconviction, Eickner again sought relief from his no contest plea, which the circuit court again denied.[2]

On appeal, Eickner argues that the circuit court should have granted his motion to withdraw his no contest plea because he established a fair and just reason to do so.

In order to withdraw a plea prior to sentencing, the defendant must establish a fair and just reason for the relief. ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. "The reason must be something other than the desire to have a trial or belated misgivings about the plea." ***Id.***, ¶32 (citations omitted). "When the plea colloquy is sufficient … the defendant's fair and just reason *should* rely on matters outside the plea colloquy record *or* be able to show why it is fair and just to disregard the solemn answers the defendant gave in the colloquy." ***Id.***, ¶62. We will uphold the circuit court's credibility determinations and findings of fact if they are not clearly erroneous. *See* ***id.***, ¶33. Left to the circuit court's discretion are whether the defendant's reason is adequate and whether to grant the plea withdrawal motion. ***Id.***, ¶¶30-31.

[2] On appeal, Eickner does not pursue the additional challenges he raised postconviction.

Eickner sought plea withdrawal because the attorney who represented him through the entry of his no contest plea (plea counsel) misled him about the likely sentence he faced,[3] and he did not understand aspects of the plea colloquy. At the evidentiary hearing on his plea withdrawal motion, Eickner claimed that he told his plea counsel he wanted to review the discovery, but, without doing so, he decided to enter a no contest plea after counsel told him he would not receive a long sentence, he would be going home, and the State would remain silent at sentencing.[4] Even though there were matters he did not understand during his discussions with counsel, he did not ask questions because he "just wanted to get [it] over with." Eickner confirmed that he understood the questions the circuit court asked during the colloquy and conceded that he had an opportunity to raise his questions and concerns at the plea hearing. Pleading no contest was not a "spur of the moment" decision; Eickner consulted with plea counsel and his family. He thought about withdrawing his plea before he met with the presentence investigation report author, but he did not tell plea counsel what he was thinking about. After finding out that the presentence investigation report author recommended a lengthy sentence,[5] Eickner told plea counsel he wanted to withdraw his plea.

[3] Counsel's incorrect prediction concerning Eickner's sentence is not enough to support a claim of ineffective assistance of counsel, were Eickner asserting such a claim. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272.

[4] The plea agreement precluded the State from making a sentencing recommendation at odds with the presentence investigation report's recommendation.

[5] The presentence investigation author recommended thirteen to sixteen years of initial confinement and seven to ten years of extended supervision.

Eickner's parents testified that Eickner told them shortly after he pled no contest that he did not understand all of the ramifications of his plea. The parents contend they told plea counsel that Eickner wanted to withdraw his plea, but counsel told them this was not an option.

Plea counsel testified that Eickner agreed to plead no contest without reviewing the discovery he had previously asked to review, even though counsel had offered him several opportunities to do so. Counsel was ready for trial, but on the day of trial Eickner decided he would plead no contest. Counsel reviewed with Eickner each item in the plea questionnaire, including the elements of the crime and the maximum penalty. Eickner reviewed the questionnaire himself along with the attached jury instructions. Up until he entered his plea, Eickner had vacillated. A few days after the plea hearing, Eickner told counsel that he was thinking about withdrawing his plea, but counsel opined that it was late to do so. After the presentence investigation report was issued, Eickner directed counsel to file a plea withdrawal motion, and counsel filed the motion the next day. Counsel testified that he told Eickner he would probably receive jail or a short prison term (approximately five years) and probation.

The circuit court applied ***Jenkins*** and made the following findings and conclusions. Eickner decided to enter a plea on the eve of trial. The plea colloquy was not deficient. Eickner's education and other personal characteristics showed that he had the ability to understand the proceedings even if he was anxious. Eickner had the opportunity during the plea colloquy to ask questions and raise concerns. He did not do so. Rather, during the plea colloquy and during the evidentiary hearing, Eickner affirmed his understanding of the matters addressed during the colloquy. Eickner understood the maximum penalty he faced. Even though Eickner claimed he did not have an opportunity to review evidence and discovery, he did not raise that issue during the plea colloquy. Based on the prior activity in the case, Eickner did not make a

hasty decision to enter no contest plea. The sentencing recommendation in the presentence investigation report influenced Eickner's decision to seek plea withdrawal, timing the circuit court deemed important in evaluating whether he had a fair and just reason.

The circuit court acknowledged Eickner's desire for a trial but characterized his claim of innocence as weak and not credible.[6] The court considered Eickner's responses during the plea colloquy, ***Jenkins***, 303 Wis. 2d 157, ¶62, and concluded that Eickner knowingly, voluntarily, and intelligently entered his no contest plea. The court denied the plea withdrawal motion, implicitly concluding that Eickner did not offer a fair and just reason for withdrawing his plea.

On appeal, Eickner places great weight on the testimony he, his parents and plea counsel offered that shortly after he entered his plea, he realized he wanted to withdraw it because he did not understand the consequences, plea counsel told him he would likely receive very little incarceration time, and he would be going home. However, the circuit court placed greater weight on other evidence, including the adequacy of the plea colloquy, Eickner's testimony that he understood matters addressed during the plea colloquy, and that he did not decide to withdraw his plea until after the presentence investigation report was released.

The credibility of the witnesses and the weight to be placed on the evidence was for the circuit court to decide. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted) (the circuit court "is the ultimate arbiter of the

[6] In characterizing Eickner's claim of innocence as weak and "really not credible," the circuit court considered the forensic interview of the eleven-year-old victim, Eickner's statements to police, and Eickner's statements to the court, including that his drug use impaired his ability to recall what he did. As the State points out, the complaint, which was the factual basis for the no contest plea, relates that Eickner wrote a letter to the victim's family apologizing for his conduct.

credibility of the witnesses and the weight to be given to each witness's testimony."). The circuit court's findings are supported in the record and are not clearly erroneous. The circuit court applied ***Jenkins***, considered factors extrinsic to the plea colloquy and concluded that Eickner did not offer a fair and just reason for withdrawing his no contest plea. We see no misuse of circuit court discretion.

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