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DISTRICT II

October 27, 2021

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County
Electronic Notice

Michael D. Graveley
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Timothy T. Kay
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You are hereby notified that the Court has entered the following opinion and order:

2019AP2291-CR State of Wisconsin v. George L. Mitchell, Sr. (L.C. #2017CF1069)

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).

George L. Mitchell, Sr., appeals from a judgment convicting him of one count of delivering between three and ten grams of heroin and an order summarily denying his postconviction motion for plea withdrawal. 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 affirm.

Based on a series of controlled drug buys, Mitchell was charged with the following five counts: two counts of delivering three grams or less of heroin; two counts of delivering between three and ten grams of heroin; and one count of conspiracy to deliver heroin, all as a repeater.

Appointed counsel moved to withdraw, citing a breakdown in communication. The circuit court adjourned the case so that Mitchell and trial counsel could try to work things out. They agreed to do so.

At the final pretrial hearing, trial counsel informed the circuit court that the State had just presented a very favorable plea offer. Trial counsel had recommended that Mitchell accept the plea offer and asked the court to conduct a ***Ludwig***[2] colloquy. Counsel again suggested that there was an apparent breakdown in communication and that perhaps another attorney should be appointed to represent Mitchell. When asked, Mitchell told the court that he believed counsel had not spent enough time with him and said that he felt rushed. He indicated he was unsure that trial counsel understood the factual background of his case. The court sent Mitchell and trial counsel to another room so that Mitchell could "acquaint [counsel] with whatever it is you think he doesn't realize," and they would "take it from there."

After Mitchell and his counsel discussed the case, they informed the circuit court that Mitchell wished to accept the State's offer to plead guilty to one count of delivering between

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

[2] ***State v. Ludwig***, 124 Wis. 2d 600, 369 N.W.2d 722 (1985).

three and ten grams of heroin in exchange for the dismissal of the remaining four counts and all five repeater allegations. Counsel filed a completed plea questionnaire and the court engaged in a plea colloquy with Mitchell, during which Mitchell said he understood the plea agreement. The court recited the charge and the potential penalties, and asked Mitchell if he understood. Mitchell answered, "I think I do." The court asked if he had any questions and Mitchell answered, "Nothing that I can come up with right now." The court told Mitchell that he did not have to plead guilty and could instead have a trial, and Mitchell said he understood.

The circuit court continued its colloquy and asked Mitchell if his mind was clear. Mitchell answered, "I believe it is." The court followed up by asking if Mitchell was "feeling all right," and Mitchell answered, "Yes, sir." Mitchell said he "believe[d]" he had enough time to speak to his attorney and that he had enough time to think about what he was doing. When the court asked if he was rushed into pleading, Mitchell said, "I believe I have, but I dealt with it." When the court followed up by asking if Mitchell had any questions for the court or his counsel, Mitchell said, "I can't think of anything at the moment[.]"

Mitchell acknowledged on the record that the plea questionnaire was read to him, that he understood everything on it, and that he signed it. The circuit court then told Mitchell that he was pleading guilty to distributing heroin and explained that the charge meant that he "transfer[red] it to another and that you were aware of what the substance was and that the amount of the substance was greater than three grams but less than ten grams." The court asked Mitchell if he understood the charge, and Mitchell answered, "Now that you read it out just now, it is much clearer to me. Yeah, I do." Mitchell then pled guilty.

Postconviction, Mitchell filed a motion for plea withdrawal asserting that: he did not understand the charge to which he pled or the consequences of his plea, his counsel was ineffective for not informing him about the charges and the consequences, and he was coerced into pleading guilty. The circuit court denied the motion without an evidentiary hearing.

On appeal, Mitchell argues that the circuit court erred in denying his postconviction motion without an evidentiary hearing. 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. To establish a manifest injustice, the defendant has the burden to show "that there are 'serious questions affecting the fundamental integrity of the plea.'" ***Id.*** (citation omitted).

A defendant is not automatically entitled to a hearing on his or her postconviction motion. The circuit court is required to hold an evidentiary hearing only when the motion alleges facts which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient material facts, if the allegations are merely conclusory, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

We conclude that the circuit court properly denied Mitchell's motion without an evidentiary hearing. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (the sufficiency of a postconviction motion to merit an evidentiary hearing is a question of law). First, the record of the plea hearing conclusively demonstrates that Mitchell understood the

charge to which he was pleading guilty and the potential consequences of his guilty plea. The court personally ascertained Mitchell's understanding of the nature of the charge and the potential penalties. Mitchell told the court that he did not have any questions about the charge or potential punishment, and that he could not think of any questions for the court or counsel. Mitchell confirmed that he signed and understood a plea questionnaire setting forth the charge and the direct consequences of his guilty plea.

Second, Mitchell has not set forth any facts that, if true, would constitute a manifest injustice entitling him to plea withdrawal. In his postconviction motion and on appeal, he does not point to any material information that was incorrect or that he did not understand when entering his guilty plea. Instead, he asks this court to infer that he must not have understood the court's plea-taking questions because he prefaced his answers with "I believe" or "I think." Read in context, Mitchell's answers demonstrate that he understood the information provided by the court as well as the questions asked as part of the plea-taking colloquy.

For these same reasons, Mitchell is not entitled to an evidentiary hearing on his ineffective assistance of counsel claim. A defendant alleging the ineffective assistance of counsel has the burden to show that (1) trial counsel's performance was deficient and (2) this deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As with his claim that his plea was unknowingly entered, Mitchell has failed to set forth precisely what information trial counsel should have but did not provide and how this affected his decision to plead guilty. His conclusory allegations are insufficient to warrant an evidentiary hearing.

Similarly, Mitchell has not set forth any facts showing he was coerced into accepting the plea agreement. In his postconviction motion and on appeal, Mitchell claims that his guilty plea

was coerced because his counsel "lacked communication" with him and "told him that the plea deal was a good one[,]" and because the circuit court did not allow trial counsel to withdraw, but instead asked Mitchell and his counsel to engage in further discussion.

None of these assertions, if true, constitutes coercion under the circumstances of this case. Giving a defendant sound advice to accept a favorable plea offer is not coercive. ***State v. Rhodes***, 2008 WI App 32, ¶6, 307 Wis. 2d 350, 746 N.W.2d 599. To the extent Mitchell complains about trial counsel's communication, the circuit court explicitly went off the record so that Mitchell could discuss the case with trial counsel. It was after this discussion that Mitchell decided to plead guilty. The court specifically asked Mitchell if he wanted to plead guilty "given your alternatives," and Mitchell answered, "Yes. Yes, your Honor." Thereafter, the court directly asked Mitchell: "Has anybody threatened you or pressured you or forced you in any way to obtain your plea of guilty?" Mitchell answered, "No, sir."

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