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DISTRICT II

October 27, 2021

To:

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Electronic Notice

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

2020AP1539-CR State of Wisconsin v. Travis A. Jackson (L.C. #2017CF1237)

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

Travis A. Jackson appeals from a judgment of conviction entered after he pled guilty to burglary of a building or dwelling as party to a crime, contrary to WIS. STAT. §§ 943.10(1m)(a) and 939.05 (2019-20).[1] He also appeals from the postconviction order summarily denying his motion alleging his trial counsel provided ineffective assistance. 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.

In August 2017, Jackson joined his then-new-girlfriend, C.K., and her two sons for a trip to Lake Delton. C.K. packed her Toyota Corolla with the family's belongings for the trip and picked up Jackson. While in Lake Delton, Jackson and C.K. had an argument during which Jackson took C.K.'s keys and car without her permission and left Lake Delton by himself. He drove to his friend, Christopher D. Robertson's home, and together they decided to go to C.K.'s apartment in Waukesha to steal her belongings. Jackson and Robertson drove to C.K.'s apartment in her Corolla and entered her apartment without her permission. The two were captured on video surveillance loading televisions and other containers from C.K.'s apartment into her Corolla and another car she had parked at her apartment that belonged to her father, M.K. After loading both cars, Jackson and Robertson drove away.

C.K.'s mother drove to Lake Delton to bring C.K. and her sons home to find her televisions, video game systems, DVD player, and other property gone. As the police conducted their investigation, C.K. began receiving text messages from someone whom she believed to be Jackson. The messages said Robertson had her property. C.K. texted Jackson saying she wanted her property back and she would be asking the judge to sentence Jackson to the maximum. Jackson responded to her saying "U have to live to see it first" and sent a picture of Jackson holding a gun with the caption "bow." The two stolen cars were later found abandoned.

Jackson and Robertson were charged with burglary of a building or dwelling as party to a crime, two counts of operating a motor vehicle without owner's consent as party to a crime, and Jackson was charged with misdemeanor intimidation of a victim. Ultimately, Jackson pled guilty to the burglary of a building or dwelling as a party to a crime with the other three counts dismissed and read in. The victims, C.K. and M.K., submitted restitution forms. C.K. listed "Items from my car $2,757" and "Stolen from my house $3,350" for a total amount of $6,107.

A detailed listing of the items was attached to the restitution form. M.K. listed his loss as $3,210.22, attaching multiple repair receipts documenting the damage done to his car.

At the December 2018 plea hearing, the prosecutor began by reciting the plea agreement and identifying the restitution amounts as $3,210.22 for M.K. and $6,107 for C.K., noting that both victims were present in court. The court then asked defense counsel: "[I]s that an accurate recitation of the plea agreement?" Defense counsel responded that it was. The court then directly asked Jackson, "is that your agreement today?" and Jackson answered, "Yes, ma'am." Jackson also acknowledged he understood that restitution could be ordered based on the dismissed and read-in charges. The court accepted Jackson's plea and heard arguments as to sentencing.

M.K. made a statement. He told the circuit court that his family searched for the stolen property and located it at "a girlfriend's house who subsequently moved, and any hope of recovery of anything was lost." M.K. told the circuit court that Jackson started threatening the family after he was arrested and was "taunting my family on the internet with pictures of my grandson's clothing, computers, game consoles, as well as their piggy banks." Jackson's counsel told the circuit court that Jackson "wanted to return the property to the victim. However, Mr. Robertson had taken the property and would not cooperate with that plan." Trial counsel told the circuit court Jackson "would like to speak." Jackson admitted stealing from C.K. and told the court that C.K. "didn't really want to press charges and that she just wanted her stuff back." Jackson explained that he asked Robertson to return C.K.'s property, but Robertson refused "and ran off with the property." The court decided to order a presentence investigation report (PSI) before imposing sentence.

Jackson told the PSI author that C.K. "didn't get her property back" but "she did get her car back." The PSI report noted that "[r]estitution worksheets were completed for the missing items from the residence totaling: $3350.00, as well as missing items from the trunk of the stolen vehicle totaling $2757, equaling $6107.00." After the PSI was prepared, the court continued the sentencing hearing in March 2019. The court sentenced Jackson to a seven-year sentence with three years' initial confinement followed by four years' extended supervision to be served consecutively to a previously imposed sentence. After sentence was imposed, the prosecutor asked the court to order restitution, specifically identifying M.K.'s amount of $3,210.22 and C.K.'s amount of $6,107 for a total of $9,317.22. The court asked defense counsel about the restitution request and defense counsel responded: "We don't dispute that, your Honor." The court then ordered those restitution amounts and asked: "Any points of clarification that we need to make[?]" Defense counsel asked about Early Release or Challenge Incarceration and the court agreed to make Jackson eligible for both. Jackson then spoke up asking the court if he could "say one more thing." The court said "Sure" and Jackson asked if the court could transfer him to a different prison. The court explained it could not but that he should discuss his concerns with his attorney.

In June 2020, Jackson filed a postconviction motion asking for a restitution hearing. Jackson claimed his trial counsel provided ineffective assistance by failing to properly handle restitution. Jackson says his trial counsel stipulated to the restitution amount without discussing it with him and that Jackson would have insisted on a restitution hearing because "the $2,757 worth of items [C.K.] says were stolen from her car were actually recovered when the Corolla was recovered." In August 2020, the circuit court held a hearing on the motion. It recounted that at the sentencing hearing, the court specifically asked if the defense had any corrections to

the PSI, which explicitly referenced restitution worksheets and the specific restitution amounts from both C.K.'s home and her car. The circuit court explained: "In so many instances the issue related to restitution was laid out. It was done orally. It was done in writing, it was done in many different documents." The circuit court noted that "[n]o hearing is required if the Defendant fails to allege sufficient facts in his or her motion, if the Defendant presents only conclusory allegations or subject[ive] opinion, or if the record conclusively demonstrates that he or she is not entitled to relief." The circuit court ruled:

> We referenced [restitution] time and time again. Mr. Jackson was absolutely involved in his defense. We have the Victim Impact Statement that lays it out item by item, more detail than I see in most cases, for sure. The presentence investigation also completely referenced that, broke it down into two different numbers, didn't just lump it together.
>
> And then the Court had a colloquy with Mr. Jackson, and I looked back at the transcript. And I told you, you have a great presentation in court, you are very verbal. I don't believe that you didn't understand what you had agreed to.
>
> And for you to say that your attorney made some agreement on your behalf that you didn't agree to, based upon your appearance and demeanor in court and even making your own statement, the Court believes you would have spoken up. And you had many opportunities to do that.

The circuit court denied Jackson's motion, finding he failed to satisfy the requirements to warrant a ***Machner***[2] hearing. We agree.

"A criminal defendant has the constitutional right to effective assistance of counsel." ***State v. Sholar***, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89 (citing ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334). A defendant is denied that right when

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

counsel performs deficiently and the deficiency is prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985).

A ***Machner*** hearing is a prerequisite to an ineffective assistance claim. ***Sholar***, 381 Wis. 2d 560, ¶¶50-51 (citing ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)); ***State v. Curtis***, 218 Wis. 2d 550, 554, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998) ("assuming there are factual allegations which, if found to be true, might warrant a finding of ineffective assistance of counsel, an evidentiary hearing is a prerequisite to appellate review of an ineffective assistance of counsel issue"). "A defendant is entitled to a ***Machner*** hearing only when his motion alleges sufficient facts, which if true, would entitle him to relief." ***Sholar***, 381 Wis. 2d 560, ¶50 (citing ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433). This means Jackson must allege sufficient facts to establish that his counsel's performance was both deficient and prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). When a defendant simply makes conclusory allegations in his motion, his claim may be summarily rejected without an evidentiary hearing. ***Levesque v. State***, 63 Wis. 2d 412, 421, 217 N.W.2d 317 (1974). "[I]f the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Sholar***, 381 Wis. 2d 560, ¶50 (citation omitted).

Jackson alleged in his postconviction motion that the victim, C.K., got some of her property back—namely the items that were in her Corolla—which amounted to $2,757 of the restitution awarded. His entire argument rests on his assertion that C.K. recovered this property. He claims he did not know the restitution amounts documented in the record and repeatedly discussed during his court hearings included this $2,757. Jackson asserts that if his trial counsel would have discussed restitution with him, he would have requested a restitution hearing.

Jackson's allegations are insufficient to warrant a ***Machner*** hearing. His allegations are self-serving, purely conclusory, and not supported by any specific facts. Moreover, the record conclusively refutes Jackson's assertion that C.K. recovered some of her property. Jackson was in court when C.K.'s father told the circuit court that C.K. did not get her property back despite the family's efforts to track down the items Jackson stole from C.K. and her two sons. In fact, Jackson himself corroborated M.K.'s statement about his daughter not getting any of her things back. Jackson told both the circuit court and the PSI author that C.K. did *not* get any of this property back. He explained to the court that he tried to get C.K.'s property back, but his co-defendant refused to return it and absconded with the property. Jackson also specifically told the PSI author that C.K. did not get any of her property back except her car.

Jackson's postconviction motion failed to allege any specific facts to show his trial counsel acted deficiently or that any deficient performance prejudiced him. Jackson claimed only that his trial counsel stipulated to the restitution amount without discussing it with him and that if restitution had been discussed, he would have challenged the $2,757 amount. These self-serving and conclusory statements are not supported by any specific factual allegations. Jackson needed to allege more than his lawyer failed to discuss restitution with him or that he would have requested a restitution hearing because even if these assertions were true, he would not have been entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-10 (***Machner*** hearing required if defendant alleges facts which, if true, entitle him to relief).

Jackson's allegations also do not warrant a ***Machner*** hearing because the record conclusively shows he would not be entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-10. The record fully supports the restitution amounts and that Jackson had many opportunities to speak up during the repeated discussions about restitution. The only amount Jackson challenges is the

$2,757, which represented the items stolen from C.K.'s car. The record conclusively demonstrates that at the time the circuit court ordered restitution, it was undisputed that C.K. did not get back any of the stolen items. Jackson himself specifically admitted to both the circuit court and the PSI author that he tried to get these items back for C.K., but his co-defendant took all of C.K.'s property and absconded. Jackson fails to allege any specific facts to show how his trial counsel could be deficient for stipulating to restitution for property Jackson admitted he stole from C.K. and that Jackson admitted C.K. never received back.

The circuit court did not err when it summarily denied Jackson's postconviction motion.

Therefore,

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