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**DISTRICT II**

June 8, 2022

To:

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

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2021AP215-CR                      State of Wisconsin v. Richard J. Peacock (L.C. #2017CF680)

Before Neubauer, Grogan and Kornblum, 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).**

Richard J. Peacock appeals from a judgment convicting him of first-degree reckless injury and an order denying his postconviction motion seeking to withdraw his no contest plea due to ineffective assistance of trial 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).<sup>1</sup> We affirm.

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

“To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice.” *State v. Dillard*, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44. A defendant may demonstrate manifest injustice by establishing that counsel was ineffective, i.e., that counsel performed deficiently and that the deficient performance prejudiced the defendant. *Id.*, ¶¶84-85. Both deficient performance and prejudice present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* However, we review de novo whether counsel’s performance was deficient or prejudicial. *Id.* In the absence of deficient performance, we need not consider whether trial counsel’s performance was prejudicial. See *State v. Mayo*, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115.

The circuit court held an evidentiary hearing on Peacock’s postconviction motion. The circuit court was the “ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

Peacock had two lawyers in the circuit court. The first lawyer, Attorney Pangburn, withdrew before sentencing. Postconviction, Peacock claimed that Attorney Pangburn told him he would be sentenced to time served with probation which led Peacock to enter his no contest plea. Peacock received a twenty-five year sentence. The circuit court did not find credible Peacock’s claim that Attorney Pangburn made such a statement and rejected this ineffective assistance of counsel claim.

On appeal, Peacock relies upon his affidavit in support of his postconviction motion as support for his claim that Attorney Pangburn made this statement about his forthcoming sentence. Peacock overlooks that the circuit court held an evidentiary hearing and made credibility determinations. Because Peacock did not establish in the circuit court that Attorney Pangburn made a statement that caused him to enter his no contest plea, the circuit court did not err in rejecting Peacock's claim that Attorney Pangburn was ineffective.

We turn to Peacock's ineffective assistance of counsel claim against his second lawyer, Attorney Stevens. Peacock alleges that Attorney Stevens performed deficiently when he failed to file a promised pre-sentence motion to withdraw Peacock's no contest plea. The circuit court concluded that Attorney Stevens did not perform deficiently.

At the evidentiary hearing, Attorney Stevens testified that he was appointed approximately two months before sentencing. He met with Peacock on more than one occasion, and Peacock told him he wanted to withdraw his plea because he was displeased with Attorney Pangburn and thought he was entering a plea to "second-degree reckless endangerment," not "first-degree reckless endangerment."<sup>2</sup> Counsel and Peacock discussed the plea withdrawal procedure and that such a motion was unlikely to succeed. Counsel thought Peacock acknowledged his view of the motion's likelihood of success because they then turned to discussing the sentencing. Counsel believed that Peacock wanted counsel to make arguments favorable to him at sentencing rather than seek plea withdrawal because the sentencing arguments had a better chance of success. Had Peacock insisted on a plea withdrawal motion,

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<sup>2</sup> Peacock's crime of conviction was first-degree reckless injury contrary to WIS. STAT. § 940.23(1)(a).

counsel would have filed it. Counsel denied telling Peacock he would be sentenced to time served and stated that it was not his practice to ever make such a statement to a client, although that was the recommendation counsel intended to make at sentencing. Counsel also had a practice of informing clients that the circuit court was not bound by sentencing recommendations.

Peacock testified that he was confused at the plea hearing. Attorney Pangburn told him he was entering a plea to “reckless driving,” but at the plea hearing he was told that he would be entering a plea to first-degree reckless injury. Peacock also believed he would receive “possibly two years or time served” because that is what Attorney Pangburn predicted.<sup>3</sup> Peacock tried to raise with the court his counsel’s promise about sentencing, but he “kept getting cut off.” Peacock acknowledged that during the plea hearing, the court informed him that it did not have to follow any of the recommendations and could impose the maximum penalty, but Peacock was not willing to agree that he understood this. Peacock acknowledged that the presentence investigation report recommended four years, and the State was going to argue for ten years of confinement. Attorney Stevens told Peacock that he had to seek plea withdrawal because the plea did not match the plea agreement. Peacock denied that he decided to forego a plea withdrawal motion.

The circuit court rejected Peacock’s claim that he was confused about the plea he entered. The court specifically found not credible Peacock’s claim that his counsel told him that he would

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<sup>3</sup> This contention was rejected by the circuit court, and we have affirmed that finding.

be going home after receiving a time-served sentence.<sup>4</sup> The court found that Peacock was able to and had the opportunity to raise his concerns or ask questions, as he had done in court during the case, and if he had concerns about the plea at the time he entered it or at sentencing, he could have raised them. Referring to the plea hearing transcript, the court found that Peacock agreed that he understood his lawyers, the charge against him, the plea agreement, the elements of the crime to which he had agreed to plead, the maximum possible sentence and that the circuit court could impose the maximum penalty notwithstanding any recommendations made to the court. The court rejected Peacock's repeated claim that his disabilities affected his ability to understand the proceedings and noted that this precise issue was addressed during the plea hearing at which Peacock confirmed that he takes medication for his disabilities, and the medications do not interfere with his ability to understand. The court found that Peacock was "fixated" on his view of the case against him, a view that did not align with the facts, the law or the circuit court's ability to sentence within its discretion. The court concluded that Peacock did not show that his counsel was deficient.

The circuit court's findings regarding Attorney Stevens's performance are not clearly erroneous. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6. We agree with the circuit court that Peacock did not meet his burden to show that Attorney Stevens performed deficiently. See *State v. Roberson*, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111.

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<sup>4</sup> At the plea hearing, the circuit court explored with Peacock the concept of threats and promises as an inducement to plead no contest. The court excluded any promises counsel made regarding the arguments to be made at sentencing. Peacock indicated that he understood the difference between statements made by his counsel and promises made by another relating to Peacock's case.

In the absence of ineffective assistance of counsel, Peacock cannot show the manifest injustice required to withdraw his no contest plea.

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.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*