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DISTRICT II

July 30, 2022

To:

Hon. Wynne P. Laufenberg
Circuit Court Judge
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Hon. Robert S. Repischak
Circuit Court Judge
Electronic Notice

Christopher A. Liegel
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

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

2021AP1176-CR

State of Wisconsin v. Skyler J. Nicewarner-Amettis
(L.C. #2019CF996)

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).

Skyler J. Nicewarner-Amettis appeals from the circuit court's denial of his motion for resentencing. 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 For the following reasons, we affirm.

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

Nicewarner-Amettis was charged with numerous counts of delivering or intending to deliver various drugs, as well as one count of maintaining a drug trafficking place. He ultimately pled guilty to two counts, with the other charges being dismissed and read in. The circuit court ordered concurrent sentences of two years of initial confinement followed by three years of extended supervision on one count and two years of initial confinement followed by two years of extended supervision on the other count.

Nicewarner-Amettis filed a postconviction motion seeking resentencing on the alleged basis that the sentencing court received undisclosed ex parte communication. The circuit court held an evidentiary hearing at which both Nicewarner-Amettis and his trial counsel testified,² and the following relevant testimony was provided.

On direct examination, Nicewarner-Amettis testified that on the day of his sentencing, he met with his trial counsel prior to sentencing in a conference room in the courtroom. Counsel left the conference room for five minutes, leaving the door to the conference room open. Nicewarner-Amettis testified that he heard

Judge Laufenberg inquire to the [Assistant District Attorney] and ... ask[] her what the deals were that were given to [Nicewarner-Amettis] previously. And [the Assistant District Attorney] replied that at first it was three years in, three years out and then it was two years in, two years out and then they talked a temporary D.A. into prison time but stay silent; and Judge Laufenberg said okay.

Nicewarner-Amettis said he also overheard the bailiff state that Nicewarner-Amettis “has been dealing drugs since the fifth grade,” and Nicewarner-Amettis then heard the bailiff and multiple

² The Honorable Wynne P. Laufenberg entered the judgment of conviction, and the Honorable Robert S. Repischak entered the order denying Nicewarner-Amettis’ postconviction motion.

females laugh.³ Nicewarner-Amettis testified that when his trial counsel returned to the conference room, Nicewarner-Amettis informed counsel of what he had heard. Counsel responded with “Huh, really?” and after Nicewarner-Amettis confirmed, “Yes, that’s exactly what I heard word for word,” counsel stated, “Okay.”

Nicewarner-Amettis acknowledged that during the sentencing hearing that followed, counsel did not “raise any of that,” and Nicewarner-Amettis himself did not include anything in his statement to the court about what he had supposedly heard while in the conference room. When asked why he said nothing to the court, Nicewarner-Amettis responded, “I did not know I was supposed to.” On cross-examination, Nicewarner-Amettis testified that after informing counsel as to what he heard, he believed that counsel “was going to bring that up in our court proceeding.”

On examination by the court, Nicewarner-Amettis acknowledged that he never discussed with trial counsel, either immediately after sentencing or when he spoke with counsel again several days later, counsel’s failure to raise the ex parte communication issue with the court. When the court inquired as to why he did not discuss this with counsel, Nicewarner-Amettis stated, “I was not aware at the time whether what happened was necessarily legal or not,” “I was not aware that ... it was something that I should have had to bring up.... I thought bringing it to his attention was enough,” and “I don’t have any real knowledge of ... the [j]udicial [s]ystem.... I wasn’t even aware that I could bring up the matter myself.”

³ The record indicates that the sentencing judge, Judge Laufenberg, and the Assistant District Attorney are both female.

Nicewarner-Amettis' trial counsel testified that on the day of Nicewarner-Amettis' sentencing hearing, he met with Nicewarner-Amettis to discuss the soon-to-be-held hearing. Counsel testified that he had no recollection of a period of time when he left this meeting with Nicewarner-Amettis and that he did not recall Nicewarner-Amettis "bringing anything unusual to [his] attention." He testified that if Nicewarner-Amettis had told him of such an ex parte discussion occurring, counsel "would have found that to be very unusual." Counsel continued:

I believe that it would have triggered an obligation on the legal end to have raised the issue on the record to determine if there was some information that had been provided to the Judge that may ... taint or may have tainted the sentencing hearing. On the ethical end, it would have triggered an obligation on my part, I believe, to report to the Judicial Commission and/or the Office of Lawyer Regulation that there had been an ex parte communication.

Trial counsel further indicated that as far as he could recall, he did not raise any issue regarding such communications at the time of sentencing and did not report the matter to either the office of lawyer regulation or the judicial commission. Counsel confirmed that if he had reported the matter to either of those two bodies, that would have "st[oo]d out."

In making its ruling, the postconviction court identified the issue as "whether or not the event, that being [Nicewarner-Amettis] hearing the [ex parte] conversation, reporting the conversation, occurred" and "if in fact [Nicewarner-Amettis] has established his burden as to if something was said." In considering this issue, the court noted that trial counsel was an experienced attorney who had practiced in the Racine County courts for decades, including appearing in front of the postconviction judge's court for several years, which afforded the judge "an opportunity to view how he conducts himself with clients and with the Court." The court indicated its awareness that trial counsel "has represented judges who have run into ethical or legal problems" and thus that counsel was "well aware of the ethical considerations, not only of

attorneys, but of judges, and he is well aware of the consequences that take place with ethical missteps by attorneys and the judiciary.” The court noted counsel’s testimony that ex parte communication such as Nicewarner-Amettis alleged had occurred would be “unusual” and that counsel “was, I believe, straightforward in indicating that he did not recall this conversation taking place.” The court observed that if counsel had been informed by Nicewarner-Amettis that such an ex parte conversation took place, it would have

triggered [counsel’s] duty to raise the issue and it would have triggered his duty ethically to report this not only to the Office of Lawyer Regulation as it related to the [Assistant District Attorney] but also to the Judicial Ethics Commission. And [counsel] indicated that he did not recall such conversation taking place.

The court took “into account” Nicewarner-Amettis’ testimony that he was “not well-versed in the legal system,” but nonetheless found it suspicious that he “was given the right of allocution [at the sentencing hearing] and did make a statement to the Court” but failed to mention any ex parte communication.

[T]he fact that he allegedly heard a court officer indicate that he had been dealing drugs since the fifth grade is not such a legal concept, such a foreign, strange, legal concept that he would not bring this up. This is a factual concept. And I believe a reasonable person in Mr. Nicewarner-Amettis’ position, not even knowing the legal ramifications of his actions, would step up and say, Your Honor, I had not been dealing drugs since the fifth grade. That is not a legal concept, per se, but a factual concept that one does not need to be a trained lawyer to refute.

The court further expressed concern

that Mr. Nicewarner-Amettis did not confront [trial counsel] either at the sentencing or after the sentencing as to why he did not raise this issue.... [O]ne need not be steeped in legal knowledge and education to ask a very simple question of his attorney: Hey, I provided you this information. How come you didn’t bring this up at sentencing?

Taking into account all these considerations, the court concluded that trial counsel's "recollection and his testimony is far more credible than [Nicewarner-Amettis'] and without any corroboration to backup his assertions, I do not believe that the defendant has met his burden of proof."

Because a trial court has a superior opportunity "to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony," "[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact." *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 (alteration in original; citation omitted). It is also for the trial court, not this court, "to resolve conflicts in the testimony, and we review the evidence in the light most favorable to the findings made by the trial court." *Id.* (citation omitted).

In the end, the postconviction court did not find Nicewarner-Amettis credible and thus did not believe his story that the ex parte communication upon which his postconviction motion is founded ever occurred. There was ample evidence presented at the postconviction hearing in support of the court's determination in this regard. As a result, we affirm.

Therefore,

IT IS ORDERED that the order of the circuit court is 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