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DISTRICT II

August 3, 2022

To:

Hon. Paul Bugenhagen Jr.
Circuit Court Judge
Electronic Notice

Hon. Michael P. Maxwell
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Loryn Lange Limoges
Electronic Notice

Mark S. Rosen
Electronic Notice

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

2021AP1474-CR State of Wisconsin v. Jack C. Holling, Jr. (L.C. #2018CF238)

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).

Jack C. Holling, Jr. appeals from a judgment of conviction and an order denying his postconviction motion seeking plea withdrawal based on ineffective assistance of counsel.[1] Based upon our review of the briefs and record, we conclude at conference that this case is

[1] The Honorable Michael P. Maxwell presided over the plea hearing and entered the judgment of conviction. The Honorable Paul Bugenhagen Jr. entered the order denying the defendant's postconviction motion.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] Because counsel did not provide ineffective assistance, we affirm.

Holling was charged with three counts of first-degree sexual assault of a child under the age of thirteen, for sexual contact with his girlfriend's seven-year-old daughter. Pursuant to a plea agreement, the State filed an Amended Information charging Holling with one count of sexual assault of a child under the age of sixteen and two counts of first-degree child sexual assault, contact with a child under the age of thirteen. Holling pled guilty to one count of sexual assault of a child under sixteen years of age and the remaining counts were dismissed and read in. The parties agreed to a joint sentencing recommendation of five years of initial confinement and ten years of extended supervision. The circuit court imposed a bifurcated sentence totaling twenty-five years, with fifteen years of initial confinement followed by ten years of extended supervision.

Holling filed a postconviction motion seeking to withdraw his guilty plea. He asserted that trial counsel was ineffective for erroneously advising him that the circuit court would follow the plea agreement's joint recommendation of five years of initial confinement plus ten years of extended supervision. Holling alleged that trial counsel's advice was an "unequivocal promise." Holling also alleged that trial counsel advised him not to "worry" about the circuit court's comments at the plea hearing or the "words in the plea forms." Holling alleged that but for the representations and promise he would have proceeded to a jury trial.

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

As requested in Holling's motion, the circuit court conducted an evidentiary ***Machner***[3] hearing. Holling testified that his trial counsel told him "unequivocally" that "the judge would go along with [the plea] deal," and threatened Holling that if he did not plead he "would end up with double digits." Holling acknowledged that his trial counsel went through the plea forms with him prior to the hearing and explained the possible maximum penalties. He acknowledged that the plea questionnaire stated that the circuit court could sentence him to the maximum penalty, but he was told that "as long as I plead guilty, that this would be a deal." He testified that his trial counsel told him to "plead guilty and everything would be fine." He believed the joint sentencing recommendation was "set in stone." Holling testified that trial counsel told him to say that he was not promised anything, and to "go along with" the circuit court during the plea colloquy. Holling testified that he took the joint recommendation as "better than a promise."

Holling's mother also testified at the ***Machner*** hearing. She testified that trial counsel told her he had advised Holling to plead guilty so that he could "get" the joint sentencing recommendation, or Holling would get "double digits."

Trial counsel also testified and denied Holling's allegations as well as those of his mother, averring that he told neither person that the judge would follow the joint sentencing recommendation. He testified that he "always make[s] it clear to all of [his] clients that the judge is not a party to the plea agreement and ... can give the client any sentence the judge deems as appropriate." He testified that he "would never tell a client what the judge is going to follow or if there's any guarantee that the judge is going to follow that plea agreement." He stated that he

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

would "never tell a client that [he] know[s] exactly what a judge is going to do." Trial counsel did not recall telling Holling that if he went to trial he would "get double digits."

Trial counsel further testified that he had no recollection of speaking with Holling's mother about the plea agreement and stated that speaking with family members of a defendant is "not normally [his] practice" since he did not think it was "appropriate." Trial counsel further testified that he would have "read the entire plea questionnaire" to Holling, as he "always" did with clients, and in the course of doing so, he would have told Holling, at least once, that "the judge can give the client any sentence that is allowed by the statute." He stated that he would never say anything that is in conflict with the plea questionnaire. Trial counsel reaffirmed that he did not promise Holling or Holling's mother that the judge would agree to the plea agreement, stating that he was "confident that [Holling] understood the judge was not bound by [the plea] agreement."

The circuit court denied Holling's plea withdrawal motion, finding that trial counsel was credible and Holling was not.[4] The court relied on the plea colloquy during which Holling acknowledged that the court was not bound by the plea agreement's sentencing recommendation. The court found that Holling's contention that he was promised that the circuit court would follow the plea agreement was not credible. Holling appeals.

[4] The court observed that the testimony of Holling's mother "didn't really add or detract much" but that it was "hard to rely on it when it is really coming secondhand as to what was done" because there was "no indication that she would have been involved in the conversations between [trial counsel] and Mr. Holling." The court stated further that her testimony did not raise "any concern as to the credibility of [trial counsel]'s statements."

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44. "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." ***Id.***, ¶84. The defendant must prove both that counsel's conduct was deficient, or outside the wide range of professionally competent assistance, and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice in a plea withdrawal case like this one, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. ***Dillard***, 358 Wis. 2d 543, ¶¶95-96. We need not address both prongs of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697. We uphold a trial court's factual findings unless clearly erroneous, but decide de novo the legal question of whether counsel was constitutionally ineffective. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

We conclude that Holling is not entitled to plea withdrawal because he has not shown that trial counsel misinformed him about the consequence of the plea, or more precisely, that he promised him that the circuit court would adopt the joint sentencing recommendation. The circuit court credited trial counsel's ***Machner*** hearing testimony confirming that he did not promise that the circuit court would adopt the joint sentencing recommendation. The court found Holling's testimony that trial counsel told him to "go along with" the circuit court's comments during the plea colloquy incredible. The court's credibility findings are not clearly erroneous and we must accept them. *See* ***State v. Domke***, 2011 WI 95, ¶58, 337 Wis. 2d 268, 805 N.W.2d 364.

In addition to the ***Machner*** hearing testimony, the record of the plea hearing supports the circuit court's factual findings and its conclusion that trial counsel did not perform deficiently. The plea-taking court confirmed the joint sentencing recommendation, and then personally ascertained that Holling understood "that the court is not bound by the offer" and could "sentence [him] to the maximum possible penalty under the law." After Holling confirmed that he understood, he affirmed that he wanted to move forward with the plea.

Because Holling failed to show a manifest injustice by clear and convincing evidence, we affirm the judgment of conviction and order denying Holling's postconviction motion.

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