



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

February 7, 2023

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DeShea D. Morrow
Electronic Notice

David M. Dolecki
1604 River Street
Niagara, WI 54151

Angela Dawn Chodak
Electronic Notice

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

2020AP1940-CRNM State of Wisconsin v. David M. Dolecki (L. C. No. 2018CF127)

Before Stark, P.J.¹

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).

David Dolecki appeals from a judgment convicting him of two domestic abuse misdemeanors. Attorney Angela Chodak has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32. The no-merit report sets forth the procedural history of the case and discusses Dolecki's pleas and sentences. Dolecki has filed a response to the no-merit report in which he seeks to withdraw his pleas based upon claims of ineffective

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

assistance of counsel and also challenges the factual basis for his sentences. Chodak has filed a supplemental no-merit report addressing Dolecki's claims. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude that counsel will be allowed to withdraw and the judgment of conviction shall be summarily affirmed.

The State charged Dolecki with felony intimidation of a victim and misdemeanor counts of battery, criminal damage to property, and disorderly conduct, each as an act of domestic abuse. The charges were based on allegations that Dolecki physically assaulted his girlfriend Helen² during a drunken altercation and smashed her phone when she attempted to call 9-1-1. Dolecki eventually pled no contest to the battery and disorderly conduct counts as charged in this case and to a felony theft count in another case. In exchange, the State agreed to request the dismissal of the remaining counts as read-in offenses and to make a joint sentencing recommendation. The circuit court accepted Dolecki's pleas after reviewing a signed plea questionnaire with attached jury instructions, conducting a plea colloquy, and ascertaining that the facts set forth in the complaint—which Dolecki personally acknowledged on the record to be true—provided a sufficient factual basis for the pleas.

After the plea hearing, Helen filed a victim impact statement wherein she stated that she did not remember much of the incident due to her level of intoxication. Helen nonetheless asserted that any injuries she suffered were her “own intoxicated fault” and that she was “pretty sure in [her]drunken stupidity [she] broke [her] phone as a result of dropping it.”

² This matter involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

The circuit court subsequently held a sentencing hearing at which the parties addressed the presentence investigation report and provided a joint sentencing recommendation in accordance with the plea agreement. The State also informed the court that Helen had changed her story “a lot ... placing more blame on herself for what happened here, saying that her intoxication played a role in this as well.” Dolecki exercised his right of allocution, apologizing to Helen and taking “full responsibility” and “full ownership for all of [his] wrongdoings.” After hearing from the parties, the court acknowledged that Helen had altered her account of the incident while the case was pending and that there was likely “some mutual responsibility” for the altercation. Taking into account the ambiguity as to what actually happened, the court followed the parties’ joint recommendation regarding the charges in this case³ and sentenced Dolecki to consecutive terms of sixty days in jail on the battery count and thirty days in jail on the disorderly conduct count.

Upon reviewing the record, we agree with counsel’s description, analysis, and conclusion that the plea colloquy was adequate. We further note that Dolecki does not allege any specific misunderstanding related to the nature of the charges or his constitutional rights. Rather, Dolecki seeks to withdraw his pleas based upon allegations that his trial counsel: (1) met with Dolecki for only brief periods immediately prior to circuit court proceedings and did not timely provide him with updates on his case, as Dolecki believes was required by the Supreme Court Rules of Professional Conduct (“SCR”); (2) did not move to dismiss the case based upon a delay in charging; (3) failed to interview potential impeachment witnesses James Feldman and

³ The circuit court exceeded the parties’ joint sentence recommendation on the theft count in the accompanying case, but that case is not before us on appeal.

Anna Dolecki; (4) allowed the felony intimidation of a witness charge to be used as leverage in the plea agreement despite Helen’s recantation; (5) “ambushed” Dolecki by not advising him until “the last minute” that the felony intimidation of a witness charge would be read in rather than dismissed outright; (6) failed to explain to Dolecki that his convictions on the misdemeanors could serve as the basis for repeater allegations in the future; (7) failed to show Dolecki Helen’s actual recantation statement; and (8) failed to provide Dolecki an opportunity to either “reaffirm” or withdraw his pleas after the court stated that it would not follow the parties’ joint sentencing recommendation in the accompanying case. In addition, Dolecki asserts that there was no “factual basis” for his sentences following Helen’s partial recantation. We will briefly address each of these claims.

First, Dolecki alleges that his trial counsel failed to comply with SCR 20.1.1, SCR 20.1.3 and SCR 20.1.4—respectively dealing with competence, diligence, and communication—by meeting with him only immediately prior to circuit court proceedings. Even if such allegations might arguably provide grounds for a disciplinary complaint, they do not provide grounds for plea withdrawal. In particular, the timing of when counsel met with and communicated with Dolecki does not negate the substance of the information and advice that counsel provided to Dolecki before Dolecki entered his pleas.

Second, Dolecki contends that the State violated WIS. STAT. § 968.075(7)(b) by not charging him until nine months after the incident. That statute directs each district attorney’s office to develop and implement a policy that charging decisions on domestic abuse incidents ordinarily should be made within two weeks of a report. There is nothing in the statute, however, that required the district attorney to charge Dolecki within two weeks of the incident, nor does the statute suggest that the State’s failure to make a charging decision within two weeks

provides any basis for the dismissal of charges. Rather, it is self-evident that the statute is aimed toward protecting the rights of domestic abuse victims, not defendants. Therefore, the State's delay in charging Dolecki provided no grounds for trial counsel to file a dismissal motion.

Third, Dolecki faults his trial counsel for failing to interview two potential impeachment witnesses. Dolecki does not, however, allege that either witness would have provided information that Dolecki himself was unaware of at the time he made his decision to enter pleas. Moreover, appellate counsel has explained in the supplement to the no-merit report why it was unlikely that either witness would have provided useful impeachment information.

Fourth, Dolecki seems to argue that his trial counsel should have moved to dismiss the witness intimidation count before Dolecki entered his pleas, based upon Helen's partial recantation. However, Helen's victim impact statement was filed months after Dolecki entered his pleas. Dolecki does not point to anything in the record that would show that his trial counsel had any grounds to seek dismissal of the intimidation count prior to the plea hearing. To the contrary, the responding officer testified at the preliminary hearing that Helen reported that Dolecki broke her cell phone to prevent her from calling 9-1-1, and the officer personally observed the cell phone's broken screen.

Fifth, Dolecki does not dispute that he was advised and understood before he entered his pleas, that the witness intimidation count would be read in rather than dismissed outright. Again, the fact that the information was relayed on short notice does not negate the fact that it was relayed before Dolecki entered his pleas.

Sixth, Dolecki contends that his pleas were unknowingly entered because counsel did not advise him that his misdemeanor convictions could serve as the basis for future repeater

penalties. However, any future repeater penalties would have been a collateral, rather than a direct, consequence of Dolecki's pleas. See *State v. Brown*, 2004 WI App 179, ¶7, 276 Wis. 2d 559, 687 N.W.2d 543 (stating that a direct consequence of a plea is one with "a definite, immediate, and largely automatic effect on the range of a defendant's punishment," while a collateral consequence "does not automatically flow from the conviction, and may depend on the subsequent conduct of a defendant") (citation omitted)). There is no evidence that counsel actively misinformed Dolecki about potential future repeater penalties, and a plea may not be withdrawn based upon a mere lack of knowledge about a collateral consequence. See *id.*, ¶¶10-13.

Seventh, Dolecki alleges that he should be allowed to withdraw his pleas because his trial counsel failed to show him Helen's actual victim impact statement with the partial recantation. Once again, however, counsel could not have shown Dolecki the statement prior to the plea hearing because Helen had not yet made the statement at that time. Dolecki does not dispute that he was aware of the recantation by the time of sentencing. We are unaware of any authority supporting a claim that counsel performed deficiently by discussing the victim impact statement with Dolecki rather than showing it to him.

Eighth, the record shows—and Dolecki himself acknowledges—that he was advised at the plea hearing that the circuit court was not bound to follow any sentence recommendations by the parties. Contrary to Dolecki's apparent belief, dissatisfaction with a sentence does not provide grounds for plea withdrawal. Furthermore, the court imposed sentences in accordance with Dolecki's own recommendation on the two counts in this case. See *State v. Scherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he or she affirmatively approved).

Finally, we construe Dolecki's assertion that there was no factual basis for his sentences as a claim that he was sentenced based upon inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. We do not, however, deem information to be "inaccurate" merely because it was contested or incomplete. Rather, the defendant must demonstrate that the information upon which the circuit court relied at sentencing was "extensively and materially false." *State v. Travis*, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491.

Here, the circuit court was well aware of the discrepancies between Helen's initial account of the incident, her subsequent partial recantation, and Dolecki's own version of events. The court was not required to find Helen's recantation more credible than her initial report. For instance, we note that the responding officer observed and photographed injuries to Helen's wrist, knee, hip, shoulder, and the area above her eye, as well as Dolecki's bruised and bloody knuckles. Those observations, as well as Dolecki's own acknowledgement of responsibility for his "wrongdoings," fully support the conclusion that some physical altercation happened that was sufficient to support the counts of conviction. That the court granted Dolecki the benefit of the doubt regarding ambiguity over the exact details does not mean that Dolecki was sentenced based upon inaccurate information.

Our independent review of the record discloses no other potential issues for appeal.⁴ We conclude that any further appellate proceedings would be wholly frivolous within the meaning of

⁴ We note that Dolecki's pleas forfeited his right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights other than a double jeopardy claim that could be resolved based on the record. *See State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Anders. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Angela Chodak is relieved of any further representation of David Dolecki in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals