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DISTRICT II

July 26, 2023

To:

Hon. John A. Jorgensen
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

John W. Kellis
Electronic Notice

Walter W. Stern
Electronic Notice

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

2022AP2023-CR State of Wisconsin v. Mark R. Petersen (L.C. #2020CF635)

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).

Mark R. Petersen appeals from a judgment of the circuit court and an order denying his postconviction motion. He contends the court erred in denying, without a hearing, his request to withdraw his no-contest plea to operating a motor vehicle while intoxicated, fourth offense. 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 (2021-22).[1] For the following reasons, we affirm.

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[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

At a plea and sentencing hearing, Petersen pled no contest to OWI, fourth offense, with three other charges being dismissed. At the time of the plea, and during the sentencing portion of the hearing that immediately followed, Petersen, his counsel, the prosecutor, and the circuit court all appeared to be under the impression that the thirty-six-month driver's license revocation that was part of Petersen's plea understanding and the court's sentence would be the revocation he would incur.

Approximately a year and one-half later, Petersen moved to withdraw his plea because, according to his affidavit accompanying the motion, he learned some time after sentencing that instead of a thirty-six-month driver's license revocation, his driving privileges would be "permanently suspended." He further averred that had he known this would be the case, he would not have pled but would instead have insisted on a trial on the charges against him. The circuit court denied Petersen's motion, and he now appeals.

Before the circuit court and before us, Petersen stakes his claim on his position that we must review his motion for plea withdrawal under the "fair and just reason" standard.[2] This is the wrong standard. The "fair and just reason" standard applies when a defendant has pled to and been found guilty of a charge but has not yet been sentenced. After a defendant has been sentenced, which is the case here, a higher standard applies. Postsentencing, "[t]he circuit court has discretion to determine whether a plea should be withdrawn, and a plea will not be disturbed unless the defendant establishes by clear and convincing evidence that failure to withdraw the

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[2] In general, the fair and just reason standard states that "a circuit court should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" ***State v. Lopez***, 2014 WI 11, ¶2, 353 Wis. 2d 1, 843 N.W.2d 390 (alteration in original).

guilty or no contest plea will result in a manifest injustice." *See* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482.[3]

In its response brief, the State provides extensive argument based upon the correct legal standard to show why Petersen has failed to demonstrate that plea withdrawal is necessary to correct a manifest injustice. Petersen filed no reply brief and thus has conceded the State's arguments. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (lack of a reply to an opposing party's argument may be taken as a concession).

As Petersen recognizes, an important foundational question for his appeal is whether the purported "permanent[] suspen[sion]"[4] of his driver's license is a direct consequence of his plea or a collateral consequence of his plea.

> Direct consequences are those that have a "definite, immediate, and largely automatic effect on the range of a defendant's punishment." Collateral consequences, on the other hand, "are indirect and do not flow from the conviction"; rather, they "may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination" or may "rest[] not with the sentencing court, but instead with a different tribunal or government agency."

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[3] Petersen asserts that the lower standard of "fair and just reason" nonetheless applies here because "sentencing occurred immediately after the plea. There was no time in between the plea and the sentencing" to move to withdraw the plea. Petersen develops no argument and provides no legal authority in support of this position and thus we consider it no further. *See* ***ABKA Ltd. P'ship v. Board of Rev.***, 231 Wis. 2d 328, 349 n.9., 603 N.W.2d 217 (1999); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We further point out that immediately after accepting Petersen's plea to OWI fourth offense and finding him guilty, the court offered Petersen the opportunity to have the sentencing portion of the hearing adjourned to approximately a month and one-half later in order to have a presentence investigation done, but Petersen explicitly declined to take the court up on this offer.

[4] In his brief he refers to it as a "permanent revocation" of his driver's license.

State v. LeMere, 2016 WI 41, ¶31, 368 Wis. 2d 624, 879 N.W.2d 580 (alteration in original; citations omitted). The question is important and foundational because "[d]efendants have a due process right to be notified about the 'direct consequences' of their pleas…. If a defendant is not aware of the direct consequences of a plea, he or she is not appraised of 'the potential punishment' under WIS. STAT. § 971.08(1)(a)." ***State v. Byrge***, 2000 WI 101, ¶60, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). However,

> [i]nformation about 'collateral consequences' of a plea … is not a prerequisite to entering a knowing and intelligent plea.… The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea.

Id., ¶61 (citation omitted).

In his brief-in-chief, Petersen states in conclusory fashion that the permanent suspension is a direct consequence of his plea. In its response, the State provides extensive argument as to why it is only a collateral consequence. Again, Petersen submitted no reply brief and thus provides no retort to the State's argument, conceding this point as well.

On appeal, it is the appellant who bears the burden to demonstrate how the circuit court erred. ***Gaethke v. Pozder***, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381. By failing to provide any developed argument on the correct legal standard of manifest injustice and whether the revocation of his license is a direct or collateral consequence, he has failed to satisfy this burden.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals