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DISTRICT IV

September 28, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Waupaca County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP832-CR State of Wisconsin v. Elijah R. Kerrigan (L.C. # 2019CF8)

Before Kloppenburg, P.J., Graham, and Nashold, 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).

Elijah Kerrigan, by counsel, appeals his judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

Kerrigan was charged with nine felonies and two misdemeanors related to kidnapping a 15-year-old child and engaging in drug use and sexual contact with her over several days.

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

Pursuant to a negotiated plea agreement, Kerrigan pled guilty to one count each of child enticement with intent to have sexual contact, possession of child pornography, and distribution of methamphetamine to a minor in an amount equal to or less than three grams. *See* WIS. STAT. §§ 948.07(1); 948.12(1m); 961.41(1)(e)1. For child enticement and possession of child pornography, the circuit court sentenced Kerrigan to ten years of initial confinement and eight years of extended supervision on each count. For distribution of methamphetamine to a minor, the circuit court sentenced Kerrigan to four years of initial confinement and three years of extended supervision, with all sentences to be served concurrently.

Kerrigan argues on appeal that he is entitled to plea withdrawal because his trial counsel rendered ineffective assistance by failing to accurately advise Kerrigan, prior to his plea hearing, that he faced a mandatory minimum sentence of three years for possession of child pornography in violation of WIS. STAT. § 948.12(1m), rather than a presumptive minimum sentence of three years. Kerrigan first raised his claim of ineffective assistance of trial counsel by postconviction motion in the circuit court. The circuit court held an evidentiary hearing on April 18, 2022, pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The appellate record does not contain a transcript of the ***Machner*** hearing.[2] From electronic circuit court docket entries, it appears that both Kerrigan and his trial counsel testified. The circuit court denied Kerrigan's postconviction motion following the hearing, and Kerrigan appealed.

[2] It is the responsibility of the appellant to ensure the record on appeal is complete. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When transcripts are missing from the record, we assume that they support affirming the circuit court's determinations. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

"We review a circuit court's decision to deny a plea withdrawal motion under an erroneous exercise of discretion standard." ***State v. Savage***, 2020 WI 93, ¶24, 395 Wis. 2d 1, 951 N.W.2d 838. A defendant who seeks to withdraw a plea after sentencing must show by clear and convincing evidence that "allowing the withdrawal of the plea 'is necessary to correct a manifest injustice.'" ***Id.*** (citations omitted). "One way of demonstrating manifest injustice is to establish that the defendant received ineffective assistance of counsel." ***Id.***, ¶25 (citation omitted). To demonstrate constitutionally ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Relevant to this case is WIS. STAT. § 939.617, which provides minimum sentences for certain child sex offenses, including possession of child pornography contrary to WIS. STAT. § 948.12. Section 939.617(1) provides that "the court shall impose a bifurcated sentence" and that "[t]he term of confinement in prison portion of the bifurcated sentence shall be at least … 3 years for violations of [§] 948.12." Section 939.617(2) goes on to provide certain circumstances where the court "may impose a sentence" less than the maximum, but it is undisputed that none of those circumstances apply in this case.

The record reflects that Kerrigan's trial counsel prepared a plea questionnaire, and that Kerrigan reviewed the questionnaire with his counsel and signed it a few days before the plea hearing. At the bottom of the first page of the questionnaire, counsel wrote that the presumptive minimum penalty was "3 years of initial confinement," and "N/A" under the section referencing the mandatory minimum penalty Kerrigan faced. Kerrigan argues that his counsel incorrectly advised him that the minimum penalty he faced was presumptive rather than mandatory, and that this error deprived him of the effective assistance of counsel.

However, the record also reflects that, during the colloquy at the plea hearing, the circuit court identified and corrected any misunderstanding regarding the penalties that Kerrigan faced for possession of child pornography. The court asked Kerrigan, "[D]o you understand with regard to this offense the initial confinement must be at least three years?" Kerrigan replied, "I do, Your Honor." Kerrigan's trial counsel interjected that "it's a presumptive penalty of three years," but the court corrected counsel's error, stating, "Well, it indicates the Court shall impose a bifurcated sentence including at least three years of initial confinement." The court again asked Kerrigan if he understood, and Kerrigan replied, "Yes."

In his appellant's brief, Kerrigan asserts that he would not have entered his plea and would have insisted on proceeding to trial had he been correctly advised that he faced a mandatory (not presumptive) minimum penalty prior to the plea hearing, instead of learning that the minimum penalty was mandatory during the plea hearing. Other than a self-serving affidavit, Kerrigan fails to provide this court with any support for his contention that he would have pled differently had he been given the correct information prior to the plea hearing.

The State argues that Kerrigan's conclusory assertion, without more, is insufficient to establish the prejudice required to prevail on a claim of ineffective assistance of counsel. "To show prejudice, a defendant must do more than merely allege that he would have pleaded differently but for the alleged deficient performance. He must support that allegation with 'objective factual assertions.'" ***State v. Hampton***, 2004 WI 107, ¶60, 274 Wis. 2d 379, 683 N.W.2d 14 (quoting ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996)). The State asserts that Kerrigan has failed to meet the burden for establishing prejudice under ***Hampton***.

The State also argues that it is wholly illogical for Kerrigan to assert that he would have rejected the State's plea offer and insisted on proceeding to trial due to the mere timing of when he first learned that the three-year term of initial confinement for possessing child pornography was mandatory, rather than presumptive. The State argues that such an assertion makes even less sense in consideration of the record as a whole. Specifically, the record establishes that, absent the plea deal, Kerrigan faced numerous other criminal charges that carried multiple decades of potential prison confinement. Under the terms of the plea deal, the State agreed to recommend no more than ten years of initial confinement at sentencing, and agreed to dismiss and read in eight criminal charges.

Kerrigan did not file a reply brief and, therefore, the State's arguments are deemed admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted). But even without relying on Kerrigan's concession, we agree with the State. There is no indication in the record, other than Kerrigan's unsupported assertion, that he would have rejected the State's plea deal and risked a longer prison sentence, all because he did not learn until the plea hearing that he would have to serve at least three years of mandatory initial confinement if convicted of possessing child pornography.

For the reasons stated above, we conclude that Kerrigan has failed to establish that he was prejudiced by his trial counsel's alleged error. On the record before us, we cannot conclude that the circuit court erroneously exercised its discretion when it denied Kerrigan's postconviction motion for plea withdrawal based on ineffective assistance of counsel.

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.

Samuel A. Christensen
Clerk of Court of Appeals