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DISTRICT II

Amended June 11, 2024
June 5, 2024

To:

Hon. Brad Schimel
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Michael J. Conway
Electronic Notice

Megan Sanders
Electronic Notice

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

2022AP1225-CR State of Wisconsin v. Demetrick R. Eskridge (L.C. #2019CF1414)

Before Neubauer, Grogan and Lazar, 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).

Demetrick R. Eskridge appeals from a judgment convicting him of attempted possession of a firearm contrary to an injunction and an order denying his postconviction motion without an evidentiary hearing. 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].

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

We conclude that the circuit court did not erroneously exercise its discretion when it denied the postconviction motion without an evidentiary hearing. We affirm.

The parties do not dispute the facts pertinent to this appeal. In late 2016, Eskridge appeared for a hearing during which the circuit court granted a four-year domestic abuse injunction against him. *See* WIS. STAT. § 813.12. As with all § 813.12 injunctions, Eskridge's injunction required him "to surrender any firearms that he … owns or has in his … possession." *See* § 813.12(4m)(a)2. Eskridge was personally served with a copy of the injunction.

In July 2019, Eskridge attempted to purchase a handgun from a firearms store. He was subsequently notified by a store sales associate that his attempted handgun purchase was denied because he was not authorized to possess firearms under Wisconsin law. A detective with the Waukesha police department later contacted Eskridge and asked him to come to the precinct. Eskridge agreed, waived his ***Miranda***[2] rights, and admitted that he attempted to buy a handgun. Eskridge asserted that he had not known that the domestic abuse injunction was still active when he tried to buy the gun.

About a year after waiving his preliminary hearing, Eskridge filed a motion to dismiss the Complaint. He argued that WIS. STAT. § 941.29(1m)(f) required the State to prove that he subjectively knew he was subject to the domestic abuse injunction when he tried to buy the gun. Eskridge relied on the U.S. Supreme Court's then-recent decision in ***Rehaif v. United States***, 588 U.S. 225 (2019), which held that the federal felon-in-possession statute requires proof that the defendant actually knew of his felony status. The circuit court denied the motion, ruling that it was both untimely and it failed on the merits. The Criminal Complaint alleged that Eskridge

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

knew of the domestic abuse injunction and the challenge to the Complaint came too "late" in the proceedings.

Eskridge then filed a motion in limine to modify the jury instructions regarding the elements of attempted possession of a firearm contrary to an injunction. He renewed the ***Rehaif***-based argument advanced in his motion to dismiss. Based on ***Rehaif***, Eskridge argued that in addition to the other elements of the offense, the State must be required to prove that he "knew that he was subject to an injunction" and that he knew possessing a firearm was unlawful. According to Eskridge, he had attempted to purchase the handgun based on statements denying that he had any prohibitions restricting him from possessing a firearm. The statements on which Eskridge purportedly relied were made by his relative who was a retired sheriff's deputy, his retired probation agent and another unnamed active probation agent, and an unknown sheriff's deputy.

After a hearing on the motion in limine, the circuit court concluded that the State had to prove at a trial only "that the defendant was either served with notice of the injunction or was personally advised of the injunction in court." The court then heard and granted the State's oral motion in limine to exclude the statements from other people telling Eskridge that he was not subject to any firearms restrictions. As relevant here, the court determined that Eskridge lacked evidence to establish that any of the individuals Eskridge claimed to have relied on had the authority to render a legal opinion on which he could reasonably rely. Thus, the court held that Eskridge could not raise reliance on such statements as a defense at trial. Rather, it observed that if Eskridge was confused about the injunction, "[h]is obligation would be to confirm with the [c]ourt" whether the injunction remained in effect.

Eskridge subsequently entered a guilty plea to the charge. The State agreed to cap its sentence recommendation at a $150 fine and court costs. The circuit court did not impose a fine and waived court costs, deeming the felony conviction, alone, sufficient punishment.

Eskridge filed a postconviction motion to withdraw his guilty plea. He claimed that he entered an unknowing plea because he had not been advised or informed about a particular defense—entrapment by estoppel.[3] Eskridge insisted that he was not alleging ineffective assistance of trial counsel for failing to identify this possible defense; he nonetheless sought to have trial counsel testify at an evidentiary hearing on his motion.

The circuit court denied Eskridge's motion to withdraw his plea at a status hearing without ordering an evidentiary hearing. The court noted that, as with postconviction counsel, trial counsel had also moved for leave to argue that Eskridge relied on misinformation from state officials but the court "wasn't compelled by" any of defense counsels' arguments on this point. The court remained unpersuaded that Eskridge had shown that he could reasonably rely on any of the statements, and concluded that Eskridge lacked a factual basis to raise ignorance and reliance as a defense.

Eskridge appeals, arguing that the circuit court erred by dismissing his postconviction motion without an evidentiary hearing. He contends his plea was unknowing because when he entered his guilty plea to the charge, he did not know that he had a potential entrapment-by-estoppel defense to the crime of trying to buy a firearm when he was prohibited from doing so by

[3] "Entrapment by estoppel" is a phrase used to describe a defense to a crime committed when the unlawful action was taken due to ignorance rooted in reasonable reliance on misinformation from a state agent. *See* ***United States v. Baker***, 438 F.3d 749, 753 (7th Cir. 2006). There is no Wisconsin legal authority recognizing entrapment by estoppel as a viable defense to otherwise criminal activity.

a domestic abuse injunction. He asserts that the circuit court erred in denying him an evidentiary hearing to establish facts regarding whether his plea was knowing, intelligent, and voluntary.

Whether a postconviction motion is sufficient to entitle a defendant to an evidentiary hearing is a question of law which we review de novo. ***State v. Tucker***, 2012 WI App 67, ¶6, 342 Wis. 2d 224, 816 N.W.2d 325. If the motion is insufficient, the circuit court has discretion to grant or deny a hearing. ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. A motion that contains only conclusory or speculative assertions unsupported by the record is insufficient and no hearing is required. ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996); *see also* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

In ***State v. Sulla***, 2016 WI 46, 369 Wis. 2d 225, 880 N.W.2d 659, the court reaffirmed the analysis to be applied when a postconviction motion is denied without an evidentiary hearing. "[E]ven if the motion alleges sufficient nonconclusory facts," an "evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief." ***Id.***, ¶29 (citation omitted); ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (holding that to be entitled to an evidentiary hearing on a WIS. STAT. § 974.06 motion, a defendant must allege sufficient material facts which, if true, would entitle the defendant to relief.). A circuit court has discretion to deny "even a properly pled motion" without an evidentiary hearing "if the record conclusively demonstrates that the defendant is not entitled to relief." ***Sulla***, 369 Wis. 2d 225, ¶30.

A failure to notify a defendant about a possible defense to his or her charged crime is generally viewed as a potential ineffective assistance of counsel claim. *See, e.g.*, ***State v. Savage***, 2020 WI 93, ¶¶16, 37, 395 Wis. 2d 1, 951 N.W.2d 838 (addressing motion to withdraw guilty plea based on claim that trial counsel was ineffective for not raising a defense under ***State***

v. Dinkins, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787); ***State v. Burton***, 2013 WI 61, ¶62, 349 Wis. 2d 1, 832 N.W.2d 611 (evaluating plea-withdrawal motion premised on trial counsel's failure to inform the defendant of a not-guilty-by-reason-of-insanity defense). Notwithstanding, Eskridge insists on appeal, as he did with the circuit court, that his plea was not voluntary not because his trial counsel was ineffective, but instead because of his own ignorance of a potential entrapment-by-estoppel defense. He maintains now, as he did at his postconviction hearing, that he is not claiming that trial counsel performed deficiently in any way.[4]

Regardless of how he frames it, however, Eskridge fails to persuade us that his desire to withdraw his plea rests on anything more than a claim that trial counsel performed deficiently by failing to inform Eskridge of a potential defense.

In his reply brief, Eskridge continues to argue that the reason his plea was not knowingly entered is that he was ignorant of an available defense—namely, entrapment by estoppel. Eskridge's approach fails to carry the day, however, because the only way that he could possibly have known of this potential defense would be if trial counsel had told him about it.

Eskridge admits in his briefing the "gap in Wisconsin's case law concerning entrapment by estoppel" due to the "novelty of the defense." This "gap" presents an insurmountable hurdle for Eskridge's appeal, as "we do not consider trial counsel's performance deficient for any failure to raise a novel legal issue." *See* ***State v. Hailes***, 2023 WI App 29, ¶49, 408 Wis. 2d 465, 992

[4] It is axiomatic that a defendant advancing an ineffective assistance of counsel claim must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defendant's claim. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "In the context of an argument for plea withdrawal, the prejudice prong 'focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" ***State v. Hailes***, 2023 WI App 29, ¶46, 408 Wis. 2d 465, 992 N.W.2d 835, *review denied* (citation omitted).

N.W.2d 835, *review denied, citing* ***State v. Lemberger***, 2017 WI 39, ¶18, 374 Wis. 2d 617, 893 N.W.2d 232. Unable to establish deficient performance for failure to educate him on a novel defense, Eskridge cannot meet the first prong necessary to establish ineffective assistance of counsel.

Nor can Eskridge demonstrate any prejudice from his "ignorance" of the novel defense. Referring to his potential defense as "entrapment by estoppel" does not change the fact that trial counsel vigorously argued to the circuit court that if Eskridge were to proceed to trial, fairness dictated that the jury be told of Eskridge's conversations regarding whether he was under any firearms restrictions when he attempted the handgun purchase. This knowledge component, as argued by trial counsel, would require Eskridge's testimony as to the calls he made to his retired-deputy relative, his retired probation agent, and an unnamed sheriff's deputy. As demonstrated by the recitation of facts above, the circuit court repeatedly rejected this as a potential defense because Eskridge failed to establish a factual basis for such a defense. The people he purports to have contacted were not authorized to give legal opinions and, thus, any reliance on their opinions was not reasonable.

Finally, Eskridge fails to explain why he would not have accepted the State's offer and instead proceeded to trial if he knew that he could potentially present an entrapment-by-estoppel defense. Eskridge entered a guilty plea shortly after the circuit court again rejected his argument regarding his lack of knowledge and alleged reliance on outside statements. He has, therefore, also failed to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Consequently, we reject Eskridge's argument for plea withdrawal regardless of whether it is couched in terms of ignorance of the entrapment-by-estoppel defense

or ineffective assistance of counsel, and we conclude that Eskridge is not entitled to plea withdrawal for this reason. Therefore,

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