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DISTRICT I

November 19, 2024

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2023AP294-CR State of Wisconsin v. Baron D. Hogans (L.C. # 2017CF2526)
2023AP295-CR State of Wisconsin v. Baron D. Hogans (L.C. # 2017CF5857)

Before White, C.J., Geenen and Colón, 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).

Baron D. Hogans appeals his judgments of conviction and the order denying his postconviction motion seeking to withdraw his guilty pleas in these consolidated matters. 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] We summarily affirm.

In 2017, as a result of an investigation into a mobile drug trafficking operation, Hogans was charged with numerous offenses in two joined cases relating to three incidents involving

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

many other defendants. Hogans ultimately pled guilty in May 2018 to one count of possession with intent to deliver cocaine, as a second or subsequent offense; one count of possession with intent to deliver cocaine, as a second or subsequent offense, as a party to a crime; one count of felony bail jumping; one count of resisting an officer; and one count of obstructing an officer. The trial court[2] imposed a global sentence of thirteen years and nine months of initial confinement, to be followed by ten years of extended supervision.

Hogans filed a postconviction motion seeking plea withdrawal. He argued that the trial court had failed to adequately advise him on party to a crime liability and failed to establish a factual basis for the count of possession with intent to deliver that included party to a crime liability. He also raised a claim of ineffective assistance of counsel, alleging that his trial counsel had told him that if he accepted the plea offer, he would be able to participate in the earned release program in prison and "would be out of prison and home in [ten] months after sentencing." After an evidentiary hearing, during which testimony was heard from Hogans and from his trial counsel, the postconviction court denied the motion. This appeal follows. Additional relevant facts are discussed below.

In seeking plea withdrawal after sentencing, a defendant "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). One way to establish a manifest injustice is to show that the plea was not knowingly,

[2] The Honorable Janet C. Protasiewicz took Hogans' plea and imposed sentence; we refer to her as the trial court. The Honorable Michael J. Hanrahan heard and decided Hogans' postconviction motion; we refer to him as the postconviction court.

intelligently, and voluntarily entered, because when a plea does not meet this standard it "violates fundamental due process." ***State v. Johnson***, 2012 WI App 21, ¶8, 339 Wis. 2d 421, 811 N.W.2d 441 (citation omitted). Another means of demonstrating a manifest injustice is by proving ineffective assistance of counsel. ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482.

Validity of Pleas

Hogans first argues that permitting plea withdrawal is appropriate because his pleas were not knowingly, intelligently, and voluntarily entered due to the alleged failures of the trial court relating to explaining party to a crime liability and establishing a factual basis for the count that included that liability. Whether a plea was knowingly, intelligently, and voluntarily entered is a question of constitutional fact. ***Johnson***, 339 Wis. 2d 421, ¶8. For our review, we will uphold the trial court's findings of fact unless they are clearly erroneous, but we independently review the application of the relevant law to those facts. ***Id.***

To make a *prima facie* case for plea withdrawal, the defendant must show that his or her plea did not conform to the requirements of WIS. STAT. § 971.08[3] "or other mandatory procedures" for accepting a plea. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). "A plea will not be voluntary unless the defendant has a full understanding of the charges against him [or her]." ***Id.*** at 257. This includes an understanding of the element of party to a crime liability. ***Brown***, 293 Wis. 2d 594, ¶55; ***State v. Howell***, 2007 WI 75, ¶37, 301

[3] We note that the current version of this statute is the same as the 2017-18 version of the statute, when Hogans' plea was accepted.

Wis. 2d 350, 734 N.W.2d 48. It also includes establishing a factual basis for the offense. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836.

For the count involved in this challenge—possession with intent to deliver as a party to a crime—Hogans was charged after a vehicle in which he was a passenger crashed; Hogans and the driver fled, Hogans was apprehended, and the police discovered drugs and trafficking supplies inside the vehicle. During the plea colloquy, in observing that this offense included party to a crime liability, the trial court explained that this meant that Hogans either committed the crime himself or with someone else, or that he was "ready, willing and able to step in" to commit the crime. The court confirmed that Hogans had discussed this element with his trial counsel, understood it, and had no questions about it.

The trial court subsequently began discussing the circumstances surrounding this count with Hogans to establish a factual basis for his plea. Hogans stated that he was asleep in the vehicle when it crashed. The court then asked whether Hogans nevertheless knew the cocaine was in the vehicle, to which Hogans responded that he "didn't ask what was in the car." The court observed that Hogans should not plead guilty if he "didn't do anything." After repeated attempts to verify the facts of the offense with Hogans, the court advised Hogans' counsel that it would not accept his plea for that count based on that record.

After being informed that the State would revoke the plea offer, and after conferring with counsel, Hogans admitted that he knew there was cocaine in the car, that he knew the driver planned to sell it, and that he would have helped to sell the drugs. The trial court then accepted his plea.

Hogans then filed his postconviction motion to withdraw his plea. After reviewing the motion, the postconviction court agreed to hold a hearing on the ***Bangert*** issues presented by Hogans, although it observed it was a "close call" as to whether Hogans had presented a *prima facie* case for plea withdrawal on those grounds. *See* ***id.***, 131 Wis. 2d at 274. Because a hearing on those issues was granted, the burden of proof shifted to the State "to show by clear and convincing evidence that [Hogans'] plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." *See* ***Brown***, 293 Wis. 2d 594, ¶40.

To meet its burden, the State "may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record.'" ***Id.*** (citation omitted). For example, the State may "utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden." ***Id.*** The State may also present testimony at the evidentiary hearing from the defendant and trial counsel to demonstrate the defendant's understanding of the required information. ***Id.***

Here, the postconviction court observed that the plea questionnaire filed in these matters included the jury instructions for the offenses—including the party to a crime instruction—which had been initialed by Hogans. During the plea colloquy, the trial court confirmed with Hogans that his counsel had explained the elements set forth in the jury instructions, that Hogans understood them, and that he had no further questions on them. Furthermore, Hogans' trial counsel testified at the evidentiary hearing that it was his practice to have his clients initial the jury instructions to indicate that they had gone through them. He further testified that he had gone through the jury instructions with Hogans a day or two before the plea hearing, as well as the morning of the hearing. Counsel also said he provided an additional explanation of party to a crime liability during a break at the plea hearing.

Although the trial court did not read verbatim the instruction for party to a crime liability, it conveyed through paraphrasing a "common understanding" of the elements. The record further indicates that party to a crime liability was explained to Hogans several times by his trial counsel. Therefore, based on the totality of the evidence, we conclude that the State has met its burden of demonstrating that Hogans understood party to a crime liability when he entered his plea. *See* ***Brown***, 293 Wis. 2d 594, ¶40.

The record also indicates that the trial court made repeated attempts to establish a factual basis for the offense due to Hogans' initial unwillingness to admit anything beyond being asleep in the vehicle prior to the crash. "While a judge must ensure that a defendant realizes that his or her conduct does meet the elements of the crime charged, … he or she may accomplish this goal through means other than requiring a defendant to articulate personally agreement with the factual basis presented." ***Thomas***, 232 Wis. 2d 714, ¶21 (internal citation omitted). Hogans' trial counsel stipulated to the facts in the criminal complaints as being sufficient to establish a factual basis for his pleas, which may be used for this purpose. *See* ***id.*** Moreover, Hogans' eventual admissions to knowing there were drugs in the vehicle and of the plans to sell them, and his willingness to assist in the same but for the crash, comport with the facts in the complaint: the description of the mobile drug trafficking operation being investigated; Hogans' flight from the vehicle after it crashed; and the drugs, packaging supplies, digital scale, semi-automatic pistol, five cell phones, and multiple license plates that were found in the vehicle. Therefore, this record as a whole demonstrates that the State met its burden of showing that a factual basis was established. *See* ***Brown***, 293 Wis. 2d 594, ¶40.

In short, the record reflects that Hogans was aware of the elements of the offense in question and that his conduct met those elements. *See* ***Thomas***, 232 Wis. 2d 714, ¶22. As a

result, his claim that his pleas were not knowingly, intelligently, and voluntarily entered fails. *See* ***Brown***, 293 Wis. 2d 594, ¶40.

Ineffective Assistance of Counsel

In Hogans' claim of ineffective assistance of counsel, he alleges that his trial counsel told him that if he accepted the plea offer, he would be able to participate in the earned release program in prison and "would be out of prison and home in [ten] months after sentencing." To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must prove both prongs of this test or the claim fails. ***Id.*** In our review of an ineffective assistance claim, we will uphold the court's factual findings unless they are clearly erroneous; the question of whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law that we decide *de novo*. ***State v. Hunt***, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434.

Hogans asserts that the advice from his trial counsel regarding potential release within ten months was improper and deficient. He argues that according to Department of Corrections (DOC) policy, there can be no more than forty-eight months remaining on a sentence in order to be eligible for the program. Therefore, Hogans contends that counsel's advice was objectively unreasonable given the approximate 113 years of exposure that he was facing, along with the State's recommendation of "substantial prison" pursuant to the plea agreement. *See* ***State v. Carlson***, 2014 WI App 124, ¶¶30-31, 359 Wis. 2d 123, 857 N.W.2d 446 (stating that trial counsel's advice regarding a plea must be "objectively reasonable").

At the evidentiary hearing, trial counsel testified that when explaining the earned release program to Hogans, he told him that "*if* there was immediate eligibility" allowed by the trial court, then being released in ten months was something that could occur. (Emphasis added.) However, counsel also testified that he told Hogans the trial court could instead set an eligibility date rather than allowing immediate eligibility; and further, that even if the court allowed eligibility, Hogans would still have to apply for the program through the DOC and meet its requirements for participation. Additionally, counsel stated that he did not tell Hogans that he would be immediately eligible for the program because he "could not make that promise to anyone."

The postconviction court found counsel's testimony to be credible. We will not disturb credibility findings unless they are clearly erroneous. ***State v. Jenkins***, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. Based on this record, we conclude that Hogans has not demonstrated that his trial counsel's performance fell below the objective standard of reasonableness and was thus deficient. *See* ***Strickland***, 466 U.S. at 687-88.

Furthermore, "[t]o establish prejudice in the context of a postconviction motion to withdraw a guilty plea based upon ineffective assistance of counsel, the defendant must allege that 'but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Burton***, 2013 WI 61, ¶50, 349 Wis. 2d 1, 832 N.W.2d 611 (citation omitted). While Hogans did make this allegation, the postconviction court did not find his testimony in this regard to be credible. In making this finding, the postconviction court pointed out that the trial court had gone through the maximum penalties that Hogans could receive, which Hogans indicated he understood, never raising a question regarding the purported promise of being released in ten months.

Moreover, the record reflects that Hogans did not want to lose his plea deal. When the trial court declared that it would not accept Hogans' pleas after his hesitation in admitting the facts relating to the offenses, rather than proceed to trial, Hogans reinitiated the colloquy and made admissions relating to the elements of the charges. We therefore conclude that Hogans has not demonstrated that he was prejudiced by the alleged deficiency of trial counsel. *See* ***id.*** As a result, his ineffective assistance of counsel claim fails. *See* ***Strickland***, 466 U.S. at 687.

In sum, both of Hogans' claims upon which he bases his request for plea withdrawal fail. Accordingly, we affirm his judgments of conviction and the order denying his postconviction motion.

For all the foregoing reasons,

IT IS ORDERED that the judgments and order 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