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DISTRICT II

April 17, 2013

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

2012AP1980 State of Wisconsin v. Chad A. Stites (L.C. # 2011CF47)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Chad A. Stites appeals pro se from an order denying his WIS. STAT. § 974.06 postconviction motion for plea withdrawal. 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 (2011-12).[1] We affirm.

In 2011, the State filed a criminal complaint and information charging Stites with four counts: (1) operating a motor vehicle while intoxicated as a fourth offense within five years;

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

(2) operating after revocation; (3) possession of a controlled substance; and (4) possession of a non-narcotic controlled substance. After receiving the State Crime Laboratory's report indicating that Stites's blood alcohol content (BAC) was .026 per 100 milliliters and that the blood sample indicated the presence of various controlled substances, including cocaine, the State filed an amended information adding two new charges as counts five and six: (5) operating with a detectable amount of a restricted controlled substance as a fourth offense within five years; and (6) operating with a prohibited blood alcohol concentration (PAC) in excess of .02, as a fourth offense within five years. Stites acknowledged receipt of the amended information and pled guilty to count one. After performing a colloquy, the trial court accepted Stites's plea and, pursuant to the parties' plea agreement, dismissed the remaining five counts.[2]

In 2012, Stites filed a pro se WIS. STAT. § 974.06 postconviction motion seeking plea withdrawal. The motion alleged that trial counsel "was ineffective for allowing [Stites] to plead to an offense that wasn't in violation of the law because the information/complaint did not contain the PAC charge 346.43(1)(b) to justify the fourth offense OWI violation." Stites also claimed that the amended information was invalid because it was not filed within thirty days of arraignment. The trial court held a non-evidentiary hearing, and after considering the parties' arguments, denied the plea withdrawal motion. Stites appeals.

Stites's appellate claims are difficult to discern. For simplicity's sake, we construe his postconviction motion as a request for plea withdrawal under both ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The

[2] Both of the new charges were dismissed outright. Counts two, three, and four were dismissed and read in.

Bangert analysis addresses defects in the plea colloquy while ***Bentley*** applies where the defendant alleges that factors extrinsic to the plea colloquy, such as trial counsel's conduct, rendered his plea infirm. This dual approach permits analysis of whether the trial court erred in denying Stites's postconviction motion: (1) after a hearing on the merits; and (2) without conducting further proceedings, such as an evidentiary ***Machner***[3] hearing.

First, we conclude that the trial court did not err in denying Stites's plea withdrawal motion under ***Bangert*** because the motion failed to establish a prima facie case that the plea colloquy did not comply with WIS. STAT. § 971.08 or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274. Stites's central claims appear to be that the trial court failed to ascertain his understanding of the nature of the charge and the existence of a factual basis. With regard to the nature of charge, the record demonstrates that the trial court explicitly ascertained Stites's understanding of the elements of operating while intoxicated.[4] Further, the trial court personally ascertained, and we agree, that there was a factual basis for the charge to which Stites pled. The complaint alleged that the arresting officer stopped Stites after observing erratic driving, including "weav[ing] within its lane and cross[ing] over the white fog line and lane dividing line on numerous occasions." The officer detected a moderate odor of alcohol and saw that Stites's eyes appeared tired, glassy, and slightly bloodshot. Stites failed some of the field sobriety tests, and officers found in Stites's pocket two prescription medication bottles containing numerous

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing to preserve the testimony of trial counsel is a prerequisite to an appellate claim of ineffective assistance of counsel.

[4] If Stites is arguing that the trial court had a duty to ensure his understanding of the charges in the amended information, that claim is without merit. Stites has not provided us with and we are not aware of any authority for the proposition that the trial court has a duty to ascertain a defendant's understanding of dismissed charges.

pills. Among other drugs, the bottles contained lorazepam and a black straw, and Stites admitted to having consumed lorazepam. Regardless of Stites's BAC, these allegations, all contained within the criminal complaint, more than adequately support the charge of operating while intoxicated.

Second, we determine that the record conclusively demonstrates that Stites was not entitled to plea withdrawal under ***Bentley***. A defendant seeking plea withdrawal on grounds constituting a manifest injustice other than a ***Bangert*** violation need only be given an evidentiary hearing when his or her motion alleges facts which, if true, would entitle him or her to relief. ***Bentley***, 201 Wis.2d at 309-10. No hearing is required when the defendant presents only conclusory allegations or the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Whether a postconviction motion sufficiently alleges facts entitling a defendant to relief is reviewed de novo. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

We reject Stites's claim that trial counsel was ineffective for failing to object to the filing of the amended information. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient; and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Stites's postconviction motion fails to allege sufficient facts from which a court could determine that trial counsel performed deficiently or that counsel's conduct prejudiced Stites. As stated at the postconviction hearing, the trial court properly permitted the amendment of the information under WIS. STAT. § 971.29(1). *See* ***Whitaker v. State***, 83 Wis. 2d 368, 374, 265 N.W.2d 575 (1978) (section 971.29(1) permits amendment of the information after arraignment but before trial). Therefore, trial counsel had no grounds for objecting to the amendment and his

performance was not deficient. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected). Further, Stites has failed to demonstrate that he was prejudiced by the filing of an amended information where both new charges were subsequently dismissed.[5]

We also reject Stites's claim that trial counsel was ineffective for failing to request an adjournment to investigate the new charges. Again, because these charges were dismissed, Stites has failed to demonstrate any prejudice. Further, Stites's motion fails to sufficiently explain how a postponement would have resulted in a different outcome. The postconviction motion alleged: "There is a reasonable probability that Stites would not have been convicted of fourth offense if counsel would have objected to the amended information, because (Pac) was not included in original and (Pac) is the heart of the case." This self-serving, conclusory statement fails to explain why Stites would have pled in the face of four, but not six, charges.

Upon the foregoing reasons,

IT IS ORDERED that the order of the trial court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[5] The cases Stites relies on to demonstrate prejudice involve amendments at trial under WIS. STAT. § 971.29(2). These cases are inapplicable to the present circumstance, where the information was amended prior to an anticipated plea.