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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:

2012AP759	State of Wisconsin v. Gregory A. Koleske (L.C. # 2009CF224)
2012AP760	State of Wisconsin v. Gregory A. Koleske (L.C. # 2009CF343)
2012AP761	State of Wisconsin v. Gregory A. Koleske (L.C. # 2009CF397)

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

In these consolidated appeals, Gregory A. Koleske appeals from orders denying his motion for postconviction relief. Koleske contends that the circuit court erred in denying his motion to withdraw his guilty pleas without an evidentiary hearing. Based on 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 the orders of the circuit court.

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

In 2009, Koleske entered guilty pleas to misdemeanor battery of his wife and two counts of felony bail jumping. The circuit court subsequently held a status hearing at which Koleske's attorney informed the court that she believed the victim's statements in the presentence investigation (PSI) report were inaccurate. Consequently, she asked the court for a chance to prove the inaccuracies. She also asked the court to allow her to obtain the medical records from the hospital where the victim was seen.

The circuit court held another hearing two weeks later at which Koleske's attorney told the court that, "[a]fter doing my research, I came to the conclusion that this is a sentencing hearing and, therefore, we probably would not be entitled—we would not be entitled to get the victim's mental health or physical records, so I am withdrawing that motion." Koleske's attorney also asked to postpone sentencing until certain witnesses were available to testify on Koleske's behalf. The court granted this request.

The circuit court held a sentencing hearing the following month. There, Koleske's attorney informed the court that she did not have any additions or corrections to the PSI report. The court asked Koleske's attorney if she had discussed with Koleske his desire to file a motion to withdraw his pleas. Koleske's attorney replied that she did and told the court that Koleske had decided not to withdraw his pleas and instead wished to go forward with sentencing. The court then sentenced Koleske.

In November 2011, Koleske filed a Wis. STAT. § 974.06 motion to withdraw his guilty pleas, alleging ineffective assistance of counsel and newly discovered evidence. The circuit court denied his motion without an evidentiary hearing.² This appeal follows.

On appeal, Koleske contends that the circuit court erred in denying his motion to withdraw his guilty pleas without an evidentiary hearing. Koleske maintains that his trial counsel was ineffective for (1) failing to conduct an investigation with medical evidence and police reports; (2) failing to obtain defense witnesses; and (3) failing to object to “know[n] inaccuracies in the PSI” report. He further maintains that the medical evidence and police reports constitute newly discovered evidence.

Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that we review de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.* However, if the motion does not raise facts sufficient to entitle the defendant to relief, “or presents conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Allen*, 274 Wis. 2d 568, ¶9. We

² In denying Koleske’s postconviction motion, the circuit court applied the procedural bar of *Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We conclude that *Escalona* does not apply, as there has not been a direct appeal or a prior postconviction motion in Koleske’s case. See *State v. Lo*, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756. Accordingly, we will consider Koleske’s arguments on their merits.

review the court's discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

We conclude that the circuit court properly denied Koleske's postconviction motion without an evidentiary hearing. With respect to Koleske's claim of ineffective assistance of counsel, we view his allegations regarding his attorney's failure to conduct an investigation with police reports and failure to object to the PSI report as conclusory at best. Moreover, the record conclusively demonstrates that Koleske waived seeking medical evidence and obtaining defense witnesses³ when he entered his guilty pleas and elected to go forward with sentencing. Finally, with respect to the claim of newly discovered evidence, Koleske's argument is a nonstarter. Because Koleske waived seeking medical evidence, he cannot rely on it as new evidence. Likewise, he cannot rely on the police reports as new evidence, as they are simply Koleske's new interpretation of old evidence.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ During the circuit court's plea colloquy, Koleske indicated that he understood he was giving up his right to have his attorney subpoena people to come to court to testify on his behalf.