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DISTRICT II

July 17, 2013

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

2012AP2258-CR

State of Wisconsin v. Jose A. Leon-Nava (L.C. #2009CF909)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jose A. Leon-Nava appeals from a judgment of conviction and an order denying postconviction relief. Leon-Nava contends that the circuit court erred in denying his postconviction motion without a 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 (2011-12).¹ We affirm the judgment and order of the circuit court.

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

Leon-Nava was convicted following guilty pleas to felony murder as a repeater and first-degree reckless injury with use of a dangerous weapon as a party to a crime and as a repeater. The charges stemmed from Leon-Nava's actions in a fatal armed robbery at an eatery in Kenosha. The circuit court sentenced Leon-Nava to a total of fifty years of imprisonment and ordered him to pay restitution in the amount of \$178,046.27.

Leon-Nava subsequently filed a postconviction motion seeking to compel a restitution hearing. In it, he complained that the circuit court failed to make findings regarding his ability to pay restitution. He further complained that his trial counsel was ineffective for having agreed to the payment and amount of restitution without first consulting him. The circuit court denied the motion without a hearing. This appeal follows.

On appeal, Leon-Nava contends that the circuit court erred in denying his postconviction motion without a hearing. 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 only 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 review the court’s discretionary decision “under the deferential erroneous exercise of discretion standard.” *Id.*

Reviewing Leon-Nava's postconviction motion, we agree with the circuit court that it did not warrant a hearing. With respect to Leon-Nava's first complaint, there was no error in the circuit court's failure to make findings regarding his ability to pay restitution. The issue was never before the court, as Leon-Nava's counsel offered no objection to the restitution order.² *See State v. Szarkowitz*, 157 Wis. 2d 740, 750, 460 N.W.2d 819 (Ct. App. 1990) (when a defendant fails to offer any evidence on the issue of his inability to pay amounts claimed as restitution, the issue is not before the court and the court need not make detailed findings regarding the defendant's ability to pay).

With respect to Leon-Nava's second complaint, there was no basis to conclude that trial counsel was ineffective for having agreed to the payment and amount of restitution. As noted by the circuit court, counsel was employing a clear legal strategy in offering no objection to the restitution order. Counsel wished to curry favor with the court at sentencing, and Leon-Nava rode that wave with his own remarks of contrition. Even assuming that counsel's actions amounted to deficient performance, Leon-Nava does not assert in his motion that he would have done something differently if counsel had consulted him. Thus, Leon-Nava failed to plead sufficient facts supporting the prejudice prong of the ineffective assistance of counsel standard. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).³ As a result, the circuit court properly denied his motion without a hearing.

² Leon-Nava's counsel began his sentencing remarks by stating, "The first thing I'll say is we don't have any objection to the restitution order."

³ Although the circuit court did not rely on this ground, this court may affirm a circuit court's decision on a rationale different from the one on which the circuit court relied. *See State v. Trecroci*, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals