COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1349 **Cir. Ct. No. 2007CF1234**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT E. HARRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Vincent Harrell appeals pro se from an order denying his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion and denying

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

his motion for reconsideration of the circuit court's decision vacating an order that the victim witness surcharge (VWS) owed by Harrell is to be collected only as a condition of extended supervision. Harrell argues that he should be allowed to withdraw his guilty plea because the prosecutor breached the plea agreement by not dismissing repeater enhancers and that his trial counsel was ineffective in failing to object to the breach or in failing to advise Harrell that the plea agreement had been modified. He also argues that the Department of Corrections' (DOC) motion to vacate the order that the VWS be collected only during extended supervision was untimely and was without a legal basis. We affirm the order of the circuit court.

¶2 In 2007 Harrell was charged with two counts of robbery by threat of force as a repeat offender. In 2009 Harrell was convicted on his guilty plea of two counts of theft from a person or corpse as a repeat offender. His conviction shows a $170 VWS. When prison officials began collecting the VWS from Harrell's prison trust account, he moved the sentencing court to clarify that the court intended the VWS to only be a condition of extended supervision. By a February 5, 2011 notation, the sentencing court made that clarification and asked that the institution be so informed. When Harrell was transferred to the new institution, that institution began collecting the VWS from Harrell's prison trust account. Harrell wrote a letter to the circuit court clerk requesting something from the court stating that his previous motion to restrict collection was granted.[2] The circuit court entered an order November 12, 2013, stating that the VWS is to be paid as a condition of extended supervision. On December 9, 2013, the DOC filed

[2] Harrell's letter does not indicate that a copy was sent to anyone other than the clerk.

a motion to rescind the November 12, 2013 order. After a hearing, the DOC's motion was granted. Harrell's subsequent motion for reconsideration was denied.

¶3 In his WIS. STAT. § 974.06 motion, Harrell alleged that on November 20, 2009, the prosecution's plea offer was for Harrell to plead guilty to amended charges of theft from a person with the repeater enhancer stricken and that he agreed to accept that offer. At the plea hearing, Harrell's attorney indicated that the agreement was that Harrell would enter a guilty plea to two counts of theft from a person as a repeater. Harrell alleged that he questioned his attorney at the plea hearing as to why counsel had not informed the court that the repeater enhancer was dismissed and his attorney indicated it did not make a difference. Harrell's § 974.06 motion claimed his trial counsel was ineffective in failing to enforce the agreement as he understood it—to require the repeater enhancer to be stricken. At the hearing on the motion, Harrell asserted that the prosecutor had breached the plea agreement. The circuit court summarily denied the motion finding that it had no merit.

¶4 When a defendant alleges some factor extrinsic to the plea colloquy, like ineffective assistance of counsel, as grounds to withdraw his or her plea, we review the circuit court's decision under the ***Nelson/Bentley*** line of cases. ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48; ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). A ***Nelson/Bentley*** motion "may be denied without an evidentiary hearing if the record as a whole conclusively demonstrates that relief is not warranted." ***Howell***, 301 Wis. 2d 350, ¶77. We independently determine as a matter of law whether the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.***, ¶78. After the determination as a matter of law, we

consider whether the circuit court erroneously exercised its discretion in not conducting a hearing. ***Id.***, ¶79.

¶5 For his claim that the plea agreement required the repeater enhancer to be stricken, Harrell relies on a November 20, 2009 letter from the prosecutor to his attorney outlining the pretrial offer. The letter does not support Harrell's contention that the repeater enhancer would be stricken with amended charges. The letter stated:

> The defendant should plead to both counts as charged in 07-CF-1234. The repeater enhancers will be struck. The State will recommend five years IC plus five years ES on each count concurrent to each other but consecutive to the Milwaukee County case.

¶6 The November 20, 2009 letter outlines an agreement to strike the repeater enhancers if Harrell entered a plea to the original charges of robbery by threat of force. The letter does not suggest any offer to reduce the charges.

¶7 The plea questionnaire signed by Harrell indicates that he would plead to two counts of theft from a person, as a repeater. It includes Harrell's acknowledgement that he understood the elements of theft from a person and habitual criminality and that the maximum penalty was "14 years prison (10 + 4) on each count." The second page of the questionnaire recites the plea agreement as requiring the prosecution to file an amended information as two counts of theft from a person as a repeater.[3] Harrell's initials appear next to the charges listed on amended information, a copy of which is attached to the plea questionnaire. The

[3] Harrell questions whether the second page of the plea questionnaire exists because it was not provided to him when he requested a copy of the plea questionnaire. It appears to have been an oversight that the second page was on the backside of the first.

amended information lists the charges as "theft from person or corpse, repeater," and also sets forth the prior convictions that supported the repeater enhancer. During the plea colloquy, the court advised Harrell he was being charged as a habitual criminal and Harrell acknowledged he had read the amended information and the plea questionnaire was accurate.

¶8 Harrell's motion for plea withdrawal rests on the factually erroneous premise that the prosecutor agreed to reduced the charges and strike the repeater enhancers. Harrell is not entitled to relief. The circuit court correctly denied his motion.

¶9 Harrell argues that the DOC's motion to vacate the order restricting collection of the VWS to extended supervision is untimely because it was made more than three years after sentencing. He also argues that by not responding to his motion in 2011, the DOC waived the right to challenge the circuit court's exercise of discretion to limit collection to extended supervision. Regardless of timing,[4] it remains that WIS. STAT. § 973.045(4) controls and the circuit court has no discretion to delay collection of the VWS.

¶10 WISCONSIN STAT. § 973.045(4) provides:

> If an inmate in a state prison or a person sentenced to a state prison has not paid the crime victim and witness assistance surcharge under this section, the department shall assess and collect the amount owed from the inmate's wages or other moneys. Any amount collected shall be transmitted to the secretary of administration.

[4] Harrell's reliance on WIS. STAT. § 805.17(3) as limiting reconsideration to twenty days after entry of a final judgment or order is misplaced. Section 805.17(3) only requires a timely motion for reconsideration for purposes of applying tolling provisions of that section, notably the tolling of the time to appeal when a timely motion is filed. Moreover, that statute applies only following an evidentiary hearing by the circuit court. *See* ***Schessler v. Schessler***, 179 Wis. 2d 781, 785, 508 N.W.2d 65 (Ct. App. 1993). We need not decide whether § 805.17 applies.

¶11 The provision uses the word "shall," and it is deemed mandatory. ***State v. Sprosty***, 227 Wis. 2d 316, 324, 595 N.W.2d 692 (1999). The statute requires the DOC to collect the VWS from prison wages and accounts. The DOC must comply with the statute and the circuit court cannot delay payment until extended supervision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.