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DISTRICT IV

September 14, 2015

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

2013AP2726-CR State of Wisconsin v. William A. Boyer (L.C. #2012CF433)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

William A. Boyer appeals from a judgment of conviction for party to the crime of substantial battery and from an order denying his postconviction motion to withdraw his no contest plea based on ineffective assistance of trial counsel. 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 (2013-14).¹ We affirm the judgment and order.

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

Boyer and two others, including Boyer's son, entered the home of a man and beat him. At the time Boyer was separated from his wife and she was dating the victim and was at his home when the assault occurred. The criminal complaint alleged that Boyer's son and his friend knocked on the front door of the house and when the victim answered the door, Boyer entered through another door of the house and struck the victim. Boyer was charged with criminal trespass, disorderly conduct as domestic abuse, and party to the crime of substantial battery.

Boyer entered a no contest plea to the substantial battery charge and the other two misdemeanor charges were dismissed as read-ins at sentencing. Boyer filed a postconviction motion for plea withdrawal alleging that his trial counsel was ineffective for not explaining possible defenses—self-defense and consent to enter—to the substantial battery and criminal trespass charges.² After a *Machner*³ hearing, the circuit court denied the motion.

“After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Proof of ineffective assistance of counsel satisfies the “manifest injustice”

² Boyer also argued in his postconviction motion that his plea was not knowingly made because he did not understand that he would lose his right to possess a firearm upon a felony conviction. The circuit court found that Boyer was aware that his plea would result in a felony conviction and, as a result, that he could not possess a firearm. Boyer does not argue on appeal that he should be allowed to withdraw his plea because he did not understand the firearm prohibition. Although the State briefs the issue and Boyer follows up in his reply brief, we deem the claim abandoned. See *State v. Chu*, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878 (alleged error not discussed in main brief may not be raised in the reply brief); *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue not briefed on appeal is deemed abandoned).

³ A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim and permits testimony from trial counsel. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

standard. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In determining whether there was ineffective assistance of counsel, we apply the familiar test for ineffectiveness under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), regarding the defendant's burden to show deficient performance and prejudice. In the context of a no contest plea, the defendant must show that there is a reasonable probability that he would not have entered the plea had trial counsel not made the alleged error. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Whether counsel's performance was ineffective presents a mixed question of fact and law. *State v. Maloney*, 2005 WI 74, ¶15, 281 Wis. 2d 595, 698 N.W.2d 583. The circuit court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See id.* However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. *Id.* When a circuit court's factual determinations are rooted in its assessment of the witnesses' credibility, we accept those determinations. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

Boyer's trial counsel testified that he was aware that the police reports contained the wife's statement that she admitted Boyer into the victim's home. Counsel was also aware that the wife's consent to Boyer's entry into the home would present a possible defense to the criminal trespass charge. Counsel also discussed with Boyer the possibility of having Boyer's co-defendants testify in his case but Boyer did not want to get the two younger men in trouble and Boyer asserted his responsibility for the assault. Counsel testified that Boyer said he punched the victim first. Counsel was also aware that Boyer had gone to the victim's residence out of concern for the safety of his wife. When asked if counsel discussed a possible affirmative defense of acting to protect another, counsel indicated that possible defenses to the substantial

battery charge were considered when he first talked to Boyer, but there could be no self-defense with Boyer's assertion that he threw the first punch and there was no evidence that Boyer's wife was in danger. Counsel explained that Boyer was concerned about his son being convicted of a felony and that concern drove Boyer's directions to counsel about how to handle the case. Boyer testified that he did not recall telling trial counsel that his wife let him into the residence, that he did not recall telling trial counsel he threw the first punch, and that he did not recall any discussion with trial counsel about the possibility of a self-defense argument. He indicated that had he known of the possibility of arguing self-defense, he would have sought "more counsel."

The circuit court found trial counsel's testimony to be credible. The court found that Boyer's trial counsel specifically discussed the facts of the case with Boyer, that Boyer told trial counsel he threw the first punch, and that counsel considered self-defense or defense of others to not be viable defenses. It also found that Boyer indicated to trial counsel that he wanted to take full responsibility for his actions to minimize his son's exposure to a felony conviction.

Accepting the circuit court's findings of what trial counsel did and his discussions with Boyer, there was no deficient performance as to counsel's alleged failure to explain self-defense as a possible defense to the substantial battery charge. Although there was no specific finding about trial counsel's consideration and discussion of consent to enter as a possible defense to the criminal trespass charge, Boyer's testimony did not establish that he would not have entered into the plea agreement which resulted in dismissal of the trespass charge had he been informed by counsel of a possible defense to that charge. Further, the circuit court found that Boyer's plea was driven by the desire to reduce his son's exposure to a felony conviction and, by implication, not on an assessment of possible defenses. We affirm the order denying Boyer's motion to withdraw his plea.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals