COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1128 **Cir. Ct. No. 2005CF179**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL WILLIAM HERDENBERG,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Paul Herdenberg, pro se, appeals orders denying a WIS. STAT. § 974.06 (2015-16)[1] motion to withdraw his no contest plea and the denial of his motion for reconsideration. We affirm.

¶2 The procedural history of this case is extensive. In October 2005, pursuant to a plea agreement, Herdenberg pleaded no contest to fourth-degree sexual assault and second-degree sexual assault of a child. Regarding the latter, the parties entered into a deferred entry of judgment agreement which provided that after two years, upon Herdenberg's compliance with the agreement's terms, the second-degree charge would be dismissed with prejudice. As recommended by the parties, the circuit court entered judgment on the fourth-degree charge, withholding sentence and imposing two years' probation, with sixty days' jail as a condition.

¶3 We affirmed the judgment of conviction on the fourth-degree sexual assault charge after conducting an independent review of the record pursuant to a no-merit report. *See* ***State v. Herdenberg***, No. 2006AP954-CRNM, unpublished slip op. (WI App Oct. 3, 2006). We noted that Herdenberg's plea to the second-degree sexual assault charge did not result in a final judgment and was thus not subject to review at that time. During the pendency of that no-merit appeal, Herdenberg absconded. Herdenberg was returned to custody, and in April 2009, the public defender appointed Frederick Bourg to represent Herdenberg. Attorney

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Bourg is the only attorney whose performance is challenged as deficient in this appeal.[2]

¶4 In April 2009, Herdenberg's probation was revoked. In July 2009, Attorney Bourg filed a "motion to vacate the order setting aside the deferred entry of judgment agreement." In the alternative, Herdenberg sought to withdraw his plea, asserting that a conviction on the second-degree charge would constitute double jeopardy.

¶5 On September 25, 2009, Herdenberg received a six-month jail sentence on the revoked fourth-degree charge. Herdenberg also entered into a second deferred judgment agreement on the second-degree charge. On that same day, Herdenberg pleaded no contest to a charge of failure to report to jail, contrary to WIS. STAT. § 946.425(1r)(a).

¶6 Before the second deferred judgment agreement expired, Herdenberg was convicted of burglary. The State moved to terminate the second deferred judgment agreement and enter a judgment of conviction. The parties ultimately agreed to recommend the circuit court enter judgment on the second-degree charge, but withhold sentence in favor of a seven-year term of probation.

¶7 In November 2012, the public defender appointed a new attorney to represent Herdenberg. The judgment of conviction for second-degree sexual assault of a child was entered on February 11, 2013. At the sentencing hearing for

[2] Attorney Bourg did not represent Herdenberg when he entered his no-contest plea in October 2005 for second-degree sexual assault of a child.

this charge, the circuit court withheld sentence and ordered seven years' probation. Herdenberg did not pursue a direct appeal from this judgment.

¶8 Herdenberg's probation was soon revoked. In March 2014, the circuit court imposed a sentence of nine years' initial confinement and seven years' extended supervision on Herdenberg's conviction for second-degree sexual assault of a child. Herdenberg's attorney filed a no-merit report, to which Herdenberg responded. We affirmed, noting the appeal brought before us only the sentence imposed after revocation of Herdenberg's probation. *See* ***State v. Herdenberg***, No. 2014AP1946-CRNM, unpublished slip op. (WI App Apr. 6, 2016). We further noted Herdenberg's underlying conviction was not before us, and that Herdenberg could similarly not challenge the probation revocation decision in the appeal. We ultimately determined the sentence imposed after revocation of probation was a proper exercise of discretion and was not overly harsh or excessive. We also noted that Herdenberg additionally argued that his conviction for second-degree sexual assault of a child was a double jeopardy/multiplicity violation, owing to the fact that he was previously convicted of fourth-degree sexual assault. We found that issue "not within the scope of this appeal from a sentence following the revocation of probation." For the same reason, we also rejected Herdenberg's contention that the attorney who represented him for purposes of sentencing after revocation was ineffective for failing to raise the double jeopardy issue. We concluded our review of the record disclosed no other issues for appeal.

¶9 Herdenberg, pro se, subsequently filed a WIS. STAT. § 974.06 motion seeking plea withdrawal based on ineffective assistance of his trial counsel, his sentencing counsel, and his postconviction counsel. The circuit court denied the motion without a hearing, determining that all of Herdenberg's claims were

already addressed by this court in the no-merit proceeding and that Herdenberg did not provide adequate reasons for failing to raise any new issues in previous proceedings.

¶10 Herdenberg, still pro se, then moved for reconsideration. The circuit court denied the motion. The court stated, "Any way you analyze your motion, it is still meritless. The Court of Appeals has considered your issues and determined that they are meritless." It also stated, "Any motion to reconsider is denied as it lacks arguable merit because all of your issues have either been addressed in previous appeals or they are procedurally barred." Herdenberg now appeals.

¶11 If a postconviction motion to withdraw a plea does not raise facts sufficient to entitle the movant 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 discretion to grant or deny a hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a defendant's motion to withdraw a guilty or no contest plea on its face alleges facts that would entitle the defendant to relief, and whether the record conclusively demonstrates the defendant is not entitled to relief, are questions of law we review independently. ***State v. Howell***, 2007 WI 75, ¶78, 301 Wis. 2d 350, 734 N.W.2d 48.

¶12 When a defendant seeks to withdraw a guilty or no contest plea after sentencing, he or she must prove by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. One way to show manifest injustice is to prove that the plea was not entered knowingly, intelligently, and voluntarily. ***Id.*** Whether a plea is entered knowingly,

intelligently, and voluntarily is a question of constitutional fact that we review independently. ***Id.***, ¶25.

¶13 Here, the record conclusively demonstrates that Herdenberg is not entitled to relief, and therefore the circuit court properly exercised its discretion by denying his postconviction motion without a hearing. Herdenberg argues his 2005 no contest plea to second-degree sexual assault of a child was not knowingly or voluntarily entered as a result of ineffective assistance by his trial counsel. Herdenberg insists he was entitled to an evidentiary hearing on his postconviction motion to withdraw his plea because he received "bad advice" from Attorney Bourg, who advised him the "added" count of fourth-degree sexual assault was "multiplicious" and because double jeopardy applied, "the Court [could] not sentence [him] to any additional time." Herdenberg asserts "this information was material to his decision to plead no contest." Herdenberg also insists "[t]hat information led Herdenberg to enter into a second deferred agreement," because Herdenberg believed at the time of the second deferred agreement that "he would not receive any additional confinement as a result of double jeopardy/multiplicity."

¶14 However, when Herdenberg entered into his no contest plea in 2005, he was represented by Attorney Catherine Canright. Herdenberg's ineffective assistance argument on appeal lies only with Attorney Bourg, who did not represent Herdenberg until 2009, and whose representation was completed before Herdenberg's 2013 conviction and sentencing. Another attorney represented Herdenberg during sentencing.

¶15 Moreover, Attorney Bourg's performance in this case was far from deficient, and Herdenberg cannot show prejudice. As soon as Attorney Bourg was

appointed, he filed a motion to vacate the order terminating the deferred judgment agreement or, alternatively, to permit Herdenberg to withdraw his plea. In that motion, he argued that Herdenberg's convictions for sexual assault of a child were multiplicitous and constituted double jeopardy. Accordingly, Attorney Bourg argued Herdenberg's plea was not "knowing, voluntary, or intelligent" when Herdenberg entered it four years prior.

¶16 Attorney Bourg's motion and strategy resulted in an agreement with the State to once again defer the judgment of conviction. Had Attorney Bourg not filed his motion, there is no reason to believe that there would have been a second deferred judgment agreement. As a result of Attorney Bourg's efforts, Herdenberg's conviction was again successfully deferred and, upon successful compliance with the agreement, the second-degree sexual assault of a child charge would have been dismissed with prejudice.

¶17 However, Herdenberg himself failed to take advantage of his counsel's successful efforts. Before the second deferred judgment agreement expired, Herdenberg was convicted of burglary. The State therefore moved to terminate the second deferred judgment agreement. Yet, with Attorney Bourg's representation, the parties jointly recommended a withheld sentence in favor of seven years' probation, which the circuit court adopted. Once again, Herdenberg failed to take advantage of his counsel's efforts, and his probation was revoked for continued and multiple violations. So, while Herdenberg argues that Attorney Bourg provided deficient assistance of counsel, the record demonstrates that Herdenberg benefitted from Attorney Bourg's reasonable efforts.

¶18 Moreover, Herdenberg cannot show prejudice for several reasons. First, Herdenberg cannot demonstrate that he would not have entered into the

second deferred judgment agreement absent counsel's advice, and that he reasonably believed the circuit court could not sentence him to additional confinement in the event the deferred judgment agreement were terminated for good cause. The second deferred judgment agreement specifically provided:

> Upon completion of the period and compliance with the agreement, if the agreement has not been terminated by myself or the State, the State will make a motion to the Court to dismiss Count 1 with prejudice.
>
> A Motion to Terminate this Agreement for good cause, may be scheduled upon written notice by either myself or the State to the other person, at any time prior to the completion of the period of the agreement. If Felony Judgment of Conviction is entered, an Open Argument Sentencing Hearing will be scheduled, and a presentence investigation may be ordered.

¶19 In addition, the best that could occur if the second deferred judgment agreement was vacated – or not entered into – would be sentencing on the felony charge. Herdenberg would not be entitled to vacate his plea and go to trial as he now claims. Attorney Bourg's 2009 motion gave Herdenberg the opportunity for a second deferred judgment agreement and, if Herdenberg had successfully completed it, the felony charge would have been dismissed with prejudice. Under no circumstances would Herdenberg be permitted to withdraw his 2005 plea based upon advice by Attorney Bourg after the plea was entered. Any claims of ineffective assistance against Attorney Bourg seeking to "challenge … the underlying conviction" are misplaced. The record conclusively demonstrates that Herdenberg was not entitled to postconviction relief. As a result, the circuit court properly denied Herdenberg's postconviction motion without a hearing.

By the Court.—Orders affirmed.

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