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DISTRICT II

August 15, 2018

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

2017AP1322-CR State of Wisconsin v. Dequan J. Young (L.C. # 2013CF438)

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

Summary disposition orders 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).

Dequan J. Young appeals a judgment of conviction and an order denying his postconviction motion seeking plea withdrawal. 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 (2015-16).¹ We affirm.

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

Young was charged with two counts of first-degree intentional homicide and two counts of armed robbery, all as a party to the crime, for his role in an armed robbery resulting in two homicides. According to the complaint, Young and two other men carried out a scheme to rob the victims during a drug buy. Once Young received the drugs, a codefendant, Darshawn Frison, pulled out a gun and demanded money. One of the victims went for Frison's gun. Frison shot and killed both victims.

Pursuant to a plea agreement, Young pled guilty to an amended information charging two counts of felony murder. At the plea hearing, the court asked Young if he had read and understood the plea questionnaire form, and Young answered in the affirmative. The court explained the elements of felony murder to Young, stating, "the elements of Felony Murder are two. Number one, you were party to a crime. In this case armed robbery. And number two, the death of [the victim] was caused by the commission of the crime, in this case armed robbery." Young said that he understood these elements. The court accepted Young's pleas and Young was ultimately sentenced to concurrent bifurcated prison sentences.

Young filed a postconviction motion seeking to withdraw his guilty pleas. The motion alleged that the circuit court had a duty and failed to ascertain Young's understanding of the charge, specifically, the elements of the predicate offense of armed robbery, and that Young did not understand the elements of armed robbery. The circuit court held an evidentiary hearing on

Young's motion.² After hearing testimony from trial counsel and from Young, and based on the record, the circuit court denied Young's postconviction motion. Young appeals.

A defendant seeking to withdraw a plea after sentencing must prove that refusal to allow plea withdrawal would result in a manifest injustice. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant sets forth a prima facie case for plea withdrawal if his or her motion establishes that the plea colloquy did not conform with WIS. STAT. § 971.08 or other mandatory procedures, and alleges that he or she did not understand the information the court should have provided. *Brown*, 293 Wis. 2d 594, ¶2; *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant sets forth a prima facie case, the burden shifts to the State to demonstrate that despite the deficiency, the defendant otherwise knew or understood the missing information. *Brown*, 293 Wis. 2d 594, ¶6.

Because we assume for purposes of this decision that Young's motion set forth a prima facie case for plea withdrawal, the question becomes whether the State met its burden to show that Young understood the nature of the charge, more specifically, the elements of armed robbery.

² As the State's brief observes, the circuit court determined that Young failed to set forth a prima facie case entitling him to an evidentiary hearing in part because Young's motion did not include an affidavit. We agree with the State that Young was not required to allege his lack of understanding in affidavit form. *State v. Brown*, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906. Like the State, we also question whether the circuit court's reliance, at the prosecutor's urging, on *State v. Hoppe*, 2008 WI App 89, 312 Wis. 2d 765, 754 N.W.2d 203, *aff'd on other grounds*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, was misplaced. Regardless, we need not decide whether Young's motion entitled him to an evidentiary hearing as a matter of law because the circuit court conducted such a hearing in its discretion. We applaud the circuit court for choosing to conduct a hearing and take this opportunity to remind circuit courts that they retain the discretion to hold a postconviction hearing despite an insufficient or questionable pleading. *See, e.g., State v. Cross*, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64; *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

We conclude that the State amply met its burden to prove that Young understood the nature of the charge to which he pled, including the elements of the predicate offense of armed robbery. The circuit court's finding that Young understood the elements of armed robbery is not clearly erroneous and is supported by the record. See *State v. Dumstrey*, 2016 WI 3, ¶13, 366 Wis. 2d 64, 873 N.W.2d 502 (“A finding is clearly erroneous if ‘it is against the great weight and clear preponderance of the evidence.’” (citation omitted)). The circuit court determined that trial counsel testified credibly and that counsel was “much more credible” than Young. See *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) (the circuit court acting as fact finder is the ultimate arbiter of witness credibility). Trial counsel testified that he had “many discussions” with Young “about felony murder” during which they reviewed the elements of armed robbery. Counsel said he shared with Young his belief “that the case was overcharged” and should have been charged “as felony murder in the first place.” Counsel testified that Young “joined in that discussion” and “understood.” The plea questionnaire filed with the circuit court attached the form jury instructions for felony murder and armed robbery. The jury instructions contained handwritten notes tailored to the instant case, for example, identifying the predicate crime as “armed robbery” and identifying the victims by name. Young signed not only the plea questionnaire, but the attached jury instructions as well. The attached jury instructions lend credence to trial counsel's testimony that he discussed armed robbery with Young.

Young argues that “it is clear from [his] own testimony that he did not understand the elements of the armed robbery charges until he had time to review the matter while in prison.” This ignores the circuit court's finding that Young's testimony was “not credible on many different levels.” The circuit court's credibility finding is supported by the record, including Young's on-the-record testimony that he lied on the plea form about having a GED.

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.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals