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DISTRICT II

April 30, 2025

To:

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Circuit Court Judge
Electronic Notice

Nicholas DeSantis
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Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Brian Patrick Mullins
Electronic Notice

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

2024AP379-CR

State of Wisconsin v. Desirea Dee Graham (L.C. #2020CF458)

Before Gundrum, P.J., Grogan and Lazar, JJ.

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).

Desirea Dee Graham appeals from a judgment of conviction entered following a jury trial and from an order of the circuit court denying her postconviction motion. She contends the court erred in denying her postconviction motion without holding an evidentiary 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 (2023-24).¹ For the following reasons, we affirm.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

Background

On December 30, 2020, Graham was charged as a repeater with first-degree reckless homicide as a party to the crime in connection with the delivery of a controlled substance to the deceased victim. She was also charged as a repeater with felony bail jumping. That same day, the State made an initial plea offer to Graham, which Graham rejected.

The circuit court scheduled trial for December 20, 2021. On December 2, 2021, the State presented Graham with a second, more favorable, plea offer. Graham agreed to accept the offer, and a plea hearing was scheduled for December 10, 2021.

At that hearing, first counsel for Graham informed the circuit court he had received an email from new counsel indicating Graham had retained new counsel to represent her and informing first counsel “that any deal that [he] made or agreement is off.” The court permitted first counsel to withdraw. The State also informed the court that new counsel had instructed the State “that the defendant did not wish to proceed forward with the plea agreement.”

On December 13, 2021, the circuit court held a hearing on a motion by new counsel to adjourn the December 20 trial date. The court granted the motion and rescheduled the trial for January 18, 2022.

Following the jury trial, Graham was convicted of both felony offenses and ultimately sentenced to a period of imprisonment longer than that proposed in either of the State’s two plea offers.

Graham moved for postconviction relief, asserting first counsel provided her ineffective assistance by inaccurately advising her as to what the State would need to prove for a conviction

at trial and seeking an order from the court “directing the State to reoffer” her the second plea agreement or alternatively the first.² Following a nonevidentiary hearing, the circuit court denied Graham’s motion, stating:

I don’t see how you can show that the outcome of the plea process would have been different even if, for argument’s sake, [first counsel] was deficient in terms of explaining the charge to his client because she had a new attorney in place prior and during the pretrial process and the defendant nonetheless chose to proceed to trial after she had competent counsel assisting her. So there’s unsupported allegations posttrial that she wanted to plead guilty, but nothing that shows in any way that the outcome would have been different and that she was prejudiced by any deficiency [first counsel] had.

Graham appeals.

Discussion

To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel performed deficiently and such deficiency prejudiced the defendant. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the defendant must show that counsel’s specific “acts or omissions were outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prove prejudice, the defendant must demonstrate a reasonable probability that, but for counsel’s error, she would have received a more favorable outcome. *Id.* at 694. If the defendant fails to prove either prong, we need not address the other. *See id.* at 697.

² Graham did not assert that new counsel performed ineffectively.

A defendant is entitled to an evidentiary hearing on her motion alleging ineffective assistance of counsel “[i]f the motion raises sufficient facts that, if true, show that the defendant is entitled to relief.” *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. “However, if the motion does not raise such facts, ‘or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,’ the grant or denial of the motion is a matter of discretion entrusted to the circuit court.” *Id.* (citation omitted). Whether the motion raises “sufficient material and non-conclusory facts that, if true, would entitle the defendant to relief” and “whether the record conclusively demonstrates that the defendant is not entitled to relief” are questions of law we review de novo. *State v. Jackson*, 2023 WI 3, ¶8, 405 Wis. 2d 458, 983 N.W.2d 608. In this case, Graham failed to raise sufficient facts in her motion that, even if true, establish prejudice. Therefore, the postconviction court did not err in declining to hold an evidentiary hearing.

Graham alleged first counsel inaccurately advised her as to what the State would need to prove for a conviction at trial and because of that deficient advice, she did not plead guilty on December 10, 2021, and lost the opportunity to plead to the first and second plea offers extended by the State. However, Graham also acknowledged that approximately one week before trial, new counsel cleared up for her what the State would need to prove for a conviction at trial. She stated that after receiving this clarification, “she asked [new counsel] if she could still plead guilty,” but all new counsel said to her was that it was “probably too late.”

First, the record shows that whether first counsel correctly or incorrectly advised Graham as to what the State would need to prove for a conviction, by December 2, 2021, he had teed up for her a second, better, plea agreement, one she now wishes she had gone through with on December 10. All indications are that whether or not she had a correct understanding of what the

State would need to prove, had she not chosen to seek new counsel, she would have continued with first counsel and received the benefit of the best plea deal the State had offered.

Second, new counsel's statement to Graham that it was "*probably* too late" for her to "still plead guilty" is insufficient to establish prejudice, as it is merely speculation. *See State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice requires more than speculation."); *see also State v. Domke*, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 ("It is not sufficient for the [appellant] to show that [her] counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" (citations omitted)). Graham acknowledged in her motion that due to new counsel's advice, she correctly understood about a week before trial what the State would have to prove. In response to her inquiry as to whether she could "still plead guilty," the most that new counsel told her was that it was "probably" too late. Significantly, she does not suggest counsel had spoken with the State and was told Graham could no longer plead guilty and receive the benefit of the December 2, 2021 plea offer.

Moreover, looking at the record, we note that the first plea offer from the State, made on December 30, 2020, indicated "[t]his offer will be revoked if the matter is set for trial." The second, December 2, 2021 plea offer, however, does not include any such conditional language. In relevant part, it just says that "[i]n order to accept this offer, [Graham] must enter a plea of guilty" to an amended/reduced charge of second-degree reckless homicide. Further, at the December 10, 2021 hearing, the prosecutor informed the court that he had "received a communication from [new counsel] that instructed me that the defendant did not wish to proceed forward with the plea agreement." The prosecutor gave no follow-up indication that, from the State's perspective, the December 2 offer was off the table. Nor did the State give any such indication at the December 13, 2021 hearing on Graham's motion to adjourn the December 20,

2021 trial. Thus, Graham's postconviction motion and the rest of the record provide no basis we see to believe that Graham could not still have received the benefit of the December 2 plea offer after new counsel clarified what the State needed to prove for a conviction. Thus, even if first counsel did deficiently advise Graham, she has not made a preliminary showing that such advice precluded her from receiving the benefit of the second/better offer from the State instead of taking the case to trial on January 18, 2022.

Therefore,

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.

Samuel A. Christensen
Clerk of Court of Appeals