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DISTRICT I

February 9, 2021

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

2019AP546-CR State of Wisconsin v. Sharif Donnell Green (L.C. # 2014CF4676)

Before Brash, P.J., Donald and White, 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).

Sharif Donnell Green appeals a judgment convicting him of one count of possession with intent to deliver more than forty grams of cocaine and possession with intent to deliver more than fifty grams of heroin. He also appeals an order denying his postconviction motion without a hearing. Green argues that: (1) he received ineffective assistance of trial counsel; (2) he received ineffective assistance of postconviction counsel; (3) he was entitled to a hearing on his claims of ineffective assistance of counsel; and (4) his plea was not knowingly and voluntarily

entered. We conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Upon review, we affirm.

To prove a claim of ineffective assistance of counsel, a defendant must show that his or her counsel performed deficiently and that this deficient performance prejudiced him or her. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation "fell below an objective standard of reasonableness." ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

We agree with the circuit court's analysis of Green's argument that he received ineffective assistance of trial counsel and adopt the following portion of the circuit court's decision as our own. *See* WIS. CT. APP. IOP VI (5)(a) (Dec. 1, 2020) ("When the trial court's decision was based upon a written opinion … the panel may … make reference thereto, and affirm on the basis of that opinion.").

> The defendant claims that counsel told him there was no such thing as a "binding plea" in which the judge would inform counsel if he or she would be willing to accept a plea agreement before the defendant actually entered his plea. The defendant contends that counsel was ineffective because the law allows for this, citing to ***Santobello v. New York***, 404 U.S. 257 [(1971)]. The defendant misconstrues the meaning of the case, as ***Santobello***'s holding dealt solely with the prosecutor's breach of the plea

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

agreement when he failed to remain silent as promised. Moreover, Wisconsin does not follow a rule which allows a judge to comment on whether or not he (or she) will accept a particular plea bargain, or sentence a defendant pursuant to the terms of plea negotiations, prior to the entry of the plea. *See* ***State v. Betts***, [129 Wis. 2d 1, 2, 383 N.W.2d 876] (1986). In sum, this claim has no basis in Wisconsin law, and therefore, counsel was not ineffective.

The defendant next contends that counsel failed to contest the factual bases for the charges and failed to inform him of the elements of the offenses. He contends that he possessed the drugs for his own use, not to sell them, and thus, the "intent to deliver" portion of the charges should have been challenged. Judge Fiorenza held a plea colloquy with the defendant and went through the elements of each offense with him, including the elements of possession and intent to deliver. The defendant stated he understood those elements. Further, he *admitted* that he intended to sell the cocaine and intended to give the heroin to another person. Judge Fiorenza also went through the facts of the complaint with the defendant and established that an adequate factual basis for possession with intent to deliver both cocaine and heroin existed. Under the circumstances, counsel cannot be deemed ineffective as it has not been shown that the defendant was inadequately informed about either the elements or the factual bases underlying the charges.

The defendant next asserts that trial counsel forced him to enter into the plea agreement under coercion and duress because she threatened to withdraw if he did not enter a plea. The record speaks for itself: the defendant told the court that nobody had put pressure on him to enter his pleas, nobody forced him, and nobody coerced him. "If the […] record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis.2d 489, 497-98[, 195 N.W.2d 629] (1972).

The defendant's claim that trial counsel failed to challenge a deficient search warrant is wholly conclusory and without the requisite factual support.

The defendant next maintains that counsel failed to inform the sentencing judge of the first plea offer. The plea negotiations as stated by the prosecutor were exactly alike at both the plea and sentencing hearings. If there was a prior plea offer, it was wholly irrelevant to either proceeding. This is not a valid claim for relief. He also faults counsel for failing to object to a different sentencing judge. Judge Fiorenza had rotated after the plea hearing, and Judge Konkol was assigned to Judge Fiorenza's felony drug calendar. A defendant does not have a right to be sentenced by a specific judge, and his belief that Judge Fiorenza would have

> imposed a "fairer" sentence is entirely speculative. This is also not a viable claim for relief.

(Record cites and footnotes omitted).

Green next argues that he received ineffective assistance of postconviction counsel because his counsel did not raise the issue of ineffective assistance of trial counsel and did not pursue a direct appeal on Green's behalf. Green's argument that he received ineffective assistance of trial counsel is not meritorious. Counsel does not render ineffective assistance by failing to raise issues that are meritless. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994). Moreover, appointed counsel did not pursue an appeal on Green's behalf because Green discharged counsel and opted to file a supplemental postconviction motion *pro se*. Therefore, we reject Green's argument that he received ineffective assistance of postconviction counsel.

Green next argues that his plea was not knowingly, voluntarily, and intelligently entered. Green did not raise this argument in the circuit court. Therefore, he may not now raise it on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995) ("[A] party seeking reversal may not advance arguments on appeal which were not presented to the trial court.").

Finally, Green argues that the circuit court should have held a hearing on his claim of ineffective assistance of counsel. The circuit court was not required to hold a hearing on Green's claim because the record conclusively demonstrated that he was not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* 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