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DISTRICT II

March 30, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Calumet County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1938-CR

State of Wisconsin v. Allison G. Wells (L.C. #2016CF84)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Allison G. Wells appeals from a judgment convicting him of three counts of failing to support a child and from a circuit court order rejecting his request for a new trial due to 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 (2019-20).¹ We affirm the circuit court.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

After the jury convicted him, Wells filed a postconviction motion seeking a new trial due to ineffective assistance of trial counsel. Wells faulted counsel for (1) not obtaining health records that he claims would have shown that he was unable to work and therefore had a defense to the failure to support charges, (2) failing to retain an expert to review said health records, and (3) failing to request a jury instruction setting out this affirmative defense. *See* WIS JI—CRIMINAL 2152A; WIS. STAT. § 948.22(6).²

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that “counsel’s performance was deficient” and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. *Id.* We review de novo whether counsel’s performance was deficient or prejudicial. *Id.* We will uphold the circuit court’s findings of fact if they are not clearly erroneous. *Id.* Credibility determinations are for the circuit court to make. *State v. Young*, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736. We do not reweigh the evidence or independently assess the credibility of the witnesses. *Id.*

At the evidentiary hearing on Wells’s postconviction motion, trial counsel testified that Wells never told her about his health issues and there was nothing about Wells or her interactions with him that suggested that he had health problems, let alone health problems that inhibited his ability to work such that he had a defense to failure to support. Wells appeared for their

² The judgment of conviction indicates that the failure to support crimes were committed between June and October 2010, July and October 2015, and November 2015 and February 2016. Wells was convicted in August 2017. Because WIS. STAT. § 948.22 has been in the same form since June 2010, we cite to the 2019-20 version of the statute for ease of reference.

meetings wearing a work-related shirt, and prior counsel’s file contained no information about Wells’s alleged health condition. The circuit court found trial counsel more credible than Wells on the question of whether he told counsel about the health conditions he claimed inhibited his ability to work and pay support.³ The court found that it was “much more likely that [Wells] did not reveal his medical condition to [trial counsel], rather than [trial counsel] knew this information and refused to use that information for her client’s defense, or that she simply forgot that he had significant medical issues.” The court concluded that Wells did not meet his burden to show that he informed trial counsel about his health issues and therefore counsel was not ineffective for failing to act on this information.

On appeal, Wells argues that trial counsel’s postconviction testimony was patently incredible. Wells essentially argues that he was more credible than trial counsel. Credibility was for the circuit court to determine. *Young*, 316 Wis. 2d 114, ¶17. “[O]nly when testimony is inherently or patently incredible will this court substitute its judgment for that of the fact finder.” *State v. Jacobs*, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 822 N.W.2d 885. Evidence is inherently or patently incredible when it is “in conflict with nature or fully established or conceded facts.” *Id.*, ¶20 (citation omitted). The circuit court was free to reject Wells’s claim that he told defense counsel about his health issues and that he had no ability to work. Trial counsel’s testimony was not patently incredible.

The circuit court’s findings of fact are based on the credible evidence before it, and they are not clearly erroneous. Trial counsel was “not ineffective for not pursuing something the

³ After considering Wells’s conduct in the case, including his failure to follow court orders, his demeanor and his self-serving testimony, the circuit court found that Wells was not credible.

defendant knew, but did not reveal.” *State v. Eison*, 2011 WI App 52, ¶21, 332 Wis. 2d 331, 797 N.W.2d 890.⁴

Wells asks this court to exercise its WIS. STAT. § 752.35 power of discretionary reversal. In support of this request, Wells argues that the circuit court imposed an unduly harsh sentence. A postconviction motion is a prerequisite to a challenge to a sentence, including any Eighth Amendment challenge to an allegedly harsh sentence. *State v. Monje*, 109 Wis. 2d 138, 153-153a, 327 N.W.2d 641 (1982) (on reconsideration). Wells’s postconviction motion asserted, without elaboration, that his sentence violated his constitutional rights. At the hearing on his postconviction motion, Wells did not bring to the circuit court’s attention that he was seeking a modification of his sentence on the grounds that it was unduly harsh or unconstitutional. We conclude that Wells’s challenge to his sentence was not effectively raised in the circuit court. We will not consider issues raised for the first time on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

Given the state of this record and Wells’s failure to establish ineffective assistance of trial counsel, we decline to exercise our discretionary power of reversal. See *State v. Echols*, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989).

Upon the foregoing reasons,

⁴ Postconviction, Wells presented information from an expert that he had health problems that could impact his ability to work and pay support. This information is not relevant to his ineffective assistance of trial counsel claim unless he told trial counsel about these issues. As the circuit court found, Wells did not.

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