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DISTRICT II

July 13, 2022

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

2021AP4-CR

State of Wisconsin v. Jordan T. Denney (L.C. #2018CF1231)

Before Neubauer, Grogan and Kornblum, 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).

Jordan T. Denney appeals from the circuit court's judgment of conviction and an order denying his postconviction motion. Denney argues that the court erred in refusing to allow him to withdraw his guilty plea due to ineffective assistance of counsel, and that the court made errors in sentencing regarding Denney's ability to participate in the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP). Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary judgment. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We disagree with Denney's contentions and affirm.

Denney was charged with a total of five offenses, three counts related to drug possession with intent to deliver (cocaine, ecstasy and marijuana), one for possession of a firearm by a felon, and the last for maintaining a drug trafficking place (second or subsequent offense). The charges were based on evidence recovered when police executed a search warrant at Denny's apartment. Denny pled guilty to two counts of possession with intent to deliver (cocaine and ecstasy). The other three counts were dismissed and read in. Denny was on extended supervision for a previous drug charge at the time he committed these offenses. On the charge for possession with intent to deliver ecstasy, the circuit court sentenced Denny to a total of fourteen years, consisting of four years' initial confinement and ten years' extended supervision, consecutive to the time he was doing on revocation for the prior offense. Regarding the possession with intent to deliver cocaine, the court sentenced Denny to fourteen years' incarceration, bifurcated into a consecutive six years' confinement and eight years' extended supervision. The court, however, stayed that sentence and instead placed Denney on fourteen years' probation concurrent to the sentence on the ecstasy charge. Regarding programming, the court ordered no programming for the ecstasy charge, stating: "You are just going to do your time." On the cocaine charge, the court allowed earned release privileges after the first two years of confinement.

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

Denney filed a postconviction motion, arguing that his trial counsel was ineffective for failing to file a motion to suppress the evidence forming the basis of his conviction, failing to demand the identity of a confidential informant, and failing to explain the consequences of the read-in offenses. The second set of challenges relate to the court's alleged errors regarding programming. He claims that the court erred in failing to clarify whether Denney was eligible for the SAP, as the judgment of conviction contradicted itself between pages one and two. Denney further requested that the court make him eligible for the CIP and correct the judgment of conviction to so reflect as the written judgment contradicted the sentencing transcript.

In a written order, the circuit court resolved the issues regarding conflicts in the sentencing without a hearing. In that order, the court corrected page two of the judgment to be consistent with page one, indicating that Denney is ineligible for drug treatment. The court rejected Denney's argument that he should be eligible for the CIP on count one because he meets five of the six criteria. The court pointed out that the sixth criterion, approval of the court, was not met. The court stated that Denney "got the benefit of his plea agreement and that is enough." Finally, the court clarified the judgment of conviction by stating that Denney is not eligible for the CIP on count two, only "[e]arned [r]elease for drug treatment only."

The circuit court also held a *Machner* hearing² to address Denney's postconviction motion claims of ineffective assistance of counsel. Denney failed to appear at the hearing, due to refusing transport from Stanley Correctional Institution for the second time. Although the court found that Denney's failure to appear waived his right to postconviction relief, the court

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

conducted the hearing anyway to “give him his shot.” The court heard testimony from Denney’s trial counsel, who denied the allegations in Denney’s postconviction motion regarding counsel’s alleged ineffectiveness. The first allegation related to failing to file a motion to suppress the evidence based on problems with the search warrant. This motion centered on filing a motion to reveal the identity of a confidential informant. Counsel testified about his reasons for not making such a motion. Because Denney was not present, his postconviction counsel could not secure from him a waiver of attorney-client privilege, and therefore, his trial counsel could not testify about the contents of the communication trial counsel had with Denney. Denney also could not testify due to his absence. Denney’s second claim was that trial counsel failed to discuss the effect of read-in counts, which his trial counsel denied. Denney could not refute his trial counsel’s denial due to his absence. The circuit court also read from the transcript of the sentencing hearing its explanation of the effect of read-in offenses. The circuit court denied the claims of ineffective assistance of counsel, finding no evidence to support them. Denney now appeals.

“Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact.” *State v. Maday*, 2017 WI 28, ¶25, 374 Wis. 2d 164, 892 N.W.2d 611. “The factual circumstances of the case and trial counsel’s conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel’s conduct constitutes ineffective assistance is a question of law, which we review de novo.” *State v. Breitzman*, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93.

We conclude the circuit court did not erroneously exercise its discretion. The only evidence presented amply supports the court’s decision. Denney waived his right to present

evidence, and consequently to relief, by refusing to attend the *Machner* hearing. *See State v. John*, 60 Wis. 2d 730, 735, 211 N.W.2d 463 (1973).

Denney also argues that he is entitled to a reversal of the circuit court’s decisions regarding correcting the sentencing orders. We review sentencing decisions, including eligibility for program participation, under an erroneous exercise of discretion standard. *State v. Owens*, 2006 WI App 75, ¶¶7, 9, 291 Wis. 2d 229, 713 N.W.2d 187. When a circuit court exercises its sentencing discretion, the court must determine whether a defendant is eligible for the CIP (aka “boot camp” or “challenge incarceration”) under WIS. STAT. § 973.01(3m). *State v. Lehman*, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644. The court may deny eligibility even if the defendant otherwise meets the statutory criteria. *Id.* Likewise, the court must determine if a defendant is eligible for earned release under the SAP. WIS. STAT. § 973.01(3g). “There is a strong public policy against interfering with the [circuit] court’s sentencing discretion, and we presume the [circuit] court acted reasonably.” *Owens*, 291 Wis. 2d 229, ¶7. We do not require separate findings regarding the earned release programs (ERP) “so long as the overall sentencing rationale also justifies the ERP determination.” *Id.*, ¶¶9-10.

The record in this case is clear that the circuit court based its sentence on the appropriate sentencing factors: “the gravity and nature of the offense, including the effect on the victim; the character and rehabilitative needs of the offender; and the need to protect the public.” *Id.*, ¶8. The court thoroughly explained its decision by explaining all of these factors. The court corrected the errors in its judgment and in its written order on the postconviction motion. The court further explained in that order why it did not grant Denney’s requests regarding programming. In the court’s view, Denney got the benefit of the plea agreement. Based on the

entire record, we conclude the court did not erroneously exercise its discretion in deciding that Denney was not eligible for the CIP.

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