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DISTRICT II

December 14, 2022

To:

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Circuit Court Judge
Electronic Notice

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Samuel A. Christensen
Clerk of Circuit Court
Racine County
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Patricia J. Hanson
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1545-CR

State of Wisconsin v. Demetrius L. Johnson (L.C. #2018CF596)

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).

Demetrius L. Johnson appeals from a judgment convicting him of felony battery (domestic abuse) as a repeat offender¹ and from a circuit court order denying his request to withdraw his no contest plea due to ineffective assistance of trial counsel. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary

¹ The notice of appeal states that the appeal is taken from the judgment of conviction dated September 10, 2020. However, the judgment of conviction was entered on November 9, 2018; the order denying the postconviction motion was entered on September 10, 2020. In this WIS. STAT. RULE 809.30 (2019-20) appeal, we construe the notice of appeal as being taken from the judgment of conviction and the postconviction order.

disposition. *See* WIS. STAT. RULE 809.21 (2019-20).² We agree with the circuit court's rejection of Johnson's ineffective assistance of counsel claim that counsel did not perform deficiently and Johnson did not meet his burden to show a manifest injustice warranting plea withdrawal. We affirm.

On appeal, Johnson focuses on the assistance rendered by his counsel in connection with Johnson's decision to reject the State's plea offer to the original misdemeanor charges. Johnson originally faced misdemeanor battery, criminal damage to property and disorderly conduct charges. The State made a plea offer. During a hearing, Johnson confirmed that he discussed with his counsel his decision to reject the plea offer. Johnson stated that he understood that if he rejected the State's plea offer, the State would dismiss the misdemeanor charges without prejudice and refile the battery and criminal damage to property charges as felonies, a position the State also placed on the record during the same hearing.³ Johnson's counsel confirmed that he and Johnson discussed the plea offer and the foregoing ramifications of rejecting it. To head off the circuit court's dismissal of the misdemeanor charges without prejudice, counsel asked the court to deny the State's motion to dismiss and schedule a speedy trial date on the misdemeanor charges. Johnson's speedy trial request was apparently premised on the belief that the victim might not cooperate in the prosecution, an inference likely drawn from the victim's failure to cooperate at Johnson's revocation hearing in another case. The court declined to schedule a trial

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

³ The State advised that the battery and criminal damage to property charges should have been charged as felonies due to available repeater and domestic abuse enhancers.

on the misdemeanor charges and granted the State's motion to dismiss without prejudice.⁴ Thereafter, the State charged Johnson with felony battery and criminal damage to property with domestic abuse and repeater enhancers. Johnson ultimately pled no contest to the felony battery charge.

Postconviction, Johnson sought to withdraw his no contest plea to felony battery due to ineffective assistance of trial counsel. He alleged that counsel advised him to reject the plea offer in the misdemeanor cases because the State would *not* reissue the charges as felonies. Johnson claimed that he would have entered a plea to the misdemeanors had he understood that the dismissed misdemeanor charges would be refiled as felony charges.

After hearing testimony from Johnson and his trial counsel, the circuit court made the following findings of fact. Trial counsel credibly testified about the circumstances under which Johnson rejected the plea offer: counsel and Johnson discussed that if he rejected the plea agreement, the State would refile the charges as felonies, and counsel and Johnson believed that the victim would not cooperate in the prosecution. While Johnson claimed that he rejected the plea offer on counsel's advice that the State would *not* refile the misdemeanor charges as felonies, this claim was not credible. Rather, Johnson rejected the plea offer knowing that the State intended to refile those charges as felonies. As the circuit court found: "Under those circumstances the advice that you should brave the storm essentially [by rejecting the plea offer] and take the chance of a more serious charge being issued would not necessarily have been bad

⁴ Johnson does not argue that the circuit court erred when it granted the State's motion to dismiss without prejudice.

advice.” Because counsel did not perform deficiently, the circuit court denied Johnson’s postconviction motion. Johnson appeals.

A defendant who seeks plea withdrawal after sentencing must show a manifest injustice necessitating plea withdrawal. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Ineffective assistance of trial counsel can be a way to demonstrate the required manifest injustice. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel was ineffective, i.e., that counsel’s performance was deficient and that the deficient performance prejudiced the defendant. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* We review de novo whether counsel’s performance was deficient or prejudicial. *Id.* We need not consider whether trial counsel’s performance was prejudicial if we can resolve the ineffectiveness issue on the grounds that counsel did not perform deficiently. *See State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

Johnson argues that the circuit court’s findings of fact based on its credibility determinations are clearly erroneous. We disagree. At the postconviction motion hearing, the circuit court was “the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. The court stated its reasons for finding trial counsel’s testimony more credible than Johnson’s testimony and rooted its conclusion that counsel did not perform deficiently in its credibility determinations. We accept those credibility determinations. *See State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. The circuit court’s findings about counsel’s performance are not clearly erroneous.

Johnson relies upon the timing of trial counsel's attempt to preclude the State from refiling the charges as felonies to support his claim that counsel actually advised him to reject the plea agreement because the charges would not be reissued as felonies. Trial counsel credibly testified that he routinely makes such arguments in order to "make a record," and that the timing of his arguments had to do with how the circuit court managed the hearing at which Johnson rejected the misdemeanor plea agreement. There is no support in the record for Johnson's contention that trial counsel's arguments are evidence that counsel advised him to reject the plea offer because the charges would not be reissued as felonies.

We agree with the circuit court that trial counsel did not perform deficiently. For that reason, we need not address Johnson's arguments that he was prejudiced by counsel's performance. *See Moats*, 156 Wis. 2d at 101.

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