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DISTRICT III

November 5, 2024

To:

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Circuit Court Judge
Electronic Notice

Caroline Brazeau
Clerk of Circuit Court
Marinette County Courthouse
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Kara Lynn Janson
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You are hereby notified that the Court has entered the following opinion and order:

2023AP421-CR State of Wisconsin v. Terez Lamar Cook (L. C. No. 2005CF117)

Before Stark, P.J., Hruz and Gill, 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).

Terez Cook appeals from an order that denied, without an evidentiary hearing, his postconviction motion for plea withdrawal or resentencing. 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 (2021-22).[1] We affirm.

This case has a long and complex procedural history. In 2006, Cook was convicted by a jury on eight charges, each as a repeat offender, including felony counts of armed robbery,

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

burglary, false imprisonment, and cruelty to an animal. The charges all arose out of a violent home invasion in which three residents were restrained, two of them were beaten, and their dog was shot. The circuit court imposed sentences totaling forty years' initial confinement followed by eighteen years' extended supervision. In 2008, this court affirmed Cook's convictions on direct appeal.

In 2009, Cook filed a pro se postconviction motion under WIS. STAT. § 974.06, seeking a new trial based on several grounds not raised in his direct appeal, including multiple alleged instances of ineffective assistance of his trial counsel and the circuit court's failure to provide a jury instruction or to consider sentencing guidelines. Cook further alleged ineffective assistance of postconviction and appellate counsel as the reason he had not raised those issues on his direct appeal. In 2010, the circuit court granted Cook's § 974.06 motion, vacated the judgment of conviction, and ordered a new trial. The State appealed the order granting Cook a new trial.

In 2011, while the State's appeal was pending, the parties reached a proposed settlement agreement in which Cook would plead guilty or no contest to armed robbery, three false imprisonment counts, and a misdemeanor theft charge, each without the repeater enhancer, and would agree to waive all postconviction and appellate rights. In exchange, the State would dismiss and read in the remaining charges and recommend the maximum nineteen years and nine months' initial confinement available under the proposed reduced charges. The circuit court rejected the plea agreement based on the victims' desire that Cook serve more than twenty years, their ambivalence as to whether they wanted a new trial, and the possibility that this court could reverse its order for a new trial—which would allow the original sentences the victims wanted to remain in place without a new trial.

In 2012, this court reversed the circuit court's order granting Cook a new trial and reinstated the original judgment of conviction. In 2020, however, the Seventh Circuit Court of Appeals granted Cook's federal petition for a writ of habeas corpus and once again vacated the original judgment of conviction. The Office of the State Public Defender appointed a new attorney, Amanda Skorr, to represent Cook in further proceedings.

The parties proceeded to negotiate a new plea deal in which Cook would plead no contest to armed robbery, without the repeater enhancer, and three false imprisonment counts, each as a repeat offender. In exchange, the State agreed to recommend sentences totaling thirty years' initial confinement followed by nineteen years' extended supervision. This time, the circuit court accepted Cook's pleas based upon a colloquy and signed plea questionnaire. The court then ordered that a new presentence investigation report be prepared.

At the sentencing hearing held in 2021, the State argued that Cook and a co-defendant had come up with the idea to invade the victims' home and had enlisted two girls to buy items at Walmart to facilitate the crime. The circuit court later echoed the State's assertion that Cook had involved two girls in the offenses. The court imposed new sentences totaling thirty-five years' initial confinement followed by nineteen years' extended supervision.

Cook filed a postconviction motion seeking plea withdrawal or, in the alternative, resentencing. As grounds, Cook claimed: (1) he was entitled to specific performance of the 2011 plea agreement because the circuit court improperly inserted itself into the plea negotiations; (2) the court failed to inform Cook (who was represented at the time of his pleas) that an attorney might discover defenses or mitigating circumstances that would not be apparent to a layperson; (3) the State's offer of a substantially harsher plea agreement after Cook

prevailed in overturning his convictions constituted vindictive prosecution; and (4) Cook was sentenced based upon inaccurate information that he had involved two girls in the offenses.[2] Cook further alleged ineffective assistance of counsel in various prior proceedings as the reason these claims had not been raised earlier. The circuit court denied the motion without an evidentiary hearing, and Cook appeals.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We will review the circuit court's decision to deny a plea withdrawal motion without an evidentiary hearing under the de novo standard, independently determining whether the facts alleged would establish the denial of a constitutional right sufficient to warrant the withdrawal of the plea as a matter of right. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996).

In the context of a plea withdrawal motion, a defendant must allege facts either showing that the plea colloquy was defective and that the defendant did not understand information that was supposed to have been provided or demonstrating some other manifest injustice such as coercion, a genuine misunderstanding on the defendant's part, an insufficient factual basis to support the charge, ineffective assistance of counsel, a failure by the prosecutor to fulfill the plea agreement, or some other issue raising "serious questions affecting the fundamental integrity of

[2] As to resentencing, Cook raised an additional claim that the circuit court failed to consider Cook's positive adjustments in prison. However, Cook does not discuss that claim on appeal.

the plea." ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991); ***State v. Dillard***, 2014 WI 123, ¶83, 358 Wis. 2d 543, 859 N.W.2d 44 (citation omitted). In the context of a claim for resentencing based on inaccurate information, a defendant must allege facts showing that the circuit court relied upon information that was "materially and extensively false." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1; ***State v. Travis***, 2013 WI 38, ¶¶18, 22, 347 Wis. 2d 142, 832 N.W.2d 491.

As a threshold matter, we note that a defendant is not entitled to relief on a procedurally barred claim. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶71, 360 Wis. 2d 522, 849 N.W.2d 668. No claim that could have been raised in a previously filed postconviction motion or on direct appeal can be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was a sufficient reason for failing to raise the claim in the earlier proceeding. Sec. 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). It is unclear how ***Escalona-Naranjo*** would apply here, however, when Cook is appealing as of right from a new judgment of conviction, entered on January 29, 2021, and from an order denying his first postconviction motion seeking relief from that judgment under WIS. STAT. RULE 809.30, not under § 974.06.

Moreover, even if ***Escalona-Naranjo*** applies in these circumstances, Cook's assertion of ineffective assistance of counsel as a "sufficient reason" why he did not raise his claims earlier places this court in a circular position. That is, we must essentially address the merits of each claim in order to determine whether the merits of the claim are properly before us. *See* ***State v. Lo***, 2003 WI 107, ¶50, 264 Wis. 2d 1, 665 N.W.2d 756. We therefore conclude it is most

efficient to directly address the sufficiency of the claims raised in Cook's postconviction motion without analyzing the additional layers of prior counsel's performance.

Cook first claims that he is entitled to withdraw his pleas and obtain specific performance of the 2011 plea agreement because the circuit court improperly inserted itself into the plea negotiations when it rejected the originally proposed deal. Cook cites ***State v. Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58, for the proposition that a court's participation in plea negotiations before an agreement is reached renders the resulting plea involuntary.

We note that the circuit court's alleged participation in plea negotiations here occurred *after* the parties had already reached an agreement that they were presenting to the court. When the court rejected that agreement, it made no suggestion that it would accept another plea agreement with different terms. Rather, the facts alleged in the applicable motion show that the court simply exercised its authority to reject a plea agreement that it found to be against the public interest. *See generally* ***State v. Conger***, 2010 WI 56, ¶48, 325 Wis. 2d 664, 797 N.W.2d 341. Moreover, even if the court had acted improperly in rejecting the plea agreement, Cook has presented no authority that would authorize, much less compel, the specific performance of a rejected plea agreement. Rather, the remedy in the cases Cook cites was the withdrawal of any pleas that had been rendered involuntary, reinstating the original charges.

Cook's second claim for plea withdrawal is that the circuit court violated its duties under ***Bangert*** when it failed to advise him that an attorney might discover defenses or mitigating circumstances that would not be apparent to a layperson. Although that warning is included in the information circuit courts are directed to provide to defendants in ***State v. Brown***, 2006 WI

100, ¶¶33-36, 293 Wis. 2d 594, 716 N.W.2d 906, it is not clear that the directive applies *when the defendant is already represented by counsel*, as Cook was here. For instance, we note that the special materials judges routinely use to conduct plea colloquies with represented defendants do not include that information. *See* WIS JI—CRIMINAL SM-32 (2021). Rather, courts typically provide a defendant with information about the assistance that an attorney could provide when obtaining a waiver of counsel before accepting a plea from a pro se defendant. *See* WIS JI—CRIMINAL SM-30 (2015).

Even assuming that a circuit court has a mandatory obligation under ***Brown*** to advise an already represented defendant that an attorney might discover defenses or mitigating circumstances that would not be apparent to a layperson, we are not persuaded that the failure to do so warrants a plea withdrawal hearing. A small deviation or insubstantial defect in the court's colloquy does not automatically constitute a due process violation. ***State v. Taylor***, 2013 WI 34, ¶¶33-34, 347 Wis. 2d 30, 829 N.W.2d 482. We are satisfied that neglecting to tell a represented defendant about the advantages of having an attorney is precisely the sort of minor deviation from a court's plea colloquy duties that is insufficient to warrant a hearing under ***Taylor***.

Cook's third claim for plea withdrawal is that the State's offer of a substantially harsher plea agreement after Cook prevailed in overturning his convictions constituted vindictive prosecution. He cites ***State v. Williams***, 2004 WI App 56, ¶44, 270 Wis. 2d 761, 677 N.W.2d 691, for the proposition that a presumption of vindictiveness arises when a prosecutor adds charges or increases their severity after a defendant obtains a new trial. Cook then argues that his situation is analogous because the only thing of significance that happened between the State's first and second plea offers was Cook's success in overturning his convictions. Cook's argument completely ignores the fact that the circuit court rejected the first plea agreement as

being contrary to the public interest. That determination provided sufficient grounds for the State to offer different terms in its next plea offer.

Cook's final claim is that he was sentenced based upon inaccurate information that he had involved two girls in the offenses. Cook asserts that it was instead one of the two girls who involved him in the offenses because she identified the victims' garage as a place where a large amount of marijuana might be stored. However, the complaint alleged that Cook gave the girls twenty dollars to go to Walmart to buy gloves, bandanas, and duct tape. Therefore, the circuit court's view of the relative culpability of Cook and the girls in the offenses was a matter of interpretation and characterization, not an assertion of a materially false fact.[3] In any event, the court's remarks at sentencing make clear that the court was focused on Cook's terrorization of the victims during the home invasion and the impact the crime had upon them, not on whose idea it first was to invade the home. Thus, even if Cook could demonstrate that information that he involved the girls in the offense was false, the record conclusively demonstrates that the court did not rely upon it in setting the sentences.

In sum, none of the facts alleged in Cook's postconviction motion, even if true, would entitle him to the relief he sought. Therefore, the circuit court properly denied the motion without an evidentiary hearing.

[3] Cook appears to suggest that the State's decision not to prosecute the girls and the circuit court's view of Cook's role in the offenses were premised upon racial discrimination. However, he has failed to develop those arguments as separate issues for appellate review.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. 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