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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP000062-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SANTOS LEE HERNANDEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE J.D. WATTS AND THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T OF A P P E A L S

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

(1) Was Hernandez entitled to a hearing on his post-conviction motion?

Trial Court answered: No

States position: No.

(2) Was the argument preserved that sex-offender probation is a direct consequence of his guilty plea?

Trial Court did not address the issue.

State's position: No.

(3) Was sex-offender probation a direct consequence of Hernandez's guilty plea?

Trial Court did not address the issue.

State's position: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Hernandez's statements of the procedural history and the facts of the case are sufficient to frame the issues for review. As respondent, the State exercises its option not to present a full statement of the case, but will supplement the facts as needed in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED HERNANDEZ'S POST-CONVICTION MOTION WITHOUT A HEARING.

A. Standard of review.

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 576–77, 682 N.W.2d 433, 437. The reviewing court first determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that is reviewed de novo. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50, 53 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.* at 310, 548 N.W.2d 50; *Nelson v. State,* 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972).

The appellate courts review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin,* 2004 WI 38, ¶ 6, 270 Wis.2d 271, 677 N.W.2d 276; *Bentley,* 201 Wis.2d at 311, 548 N.W.2d 50.

B. The circuit court properly held no hearing was necessary because the record conclusively demonstrates Hernandez's plea was validly made.

If a motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant *or deny* a hearing. *Bentley,* 201 Wis. 2d at 310-11, 548 N.W.2d 50; *Nelson,* 54 Wis. 2d at 497-98, 195 N.W.2d 629. The circuit court must "form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson,* 54 Wis. 2d at 498, 195 N.W.2d 629. *See Bentley,* 201 Wis. 2d at 318-19, 548 N.W.2d 50 (quoting the same).

In the case at hand, Hernandez filed a post-conviction motion with the trial court, which alleged that manifest injustice occurred because Hernandez did not knowingly, voluntarily or intelligently enter his guilty plea due to fear of incarceration, due to being drunk at the hearing, and due to his true belief that there was not a factual basis for his plea. (R9:1-4). The circuit court denied Hernandez's post-conviction,

without hearing. (R10:4). In its reasoning, the court indicated that it was entitled to rely on Hernandez's representations in court during the plea colloquy, which were that he was not under the influence, that he was making a voluntary plea, and that he admitted to the factual basis for his plea. (R10:2-4). The court further found that Hernandez's current claims were self-serving, and contrary to the record. (R10:2-4).

The circuit court properly made its ruling, based on the facts in the record. The record before the court clearly and conclusively demonstrates that Hernandez understood the plea proceedings, was not under the influence of any intoxicating substances, and fully admitted to the elements of the crime he committed.

First, Hernandez indicated to the court that he understood the negotiations, the charges he was pleading guilty to, the charges that were read in, and the possible penalties he faced. (R14:6-18).

Next, Hernandez indicated on the plea questionnaire form that he had not drank any alcohol in the twenty four hours prior to his hearing. (R4:1). When asked by the judge during the colloquy, Hernandez indicated the same, and answered "No" when the court asked if Hernandez had "any alcohol, medicine, or drugs within the last 24 hours." (R14:18).

Finally, Hernandez admitted that there was a factual basis his guilty plea. Hernandez indicated that he would not be making any defense to the facts alleged against him, indicated he understood the elements of each respective crime, and conceded a factual basis. (R14:23-30). It is also worth noting that Hernandez plead guilty, and made no attempt to enter a plea of no contest.

Moreover, in addition to the record conclusively demonstrating Hernandez is not entitled to relief, post-conviction attorney Gregory Bates (same attorney as appellate counsel) has failed to point to any specific instances in the record which would entitle Hernandez to a hearing.

Therefore, no hearing was needed to determine what Hernandez may have misunderstood, as the record conclusively

demonstrates "that the Defendant gave clear, concise, and relevant answers to all the court's questions during the plea colloquy, and that he understood every aspect of all the proceedings." (R10:2). Furthermore, no hearing was needed to determine whether Hernandez had fabricated a factual basis for his guilty plea, as his claims are "belied by all of the evidence[.]" (R10:4). The circuit court had all the information it needed to make its decision in denying Hernandez's post-conviction motion and thus it properly used its discretion to do so.

II. HERNANDEZ DID NOT PROPERLY PRESERVE HIS ARGUMENT THAT SEX-OFFENDER REGISTRATION IS A DIRECT CONSEQUENCE OF HIS GUILTY PLEA.

This court should not address the issue of whether sex-offender probation is a direct consequence of a guilty plea because Hernandez failed to preserve the issue.

It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. *State v. Caban,* 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court. *Id.* at 604, 563 N.W.2d 501.

The Wisconsin Supreme Court has commented on the reasoning behind this rule:

> Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

State v. Huebner, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730.

In the instant case, Hernandez failed to mention the issue of "direct consequences" until his appeal. His post-conviction motion merely offers the following paragraph:

> After being placed on probation and meeting with a probation agent, Santos Hernandez became aware that the charges to which he pled guilty were "sex crimes" and that the Department of Corrections would treat him as a "sex offender" and would require him to follow the Department's onerous "sex offender" rules.

(R9:3)

This vague paragraph is not a valid preservation of the issue he now makes on appeal. Moreover, it is the State's position that Hernandez's raising of this issue is erroneously brought as a response to the post-conviction decision, and not based on an actual issue Hernandez disagrees with. If Hernandez did disagree with the circuit court's ruling, he should have raised this issue during the countless opportunities he had during the plea colloquy. However, he has not and thus Hernandez failed to preserve this issue.

III. SHOULD THIS COURT FIND THAT SEX-OFFENDER PROBATION WAS PROPERLY PRESERVED, SEX-OFFENDER PROBATION IS NOT A DIRECT CONSEQUENCE OF HERNANDEZ'S GUILTY PLEA.

The record demonstrates Hernandez was aware of sex-offender registry and deportation may be consequences of his plea (R14:15), yet Hernandez takes umbrage with the fact that he was treated as a sex offender by the DOC, and contends that this is a direct consequence, and flows from his conviction. (Hernandez's Brief pp. 13-15).

Courts are constitutionally required to notify defendants of the "direct consequences" of their pleas. *Brady v. United States,* 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *State v. James,* 176 Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). In contrast, defendants do not have a due

process right to be informed of the collateral consequences of their pleas. *Id.; State v. Santos,* 136 Wis. 2d 528, 531, 401 N.W.2d 856 (Ct. App. 1987).

The distinction between "direct" and "collateral" consequences of a plea is affected by whether the complained of consequence has an "effect on the range of the defendant's punishment." *State v. Merten*, 2003 WI App 171, ¶ 8, 266 Wis. 2d 588, 596, 668 N.W.2d 750, 754. (citing *State ex rel. Warren v. Schwarz,* 219 Wis.2d at 636, 579 N.W.2d at 708). An additional factor affecting whether the consequence of a plea is collateral or direct is whether the consequence rests in the hands of another government agency or different tribunal. *State v. Kosina,* 226 Wis. 2d at 486, 595 N.W.2d at 467 (Ct. App. 1999); *Torrey v. Estelle,* 842 F.2d 234, 236 (9th Cir.1988).

It is the State's position that sex-offender probation is clearly a collateral consequence because the consequence rests with the Department of Corrections.

Similar to sex-offender probation, the *Bollig* case has held that sex-offender registration is not a direct consequence of a guilty plea, due to the fact that registration is not a punishment. *State v. Bollig*, 2000 WI 6, ¶ 27, 232 Wis. 2d 561, 576–77, 605 N.W.2d 199, 206. The court in *Bollig* stated:

> We determine that Wisconsin's sex offender registration requirements do not constitute punishment. Because the duty to register is not punishment, it does not represent a direct consequence of Bollig's no contest plea. Rather, it is a collateral consequence, and Bollig does not have a due process right to be informed of collateral consequences prior to entering his plea.

Id.

In the instant matter, sex-offender offender probation is not a punishment, but rather a type of probation.

Finally, it is worth noting that Hernandez has failed to allege the fact that he would not have plead guilty if he had known sex-offender probation was going to be ordered by the Department of Corrections.

Therefore, sex-offender probation is not a direct consequence to Hernandez's plea.

CONCLUSION

In the case at hand, the circuit court properly denied Hernandez's post-conviction motion, based on the records clear demonstration of a knowing, voluntary, and intelligent plea, and the court's finding as to Hernandez's credibility.

Additionally Hernandez has failed to preserve the issue he brings as related to sex-offender registry. Should this Court find that Hernandez did properly preserve the issue, his claim fails as it is well settled that sex-offender registry is not a direct consequence to a guilty plea, and in this case the DOC is the party who had control over the classification.

Accordingly, the State of Wisconsin respectfully request this court affirm the judgment of conviction and the motion denying post-conviction relief.

Dated this ______ day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 1,993.

_________________ ________________________

Date

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_________________ ________________________

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