

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1948-CR

Cir. Ct. No. 2007CF1450

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIANE MARIE ZIMMERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Diane Zimmerman wanted her husband dead so she offered Michael Isferding \$50,000 and a new Harley-Davidson motorcycle to kill him. Isferding agreed to her offer and brutally stabbed Zimmerman's husband but

failed to kill him. Zimmerman was charged with party to the crime of attempted first-degree intentional homicide and proceeded to trial. The trial was not going well for Zimmerman and on the fourth day of trial she changed her plea to no contest. Zimmerman was sentenced to thirty-five years of initial confinement, eight years of extended supervision, and ordered to pay \$185,000 in restitution. Zimmerman seeks: (1) withdrawal of her plea, alleging ineffective assistance of counsel; (2) resentencing on the grounds that the court failed to consider her “positive” character in a meaningful way; and (3) modification of the restitution amount given her inability to pay. We disagree with Zimmerman in all respects and affirm her conviction and sentence.

Plea Withdrawal

¶2 Zimmerman argues that a manifest injustice will occur if she is not allowed to withdraw her plea. To withdraw a guilty plea after sentencing, a defendant “carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a ‘manifest injustice.’” *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). One way a defendant can demonstrate a “manifest injustice” is to prove he or she received ineffective assistance of counsel during the plea process. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Zimmerman alleges that her trial attorneys were deficient and ineffective, as they coerced and threatened her into changing her plea and promised her eight years in prison if she entered a no contest plea.

¶3 To determine whether a convicted defendant received ineffective assistance of counsel, a convicted defendant must satisfy both prongs of the two-part *Strickland* test: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We defer to the circuit court's findings unless clearly erroneous, but whether counsel's performance was deficient and prejudicial to the defendant are questions of law that we review de novo. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶4 The circuit court held an evidentiary hearing on Zimmerman's allegations that her attorneys were deficient. The facts from that hearing do not support Zimmerman's allegations.

¶5 At the postconviction hearing, Zimmerman's trial attorneys testified that they never promised Zimmerman what her sentence would be. Zimmerman conceded that she was never promised an eight-to-ten-year sentence, but rather her attorneys told her they would argue for an eight-to-ten-year sentence based on department of corrections sentencing guidelines. The circuit court found that neither attorney promised Zimmerman anything to get her to plead no contest. The court also found that Zimmerman was not threatened to change her plea from not guilty to no contest. We agree with the circuit court that Zimmerman's attorneys were not deficient and that Zimmerman's uncorroborated allegations do not support a claim of ineffective assistance of counsel.

Sentencing Discretion

¶6 Zimmerman argues that the court did not meaningfully consider her “positive” character and seeks resentencing. We disagree. The court considered all relevant character evidence, including Zimmerman’s psychological evaluations, the State’s presentence investigation report, the public defender’s office’s presentence investigation report, and the testimony of nineteen witnesses. In assessing Zimmerman’s character, the court meticulously went through her background. The court noted that Zimmerman’s attorney described her as “loving[,] caring[,] religious, [and] giving,” but stated, “That wasn’t the evidence that I saw.” The court also noted that Zimmerman reported being sexually assaulted when she was thirteen and that her husband was abusive during their marriage. It considered Zimmerman’s educational background, her employment history, and her lack of a criminal record. The court also stated that Zimmerman’s community was her family and that she “morally” failed to protect them.

¶7 The court stated that the attack on Zimmerman’s husband was “one of the most horrendous crimes” it had ever seen and concluded that Zimmerman was a high risk to reoffend. The court indicated punishment served as the foremost sentencing objective.

¶8 The circuit court specified its sentencing objectives on the record, identified the objectives of greatest importance, and described why the sentence imposed supported the objectives. As the circuit court fully considered all the sentencing objectives and addressed the relevant sentencing factors, we affirm

Zimmerman's sentence. See *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20.

Restitution Order

¶9 Zimmerman seeks modification of the restitution order. After the circuit court imposed restitution at the sentencing hearing, Zimmerman's attorney stated, "Given the Court's sentence of 43 years and Ms. Zimmerman's age, I believe that there would not be an ability to pay restitution." Zimmerman presented no other evidence on her inability to pay. A defendant who argues that she is unable to pay a court ordered restitution must present evidence to that effect and may not simply rely on an argument by her attorney. See *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990).

¶10 As Zimmerman failed to present any evidence on her financial resources or her ability to pay, she "cannot now complain that the sentencing court failed to consider [her] financial circumstances." *Id.* We affirm the \$185,000 restitution amount.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

