

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2013AP1237-CR

Cir. Ct. No. 2009CF1401

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD O. ORTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Gerald Orton appeals a judgment of conviction and orders denying his postconviction motions. We affirm.

¶2 Orton pled no contest to one count of first-degree intentional homicide. Orton filed two postconviction motions. His first postconviction motion alleged ineffective assistance of counsel. Orton alleged that his trial counsel incorrectly informed him before his no-contest plea that he could withdraw that plea at any time before sentencing. After an evidentiary hearing, the circuit court found trial counsel more credible, and that counsel properly explained the standards for plea withdrawal. The court further rejected as not credible Orton's testimony that he thought he could withdraw the plea for any reason, and that he believed he was giving up only his right to the then-scheduled trial, rather than to any possible trial.

¶3 Orton argues that the circuit court's credibility determinations were clearly erroneous. He does not acknowledge long-standing case law that credibility determinations are for the fact-finder, not this court. Orton argues that the court misperceived the number of times that Orton had terminated his several trial counsels, and that this misconception affected its credibility determinations. However, it is not reasonable to believe that this one error on a specific point altered the court's overall credibility findings after hearing testimony on numerous other points.

¶4 Orton's second postconviction motion alleged that his plea was not entered knowingly, voluntarily, and intelligently. The underlying argument was essentially the same as for the ineffective assistance claim, namely, that Orton had not understood that his plea could not easily be withdrawn, and that he believed it was a waiver only of the then-scheduled trial. The circuit court denied this motion without holding a new evidentiary hearing.

¶5 Orton argues that an evidentiary hearing was required because the second motion raised an issue that was not previously before the court. He argues that, unlike the ineffective assistance claim, in the second claim “[t]he question isn’t what [trial counsel] told him, but what [Orton] believed.” However, the question of what Orton believed was already addressed in the first hearing, and the court rejected Orton’s testimony about what his belief was.

¶6 Orton argues that on his second motion he would have presented additional mental health evidence that would have supported his claim that he inaccurately understood the nature of his plea. However, at the first hearing the circuit court rejected his claimed misunderstanding of the plea after hearing testimony from Orton personally and looking at the rest of the record related to the plea. We see no reason to believe that additional testimony about Orton’s mental health conditions would have changed the outcome. As far as we can see, the mental health testimony would not have specifically addressed what Orton’s understanding of the plea was. Therefore, we see no reason to believe it would have overcome the court’s more direct perceptions of Orton’s testimony and the record, so as to lead the court to accept Orton’s assertion that he did not understand the nature of the plea.

¶7 Orton’s second postconviction motion also presented a claim that he was sentenced based on inaccurate information. At sentencing, the State called witnesses to rebut Orton’s version of certain facts of the offense, as presented by Orton to the author of the presentence report. While imposing sentence, the court made what are essentially findings of fact about which version of the event was accurate. In Orton’s postconviction motion, he again raised those same factual disputes, this time with additional evidence that he wanted to submit. The circuit court denied the motion without an evidentiary hearing.

¶8 Orton has not persuaded us that the circuit court was required to hold an evidentiary hearing on this claim. He does not appear to identify any legal theory that requires the circuit court to revisit facts that were actively disputed at sentencing, and on which testimony was taken and findings made, when the same disputes are presented again as a claim of “inaccurate information.” If Orton wants to claim that the findings at sentencing are inaccurate, he can challenge them directly. However, he does not make that argument. Accordingly, we see no basis to conclude that the circuit court erred by not holding an evidentiary hearing on this claim.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2013-14).

