STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

Appeal No. 2011AP000450 CR

vs. Case No. 2009CF002823

JULIUS C. BURTON,
Defendant- Appellant

ON APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE
THE HON. KEVIN E. MARTENS, PRESIDING

BRIEF OF DEFENDANT- APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Q. Did defense counsel's failure to advise the defendant that he had the right to a bifurcated trial in which he could plead guilty to the crimes and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect constitute ineffective assistance of counsel, and did the Circuit Court's denial of the defendant's postconviction motion to withdraw his plea of guilty on that ground, without even ordering a hearing, constitute an abuse of its discretion?

   A. The Circuit Court answered no.

2. Q. Since the Circuit Court failed to advise the defendant that he had the right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect, had the defendant's plea of guilty not been knowingly, intelligently and voluntarily made and was the defendant entitled to have his plea of guilty withdrawn?

   A. The Circuit Court answered no.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The defendant-appellant requests , pursuant to Wis. Stats. §809.19(1)(c), that oral arguments be held in this matter and that the opinion in this matter be published because the issues raised herein, as to whether defense counsel and the trial court had a duty to advise the defendant, who had entered a plea of not guilty by reason of mental disease or defect in this matter, could plead guilty to the crimes charged and still have the right to a jury trial, under the bifurcated procedures set forth by statute, to determine whether he should not be held criminally responsible for his conduct by reason of mental disease or defect, appear to be matters of first impression in the State of Wisconsin.

STATEMENT OF THE CASE- PROCEDURAL FACTS

1. This criminal action commenced with the filing of a Criminal Complaint in the Circuit Court of Milwaukee County on June 11, 2009, charging the defendant with two counts of Attempted Intentional Homicide in the first degree with the use of a dangerous weapon, contrary to Wis. Stats. §940.01(1)(a), §939.50(3)(a), §939.32, and §939.63(1)(b), Class B felonies. (Record 2, pp. 1-4; Appendix, pp. A1- A4). The shootings of two Milwaukee police officers in this case took place on June 9, 2009.

2. The defendant appeared in the Circuit Court of Milwaukee County on June 11, 2009 for an initial appearance. At that time, a competency examination was ordered by the Court. (R.39, pp.1-6). On June 26, 2009, Attorneys Julius Kim and Jonathan LaVoy were retained to represent the defendant. (R.40, pp. 1-7). On July 23, 2009, a report was filed by Dr. Luchetta, finding the defendant competent to proceed. (R.41, pp. 1-5). Defense counsel did not object to that finding.

3. On July 31, 2009, a preliminary hearing was held, at which Officer Bryan Norberg and Officer Graham Kunisch, the two officers who had been shot in this incident, as well as Officer Cory Harris and Detective Christopher Blaszak testified. (R.42, pp. 1-48; App. pp. A5-A38). The Court found probable cause to believe that felonies had been committed by the defendant and bound the case over for trial. Following the hearing, an Information was filed, charging the same charges as in the Criminal Complaint. (R.3, p. 1; App. p. A39).

4. On August 27, 2009, defense counsel indicated that it was going to enter a plea of not guilty by reason of mental disease or defect. The Court, therefore, ordered an examination of the defendant by Dr. Kenneth Smail to determine whether there was sufficient evidence to support such a plea. (R.43, pp. 1-6). Thereafter, on October 12, 2009, Dr. Smail filed a report

with the Court, finding that there was not sufficient evidence to support such a plea. (R.33, pp. 175- 185; App. pp. A120- A130). The defense retained Dr. Diane Lytton to prepare a report as to whether there was sufficient evidence to support such a plea. She prepared a report, dated December 12, 2009, finding that there was more than sufficient evidence to support a plea of not guilty by reason of mental disease or defect. (R.33, pp. 186- 215; App. pp. A131- A160).

5. In the meantime, on November 19, 2009, the defense filed a Motion to Suppress Statements by the defendant. (R.10, pp. 1-11). The State filed a Reply on December 7, 2009. (R.12, pp. 1-4). A suppression hearing was ordered to be held on January 22, 2010 but the hearing was never held.

6. On January 21, 2010, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Patricia D. McMahon, presiding, for a plea hearing. (R.46, pp. 1-27; App. pp. A40- A66). The State was represented by Mark Williams, Assistant District Attorney of Milwaukee County. The defendant was represented by Mr. LaVoy and Mr. Kim. At that time, an offer was made to the defendant that if he pled guilty to the two counts of the Information, the State would recommend that he receive fifty years of incarceration with no recommendation as to the length of the extended supervision.

7. Defense counsel indicated that it would abandon the defendant's plea of not guilty by reason of mental disease or defect and that the defendant would enter a plea of guilty to the two Counts of the Information. The defendant signed a plea questionnaire and waiver of rights form, which again indicated that the offer was fifty years of initial confinement and no recommendation as to the length of the extended supervision. (R.15, pp. 1-3; app. pp. A67- A69). The defendant entered a plea of guilty to the two Counts of the Indictment and the Court accepted his plea.

8. On February 25, 2010, the defendant appeared before the Hon. Patricia D. McMahon for sentencing. (R.47, pp. 1-74; App. pp. A70- A91). The State recommended that the defendant be sentenced to fifty years of initial confinement and made no recommendation as to the length of the extended supervision. The Court refused to accept that recommendation and sentenced the defendant to forty years of initial confinement on each of the two charges, with the two sentences to run consecutively. It also sentenced him to ten years of extended supervision on each count to run consecutively. (R.47, p. 72; App. p. A89).

9. On March 3, 2010, a Notice of intent to pursue postconviction relief was filed on behalf of the defendant. (R.23, pp. 1-2; App. pp. A94- A95). On April 28, 2010, Esther Cohen Lee was assigned as counsel to represent the defendant on appeal. (R. ---; App. p. A96). On October 14, 2010, after counsel had filed a motion to extend the time for filing a postconviction motion in this case, the Court of Appeals issued an Order on October 19, 2010, granting an extension. (R.27, p. 1).

10. After counsel had initially filed a postconviction motion in excess of the twenty page limit for such motions, a motion was filed requesting permission to file a postconviction motion in excess of that limit. (R.29, pp. 1-7). That motion was granted to the extent that the Court allowed a twenty-five page limit. (R.30, p.1). On January 12, 2011, a new postconviction motion was filed in the Circuit Court. (R.31, pp. 1-25).

11. On February 14, 2011, the Hon. Kevin E. Martens, Circuit Court Judge of Milwaukee County, who had been assigned to determine the motion, issued a Decision and Order, denying the defendant's motion to withdraw his pleas of guilty. (R.36, pp. 1-4; App. pp. A97- A100).

12. A Notice of Appeal, dated February 25, 2011, was filed in regard to this matter. (R.37, pp. 1-2; App. pp. 101-102).. On that date, Esther Cohen Lee was assigned as counsel to handle this appeal in the Court of Appeals. (R.----; App.p.A103).

STATEMENT OF THE CASE-FACTUAL

A. The Shootings of Officer Kunisch and Officer Norberg

In his testimony at the preliminary hearing on July 31, 2009, Officer Norberg said that on June 9, 2009, he and Officer Kunisch were on routine patrol in their squad car in the area of Bradley Tech High School . (R.42, p. 11; App. p. A8). At 3:30 p.m., they were traveling east on W. National Aveune. They were both wearing their police clothes and badges and wearing their duty belts with their handguns. Kunisch was driving while Norberg sat in the passenger seat. (R.42, p. 12; App. p. A9).

As they drove along the street, Norberg said he saw a black male riding a bicycle on the sidewalk, which was contrary to a city ordinance. The officers decided to stop him and conduct a field interview of him. As they drove near him, Norberg yelled to him to stop and the man turned and looked at him. Norberg identified the defendant as being that man. (R.42, p. 13; App. p. 10).

As the defendant continued to ride his bicycle on the sidewalk, Norberg stopped the police car and got out of the car. He followed the defendant on foot and continued to yell at him to stop, but he did not do so. When the defendant turned right on S. 2nd Street, Kunisch followed him in the car. At 819 S. 2nd Street, as Kunisch was getting out of the car, Norberg went up to the defendant and grabbed him from behind to gain control of him. Norberg took the defendant off the bicycle and grabbed him, making him face west on S. 2nd Street. (R.42, p. 15; App. p. A12). He placed both of his hands on the defendant's back and forcibly removed him from the bicycle and as he did so, the defendant said, "Don't put your hands on me, why are you touching me?" (R.42, p. 22; App. p. A19).

While Norberg was holding the defendant from behind him, Kunisch got out of the car and approached them, standing to the defendant's left side. (R.42, p. 22; Pp. p. A19). Norberg got control of the defendant's left arm and he and Kunisch were trying to gain control of him to perform a pat-down search of him. The defendant was resisting their attempt to gain control of him and was flailing his arms and moving his feet. (R.42, pp. 24-25; App. pp. A21- A22). As Norberg was holding the defendant's left arm, he said, the defendant took out a pistol and shot him in the face. The pistol was only six inches from his face, he said. (R.42, p. 16; App. pp. A13). Norberg fell to the ground and as he lay on the ground, he heard more gunshots. Norberg said that he never had the chance to withdraw his firearm. (R.42, p. 17; App. p. A14).

At the preliminary hearing, Officer Kunisch reiterated the series of events that Norberg had testified to, adding that when he first told the defendant to stop, he appeared to pull something away from his head, which could have been headphones. (R.42, p. 40; App. p. A37). He said that as the defendant was struggling with Norberg, he moved up to them and tried to take control of the defendant. After that, he said, he heard two gunshots and fell to the ground. (R.42, pp. 30- 31; App. pp. A27- A28).

Detective Christopher Blaszek testified that a videotape of the incident had been obtained from a security camera on the building at 819 S. 2nd Street. He said that it showed that the person who had done the shooting was the defendant. He said that it showed that as both officers were falling to the ground, the defendant continued to shoot at them. At no time, he said, had the officers ever drawn their weapons. (R.42, pp. 43-45).

Norberg said that he had been shot several times and that the first bullet had gone through his lip, under his left nostril and then through and into his teeth, exiting out of his face. He also had a bullet wound to his shoulder and a wound to his left knee. (R.42, p. 18; App. p. A15).

Kunisch said that he had been shot in his left hand, which had torn the bone connected to his index finger to his hand. He also received a wound to his right shoulder and to the back of his neck. His most serious wound was to his face and skull, which destroyed his left eye and caused severe damage to the left side of his skull. (R.42. pp. 31- 32; App. pp. A28- A29).

B. The Lifelong History of Mental Illness of the Defendant

Unbeknownst to the officers when they decided to stop the man who was riding his bicycle on the sidewalk, they were about to approach a man who was very seriously mentally ill, and who, just a few weeks before this incident, had been held for observation in a psychiatric hospital because he had had homicidal and assaultive ideations and had been hearing voices telling him to hurt someone. In fact, they did not realize that they were approaching a man who had been suffering from a very serious mental illness his entire life and was a person with whom they could not reason.

The medical records show that the defendant's first admission to a mental health facility was when he was only nine years old, when he was admitted for dangerous behavior. On April 29, 2009, just a few weeks before this incident, the defendant was taken to a mental health facility because he was hearing voices telling him to hurt someone. The notes indicated that he was paranoid and hostile, depressed, anxious and having difficulty sleeping. Under "Violence Risk Factors", it states: "homicidal/ assaultive ideation, homicidal/ assaultive plan, violence severe stressor, paranoid." It stated that when he was asked who he wanted to hurt, he said, "no particular target, can't say what's bothering him." (R.33, pp. 147-150; App. pp. A104-A107).

He was discharged the next day, at his insistence, and told to take Risperdal and go to the Acacia Clinic. He was seen by a therapist there on May 11 and June 4, 2009. In their notes, the

Clinic said he reported hearing voices and had daily thoughts of harming people. They noted that he said he was taking his meds, and seemed less angry. (R.33, pp. 159-162). However, his family stated that he had not been taking his meds.

C. The Arrest of the Defendant and the Taking of his Statement

After the two officers had been shot, the defendant was arrested at 922 S. 3rd Street. Glen Koos owned a house near the incident and when he heard sirens that day, he left his house to find out what was happening. When he did so, he left his rear door wide open and unlocked. When he later returned home, he noticed that the door was closed and locked. He immediately contacted the police. (R.33, p. 139).

The police went there and yelled into the basement for the person inside to come out. The defendant then came out with his hands up. He was placed on the ground and handcuffed. Upon being searched, the police found the magazine of a gun in left pants pocket. The officers asked him where the gun was and he told them it was in a box in the basement. The police found the gun on a table next to a box in the basement. (R.33, pp.142-143).

After the defendant had been taken into custody, the police began questioning him at 6:15 p.m. The police reports indicate that the defendant told them he was riding the bicycle of Charles Johnson and was returning it to him. He said he only had the gun a couple days and that it was tucked inside his pants. He said he was riding on the sidewalk and listening to his Ipod when the police approached him and told him to stop. He said they grabbed him and pulled him off of the bicycle. When he asked the officers, "What did I do?", he tried to run away and officers grabbed one of his arms. He said he struggled with the officers because he did not feel he had done anything wrong. (R.33, p. 133).

When they began to pat him down, he said, he was afraid they would find the gun and that then they would shoot him. He said he pulled away and began running. He said he had taken the gun out and was going to toss it away but that the officers chased him with their guns drawn. Then, he said, he pulled the gun over his left shoulder and fired at them to scare them and to make them stop chasing him. (R.33, p. 133).

However, the police report failed to mention that throughout the first ten minutes of the interview, when his Miranda rights were being read to him, the defendant was experiencing hallucinations. In her report, Dr. Diane Lyntton noted that she had watched the interview on videotape and that during those first ten minutes, he was crying continually. He was also telling the officers that there was a man in the room who wanted to hurt him and he repeatedly begged them to make him go away. When the officers explained that there was no man in the room, the defendant insisted that he was there and that he would talk to them if only they would make him go away. (R.33, pp. 210-211; App. pp. A155- A156).

That report was consistent with the report of Dr. Luchetta who had found the defendant to be competent. She stated that the jail records showed that he complained in the jail that he was having visual and auditory hallucinations, and believed there was a man in his cell who wanted to hurt him. (R.33, p. 167; App. p. A112). She said that he was having paranoid ideations where he said he was scared of everyone. He was prescribed Haldol at the jail, a very strong anti-psychotic drug. (R.33, p. 180; App. p. A125).

D. The Reports of the Doctors as to the Evidence that Supported a Plea of Not Guilty by Reason of Mental Disease or Defect

Dr. Smail, the Court appointed psychologist, filed a report on October 12, 2009. He had interviewed the defendant once, on October 5, 2009. (R.33, p. 176; App. p. A121). He noted

that the defendant received SSI due to mental illness. He said that when he interviewed the defendant at the jail, he had been taking Haldol for several months to control the voices that he had been hearing. (R.33, p. 183; app. p. A128).

The defendant told him, he said, that he had gotten the gun because someone had recently put a gun in his face and he was scared that someone was trying to kill him. (R.33, p. 180; App. p. A125). He had gotten the gun, he said, from Jacob Collins, who had bought it for him several weeks before this incident.

Dr. Smail said that the jail records noted that the defendant was diagnosed with Schizophrenia, sometimes specified as paranoia. He also noted that the records said the defendant had reported that there was someone in the cell with him, even though he was alone in his cell, and that he was hearing voices that told him to hurt himself. The jail records showed he was found by the jail staff standing on his sink, about to harm himself. He was given injections of Haldol. (R.33, p. 183; App. p. A128).

Nevertheless, Dr. Smail said that in his opinion, there was no evidence that the defendant had a diagnosis of psychosis at the time of the incident. He said that the defendant's behavior had been "fear driven" but that his behavior was not out of his control. Further, he said, the defendant knew that the shooting of the officers had been wrong, both morally and legally. For these reasons, he said, there was no evidence to support a plea of not guilty by reason of mental disease or defect. (R.33, p. 183; app. p. A128).

In her report, prepared at the request of the defense, Dr. Lytton, stated in her report of December 12, 2009, that she had examined all of the defendant's past mental health records and had interviewed his family members and his girlfriend about his bizarre and paranoid behaviors in the weeks just before this incident. Based upon all of that information, she concluded that at

the time of the incident, the defendant was experiencing significant "active symptoms of a psychotic disorder which significantly and substantially affected his abilities to think and act and, therefore, his ability to conform his conduct to the requirements of the law." (R.33, pp. 186-187; App. pp. A131- A132).

Dr. Lytton interviewed the defendant four times for many hours. She also interviewed his mother, grandmother, sister, girlfriend and other family members. She said the defendant told her he was taking Haldol at the jail to stop him from hearing voices and to stop seeing hallucinations. He said he was afraid people were trying to harm or kill him. She noted his long history of mental illness and his history of cutting himself, which was proven by the many scars on his legs and arms. (R.33, p. 191; App. p. A136). She said that before this incident, he had left his mother's house to live with his girlfriend and their infant son because there had been several incidents where gang members had been trying to hurt him, even placing a gun to his head. (R.33, p. 195; App. p. A140).

The defendant's mother told her that he had been having auditory and visual hallucinations since early childhood. (R.33, p. 197; App. p. A142). His sister, cousin and grandmother also suffered from a disorder that caused them to have such hallucinations. (R.33, pp. 198-199; App. pp. A143- 144). His girlfriend told her that in the weeks before this incident, the defendant had become very paranoid and was afraid that people were following him. She said he always carried a bat, screw driver or knife with him. She said he refused to take his meds due to their side effects. On the night before this incident, he had become angry and hit her, she said, and she left the house that night. (R.33, pp. 200-210; App. pp. A145- A146).

In regard to the incident itself, she said, the defendant was suffering from a mental disease or defect at that time, specifically, bipolar disorder, paranoid schizophrenia and mood

disorder. (R.33, p. 212; App. p. A157). She said he was afraid of the police and that when they approached him and pulled him off the bicycle, they had caused him to have a fear reaction, which exacerbated "his extreme and increasingly delusional paranoia". Although the defendant knew the men who were involved were police officers, she said, and that he knew it was wrong to shoot them, she concluded that due to his mental illness' effect on his perceptions of reality, he was unable to control his actions and was unable to conform his actions to the requirements of the law." (R.33, pp. 214- 215; App. pp. A159- A160).

E. The Plea Hearing and Sentencing

On January 21, 2009, defense counsel indicated that it was abandoning the defendant's plea of not guilty by reason of mental disease or defect and that he was going to enter a plea of guilty to the two Counts of the Information. (R.46. [/ 4; App. p. A43). At the plea hearing, the State said it would recommend that the defendant receive fifty years of confinement with no recommendation as to extended supervision. (R.46, pp. 2-3; App. pp. A41- A42). The Court advised the defendant that it was not required to accept the State's recommendation and could sentence him up to forty-five years of initial confinement on each count. (R.46, pp. 5-6; App. pp. A44-A45). The defendant then signed the plea questionnaire and waiver of rights form, which indicated that the offer was fifty years of initial confinement and no recommendation as to extended supervision. (R.15, pp. 1-3; App. pp. A67- A69).

The Court then elicited a plea of guilty from the defendant. The defendant acknowledged that he had shot both officers with a firearm and that his conduct was substantially likely to cause their death. (R.46, p. 12; App. p. A51). The Court asked him if he realized that he was giving up the insanity defense and the defendant answered, "Yes." He told the Court he was withdrawing

his plea of not guilty by reason of mental disease or defect and giving up his right to a hearing to determine the admissibility of the statements that he had made to the police. (R.46, pp.13-14; App. pp. A52- A53).

The defendant said that he was aware of Dr. Lytton's report that indicated there was evidence that he was not guilty by reason of mental disease or defect. (R.46, p. 17; App. p. A56). Mr. LaVoy said that the defendant wished to forgo that issue and to plead guilty to the charges. He did not state why the defendant would plead guilty to at best, fifty years in prison, and at worst, ninety years in prison. (R.46, p. 18; App. p. A57).

The defendant then pled guilty to the two counts of the Information. (R.46, pp. 22-23; App. pp. A61- A62). The Court accepted the plea and in doing so, it noted that there were mental health issues in the case but that it was satisfied that the defendant was competent to proceed to trial. It said it was satisfied that the defendant had entered his plea knowingly, intelligently and voluntarily. The Court found the defendant guilty of both counts and ordered a presentence report. (R.46, p. 23; App. p. A62).

On February 25, 2010, the defendant appeared before the Court for sentencing, the Hon. Patricia D. McMahon, presiding. The State recommended that the defendant be sentenced to fifty years of initial confinement with no recommendation as to the extended supervision. (R.47, p. 3; App. p. A72). He noted that the presentence report was replete with mental health records and that "no one can argue that there are some mental health problems here." (R.47, p. 7). However, he said, the defendant knew what he was doing and he knew right from wrong. (R.47, p. 8). He said that he was satisfied that the plea would mean that the defendant would spend the rest of his life in prison and that the officers had suffered enough and he did not want to have to put them through the ordeal of a trial. (R.47, p. 10).

Both of the officers spoke at the sentencing, describing the terrible ordeal they had gone through and the permanent injuries they had received, including the loss of Officer Kunisch's left eye and the loss of a portion of the left frontal lobe of his brain. (R.47, pp 23, 28).

Mr. Kim spoke on behalf of the defendant. He acknowledged that the defendant suffered from "severe mental illness", paranoia in particular, and that that had played a role in the incident. (R.47, pp. 44-47). He described some of the defendant's long history of mental illness and the fact that he had been hearing voices since he had been a child. (R.47, p. 47). As a result, he said, the defendant did not have the capacity to make choices as clearly as other people and that this incident was a result of that. He said that when he first started seeing the defendant at the jail, he was disoriented and did not understand what was happening. He said that after he started taking his medication, he was a different person. (R.47, pp. 50-51). Still, he said, the defendant had chosen to withdraw his defense.

He asked the Court to give the defendant credit for sparing everyone a trial and that he did not know if the jury would have found him not guilty by reason of mental disease or defect. (R.47, p. 53). He said the defendant pled guilty because he hoped by doing so, he would someday get out of prison. He recommended an initial confinement of thirty years. (R.47, p. 54). He did not state why he had recommended to the defendant that he withdraw his plea of not guilty by reason of mental disease or defect.

The Court completely ignored the State's recommendation and completely ignored the defendant's mental illness. The Court stated that the defendant had shot the officers at point blank range to their heads and that after the shootings, he had run and hid. (R.47, p.58; App. p. A75). The Court noted that the defendant had mental health issues that were "serious and

devastating for the defendant." It did not give him any credit for sparing the officers from having to go through a trial. (R.47, p. 62; App. p. A79).

The Court concluded that the defendant was extremely dangerous. It found he had had mental health issues throughout his life. (R.47, pp. 69- 70; App. pp. A86- A87). However, it felt that he should never be allowed to be in the community because he presented too great a risk of causing more harm. For those reasons, the Court sentenced the defendant to forty years of initial confinement on each count, to run consecutively, for a total period of initial confinement of eighty years. It also sentenced him to a period of extended supervision of ten years on each count, to run consecutively. (R.47, p.72; App. p. A89).

F. The Postconviction Motion and the Denial of the Motion by the Circuit Court

On January 12, 2011, a Postconviction Motion to withdraw the defendant's guilty pleas and convictions was filed. (R.31, pp. 1-25). There were three grounds to the motion. First, it was argued that the defendant had received ineffective assistance of counsel because it was obvious that he was suffering from a lifelong mental disease or defect and that counsel had improperly counseled him to withdraw his plea of not guilty by reason of mental disease or defect and plead guilty.

Second, it was argued that the defendant had received ineffective assistance of counsel because he had failed to adequately advise him that there was almost no chance that the Court would follow the State's recommended sentence due to the extremely serious injuries suffered by the officers. Third, it was argued that the Court had failed to advise the defendant at the plea hearing that he had the right to a bifurcated jury trial in this matter and that he could chose to plead guilty to the crimes and still have a jury trial to determine whether he was not responsible

by reason of mental disease or defect, and that, therefore, the pleas of guilty were not voluntarily, knowingly and intelligently made.

On February 14, 2011, the Court issued a Decision and Order, denying the postconviction motion. (R.36, pp. 1-4; App. pp. A97- A100). The Court held that since the Court had asked the defendant whether he wished to withdraw his plea of not guilty by reason of mental disease or defect, even in light of Dr. Lytton's report, and that he had stated that he did, and since his attorney had stated that the defendant wished to accept responsibility for his conduct, the record had not shown that he had been forced to enter his guilty pleas to the two counts. The Court held that there was nothing in the record to show that his counsel had told him it would be better to plead guilty. (R.36, p. 3; App. p. A99).

The Court also held that counsel had no duty to inform the defendant that the Court would not follow the plea agreement because it could not have possibly known whether it would do so. Finally, the Court held that the Court had no duty to advise the defendant of the possibility of a bifurcated trial on his plea of not guilty by reason of mental disease or defect when he was entering guilty pleas in the matter. The Court held that Court was under no obligation to inform him of the benefits of his original plea since he was no longer pursuing that plea. The Court also found that there was no erroneous exercise of discretion in the sentencing. The Court, therefore, denied the defendant's postconviction motion. (R.36, p.4; App. p. A100).

POINT I

DEFENSE COUNSEL'S FAILURE TO ADVISE THE DEFENDANT THAT HE HAD THE RIGHT TO A BIFURCATED TRIAL IN WHICH HE COULD PLEAD GUILTY TO THE CRIMES AND STILL HAVE A JURY TRIAL TO DETERMINE WHETHER HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, AND THE CIRCUIT COURT'S DENIAL OF THE DEFENDANT'S POSTCONVICTION MOTION TO WITHDRAW HIS PLEA OF GUILTY ON THAT GROUND, WITHOUT EVEN ORDERING A HEARING, CONSTITUTED AN ABUSE OF ITS DISCRETION.

In the State of Wisconsin, the finding of guilt of the crimes charged and the finding of whether the defendant may not be responsible for the crimes by reason of mental disease or defect are determined in a bifurcated trial before the same jury or fact-finder. Wis. Stats. 971.165; *State v. Duychak*, 133 Wis.2d 307, 311, 395 N.W.2d 796 (Wis. App. 1986); *State v. Smith,* 117 Wis.2d 399, 415, 344 N.W.2d 711 (Wis. App. 1983).

Under this bifurcated procedure, a defendant is entitled to enter a plea of guilty to the crimes charged and then request a jury trial to determine whether or not he should be held criminally responsible because of a mental disease or defect. *Schulz, v. State,* 87 Wis. 2d 167, 169, 274 N.W.2d 614 (Wis. 1979); *Duychak,* 133 Wis. 2d at 311.

This bifurcated procedure was established by the Wisconsin Supreme Court I 1967 in *State ex rel. LaFollete v. Raskin,* 34 Wis.2d 607, 614, 150 N.W.2d 318. There, the Court held that the bifurcated procedure was necessary to comply with due process so that statements made by the defendant during the mental examination would not be disclosed to the jury before it had decided the issue of guilt. Id. at 623- 627; see also, *State v. Murdock,* 2000WI App 170, ¶23, 238 Wis.2d 301, 316, 617 N.W.2d 175. This rule of law was eventually codified in Wis. Stats. §971.165 (1)(a), which provides that "If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect: (a) There shall be a separation of the issues with

a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second."

If the defendant enters a plea of guilty to the crimes themselves and continues his plea of not guilty by reason of mental disease or defect, then the trial will only consist of proof regarding the second issue. The jury will then have to decide whether the defendant suffered from a mental disease or defect at the time the crimes were committed and if so, whether the defendant should not be held responsible because the mental disease or defect caused him to lack substantial capacity either to "appreciate the wrongfulness" of his conduct or to conform his conduct to "the requirements of law". Wis. Stats. 971.15(1).

In this case, defense counsel had a duty to advise the defendant that he could do one of three things. First, the defendant could plead not guilty to the crimes charged and not guilty by reason of mental disease or defect, which would then lead to a bifurcated trial before the same jury to decide whether the defendant was guilty of the crimes and then, if so, whether he was not criminally responsible for them due to a mental disease or defect. Second, the defendant could plead guilty to the crimes and request a jury trial solely to determine whether he was not criminally responsible due to a mental disease or defect. Third, the defendant could plead guilty to the crimes and waive his plea of not guilty by reason of mental disease or defect.

Here, the record indicates that defense counsel had merely advised him that he could either continue his plea of not guilty and his plea of not guilty by reason of mental disease or defect and go to trial on the two issues, or simply plead guilty to the crimes and waive his right to a trial to determine whether he was not responsible by reason of mental disease or defect. At no time during the proceedings in this matter is there any indication that defense counsel had ever advised the defendant that he had a third choice: to plead guilty to the two counts of the

Information and to request a jury trial to determine whether he should not be held responsible due to mental disease or defect.

And counsel failed to advise the defendant of that third choice even though counsel had obtained the extensive and exhaustive report of Dr. Diane Lytton, who, after having read all of the defendant's medical records and reports, and after having interviewed not only the defendant but many of his family members and his girlfriend, had come to the expert conclusion that the defendant had been suffering from a mental disease or defect at the time the crimes had been committed.

Specifically, based upon all of that evidence, she had come to the conclusion that as a result of his extreme paranoia at the time the crimes had been committed, he had been unable to conform his conduct to the requirements of the law. Although the defendant acknowledged at the plea hearing that he was aware of that report, there is nothing in the record to indicate that counsel had advised him that a jury could still consider Dr. Lytton's report to determine whether he was not responsible by reason of mental disease or defect even if he wished to plead guilty to having committed the crimes charged. Instead, counsel merely advised the Court that the defendant wished to plead guilty to the crimes charges and to waive his plea of not guilty by reason of mental disease or defect. Counsel's failure to advise the defendant that even if he pled guilty to the crimes charged that he could still go to trial on the issue of whether he was not criminally responsible due to mental disease or defect constituted ineffective assistance of counsel.

It has been held by the United States Supreme Court that the Sixth Amendment right to counsel includes the right to be represented by effective assistance of counsel. *Strickland v. Washington,* 466 U.S.668, 688, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to determine

whether the defendant had received ineffective assistance of counsel, the Court has established a two prong test. First, it must be determined that counsel's performance was that of "reasonably effective assistance" under "prevailing professional norms." 466 U.S. at 688. Second, it must be determined that the deficiencies in counsel's performance were "prejudiced to the defense." 466 U.S. at 692.

This same two prong test has been held to be applicable under the Constitution of the State of Wisconsin, Article I, §7. *State v. Fritz,* 212 Wis.2d 284, 292, 569 N.W.2d 48 (Wis. App. 1997). Further, it has been held that an issue may be raised as to whether the failure to use the defense of not guilty by reason of mental disease or defect constituted ineffective assistance in a particular case. *Long v. Krenke,* 138 F.3rd 1160, 1163 (Seventh Cir., 1998).

The United States Supreme Court has also held that the defendant is entitled to effective assistance of counsel in regard to entering a plea of guilty. *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 88 L. Ed.2d 203 (1985). If a defendant enters a plea of guilty on advise of counsel, the voluntariness of the plea has been held to depend on whether counsel's advise "was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 56. The Court held that the two prong test under *Strickland* applies to cases where the defendant has entered a plea of guilty. 474 U.S. at 57.

Therefore, the first part of the test is whether counsel's performance had been competent. 474 U.S. at 58. The second part of the test is whether counsel's performance affected the outcome of the plea process. 474 U.S. at 59. The Court held that the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have, instead, insisted on going to trial. 474 U.S. at 59.

In this case, if the defendant had pled guilty to the crimes charged and requested a jury trial to determine whether he should not be held criminally liable by reason of a mental disease or defect, the defense would have been able to call Dr. Lytton to testify as an expert witness on behalf of the defendant. Due to her exhaustive research and interviews in this matter, and due to her strong conclusion that the defendant should not be held criminally liable for his conduct by reason of mental disease or defect, there was a strong possibility that the jury could have accepted her expert conclusion and found the defendant not guilty by reason of mental disease or defect.

There is nothing in the record to indicate that defense counsel ever gave that information to the defendant. Had the defendant been given this information by counsel, and advised that he could still go to trial on that issue even if he pled guilty to the crimes charged, there is a reasonable probability that he would not have waived his plea of not guilty by reason of mental disease or defect. That is particularly true due to the fact that by waiving that plea, he was facing at the very least fifty years in prison, and at the most ninety years in prison. As it was, of course, he received eighty years in prison.

This issue was raised in the postconviction motion filed by appellate counsel on behalf of the defendant. In response, the Circuit Court held in its Decision and Order of February 14, 2011 that, "There was a very extensive record made during the plea hearing about the defendant's desire to withdraw his original plea of not guilty by reason of mental disease or defect." (R.36, p. 2; App. p. A98). The Court also noted that the defendant's attorneys said that they had "explained to the defendant that experts were retained who would be prepared to testify in his favor" but that "he's informed us he wishes to accept responsibility by entering the pleas." (R. 36, pp. 2-3; App. pp. A98- A99).

The Court noted that counsel had said that they had read the report to the defendant "word for word" and that he was aware that she was prepared to testify but that he wished to "accept responsibility and forego that issue." The Court also noted that counsel had stated that the defendant's position was that he wished to resolve the case with a plea today." Finally, the Court said that the defendant had been asked at the plea hearing whether he had talked about his right to raise that defense and he answered that he did. (R. 36, p. 3; App. p. A99).

The Court concluded that, "there is nothing which demonstrates that the defendant was forced into entering guilty pleas to both counts or that his original plea of not guilty by reason of mental disease or defect was abandoned without reason." The Court also held, "The record reflects that it was the defendant's own decision to withdraw his plea of not guilty by reason of mental disease or defect and simply take responsibility for his actions." (R.36, p.3; App. p. A99).

The problem in this case, however, is that there is nothing in the record to indicate that the defendant's waiver of his plea of not guilty by reason of mental disease or defect had been a knowing decision. Never once at the plea hearing did counsel ever advise the Court that they had informed the defendant of his choice to plead guilty to the crimes and still request a jury trial on the issue of whether he should not be held responsible by reason of mental disease or defect.

Since there was nothing in the record to indicate that that information had been given to the defendant and since the postconviction motion moved to withdraw the defendant's plea of guilty to the two charges on that ground, the Circuit Court was required to order a *Machner* hearing to determine exactly what information or advise the attorneys may or may not have given the defendant in regard to his choices in this matter. Yet the Court failed to order such a hearing and summarily denied the motion. (R.36, p.4; App. p. A100).

In *State v. Machner*, 92 Wis. 2d 979, 804, 285 N.W.2d 905 (Wis. App. 1979), the Court held that where counsel's conduct is "questioned", a hearing should be held at which counsel would appear and be questioned about his conduct. The Court held that, "We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is a better rule and in the client's best interests, to require trial counsel to explain the reasons underlying the handling of the case." Id. at 804.

In this case, since the Circuit Court failed to order a *Machner* hearing, there is no way of knowing, other than what is contained in the transcripts of the proceedings in this matter, and especially the transcript of the plea hearing, exactly what information and advise counsel had given to the defendant about his choices in this matter. As the matter stands, without such a hearing, it appears that counsel never informed the defendant of his right to plead guilty to the two charges and still have a jury trial to determine whether he should not be held responsible by reason of mental disease or defect. If that is the case in this matter, then the defendant received ineffective assistance of counsel and was entitled to have his plea of guilty to the two charges withdrawn. It was, therefore, an abuse of the Court's discretion to fail to order the defendant's plea of guilty to be withdrawn, or, in the alternative, to order a *Machner* hearing.

POINT II

THE CIRCUIT COURT FAILED TO ADVISE THE DEFENDANT THAT HE HAD A RIGHT TO PLEAD GUILTY TO THE CRIMES CHARGED AND STILL HAVE A JURY TRIAL TO DETERMINE WHETHER HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT AND, THEREFORE, THE DEFENDANT'S PLEA OF GUILTY HAD NOT BEEN KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE AND THE DEFENDANT WAS ENTITLED TO HAVE HIS PLEA OF GUILTY WITHDRAWN.

Section 971.08(1) of the Wisconsin Statutes provides that, "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge and the possible punishment if convicted." It has been held that in order to make certain that the plea has been voluntarily made under this statute, the Court must make the defendant aware that by entering a plea of guilty to the crimes, he is waiving his constitutional right to a jury trial. The Court must also obtain a clear waiver of that right from the defendant. *State v. Bangert,* 131 Wis.2d 246, 389 N.W.2d 12 (Wis. 1986).

In *Bangert*, the Court held that the defendant has the right to withdraw his plea of guilty if the plea hearing record is "insufficient to show that he understood the nature of the charge" and if "the plea colloquy itself was facially insufficient." Id. at 251. The Court held that it is insufficient if it establishes that the defendant's plea had not been knowingly, voluntarily and intelligently entered. Id. At 251-252. The Court further held that the court has a duty to make certain that the defendant had knowledge of the constitutional rights that he was waiving by entering the plea, including the constitutional right to a jury trial.

In order for a waiver of a constitutional right to be valid, the Court held, the plea must be based on "an intentional relinquishment or abandonment of a known right or privilege." Id. at

265. The Court continued, "A plea may be voluntary either because the defendant does not have a complete understanding of the charge or because he does not understand the nature of the constitutional rights he is waiving." Id. at 265- 266.

If the guilty plea is not knowing, voluntary and intelligent, then it has been held that the defendant is entitled to withdraw his plea as a matter of right because such a plea violates fundamental due process. *State v. Brown*, 2006 WI 100, ¶19, 293, Wis.2d 594, 611, 716 N.W.2d 906. The defendant is entitled to an evidentiary hearing on the issue if he shows that he did not know or understand an aspect of the plea because of an omission by the court. Id. at 612. Finally, it has been held that if the Court failed to make the defendant aware of a constitutional right that he was waiving by entering his plea of guilty, he is entitled to an evidentiary hearing to determine the issue. *State v. Howell,* 2007 WI 75, ¶7, 301 Wis. 2d 350, 361, 734 N.W.2d 48.

In a case where the defendant has entered a plea of not guilty by reason of mental disease or defect, the Court, as a matter of due process of law, must also advise him not only that he has the right to a jury trial but specifically that he has the right to a bifurcated jury trial where the jury would first determine whether he is guilty of the crimes charged and then, second, would determine whether he was not criminally responsible for those crimes by reason of mental disease or defect. The Court must also make it clear to him that he may enter a plea of guilty to the crimes charged and still be entitled to have a jury determine whether he should be held responsible for those crimes by reason of a mental disease or defect.

In this case, at the plea hearing, the Court advised the defendant that if he pled guilty to the two crimes charged, there would not be a jury trial in the case, "because you are giving up the right to have a jury trial." The Court asked the defendant, "Correct?", and the defendant answered, "Yes." (R.46, p. 10; App. p. A49). The Court continued,

> And the right means you are giving up the right to have a trial and have 12 people come in and reach a unanimous decision or have the court reach a decision, you are giving up the right to remain silent. You are giving up the right to testify. You are giving up the right to bring other witnesses, to subpoena them and bring them to court to testify. You are giving up the right to confront the witnesses the State would bring and to cross-examine them.
>
> You understand all those rights are given up. Correct?
>
> Mr. Burton: Yes. (R.46, pp. 10-11; App. pp. A49- A50).

The Court never once made any reference to the fact that the defendant could plead guilty the crimes and still have a jury trial. Although that jury trial would not involve the issue of whether he was guilty or not, it would involve the issue of whether he was not responsible for his conduct by reason of mental disease or defect. At no time did the Court ever obtain a waiver from the defendant of his right to that second part of a jury trial.

At one point during the plea hearing, after the defendant had admitted that he had shot both of the officers with a dangerous weapon with the intention of killing them, and after he had pled guilty to the two charges, the Court advised the defendant that by pleading guilty, he was giving up the defense of "insanity". The Court asked him, "You talked with your attorney about entering, in fact, I believe, you did enter a plea of not guilty by reason of mental disease or defect?" He answered, "Yes." The Court asked him, "You are withdrawing that plea at this time. Correct?" He answered, "Yes." (R.46, p. 13; App. p. A52).

Even at that time, the Court made it appear to the defendant that if he entered a plea of guilty to the crimes, he was, therefore, withdrawing his plea of not guilty by reason of mental disease or defect, without ever advising him that by entering a plea of guilty, he was not necessarily also waiving his right to a jury trial on the issue of whether he was not responsible by reason of mental disease or defect.

After the plea of guilty had been entered, the Court stated it accepted the guilty plea. In doing so, the Court noted that it realized that there were mental health issues in the case but that it was satisfied that the defendant was competent and was making a knowing and intelligent waiver of his rights. (R.46, p. 23; App. A62).

However, since the Court had failed to advise the defendant of his right to a jury trial to determine whether he was not responsible for his conduct by reason of mental disease or defect, even though he had pled guilty to the crimes charged, the Court failed to obtain a knowing, intelligent and voluntary waiver of his right to a jury trial on that issue.

This issue was also raised in the postconviction motion that was filed in this matter. In denying that motion, the Circuit Court held that, "The court also finds that Judge McMahon had no duty to advise the defendant of the possibility of a bifurcated trial on his original plea when he was entering guilty pleas to the charges. She fulfilled her duties during the guilty plea colloquy and was under no obligation to inform him of the benefits of his original plea when he was clearly not pursuing it at that time." (R.36, p. 4; App. p. A100).

The problem with that ruling is that when the Circuit Court was eliciting the defendant's plea of guilty in this matter, it was also obtaining a waiver from the defendant of his plea of not guilty by reason of mental disease or defect. It was not possible for such a waiver to have been knowingly, voluntarily and intelligently made by the defendant unless the defendant had been informed by the Court that such a waiver had not been necessary simply because he had chosen to admit his guilt to these crimes. The failure of the Court to inform the defendant of that fact, and the fact that he could still proceed to trial on the question of whether he was not responsible by reason of mental disease or defect, denied the defendant his right to due process of law. The

Circuit Court, therefore, erred in denying the defendant his right, pursuant to his postconviction motion, to withdraw his guilty plea on that ground.

CONCLUSION

The defendant respectfully requests that his convictions for two counts of Attempted Intentional Homicide in the first degree, with the use of a dangerous weapon, be reversed and that a trial be ordered in this matter.

Respectfully submitted this 19th day of May, 2011.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 9,060 words.

Dated: May 19, 2011

s/Esther Cohen Lee
Esther Cohen Lee
Attorney for Defendant- Appellant

CERTIFICATION AS TO 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 §809.19(12) Wis. Stats. I further certify that:

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

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

Dated: May 19, 2011

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